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.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent, Illinois Environmental Protection Agency's Reply in Support of Its Cross-Motion for Summary Judgment, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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Certificate of Service

I, Angad Nagra, Assistant Attorney General, do hereby certify that I electronically mailed a copy of the attached Notice of Electronic Filing and Reply in Support of Its Cross- Motion for Summary Judgment filed in the above referenced and hereby served upon the following individuals:

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ILLINOIS EPA'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Respondent Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to 35 Ill. Adm. 101.516(b), and for its Reply in Support of its Cross-Motion for Summary Judgment, states as follows:

I. INTRODUCTION

Petitioners appeal the Illinois EPA's re-issuance of an NPDES permit ("2015 NPDES Permit") to Midwest Generation, LLC ("Midwest Generation"). The 2015 NPDES Permit authorizes and regulates effluent discharges from the company's Waukegan Generating Station ("Waukegan 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 effluent (or "thermal") 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 Board should thus grant Illinois EPA's Cross-Motion for

Summary Judgment, deny Petitioners' Motion for Summary Judgment ("Motion") should thus be denied, and dismiss Petitioners' Petition for Review ("Petition").

II. 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 35 Ill. Adm. Code 106.1180 ("Subpart K"), a regulation that did not even exist at the time Midwest Generation applied for the 2015 NPDES Permit; and (3) that Midwest Generation failed to submit an application to renew the alternative limit. None of these arguments has any merit.

i. 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. As discussed below, since Subpart K—which forms the basis for the bulk of Petitioners' arguments on appeal—was enacted after the opportunity for public hearing and comment had closed, Petitioners could not possibly

have raised those issues during that time.[1] This failure is alone dispositive of their 316(a) claim and Illinois EPA is thus entitled to summary judgment in its favor.

ii. Subpart K Should Not be Retroactively Applied.

Beginning in 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 authority to do so[2]), sets forth the specific grounds on which the agency may do so,[3] 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)

[1] Petitioners concede as much in their Response to Illinois EPA's Cross-Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment ("Response"), admitting that the Section 316(a)-related legal theories they advance in their Petition "*could not* have been raised then, because they had not yet emerged." Yet this only underscores the manifest unfairness of Petitioners' position: in addition to attempting to retroactively apply Subpart K to a permit-renewal process that was, in many respects, already complete by the time that regulation came into effect (as discussed further below), Petitioners have materially prejudiced Illinois EPA's defense by failing to raise these issues at the appropriate juncture in the permit renewal process and thereby denying the agency the opportunity to consider and respond to these arguments as part of the permit record.

[2] (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). *See also* 40 C.F.R. § 125.72 (vesting the applicable permitting agency with the authority to renew alternative thermal effluent limitations).

[3] 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).

Midwest Generation supposedly failed to make the required demonstrations under Subpart K to support renewal of the alternative limit; and (3) Midwest Generation was 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. 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.
>
> * * *
>
> 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.

Though Petitioners dismiss these arguments as "bewildering" and "nonsensical," they fail to offer any convincing response. Instead, they attempt to muddy the waters by conflating two distinct concepts, arguing that determining what constitutes a completed act or transaction (for purposes of the retroactivity analysis outlined above) is somehow the same as determining whether an agency action is final and appealable (a matter of administrative procedure). In fact, the latter bears no relation at all to the former (as evidenced by the fact that Illinois courts have applied this three-tiered retroactivity analysis with equal force to legislative statutes and administrative regulations, *see, e.g.* *Poniewozik*, 2014 IL App (1st) 132864, at ¶¶ 15-22) and the authorities Petitioners cite are thus wholly inapposite. Subpart K thus cannot be retroactively applied to this permit cycle and Petitioners' arguments based on that provision—which, in any event,

they failed to raise during the public notice and hearing phases of the renewal process—should be uniformly rejected.

iii. The Illinois EPA had authority to renew the alternative thermal effluent limit in 2015.

In their Motion, Petitioners argued 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 reasoned 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.

Motion at 23. As Illinois EPA noted in its Response to Petitioners' Motion and Cross-Motion for Summary Judgment, however, this entire argument rests on a mistaken premise: the July 2000 renewal of the Facility's NPDES permit was not, as Petitioners' Motion asserted, 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' Motion correctly noted, 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 2015. (R:0025; 0687.)[4] Accordingly, in the intervening time period, as the renewal application was pending, the

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

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.

Confronted with these facts, Petitioners now backtrack and claim that the Illinois EPA somehow misunderstood their argument, which they claim was simply that the agency "had no authority to renew or grant any kind of thermal variance" until promulgation of Subpart K in 2014, and that such authority rested exclusively with the Board, which "has not since reissued a thermal variance to Waukegan Station." Yet this assertion is also baseless. In fact, Illinois EPA has had the authority to renew alternative thermal effluent limitations ever since USEPA first delegated administration of the NPDES permit program to the state of Illinois in 1977—an arrangement that Subpart K continues. When it first requested delegation of that program, Illinois EPA explained how Section 316(a) of the Clean Water Act would be implemented in Illinois:

> A special provision to implement 40 C.F.R. Part 122, Thermal Discharges, which sets forth the procedure prescribed by Section 316(a) of the FWPA, is contained in Rule 410(c) of Chapter 3. Rule 4 10(c) allows the Board to determine that an alternative thermal standard, other than that found in 40 CFR Part 122 and Chapter 3, should apply to a particular thermal discharge.
>
> The concept of reviewing the effect of a thermal discharge on a receiving stream is not a recent addition to the Board's Water Pollution Regulations. Rule 203(i)(5), which became effective on April 7, 1972, requires that owners or operators of a source of heated effluent which discharges 0.5 billion BTU per hour or more demonstrate in a hearing before the Board that the discharge from that source has not caused and cannot reasonably be expected to cause a significant ecological damage to the receiving waters. Upon failure to

> prove the above, the Board will order that appropriate corrective measures shall be taken. The Agency proposes that the demonstration requirements found in 40 CFR Part 122 and the supporting technical documents be utilized in the determination of an alternative thermal standard pursuant to Rule 410(c) and Rule 203(i)(5).

(State of Illinois Application for Authority to Administer the NPDES Program (July 1977), Ex. A., at 27.) Since that application was submitted, each of the referenced regulations has been re-codified, and the federal Section 316(a) regulations originally found in Part 122 and have been moved to 40 C.F.R. §§ 125.70, 125.71, 125.72 and 125.73 (40 C.F.R. Part 125 subpart H).[5] 40 C.F.R. § 125.72 vests the applicable permitting agency with the authority to renew alternative thermal effluent limitations. Specifically, it provides in relevant part that

> [a]ny application for the renewal of a section 316(a) variance shall include only such information described in paragraphs (a) and (b) of this section as the Director requests within 60 days after receipt of the permit application.

40 C.F.R. § 125.72(c). The regulation thus expressly authorizes "the Director" (or the Illinois EPA in this case, since Illinois administers a delegated NPDES permit program) to renew alternative thermal effluent limitations, a responsibility the agency has duly exercised on multiple occasions in connection with Midwest Generation's alternative thermal effluent limitation. Illinois EPA is thus entitled to summary judgment in its favor.

iv. 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

[5] Additionally, the Board's former rule 410(c) is now found in 35 Ill. Adm. Code 304.141(c), and Rule 203(i)(5) refers to the Heated Effluent Demonstration procedures found in 35 Iii. Adm. Code 302.21 1(f)-(i) and Part 106 of the Board's procedural rules.

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 reject Petitioners' reading of Subpart K on this basis alone, particularly given that Petitioners do not even bother to rebut this argument in their Response.[6]

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

Petitioners next contend that Illinois EPA could not have renewed Midwest Generation's alternative thermal effluent limitation because the company failed to formally request the renewal. A cursory review of the record, however, reveals this

[6] And, in any event, Petitioners' reading of Subpart K is also problematic because it conflicts with the underlying purpose of that regulation, which was never intended to eliminate existing alternative thermal effluent limitations. Rather, it was merely promulgated in order to devise "procedural rules for alternative effluent limitations," R13-20, slip op. at 1 (Feb. 20, 2014), following the Board's determination that Illinois lacked specific procedures for creating, modifying or renewing existing limits,[6] 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 Midwest Generation's Motion for Summary Judgment as Exhibit A).

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.[7] Accordingly, the company did so—at the very latest[8]—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.

vi. 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 § 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:

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[7] 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.

[8] 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.)

> 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[9] 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 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.

[9] 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.

> 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.

a. Midwest Generation supplied the required information concerning each of the criteria set forth in 35 Ill. Adm. Code 106.1180(b).

The former provision of Subpart K thus requires "information" from the permittee—as well as "prepared[ness]" to offer supporting documentation, if so requested[10]—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 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

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

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*—an important qualification that Petitioners predictably ignore in their Reply—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.

In their Response, Petitioners contend that Illinois EPA was precluded from renewing the alternative thermal effluent limit because the "nature" of the discharge had decreased and thereby changed. (Pet'r Resp. at 28.) In fact, renewals of such limits are only prohibited if Illinois EPA finds that the thermal discharge has "changed *materially*." 35 Ill. Adm. Code 106.1180(d) (emphasis added). In this context, a change is "material" if it has the potential to significantly harm a balanced, indigenous population of shellfish, fish and wildlife. Petitioners notably do not elaborate as to how a dramatic *decrease* in the amount of thermal effluent discharged—which, in this case, was achieved through the retirement of Units 5 and 6 at the Waukegan Station—could cause such harms. In any event, there is nothing in the record that would support Petitioners' baseless conjecture.

Alternatively, even if *any* change in the amount of thermal effluent discharged (including a decrease) is sufficient preclude renewal of an alternative thermal effluent limit, as Petitioners assert, the record nonetheless reflects that the *nature* of Midwest Generation's thermal discharge did not change because 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 Midwest Generation's effluent has remained essentially unchanged since the creation of the alternative thermal effluent limitation. The Illinois EPA is thus entitled to summary judgment on Petitioners' Section 316(a) claim.

b. Midwest Generation made the demonstrations required by 35 Ill. Adm. Code 106.1180(c).

Subpart K also calls for renewal requests to demonstrate that the alternative thermal effluent limitation has not caused appreciable harm to the balanced, indigenous population of shellfish, fish and wildlife. 35 Ill. Adm. Code 106.1180(c). The evidence in the record supports Illinois EPA's finding that Midwest Generation's alternative thermal effluent limitation has not caused such harm in the vicinity of the Waukegan Station. The Board originally granted the alternative thermal effluent limitation after reviewing the results of a series of biological and thermal monitoring and modeling studies and finding that the Waukegan Station had not caused—and could not be reasonably expected to cause—significant ecological damage to receiving waters.[11] The studies included: (1) thermal plume studies (including modelling of thermal levels in Lake Michigan)[12]; (2) lake current studies; (3) water quality monitoring; (4) larval, young of

[11] Those studies were conducted at a time when the Waukegan Station had four electricity generating units operational (as opposed to just two, like today).

[12] Petitioners contend that because these thermal studies are not part of the administrative record, Illinois EPA "cannot use [them] as a basis to support a thermal variance in the [2015 NPDES Permit]." (Pet'r Resp. at 28.) "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 contest Illinois EPA's position that it reviewed the thermal plume studies before renewing the Waukegan Station permit. (R:666) Petitioners also do not contend that Illinois EPA has mischaracterized the *findings* of those studies, which are included in the permit record. (R:666, 1213-14.) This easily satisfies Illinois EPA's burden in this proceeding, which is simply to identify information in the record that supports its decision. *Des Plaines River Watershed Alliance*, PCB 04-88,

year and adult fisheries monitoring; (5) distribution of fish eggs and larvae in vicinity of Waukegan Station; (6) literature review of thermal tolerances of fish in Lake Michigan; and (7) phytoplankton, zooplankton and benthic sampling and analysis.

The Board's finding of no appreciable harm—memorialized in its 1978 order granting the alternative thermal effluent imitation—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.) Because those losses accelerated at times that the station was scaling down operations, they bear no correlation to operation of the Waukegan Station and, in fact, the authors of those studies identified other causes for that drop-off, including poor fish recruitment, habitat loss and predation. (R:222, 231-32.) Other field data from more recent aquatic surveys found that the fish community surrounding the Waukegan Station generally had not changed. (R:204) Illinois EPA's decision is thus fully supported by the record and the agency is thus entitled to summary judgment in its favor 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

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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 . . . ."). To sustain their burden of proof, Petitioners must offer more than mere conjecture that these studies *might*, if included in the record in their entirety, somehow undermine the agency's decision.

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 ("Existing Facilities 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 Existing Facilities 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 uniformly meritless.

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

Petitioners' Motion first contends 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. § 125.98(b)(6), which provides that

> [i]n the case of any permit issued after October 14, 2014, and applied for before October 14, 2014, the Director may include permit conditions to ensure that the Director will have all the information under 40 CFR 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).[13] As authorized by this provision, and as specifically reflected in Special Condition 7 of the final 2015 NPDES Permit, Midwest Generation was required to submit the information required by 40 C.F.R. 122.21(r) within four years of the effective date of the 2015 NPDES Permit:

> [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. 125.98(b)(6), given that Midwest Generation (1) filed its renewal application well before October 14, 2014 (on January 25, 2005); and (2) was issued its NPDES permit well after October 14, 2014 (in March 2015). Because 40 C.F.R. 122.21(r) is thus inapplicable to this most recent permit cycle, Petitioners' arguments based on that provision should be rejected and summary judgment entered in favor of Illinois EPA.

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

Petitioners' Motion further argued 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

[13] In the analogous portion of its Cross-Motion, Illinois EPA mistakenly cited 40 C.F.R. § 125.95(a)(2) as the basis for Special Condition 7 instead of 40 C.F.R. § 125.98(b)(6). This was an oversight, as Section 125.95(a)(2) is inapplicable. Unlike that provision (which requires a permit applicant seeking an "alternate schedule" to submit certain reports and to demonstrate "that it could not develop the required information by the applicable date for submission"), Section 125.98(b)(6), which does apply, imposes no such prerequisites to inclusion of permit provisions such as Special Condition 7.

alternatives" set forth in 40 C.F.R. § 125.94(c).[14] But, as recited above, 40 C.F.R. § 125.98(b)(6) expressly exempts permits "issued after October 14, 2014, and applied for before October 14, 2014"—including the 2015 NPDES Permit—from compliance with 40 C.F.R. § 125.94(c) until the next permit cycle. 40 C.F.R. § 125.98(b)(6). 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.)[15]

In their Response, Petitioners challenge this determination on the ground that

[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.

[15] Petitioners' Motion correctly observed 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." 40 C.F.R. § 125.98(b)(6).

Illinois EPA failed to comply with 40 CFR § 125.3 in reaching it. The applicable BTA standard—and the one that Illinois EPA applied in this case—is actually set forth in 40 CFR § 401.14, a rule specific to intake structures mirroring the standard of Section 316(b) itself.[16] And the Illinois EPA fully complied with that provision, as USEPA indicated in its comments on the draft permit. (R:622.) The BTA standard requires Illinois EPA to "determine[] whether appropriate studies have been performed, whether a given facility has minimized adverse environmental impact, and what, if any, technologies may be required." 69 Fed. Reg. 41576, 41584 (July 9, 2004) (describing system of case-by-case BTA permits applied prior to 2014). Notwithstanding Petitioners' meritless assertions to the contrary, the Illinois EPA renewed the permit based on extensive information regarding impacts on aquatic life, including impingement studies that had been relied on for decades without objection from the USEPA.[17] (R:770, 1157-65.) The decision further rested on a recent preliminary survey that showed that the aquatic life being impinged at the intake were almost entirely low-value alewives (the same percentage found in the earlier studies.) (R:770, 1215-16;

[16] Petitioners attempt to make hay out of Illinois EPA's silence in its Cross-Motion concerning Midwest Generation's argument that the reference to 40 CFR § 125.3 in Special Condition 7 is the result of a scrivener's error. But it would be pointless for the agency to take a position on this assertion at this juncture given that the record in this permit appeal, as it was filed, must ultimately dictate the Board's resolution of Petitioners' arguments. In that regard, Illinois EPA simply notes that, as the record reflects, it correctly applied the BTA standard contained in 40 CFR § 401.14 and is thus entitled to summary judgment.

[17] Petitioners contend that Illinois EPA's interim BTA determination cannot be upheld because the record does not include these studies 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 Illinois EPA's position that it reviewed the historical impingement studies before approving the Waukegan Station permit. (R:676) Petitioners also do not contend that Illinois EPA has mischaracterized the *findings* of those studies, which are included in the permit record. (R:666, 1213-14.) This easily satisfies Illinois EPA's burden in this proceeding, which is simply to identify information in the record that supports its decision. *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 . . . ."). To sustain their burden of proof, Petitioners must offer more than mere conjecture that these studies *might*, if included in the record in their entirety, somehow undermine the agency's decision.

1231.) Because these studies showed that the environmental impact of the intake structure had already been minimized, no further analysis of available technologies was needed.

III. 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, Illinois EPA requests that the Board enter summary judgment in its favor, deny Petitioners' Motion for Summary Judgment, dismiss their Petition for Review, and grant such other further relief as the Board deems just and fair.

Dated: February 25, 2016

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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