BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER Petitioners, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC Respondents.	)	PCB 2015-189 (Third Party NPDES Appeal)

NOTICE OF ELCTRONIC FILING

To:

Robert W. Petti Angad Nagra Illinois Environmental Protection Agency 69 W. Washington Street, Suite 1800 Chicago, IL 60602 rpetti@atg.state.il.us	Jessica Dexter Staff Attorney Environmental Law & Policy Center 35 E. Wacker Drive, Suite 1600 Chicago, IL 60601 (312) 795-3747 jdexter@elpc.org
Greg Wannier, Associate Attorney Sierra Club Environmental Law Program 85 Second Street, 2nd Floor San Francisco, CA 94105 greg.wannier@sierraclub.org	Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 Brad.Halloran@illinois.gov

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Respondent, Midwest Generation, LLC's Reply Memorandum in Support of its Cross-Motion for Summary Judgment, a copy of which is herewith served upon you.

Dated: February 25, 2016

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

Susan M. Franzetti
Vincent R. Angermeier
NIJMAN FRANZETTI LLP
10 South LaSalle Street Suite 3600
Chicago, IL 60603
(312) 251-5590

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondent, Midwest Generation, LLC's Reply Memorandum in Support of its Cross-Motion for Summary Judgment t, by U.S. Postal Service by First Class Mail, postage prepaid, upon the following persons:

Robert W. Petti
Angad Nagra
Illinois Environmental Protection Agency
69 W. Washington Street, Suite 1800
Chicago, IL 60602

Jessica Dexter
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601

Greg Wannier, Associate Attorney
Sierra Club Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601

Dated: February 25, 2016 /s/ Susan M. Franzetti

Susan M. Franzetti
Vincent R. Angermeier
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5590

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MIDWEST GENERATION, LLC'S REPLY MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

NOW COMES, Respondent, Midwest Generation, LLC ("MWGen") by counsel, and submits the following reply in support of its cross-motion for summary judgment. MWGen further requests that portions of the affidavits attached to the Petitioners'[1] response to MWGen's cross-motion for summary judgment be stricken because they are not based on the personal knowledge of the affiants. MWGen also requests that the Illinois Pollution Control Board (the "Board") dismiss for lack of jurisdiction all issues that the Petitioners did not present to the Illinois Environmental Protection Agency (the "Agency") during the permit approval process, and that it dismiss those issues that the Groups failed to demonstrate that they preserved in their appeal petition.

INTRODUCTION

MWGen is entitled to judgment as a matter of law. Petitioners again misidentify and misinterpret the laws and regulations that govern the Illinois NPDES program. They also offer no statutory justification for raising issues to the Board that they failed to preserve at the

[1] Petitioners are Sierra Club, Natural Resources Defense Council, Prairie Rivers Network and Environmental Law & Policy Center, hereinafter also referred to as the "Environmental Groups."

Agency level, other than to demand that the Board invent an equitable exception for them that would directly contradict, and is not authorized by, the Illinois Environmental Protection Act (the "Act"). Petitioners' alternative theory that the Illinois Constitution entitles them to ignore the plain requirements of the Act has no support in law.

Petitioners contend that the Agency was obligated to unilaterally overrule this Board's 1978 order creating an alternative effluent limit ("AEL") for the MWGen Waukegan Generating Station ("Waukegan Station"). The Agency cannot nullify Board orders it feels have become too old, or make independent legal findings that a Board order is contrary to other laws or regulations. In any event, the Agency's decision conformed to both the Board's order and all laws and regulations in effect at the time. Therefore, the inclusion of the Waukegan Station AEL in the NPDES permit the Agency issued did not violate applicable law.

The Board's new regulations for the renewal of AELs did not take effect until almost a decade after MWGen applied for renewal of its NPDES permit. 35 Ill. Adm. Code Subpart K. ("Subpart K"). The Environmental Groups are wrong to suggest that Subpart K retroactively governed Waukegan Station's 2005 permit application, and further confuse the matter by arguing that applying a 2014 regulation to that 2005 application is something other than retroactive application of the regulation. But even assuming the Subpart K regulations applied, the permit record demonstrates that the requirements of Subpart K were satisfied, and the Agency developed a record showing that Waukegan Station's contemporary thermal discharges do not significantly harm the Balanced Indigenous Population ("BIP") in its vicinity.

The Agency complied with the Clean Water Act ("CWA"), Illinois law, and this Board's regulations by permitting the Waukegan Station to discharge thermal effluent at levels that the Board has already authorized pursuant to the requirements for granting AELs. Indeed, the record

shows that the Waukegan Station now discharges a significantly reduced thermal load than it did when the Board determined in the late 1970's that the discharge causes virtually no ecological damage. The United States Environmental Protection Agency ("USEPA") conducted a close review of the final draft NPDES permit and provided the Agency with written comments. The USEPA did not conclude that the inclusion of the Board-approved AEL was in conflict with the thermal variance provisions of Section 316(a) of the CWA or its implementing regulations.

In determining that Waukegan Station utilizes the Best Technology Available on an interim basis ("interim BTA"), the Agency fully complied with the USEPA's *Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities* ("Final Impingement Rule"). 79 Fed. Reg. 48300 (Aug. 15, 2014). MWGen applied for renewal of its Permit before the Final Impingement Rule went into effect, and so the Rule called for the Agency to apply the Best Professional Judgment ("BPJ") standards the USEPA adopted in the wake of the Second Circuit's decision in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d. Cir. 2007). (the "post-*Riverkeeper* standards"). *See* 72 Fed. Reg. 37107, 37108 (July 9, 2007). The Agency reasonably found, based on extensive historical studies confirmed by modern research, that Waukegan Station's cooling water intake structure poses no significant risk to Lake Michigan's aquatic community, and so no upgrades were necessary in advance of the next permit renewal. In its comments on the permit, the USEPA explicitly found that this determination reflected the Agency's BPJ.

The Agency's mistaken citation to 40 C.F.R. § 125.3 in Special Condition 7 changes nothing; the Petitioners do not dispute MWGen's earlier contention that, under Illinois law, incorrect citations are harmless error if the correct standard is applied. (See MWGen Mot. S.J., at 33 n.14.) Here, the Agency correctly applied the controlling standards found in 40 C.F.R.

§ 401.14. Petitioners' argument that the § 125.3 standards for treatment based *effluent* limits ("TBELs") could be meaningfully applied to an *intake* structure is incoherent. Their alternative argument that MWGen was required to submit an application requesting that the post-*Riverkeeper* standards be applied relies on portions of the Final Impingement Rule that do not, and could not, apply to the 2015 permit.

ARGUMENT

I. Standing

The Environmental Groups abandoned their claim to statutory standing because they did not comply with the Act's requirement to demonstrate that they raised each of the issues on appeal during the NPDES permit issuance process. After realizing that the Illinois Constitution does not automatically excuse their error, the Groups now try to resurrect the statutory standing claim, and ask the Board to, among other things, invent an exception to the statute's requirements. A party cannot ignore jurisdictional prerequisites that are required to be affirmatively demonstrated in a third-party appeal petition. This alone justifies ignoring the belated statutory standing arguments in Petitioners' response.

The Environmental Groups also submit vague affidavits from three of their members each admitting to having no personal knowledge of whether their interests were harmed by the Agency's permit renewal decision. Therefore, the affidavits do not provide an adequate factual basis on which to confer standing pursuant to the Illinois Constitution.

A. Statutory Standing

1. The Environmental Groups did not comply with the Act's preservation and demonstration requirements for permit appeals.

The Environmental Groups' appeal petition did not demonstrate that they presented their current arguments to the Agency during the permit proceeding, as required by the Act. 415 ILCS

5/40(e)(2) ("A petitioner shall include the following within a petition . . . a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES Permit application if a public hearing was held . . . ."). "The Board has consistently, and recently, held that to have standing in an NPDES permit appeal as a third-party petitioner under Section 40(e)(2) of the Act, a petitioner must show that he or she raised the issues contained in the petition during the public comment period." *Am. Bottom Conservancy v. IEPA*, PCB 06-171, slip op. at 6 (Sept. 21, 2006) (internal citation omitted).

Petitioners resort to improperly paraphrasing the rule, assuring the Board that the only question is whether they "can" demonstrate preservation, rather than whether this demonstration actually happened. (Pet'r Resp. at 2-3.) That is not a plausible reading of the Act's requirement that the petition "shall include" a demonstration that that the appeal concerns issues that were presented during the permitting process. 40 ILCS 40(e)(2). "When used in a statute, the word 'shall' is generally interpreted to mean that something is mandatory." *See Citizens Organizing Project v. Dep't of Natural Res.*, 727 N.E.2d 195, 198 (Ill. 2000). Although Illinois courts have found occasional exceptions to treating words like "shall" as mandatory, the Environmental Groups do not argue that any of those exceptions apply. *See, e.g.*, *Emerald Casino, Inc. v. Ill. Gaming Bd.*, 803 N.E.2d 914, 923 (Ill. App. Ct. 2003) (collecting examples where statute had other provisions indicating that language was meant to be directory rather than mandatory). Nor is there any ambiguity in this standing requirement. *See Citizens Organizing Project*, 727 N.E.2d at 198 (regarding similar language in 5 ILCS 100/10-55(c): "It is difficult to see how any law could be more straightforward or less encumbered by qualification or restriction.").

Petitioners treat the standing requirement as an unimportant technicality. It is not. Appeal petitions must demonstrate preservation because, in the 30 days following the service of the

petition,[2] the respondents have no reliable way to confirm preservation independently; the appellate record is usually filed much later in the proceedings. (In this case, the record was not fully complete until 100 days after the petition was filed.) Excusing the Environmental Groups' violation of the Act's demonstration requirement would materially prejudice the Respondents and encourage similar abuses in future permit appeal proceedings.

2. The Board cannot hear arguments that the Environmental Groups did not present to the Agency.

The Environmental Groups now concede that the Subpart K and the Final Impingement Rule issues they raise in this appeal were not presented to the Agency, even though both rules took effect before the Agency issued the NPDES permit. (Pet'r Resp. at 3.) Instead of withdrawing these arguments, however, Petitioners ask the Board to invent an exception to the Act's preservation requirement in Section 40(e)(3). (Id. at 5.) They complain that they could not have raised these issues to the Agency because those issues had not yet "emerged" at the time the comments period closed.[3] (Id.)

As an initial matter, the Board should be hesitant to apply its limited equitable powers to new situations, *Chemetco, Inc. v. PCB*, 140 Ill. App. 3d 283, 286 (5th Dist. 1986) ("[A]dministrative agencies are limited to the powers vested in them by statute, and their rules and regulations are valid only when they are in furtherance of the intention of the legislature as stated within the four corners of the statute."), particularly when the exception goes against the

[2] The Board's rules place limits on how long respondents have to seek dismissal, with failure to preserve issues below being one of the most common reasons for disrupting the Board's jurisdiction. 35 Ill. Adm. Code 101.506 ("All motions to . . . dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result."). Past that period, a motion to dismiss must demonstrate material prejudice. *See Brazas v. Magnussen*, PCB 06-131, slip op. at 2 (May 4, 2006) (allowing untimely motion for dismissal in order to avoid material prejudice).

[3] The Environmental Groups presently argue that the final permit violates 40 C.F.R. § 125.3, even though they did not raise this issue at the Agency level. This regulation was in effect throughout the permit approval process, so even if the Board creates the exception demanded by the Groups, this argument would remain waived.

plain command of the Act, *Rockford Drop Forge Co. v. PCB*, 221 Ill.App.3d 505, 512 (2d Dist. 1991) ("A court may not simply dispense with the plain requirements of a statute by drawing on its equitable powers.").

Nor have Petitioners demonstrated they were precluded from raising their issues below. Subpart K and the Final Impingement Rule became effective several months before the Agency issued the Waukegan Station's NPDES permit. Indeed, Subpart K became effective 13 months before issuance. During that time, if Petitioners believed that the new Subpart K and the Final Impingement Rule required the Agency to revise certain of the provisions contained in the last publicly noticed draft of the NPDES permit, no rule prevented them from notifying the Agency and requesting that the comment period be reopened.

By failing to raise these issues and then filing this appeal petition based on those issues, the Environmental Groups prevented MWGen from responding with relevant information in support of the Agency's decision for inclusion in the permit record. The information is thus unavailable to MWGen in defense of this appeal. In addition to materially prejudicing MWGen's defense, allowing these issues to proceed improperly asks the Board to decide them without a complete permit record. Similarly, the Agency is significantly disadvantaged because it was not given the opportunity to consider and to respond to these arguments as part of its permit record and to rely on such efforts in opposing this appeal.

Illinois courts have explained the intended numerous benefits of requiring parties to present their arguments at the administrative level:

> Even without statutory guidance, the doctrine of exhaustion has long been a basic principle of administrative law—a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him. The rule is the counterpart of the procedural rule which, with certain exceptions, precludes appellate review prior to

> a final judgment in the trial court, and the reasons for its existence are numerous: (1) it allows full development of the facts before the agency; (2) it allows the agency an opportunity to utilize its expertise; and (3) the aggrieved party may succeed before the agency, rendering judicial review unnecessary.

Ill. Bell Tel. Co. v. Allphin, 60 Ill.2d 350, 357-58 (1975) (internal citations omitted).

Now the opposite is occurring. The Environmental Groups said nothing to the Agency about Subpart K's potential applicability to the Waukegan Station's renewed NPDES permit while the Subpart K rulemaking was pending, nor during the 13 months it was in effect before the Agency issued the renewed Waukegan Station NPDES permit. Now they belatedly argue that the Agency failed to develop a record sufficient to meet the demonstration requirements of Subpart K. (Pet'r Resp. at 26-27.) Petitioners also said nothing about the Final Impingement Rule at the Agency level. Now they complain that the Agency failed to retroactively apply the permit application provisions of 40 C.F.R. § 125.95(a)(2). (Id. at 30.)

The Act does not allow third parties to gain an advantage by waiting to raise issues on appeal that were not raised below. The Board should not encourage such tactics by allowing these issues to be heard on appeal. Both MWGen and the Agency would be materially prejudiced because of their lack of opportunity to consider and respond to these issues below, thus presenting a fully developed permit record for the Board's consideration. The Board should properly apply the longstanding requirement of exhaustion of administrative remedies, of which the NPDES public notice and comment procedures and the limitation of review on appeal to the contents of the permit record are critical components.

B. Constitutional Standing

1. Article XI of the Illinois Constitution does not entitle Petitioners to ignore the Act's requirements.

The Environmental Groups provide no support for their contention that Article XI, § 2, of the Illinois Constitution grants them an extrastatutory right to bring permit appeals before the Board even when they do not comply with express statutory requirements. (Pet'r Resp. at 6-7.) Regardless of Article XI's ability to provide standing, "[t]he Act simply does not allow the Board to decide any issues except as the Act provides in Section 40(e)." *Brazas v. Magnussen*, PCB 06-131, slip op. at 7 (July 5, 2006); *see also* 40 ILCS 5/5(d) (limiting Board's jurisdiction to "petitions for review of the Agency's final determinations on permit applications *in accordance with Title X of this Act* . . . .")[4] (emphasis added). The Environmental Groups' petition ignored Title X's demonstration and preservation requirements, and Article XI does not excuse this. The Illinois Supreme Court's decision in *Landfill, Inc. v. PCB*, clearly reiterates this: The existence of a statutory appeal weakens claims to special treatment under Article XI. 387 N.E.2d 258, 265 (Ill. 1978).

2. The new affidavits submitted by Petitioners do not establish standing and should be stricken.

The Environmental Groups attempt to distinguish *Glisson v. City of Marion*, 720 N.E.2d 1034, 1044 (Ill. 1999), by noting that it involved two endangered species, while here the permit is alleged to "impact the entire fishery of Lake Michigan." (Pet'r Resp. at 7-8.) As an initial matter, there is nothing in the permit record showing that the Waukegan Station has a lakewide impact; indeed, the Board has previously found that power plants' impacts on Lake Michigan are heavily localized. *In the Matter of Thermal Standards, Lake Michigan*, R70-2, slip op. at 1-715 (June 9, 1972) ("Unless it is located so as to interfere with spawning or migration, a single

[4] The demonstration and preservation requirements of Section 40 are found in Title X of the Act.

isolated 1000 MW plant will have local effects as noted above but will not upset the balance of the lake as a whole.").

More fundamentally, Petitioners simply ignore *Glisson*'s requirement that they identify a threat to human health. 720 N.E.2d at 1042 ("The primary concern of the drafters of article XI was the effect of pollution on the environment and human health. The right to a 'healthful environment' was therefore not intended to include the protection of endangered and threatened species."). Petitioners' only acknowledgment of this standard is their reference to affiant Tuchman's vague statement that humans will pay a "price," which even if it referred to human health (rather than recreational or economic benefits of fish stocks), is totally unsupported by the record or Tuchman's affidavit. (Pet'r Resp. at 8.) Because none of the affiants claim to have had their health endangered by the Agency's decision to renew the Waukegan Station NPDES permit, Article XI, § 2, does not confer standing to bring this appeal.

Indeed, all three affiants are open about their lack of standing in this case; each affiant admits that they have no idea whether the NPDES permit at issue will materially impact their ability to enjoy or benefit from the lake. (Soderquist Aff.: "I do not know what factors may be causing this [salmon] decline, and do not believe anyone knows for sure . . . ."; Shellum-Allenson Aff.: "I do not know the cause of this year's decline, and I have [no] reason one way or the other to believe it is specifically connected to power plants. . . . [I am] aware that there are many stresses right now on the Lake's ecosystem . . . ."; Tuchman Aff. : "[N]o one knows the exact impact that the Waukegan plant is having on fish and other organisms in Lake Michigan.").

Establishing that the plaintiff's injuries are "fairly traceable to defendants' actions" is a basic element of standing and the affiants admit that they do not meet this requirement. *Carr v. Koch*, 2012 IL 113414, ¶ 51 (Ill. 2012). Indeed, none of the affiants even claim to use the waters

near Waukegan Station, further diminishing the Environmental Groups' claim to associational standing based on these members. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]o establish standing plaintiffs must show that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site . . . .") (internal quote omitted).

To the extent that the affiants allege suspicions that their interests in recreation and research are impaired by the Agency's approval of the Waukegan Station's permit, these unsourced allegations are not based on personal knowledge. This is not appropriate content for an affidavit at the summary judgment phase: "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, . . . shall be made on the personal knowledge of the affiants; . . ." Ill. Sup. Ct. R. 191(a). The Board should strike these portions of the affidavits.

In sum, the Environmental Groups now raise numerous issues that they did not present below and thus are completely absent from the permit record. In their written and spoken comments during the permitting process, they never contended that the Agency was bound by the procedures in Subpart K. As such they have waived their arguments that MWGen did not comply with Subpart K's application or renewal requirements. (See Pet'r Mot. S.J., at 24-25.) Similarly, they never contended that the permit's issuance was dictated by the Final Impingement Rule. Thus they are now barred from arguing that MWGen failed to apply for an "alternate schedule" under section 125.95(a)(2) of the Final Impingement Rule, or that the Agency misapplied the "interim BTA" standard of § 125.98(b)(6) and the TBEL requirements of § 125.3. (See Pet'r Resp. at 32-36.)

Only now that the record in this case has been prepared has MWGen been able to determine that the Environmental Groups did preserve some of their arguments below,

particularly their arguments that the final permit violates the Hanlon Memo and that the permit's § 316(b) provisions did not reflect the Agency's Best Professional Judgment. (R:995-96) Regardless, because the Environmental Groups' petition did not demonstrate that these arguments were preserved, they have not complied with the unambiguous requirements of the Act, and their petition should be dismissed. The Illinois Constitution does not excuse the Environmental Groups' failure to comply with the NPDES third-party permit appeal procedures, and the Groups do not cite a single precedent to the contrary.

II. Thermal Alternative Effluent Limitation ("AEL") Issues

A. The Agency Did Not Violate the Act by Complying with the Board's PCB 77-82 AEL Order.

Petitioners ask the Board to invalidate the NPDES permit because the Agency *followed* the Board's Order in PCB 77-82. (Pet'r Resp. at 11.) The Groups insist that the Agency should have, on its own authority, overruled the Board decision because the order is "decades-old." (Id.) That is not the Agency's role: "The Board's principal function is to adopt regulations defining the requirements of the permit system. The Agency's role is to determine whether specific applicants are entitled to permits." *Landfill, Inc.*, 387 N.E.2d at 264. Although Petitioners devote several paragraphs to parsing out whether an AEL is a water quality standard or an effluent standard, they fail to explain how this distinction would empower the Agency to ignore the Board's decision in PCB 77-82. (Pet'r Resp. at 10-11.) The Agency did not violate the Act by issuing a permit that incorporates a valid Board order.

B. The Agency did not need to "renew" the AEL to include it in the permit.

Petitioners are mistaken when they state that the Agency "renewed" PCB 77-82 in the 2015 permit. (Pet'r Resp. at 11-12.) The permit did not "renew" that order any more than it

renewed the applicable water quality standards for the Lake Michigan basin. *See* 35 Ill. Admin. Code, Subpart E. AELs have never been formally renewed in the Illinois NPDES program. Prior to the promulgation of Subpart K, the Illinois Administrative Code did not even have a procedure for conducting such renewals.[5] But that did not stop the USEPA from delegating the NPDES program to Illinois, and the Environmental Groups cannot produce a single example of the USEPA objecting to an Illinois NPDES permit on the grounds that it contained an "expired" AEL.[6]

Petitioners alternatively contend that even if Illinois law did not require AEL renewals, which it does not, renewal was still required by the USEPA 2008 Hanlon Memo (the "Hanlon Memo") and the advisory note at the end of 40 C.F.R. § 125.72. (Pet'r Resp. 11-12.) But it is not the role of the Agency to act as a judicial body, looking not only to the Board's interpretation of state and federal regulations, but also analyzing USEPA memoranda and conducting an independent review of federal regulations to see if they would justify ignoring the Board's PCB 77-82 Order. (Pet'r Resp. at 11-12.) It is not practical for individual permit writers to develop their own assessments of whether a Board order remains in effect. Instead, the Agency is entitled to rely on the Board's interpretations of and rulings pursuant to the Act and the Administrative Code so long as those orders remain standing. PCB 77-82 is not time-limited and does not contain a sunset provision conditioned on periodic renewals.

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[5] Petitioners incorrectly suggest that 35 Ill. Adm. Code 304.141(c) empowered the Board to renew AELs. (Pet'r Resp. at 18) Actually, section 304.141(c) refers only to the Board's initial determination that an AEL is appropriate. It says nothing about renewals.

[6] Petitioners claim that AELs under CWA § 316(a) have "nothing" to do with heated-effluent demonstrations under 35 Ill. Adm. Code 302.211(f). (Pet'r Resp. at 15.) This one-sentence conclusion has no supporting citations and is wholly false. *See, e.g.*, *in re Procedural Rules For Alternative Effluent Limitations*, R13-20, slip op. at 5 (Feb. 20, 2014) ("[T]he Board's procedural rules . . . include provisions for making certain thermal effluent demonstrations under 35 Ill. Adm. Code 302.211. Both *Section 302.211* and the Part 106 Subpart B procedural rules reference CWA Section 316(a) and are intended to be consistent with CWA Section 316(a).") (emphasis added); PCB 13-20, *Second Notice*, slip op. at 3 (Jan. 23, 2014) ("The Agency states that, over the years, the electric generating industry used the heated effluent demonstration procedure in 35 Ill. Adm. Code 302.211(f)-(i) to obtain thermal relief from the Board's regulations under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c).").

Because the Illinois NPDES permit system did not require the "renewal" of AELs, the Environmental Groups' contention that only the Board could make these renewals is a *non sequitur*. (Pet'r Mot. at 17-18.) The Groups are unable to identify a single instance of the Board exercising this power to renew AELs, which is further evidence that AEL renewals did not exist before the adoption of the Illinois Subpart K regulations. Petitioners lack any legal support for their contention that the Agency's inclusion of the AEL in the 2000 permit was in violation of the Act or applicable regulations. (Id.)

Petitioners' attack on the 2000 NPDES Permit is barred by the Act anyway, because it is untimely. 415 ILCS 5/40(e)(1). The Environmental Groups simultaneously claim that they would "gain nothing" by obtaining a finding that the 2000 renewal was invalid, yet also insist that this finding would necessarily invalidate the permit at issue in this appeal. (Pet'r Resp. at 21.) The Act's timeliness requirement cannot be circumvented by collateral attacks, and the Environmental Groups have no basis for denying that they are making just such an attack. Black's Law Dictionary, *Collateral Attack* (10th ed. 2014) ("An attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding . . . is that the judgment is ineffective.").

C. The Agency complied with the substantive requirements of the Hanlon Memo and § 125.72, to the extent that those documents have substantive requirements.

In the mid-1970's, the Waukegan Station followed the language of the advisory note in 40 C.F.R. § 125.72 when it was "prepared" to submit studies based on its "actual operation experience" to the Board. 40 C.F.R. § 125.72 (note). Indeed, it submitted those studies, and the

Board concluded that they demonstrated that Waukegan Station's thermal discharges caused "virtually no" harm to aquatic life.[7] (R:1116)

The Environmental Groups insist that the advisory note actually wasn't advisory at all, but created a mandatory requirement that dischargers conduct elaborate and expensive heated-effluent demonstrations every five years as part of the NPDES permit renewal process, regardless of previous findings of no impact or subsequent decreases in the thermal discharge as generating units are taken off-line (which occurred here). (Pet'r Resp. at 16-17.)

That is not a plausible interpretation. If such a requirement existed, it would be an enumerated provision, not a footnote tucked in at the end of the regulation. *See* Office of the Federal Register, *Federal Register Document Drafting Handbook*, at p."7-8" (1998 rev. ed.) ("Make footnotes in a rule explanatory, not regulatory."), *available at* http://www.archives.gov/federal-register/write/handbook/ddh.pdf. If this requirement existed, it would use mandatory language, instead of calling it something that the discharger "should" do, as the advisory note does. *See* 3 Sutherland Statutory Construction § 57:3, *Aids to determine whether provision is mandatory or directory* (7th ed.) ("'Should' generally denotes discretion and should not be construed as 'shall.'"). And it would require the discharger to actually submit the demonstration studies, not just be "prepared" to do so, as the advisory note further expressly provides.

And, if the advisory note actually created a binding requirement, the USEPA would have treated it like one, instead of approving an Illinois NPDES program that contained no such requirement, and then remaining silent as the Agency issued dozens of permits containing AEL provisions that under Petitioner's interpretation purportedly violate USEPA regulations.

[7] The Environmental Groups do not argue that Waukegan Station failed to "consider any information or guidance published by [the USEPA]" when preparing this demonstration. 40 C.F.R. § 125.72(e).

See Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 721 (1985) (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where the agency that promulgated the regulation had not, at the time the regulation was promulgated or subsequently, concluded that such a conflict existed). In fact, the USEPA's position is merely that the renewal should be accompanied by "as much of the information described in 40 C.F.R. § 125.72(a) and (b) as necessary to demonstrate that the [AEL] assures the protection and propagation of the BIP."[8] (R:489) This directly contradicts Petitioners' notion that the discharger must conduct a full heated-effluent demonstration under 40 C.F.R. § 125.72(b) *every time* their NPDES permit is renewed.

The Agency's actions here were consistent with the Hanlon Memo, which suggests that the Agency look at "changes in facility operations, the waterbody, or the BIP since the time the [AEL] was originally granted." (R:489) The Agency renewed the permit after reviewing the current status of Waukegan Station operations, which had decreased from 1016 MW capacity to 742 MW after MWGen permanently shut down two of the plant's four generating units.[9] (R:205, 619, 800.) The Agency also noted changes in Lake Michigan's aquatic population. (R:673) This was based on information provided by the Illinois Department of Natural Resources, which noted that most large-scale changes in the lake's aquatic community were due to decreased nutrients in the food web and the effects of invasive species like zebra and quagga mussels, as well as fish hook water fleas. (R:618) These findings were repeated in studies whose authors also attributed the population declines to non-industrial factors. (R:221-38, 1204-36)

[8] The Environmental Groups' contention that since 1978, the USEPA has been, at turns, too lazy, too busy, too risk-averse, too partisan, and too negligent to enforce their own water regulations is incredible. (Pet'r Resp. at 14: "Respondents' attempt to ascribe legal motivations to EPA's failure to object overlooks the fact that such failure could just as easily reflect a lack of review, an unintentional oversight, prudential considerations, agency inertia, or political or staffing considerations . . . .").

[9] Correspondingly, Waukegan Station's heat rejection rate had declined 39% since 1978, and its water flow rate by 37%. (R:239-40)

D. The Hanlon Memo does not have the force and effect of law.

The USEPA never intended the Hanlon Memo to have binding effect on the Agency and the Board, and it has never treated the Memo as if it did. "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. USEPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). The opposite has occurred here: The USEPA has consistently refused to object to Illinois NPDES permits even where it found the permits inconsistent with the Hanlon Memo. (R:620, 1007.) *Compare State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989) (declining to publish rule in CFR or Federal Register indicates intent that guidance be nonbinding), *with Appalachian Power Co. v. USEPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); ("[I]f [the USEPA] leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's [interpretive] document is for all practical purposes 'binding.'").

Despite the USEPA's behavior, Petitioners contend that the Board is obligated to defer to the Hanlon Memo because of *Chevron* deference.[10] (Pet'r Resp. at 12, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). *Chevron* deference applies only to an agency's interpretation of its own regulations. *U.S. Dep't of Treasury, IRS v. FLRA*, 996 F.3d 1246, 1250 (D.C. Cir. 1993) (courts will give no special deference to interpretation by one agency of another agency's rules). But the NPDES permit in this case was a creation of the Agency, applying *state* law and regulations that the Board, not the USEPA, adopted. *See Granite City Div. of Nat'l Steel Co. v. PCB*, 155 Ill. 2d 149, 171 (1993) ("[A]n administrative agency is a creature of statute, any power or authority claimed by it must find its source within the

[10] Petitioners' unsupported contention that 40 C.F.R. § 125.72(e) gives legal effect to the Hanlon Memo is meritless. (Pet'r Resp. at 13.) That provision is advisory and only applies to dischargers conducting a heated-effluent demonstration in support of an initial AEL request. (See MWGen's Mot. S.J. at 9 n.6)

provisions of the statute by which it is created."); *Citizen Alert Reg. v. USEPA*, 259 F.Supp.2d 9, 18 (D.D.C. 2003) ("After EPA [delegates NPDES administration to a state], the responsibility for issuing permits and for monitoring the use of those permits lies with the state, not with the federal government."). To the extent that the Hanlon Memo may purport to interpret Illinois NPDES regulations, the Board does not owe this interpretation special deference.[11]

While the Board has a statutory obligation to "adopt regulations which are identical in substance to federal regulations or amendments thereto promulgated by [the USEPA]," that obligation does not extend to interpretive guidelines; guidelines are not promulgated. 40 ILCS 5/13.3; *see also* Black's Law Dictionary (10th ed. 2014) (defining promulgate as "to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal"). The USEPA cannot command the Board to adopt new state regulations through the dissemination of interpretive rules nor has it for one moment acted as if it has such a power— this would go against Congress's intentions in creating the Clean Water Act. CWA § 101 ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."). This is why the Board took no action to revise its regulations in the years after the Hanlon Memo was issued; the Act recognizes that the Board cannot be expected to have to revise its regulations in response to every USEPA communication that might be an interpretive guideline.

[11] It is also noteworthy that while *Chevron* deference applies to courts, it has never been applied to quasi-judicial state agencies operating in their area of expertise. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("[*Seminole Rock*] deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require[s] significant expertise.") (internal quotes omitted). A court of general jurisdiction might need to rely on the USEPA to interpret complex environmental regulations for them, but the Board already has the relevant expertise.

E. Neither the 2014 Subpart K Regulations nor the 2008 Hanlon Memo had retroactive effect on the Waukegan Station's 2005 NPDES Permit Renewal Application.

In seeking a ruling that the 2005 Waukegan Station NPDES renewal application violated Subpart K requirements, Petitioners conflate the difference between "acts" in the context of retroactivity, and "final agency action," in the context of when an agency takes actions that perfect a potential appeal.[12] (Pet'r Resp. at 20.) This does not change the basic fact that MWGen applied for renewal of the Waukegan Station permit in 2005, and it would have been unlawful for the Agency to subject that application to non-retroactive standards the Board adopted nine years later in 2014. *See* 5 ILCS 100/5-10(c). The Environmental Groups incredibly profess to be "bewilder[ed]" that this would be characterized as a retroactive application of Subpart K. (Id. at 20)

Petitioners are correct that "[a] law is retrospective if it changes the legal consequences of acts completed before its effective date." (Pet'r Resp. at 20.) But the cases they cite scuttle their theory that "final agency action" is the only relevant date in retroactivity analysis. *Miller v. Florida* and *Weaver v. Graham* were criminal cases, and the "acts" they referenced were criminal acts. These cases state that the criminal courts issued unconstitutional sentences (the criminal equivalent of "final agency action") when they used sentencing rules enacted after the criminal acts occurred to determine the correct punishment. *E.g., Weaver v. Graham*, 450 U.S. 24, 31 (1981). These cases *do not* say that the sentencing (the final agency act) can reflect the sentencing laws in effect on the date the judgment is entered; they say that doing so would be a retroactive determination and would violate the *Ex Post Facto* clause.

If the issuance of the NPDES permit was the Agency's "sentence," then it had to apply the laws in effect when MWGen "acted" by requesting renewal of its permit in 2005. *Rockford*

[12] The Environmental Groups tacitly concede that applying Subpart K retroactively would be unlawful.

Drop Forge Co., 221 Ill.App.3d, at 512 (finding that Board did not err in denying UST fund compensation to tank owner where UST fund was in effect at time of owner's request, but had not been in effect at time tank was removed); *see also Illinois Bell Telephone Co. v. Allphin*, 419 N.E.2d 1188, 1198 (1st Dist. 1981), *aff'd* 93 Ill.2d 241, 245 (1982) (holding that Department of Revenue must assess taxes based on regulations in effect during taxable period, not regulations in effect on date of assessment); 5 ILCS 100/5-10(c) (adopting *Allphin*'s holding as law); *Martin v. Hadix*, 527 U.S. 343 (1999) (finding that courts must award attorneys' fees based on statutory limits in effect at time legal work was performed, and not time of the award judgment). The Agency was similarly required to follow this Board's standing order in PCB 77-82, that the Waukegan Station's thermal discharge was subject to an AEL.

The Environmental Groups extensively rehash the irrelevant point that agency acts are not complete—and thus not appealable—until the agency makes a final determination. (Pet'r Resp. at 20-22.) That has nothing to do with whether the Agency was required to find that MWGen's 2005 permit application violated the application requirements created by the 2014 Subpart K regulations. It wasn't, and the Environmental Groups did not once claim that Subpart K should control in the 13 months between its enactment and the Agency's issuance of the renewed NPDES Permit. Subpart K does not say that it has retroactive effect and it was never intended to have retroactive effect.[13] Nine years into the permit renewal process, it would have been arbitrary and wasteful for the Agency to require MWGen to scrap its 2005 NPDES permit renewal application—which fully complied with pre-Subpart K regulations—and start over from

[13] Indeed, by giving regulated parties no notice that it was retroactively changing how their already filed NPDES permit renewal applications would be evaluated, the Board would likely have committed a due process violation in promulgating Subpart K. *Ill. Bell Telephone Co.*, 95 Ill.App.3d at 126 ("An agency may be bound by its own established custom and practice as well as by its formal regulations. The Board may not deviate from such prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy.").

square one, particularly when MWGen already had waited almost a decade to receive this renewed NPDES Permit reflecting its current operations.

The Environmental Groups insist that the 2008 Hanlon Memo had a binding effect on the Agency's acts, but they fail to explain why they believe this should have been given retroactive effect over MWGen's 2005 permit application. The Memo does not claim to be retroactive—"[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result" *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)—and indeed, the Clean Water Act does not authorize the USEPA to create retroactive rules. As such, while the Hanlon Memo lacked binding legal effect even after it was issued, it certainly could not have been retroactively applied to MWGen's 2005 NPDES permit renewal application.

F. If Subpart K applied, the Agency's renewal of the Waukegan Station AEL satisfied its requirements.

1. Subpart K did not invalidate all pre-Subpart K AELs.

Petitioners offer no explanation for why the Board would want to enact a rule retroactively invalidating all pre-Subpart K heated-effluent AEL determinations, nor do they offer any evidence from the Subpart K rulemaking, R13-20, that either the Board or the Agency (which proposed Subpart K) intended for the rule to operate this way. The Groups wrongly assume that if their interpretation of the *language* of 35 Ill. Adm. Code 106.1180(a) is correct, then the Board is bound to it, no matter how absurd or unintended the result. (Pet'r Resp. at 22-23.)

That is not correct. Illinois law calls for the intent of the rulemaker to prevail: "The cardinal rule of statutory interpretation is to ascertain and give effect to the intent of the legislature." *Krautsack v. Anderson*, 861 N.E.2d 633, 643 (Ill. 2006); *see also* 5 ILCS 70/1 ("In the construction of statutes, this Act shall be observed, unless such construction would be

inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute."). This is particularly true in the case of ambiguous rules, and the Environmental Groups take the position that this rule is ambiguous. (Pet'r Resp. at 23.) Indeed, Illinois courts will even go so far as to transpose language within the statute if necessary to avoid an absurd result. *See Wabash, St. L. & P. Ry. Co. v. Binkert*, 106 Ill. 298, 303 (1883); *see also Paroline v. U.S.*, No. 12-8561, slip op. at 15 (U.S. 2015) (noting that "grammatical rule of the last antecedent" need not be "applied in a mechanical way where it require accepting unlikely premises").

Subpart K was not intended to eradicate all existing AELs previously granted by the Board in order to start from scratch. Nor was it intended to burden the Board with the work of conducting *de novo* reviews of every existing AEL. Rather, it was adopted for the modest purpose of creating "procedural rules for alternative effluent limitations," R13-20, slip op. at 1 (Feb. 20, 2014), after the Board determined that Illinois lacked specific procedures for creating, modifying or renewing existing thermal AELs, AS 13-1, slip op. at 4 (Oct. 18, 2012); *see also* Agency's Statement of Reasons, at 4 ("This rulemaking comes to the Board as a result of the Agency's review of recent Board opinions in AS 13-1 and PCB 13-31.") (attached to MWGen's Motion for Summary Judgment as Exhibit A). In fact, the Board devoted all of three sentences to discussing section 106.1180, the section that Petitioners claim turned the NPDES permit system regarding AELs upside down:

> Proposed Section 106.1180 provides the process to renew an [AEL]. The Agency proposed a screening process for the Agency to evaluate whether the conditions on which the prior relief was based have changed. The Board proposed for second notice the language contained in the Agency's proposal.

R13-20, slip op at 18.[14]

[14] In enacting Subpart K, the Board and the Agency referenced the Hanlon Memo, but did not specify the connection between the two, other than the observation that since the 2008 memo, the Agency "has been working with

The Environmental Groups' misunderstanding of the history of Subpart K also causes them to misapply the anti-surplusage rule. They insist that because Subpart K is obviously the venue for making renewal requests, the Board would not have repeated this point in 35 Ill. Adm. Code 106.1180(a). (Pet'r Resp. at 25.) But the Board had reason to be very clear about how to request renewal: The main purpose of the Subpart K rulemaking was to create specific administrative procedures that govern AEL requests. R13-20, slip op. at 4. A drafting choice is not surplusage when it fulfills a core purpose of the rulemaking.

Instead it is Petitioners' interpretation that relies on surplusage, specifically the comma following the word "Board." If the Board had intended for the "pursuant" clause to restrict which AELs could be renewed, it would not have offset the clause with commas. *Nacs v. Bd. of Governors of the Fed. Reserve Sys.*, 746 F.3d 474, 487 (D.C. Cir. 2014) ("A relative clause that is restrictive—that is, essential to the meaning of the sentence—is neither preceded nor followed by a comma.") (quoting *The Chicago Manual of Style* 250 (14th ed. 2003)).[15] Instead it added a comma in a place where it only serves to emphasize that the "pursuant to" clause does not modify the word "granted." *See, e.g.*, *in re K.B.J.*, 305 Ill. App. 3d 917, 922 (1st Dist. 2009)

Region V to review the status of Illinois electric generation facilities and their thermal discharges to ensure consistency with Section 316(a) . . . ." R13-20, slip op. at 4. In any event, the Hanlon Memo does not call for the invalidation of past heated-effluent demonstrations, and so does not support the Environmental Groups' interpretation of Subpart K.

[15] The Court provided additional explanation of how these grammar rules work:

> As their labels suggest, descriptive clauses explain, while restrictive clauses define. To illustrate, consider a simple sentence: "the cars which are blue have sunroofs." Read descriptively, the clause "which are blue" states a fact about the entire class of cars, which also happen to have sunroofs. Read restrictively, the clause defines a particular class of cars—blue cars—all of which have sunroofs. Although often subtle, the distinction between descriptive and restrictive clauses makes all the difference in this case.

Nacs, 746 F.3d at 485.

("The placement of the comma after the word 'parent' reinforces the separation of the language preceding and following the comma.").

2. MWGen's application requested an AEL renewal under Subpart K.

The Environmental Groups maintain that the Agency could not renew the Waukegan Station AEL because MWGen did not formally request the renewal. (Pet'r Resp. at 25-26.) Their only authority for this argument is the Hanlon Memo, which merely says that dischargers "may" request renewal. The Hanlon Memo does not state that a formal renewal request is required nor does it specify any renewal procedure. It does not purport to stop the Agency from renewing an AEL in the absence of an express renewal request. (R:489) The Environmental Groups are unable to cite a single example of the USEPA objecting to a renewed NPDES permit on the grounds it conflicted with CWA § 316(a) because its underlying application lacked a formal AEL renewal request. That is because there is no such requirement. That is also why the USEPA's lengthy forms for renewing NPDES permits made no specific mention of AELs or whether they are being renewed. (R:31-111)

The contours of the "AEL renewal application" rule that the Environmental Groups ask the Board to create remain amorphous. MWGen pointed out that their initial renewal application implicitly requested the renewal by asking that the NPDES permit terms, which included the AEL, remain unchanged save for several discrete changes specified in the application's cover letter. (MWGen Mot. S.J. at 28.) But Petitioners now insist that their rule does not allow renewals to be requested *that* way. (Pet'r Resp. at 26.) And MWGen's further explanation that its 2005 request for reduced thermal monitoring was based on and necessarily required renewal of the AEL (MWGen Mot. S.J. at 27,) is curtly dismissed as an "absurd" way to request a renewal. (Pet'r Resp. at 25-26.) And all of the subsequent express requests by MWGen to renew the

Waukegan Station AEL, no matter how specific, are rejected by the Groups as "untimely," although they do not explain when the deadline for the renewal request allegedly expired or offer any legal basis for this unspecified deadline. (Id. at 26.)[16] The Environmental Groups simply invent new provisos as needed to get around a record that inconveniently shows MWGen repeatedly asking the Agency to renew the AEL (which the Agency was free to do without being asked, anyway).

3. The Agency's correct determination that MWGen's thermal effluent had not materially changed justified renewal of the AEL under Subpart K.

The Environmental Groups contend that the Agency was precluded from renewing the AEL because the "nature" of the discharge had changed, in that it had decreased. (Pet'r Resp. at 28.) This misstates the standard; AEL renewals are prohibited only when the Agency finds that the thermal discharge has "changed materially." 35 Ill. Adm. Code 106.1180(d).[17] In the context of an AEL, material changes are changes that have the potential to significantly harm the BIP. Yet the Environmental Groups still offer no theory of how a sustained decrease in heated effluent by the retirement of Units 5 and 6 at the Waukegan Station could harm the BIP. Certainly nothing in the record before the Agency would have supported this speculation.

Alternatively, even if there is a strict "change" rule, then the evidence before the Agency showed that the nature of the thermal discharge did not change. The "nature" of the heated

[16] Elsewhere, the Environmental Groups cite to *in re Dominion Energy Brayton Point, LLC*, 13 EAD 407, 411 (EAB 2007). In that case, the EAB mentioned that the discharger requested an AEL well after filing the initial permit application. *Id.* at 408. Rather than seize on this fact as a sufficient legal basis for excluding the AEL from the permit, the EAB treated it as immaterial by ignoring it for the remainder of the opinion.

[17] It is true that 35 Ill. Adm. Code § 106.1180(c) does not identically track the language of § 106.1180(d) in this way. Subsection (c) allows AEL renewals based on a demonstration that the discharge has "not changed," while subsection (d) closes the door to AELs when the discharge "changed materially." But Subsection (c) does not help the Environmental Groups. Subsection (c) merely outlines one circumstance under which the Agency "may" exercise its discretion to renew the AEL. The only prohibition on Agency AEL renewal authority comes upon the finding of a "material" change in subpart (d). The Environmental Groups' contention that *any* change, no matter how irrelevant or small, bars the renewal of an AEL is illogical and would be in direct conflict with Subpart K's renewal provisions. (Pet'r Resp. at 27-28.)

effluent is its temperature, and the temperature of the water leaving Waukegan Station has not significantly changed. Instead, the 39% drop in the station's heat-rejection rate since 1978 is due almost entirely to the 37% drop in water flow. (R:239-40) Thus, even if it could be said that the discharge of cooler heated effluent changes the "nature" of the effluent for purposes of Subpart K, the record shows that the temperature of the effluent has remained essentially unchanged since the creation of the AEL.

4. The record before the Agency demonstrated that the AEL had not caused appreciable harm to the BIP.

Subpart K also calls for renewal requests to demonstrate that the AEL has not caused appreciable harm to the BIP. 35 Ill. Adm. Code 106.1180(c). But this is a pragmatic standard, reflecting 40 C.F.R. § 125.73(c)'s instruction that renewal applications only contain biological studies if requested by the Agency, and Subpart K's purpose of creating a "process for streamlined renewal of [AELs]." (Agency Statement of Reasons, at 10.) The Environmental Groups concede that if the Waukegan Station thermal discharge did not change, then Subpart K allows for a streamlined renewal process. (Pet'r Resp. at 28.)

The Agency's finding that the AEL has not caused appreciable harm to the BIP near Waukegan Station was justified by the evidence in the record. The AEL was granted because the Board found that Waukegan Station has not caused and cannot be reasonably expected to cause significant ecological damage to the receiving waters. The Board came to this determination after an exhaustive review of the results of a series of comprehensive biological and thermal monitoring and modeling studies performed during a period when Waukegan Station had four generating units operating, rather than only the two it has today. The major studies performed and submitted in support of the AEL included the following:

1. Thermal Plume Studies (including modelling of thermal levels in Lake Michigan);

2. Lake Current Studies;

3. Water Quality Monitoring;

4. Larval, young of Year and Adult Fisheries Monitoring;

5. Distribution of Fish Eggs and Larvae in Vicinity of Waukegan Station;

6. Literature Review of Thermal Tolerances of Fishes in Lake Michigan; and

7. Phytoplankton, Zooplankton and Benthic Sampling and Analysis.

The conclusion supported by these historical studies of no appreciable harm, which was memorialized in the Board's opinion originally granting the AEL, was compared to contemporary studies showing decreases in some fish populations that have occurred throughout Lake Michigan—not just in the vicinity of Waukegan Station. (R:222, 231-32.) The decreases also do not correlate with the operation of the Waukegan Station, indeed, the losses accelerated at times that the station was scaling down operations. The authors of those studies identified other causes of the decline, including poor fish recruitment, habitat loss, and predation. (R:222, 231-32.) Also, MWGen provided additional field data from more recent aquatic surveys in the vicinity of the Station's discharge, which found that the fish community surrounding the station had generally not changed. (R:204) The information in the record fully supports the Agency's decision.

C. The Agency complied with applicable impingement/entrainment regulations by including Special Condition 7 in the final permit.

1. 40 C.F.R. § 125.95(a)(2) did not bar the Agency from applying the Interim BTA Standard

The Environmental Groups assume, without explanation, that the Agency renewed the permit pursuant to 40 C.F.R § 125.98(b)(5), and so had to follow the alternate schedule rules from 40 C.F.R. § 125.95(a)(2), including the requirement that the permittee demonstrate that it

cannot complete the studies before "the applicable deadline for submittal."[18] (Pet'r Resp. at 31.) This is the first time the Environmental Groups have raised this issue and hence it is not addressed in the permit record. As noted above, MWGen objects to the untimely presentation of this issue by Petitioners.

But if the Board addresses this issue, it should reject Petitioners' argument that Special Condition 7 is in violation of applicable law. As MWGen pointed out in its first brief, 40 C.F.R. § 125.98(b)(6) —not § 125.98(b)(5)—was the controlling standard here, and that subsection does not require a permitee to request an alternate schedule under § 125.95(a)(2). (See MWGen's Mot. S.J., at 31-32.) Instead the section merely instructs the Agency to apply the post-*Riverkeeper* standards in force before the Final Impingement Rule was promulgated. *See* 72 Fed. Reg. at 37108 ("Permit requirements for cooling water intake structures at Phase II facilities should be established on a case-by-case [BPJ] basis."). This grandfathering keeps the new rule from being struck down as impermissibly retroactive: The USEPA has no authority to impose substantive requirements on permit applications that predate the effective date of the rule. *See Bowen*, 488 U.S. at 208 ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

Thus, MWGen did not request "an alternate schedule for the submission of information required in 40 C.F.R. § 122.21(r)" because they never had a § 122.21(r) submission requirement to begin with. Section 125.98(b)(6) applies the standards predating § 122.21(r), while giving the Agency the option to condition the five-year permit on the initiation of § 122.21(r) studies—

[18] The Environmental Groups do not disclose that the "applicable deadline for submittal" was 180 days before the Waukegan Station's permit expired in 2005. *See* 40 C.F.R. § 122.21(d); 35 Ill. Adm. Code 309.104(a). They also decline to argue that 40 C.F.R. § 125.95(a)(2) obligated MWGen to demonstrate the impossibility of time travel before obtaining an alternate schedule.

which is the option that is reflected in the studies required by Special Condition 7 of the Waukegan NPDES Permit. (R:696-97)

Perhaps the Environmental Groups assume that § 125.98(b)(5) applies because of its reference to "permits granted before July 14, 2018 . . . ." Although MWGen's permit was renewed before July 14, 2018, Subsection (b)(5) does not apply to *all* such permits. Instead it applies only to those where the Agency also established an alternate schedule, and the Petitioners concede that there was no alternate schedule here.[19] (Pet'r Resp. at 30-31.)

Also, it is impossible to apply both subsections to the same permit. One provision, 40 C.F.R. § 125.98(b)(5) generally requires the application of the Final Rule's substantive requirements. The other one, § 125.98(b)(6), postpones their application, specifically for permittees who filed their renewal applications before the effective date in October 2014, until after studies on the cooling water intake structure are conducted—and so, as the more specific of the two subsections, § 125.98(b)(6) would control. *See Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459, (2002) ("It is . . . a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, . . both relating to the same subject, the specific provision controls and should be applied.").

2. The Agency did not arbitrarily or capriciously apply 40 C.F.R. § 401.14's standards.

Rather than simply concede that 40 C.F.R. § 401.14 was the controlling regulation here, the Environmental Groups remain noncommittal, calling the provision "Respondents' preferred regulations." (Pet'r Resp. at 34.) They offer no meaningful rebuttal to § 401.14's application.

[19] This is another instance of commas dictating whether a clause is read descriptively or restrictively. *Nacs*, 746 F.3d at 485 ("As their labels suggest, descriptive clauses explain, while restrictive clauses define."). The absence of commas between "2018" and "for which" tells the reader that the clause imposes restrictions on which permits fall under §125.98(b)(5). *Id. at* 487 ("A relative clause that is restrictive . . . is neither preceded nor followed by a comma.").

What rebuttal could there be? Subsection 125.98(b)(6) explicitly calls for the cooling water intake structures to be subject to the provisions of § 401.14, a provision titled "Cooling water intake structures." Section 401.14's standards mirror those in CWA § 316(b), as the Environmental Groups already admitted in their previous brief. (Pet'r Mot. S.J. at 30.) But, as a practical matter, if the Environmental Groups admit that § 401.14 controls here, then they also must admit that their motion for summary judgment on the § 316(b) issue did not address the applicability of § 401.14 but instead incorrectly relied on irrelevant provisions of the Final Impingement Rule. They have thus waived these new § 316(b) arguments (*see* MWGen Mot. S.J. at 33,) and failed to identify an authority which would entitle them to judgment. *See* 35 Ill. Adm. Code 101.516(b).

As to the merits, the Environmental Groups argue, again for the first time and beyond the scope of the issues raised in the permit record below, that the Agency's Interim BTA determination was arbitrary and capricious. (Pet'r Resp. at 34.) But the Agency's decision relied on scientific data and studies reflected in the record. This is why the USEPA—which played an active role in advising the Agency during the permit proceedings—determined 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)

The Agency made its Interim BTA determination in reliance on prior impingement studies. (R:770, 1157.) Furthermore, MWGen prepared and submitted a Preliminary Information Collection survey, which complied with the standards outlined in the original Phase II impingement rule. *See* 40 C.F.R. § 125.95(b)(1) (2005). The survey reproduced the findings of the historical studies, showing that the aquatic life impinged at the intake were almost exclusively low-value alewives. (R:770, 1215-16, 1231.) These studies demonstrated that the

environmental impact of the cooling water intake structure had already been minimized by the existing technology at Waukegan Station.

The Agency's Interim BTA determination was not arbitrary or capricious, but the alternative decision advocated by the Petitioners clearly would have been. It would have been arbitrary and capricious for the Agency to require the immediate design and installation of new cooling water intake technologies, which would essentially require Waukegan Station to cease operations, in order to address completely hypothetical ecological harms. The final permit instead recognizes that horses go before carts, and so, in the absence of any evidence of existing harm, MWGen is given the opportunity to conduct the Phase II impingement studies first, and then the Agency will review those studies to determine whether the existing cooling water intake structure reflects the BTA. The USEPA's observation that this reflected the Agency's Best Professional Judgment was completely justified. (R:622)

3. The Environmental Groups do not meet their burden of proof by complaining that the record summarizes historical studies.

Petitioners contend that the Interim BTA determination cannot be upheld because the Agency record does not include the studies generated in the mid-70s in their entirety. (Pet'r Resp. at 35.) "The Board's review of permit appeals is limited to information before the IEPA during the IEPA's statutory review period." *Des Plaines River Watershed Alliance. v. IEPA*, PCB 04-88, slip op. at 12 (Apr. 19, 2007). Petitioners do not dispute the Agency's position that it reviewed the historical impingement studies before approving the Waukegan Station permit. (R:676) Petitioners also do not contend that the Agency has mischaracterized the *findings* of those studies, which are included in the permit record. (R:666, 1213-14.)

Petitioners have the burden of proof in this appeal. *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.,* PCB 01-112, slip op. at 8 (Aug. 9, 2001) ("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."). By contrast, the Agency as respondent, need only identify information in the record which supports its decision—a burden it has met. *Des Plaines River Watershed Alliance*, PCB 04-88, slip op. at 12 ("The record must contain evidence to support the issuance of the permit and the conditions attached to that permit. The Board reviews the entirety of the record to determine. . . if the record supports the IEPA's decision . . . ."). The record shows that the existing intake structure was not a significant threat to Lake Michigan's aquatic life when Waukegan Station operated at full capacity in 1978, and demonstrates that the lack of any significant threat continues today with the Station's reduced operating capacity.

The Environmental Groups cannot meet the standard for summary judgment by speculating that if the permit record included the historical studies in their entirety, those studies *might* undermine the Agency's decision. Nor is it sufficient for them to insinuate that the Agency *might* not be telling the truth about the studies or their review of those studies. They have come up well short of meeting their burden of proof on appeal.

4. Section 125.3 does not regulate cooling water intake structures.

Petitioners still insist that the Waukegan Station's *intake* structure had to follow the technology based *effluent* limitations standards of 40 C.F.R. § 125.3.[20] (Pet'r Resp. at 32-33.) They suggest that the effluent guidelines for the intake structure can be meaningfully applied by looking at the *absence* of organisms in the wastewater leaving the plant. (Id. at 33.) They offer no further illumination of how this would work and decline to identify any permit in the history

[20] At no point during the Agency proceedings did the Environmental Groups raise the issue that 40 C.F.R. § 125.3 applied to this permit. The Environmental Groups cannot argue that this was a regulation that only came into effect after the close of the comments period; section 125.3 was not created as part of the Final Impingement Rule but rather was in effect through the entire public comment period here. The § 125.3 issues Petitioners raise for the first time on appeal are thus waived. *See Am. Bottom Conservancy*, PCB 06-171, slip op. at 6.

of the NPDES program that has operated this way. (Id. at 33.) They also decline to explain which technologies for reviving dead organisms in effluent the Agency should have reviewed.[21]

Petitioners do not dispute MWGen's previous showing that under Illinois law, incorrect citations are legally insignificant in the absence of substantive error. (See MWGen Mot. S.J., at 33 n.14.) Nonetheless, they suggest that section 125.3 *must* be applied to the permit no matter how incoherent the results, because the Agency has not conceded the clerical error in their appellate filings. (Pet'r Resp. at 32-33.) But the Agency's silence here is not a shock; this appeal is confined to the documents in the record. Because Petitioners did not raise this issue during the comment period, there is no Agency response in the permit record on which the Agency may rely within the confines of the Board's scope of review. *Des Plaines River Watershed Alliance*, PCB 04-88, slip op. at 12 ("The Board's review of permit appeals is limited to information before the IEPA during the IEPA's statutory review period, and is not based on information developed by the permit applicant, or the IEPA, after the IEPA's decision."). As MWGen has repeatedly asserted, Petitioners' failure to raise issues in their comments on the permit should not be countenanced by the Board because it violates the NPDES permit appeal requirements. Review here is limited to issues raised during the permit period. Allowing Petitioners to seize upon the Agency's "silence" on this new section 125.3 issue would unfairly prejudice the Agency, as well as MWGen, while improperly rewarding the Petitioners' failure to provide the Agency with an opportunity to respond to this issue as part of the permit issuance process.

[21] Indeed, Petitioners insist that their plan to create effluent limitations based on absent organisms is so self-evident that any further discussion would merely "reiterate" arguments from their Motion for Summary Judgment. (Id.) That Motion only contains three sentences about 40 C.F.R. § 125.3, and their new theory for limiting absences is totally absent. (See Pet'r Mot. S.J. at 35-36.)

CONCLUSION

Because there is no genuine issue of material fact and because the Petitioners cannot sustain their burden of proving that the NPDES permit, as issued, would violate the Act or Board regulations, MWGen requests that the Board grant summary judgment in MWGen's favor; and grant such other further relief as the Board deems just and appropriate

Dated: February 25, 2016

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

Of counsel:

Susan M. Franzetti
Vincent R. Angermeier
NIJMAN FRANZETTI LLP
10 South LaSalle Street Suite 3600
Chicago, IL 60603
(312) 251-5590