BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER	)	
	)	PCB 15-189
Petitioners,	)	(Third Party NPDES Appeal)
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC	)	
Respondents.		

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on December 14, 2016, I electronically filed with the Clerk of the Illinois Pollution Control Board: **PETITIONERS' POST-HEARING REPLY**, a copy of which is served on you along with this notice.

Respectfully submitted,

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Dated: December 14, 2016

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER	)	
Petitioners,	)	
v.	)	PCB 15-189 (Third Party NPDES Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC	)	
Respondents.	)	

PETITIONERS' POST-HEARING REPLY

Petitioners Sierra Club, Natural Resources Defense Council, Prairie Rivers Network and Environmental Law and & Policy Center (collectively "Petitioners" or "Environmental Groups") respectfully submit this brief replying to the post-hearing briefs filed on November 14, 2016 by Respondents Illinois Environmental Protection Agency ("IEPA" or "the Agency") and Midwest Generation, LLC ("Midwest Generation").

Respondents' post-hearing briefs do not identify substantial evidence to support either the Agency's renewal of the 1978 thermal variance or its best professional judgment determination as to the interim best technology available (BTA) to minimize adverse environmental impacts. Instead, they incorrectly state the applicable standards, improperly shift Petitioners' burden in this matter, and inappropriately exaggerate the scant information in the administrative record relevant to these matters. Midwest Generation defies the Board's holdings in the April 7, 2016 Opinion and Order on summary judgment ("Order"), and further seeks to introduce new and irrelevant evidence into the record that the Agency did not rely upon in making its decisions.

Accordingly, the Board should find that Petitioners have met their burden of showing that the Agency's purported renewal of the thermal variance and establishment of an interim BTA were inconsistent with law and not supported by substantial evidence, and invalidate those actions.

I. Respondents Have Not Overcome Petitioners' Demonstration that the Agency Decision to Issue the Thermal Variance Did Not Comply with Subpart K and Was Not Supported by Substantial Evidence

Respondents' post-hearing briefs mischaracterize the standard that applies to IEPA's action, mischaracterize Petitioners' burden in this matter, and mischaracterize the evidence that was presented at hearing.

A. Subpart K is the standard that applies to the agency action.

The Board's April 7, 2016 Order clearly stated that the Board's Subpart K rules, specifically 35 Ill. Adm. Code §§ 106.1180 (c)-(d), govern the Agency's renewal of an alternative thermal effluent limitation. (Order at 10.) Yet the Midwest Generation post-hearing brief ignores this finding, quoting a 1979 document related to the federal thermal variance rules to claim that it is only required to re-justify a thermal variance "where other evidence shows that circumstances have changed, that the initial variance may have changed, that the initial variance may have been improperly granted, or that some adjustment in the terms of the initial variance may be warranted." (MWG Post-Hr'g Br. at 8 (internal citations omitted).) This is not a correct representation of the standard that applies to a renewal of a thermal variance by the Illinois Environmental Protection Agency. As the Board correctly held on summary judgment, IEPA can only renew an alternative thermal effluent limitation previously granted by the Board under Subpart K if it makes two findings: 1) that the nature of the thermal discharge has not changed; and 2) that the alternative thermal effluent limit has not caused appreciable harm to a balanced, indigenous population of fish, shellfish and wildlife. 35 Ill. Adm. Code §§ 106.1180(c)-(d).

The Agency's post-hearing brief mischaracterizes the Subpart K standard as well. The Subpart K standard is plainly "that the nature of the thermal discharge has not changed." 35 Ill. Adm. Code § 106.1180(c). Yet the Agency seems to be arguing instead a narrower "no additional heat" standard. (IEPA Post-Hr'g Br. at 7 ("the agency concluded that 'there have not been any changes at the facility which would result in additional heat being discharged into the lake.'").) This finding does not meet the requirements of Subpart K. As Petitioners demonstrated in their post-hearing brief and elsewhere, (*e.g.*, Pet'r Post-Hr'g Br. at 8-12), the record is clear that the nature of the thermal discharge has changed, in ways the Agency cannot fully explain because necessary evidence is lacking. Subpart K therefore precludes a streamlined renewal by the Agency.

B. Petitioners' burden is to show the agency action is not supported by substantial evidence in the record.

Respondents' arguments are predicated on a misrepresentation of the burden of proof that applies to Petitioners' claims. The findings they present in their briefs improperly twist the burden to make it appear that the Agency's failings belong to the Petitioners.

As explained in their briefs, (*e.g.*, Pet'r Post-Hr'g Br. at 6-7), Petitioners meet their burden of proof by demonstrating that the administrative record lacks substantial evidence to support the Agency's action. The Illinois Appellate Court holds "that the third parties … met their burden of proof before the Board by demonstrating that IEPA failed to require sufficient evidence" to meet the requirements of the Board's regulations. *Ill. Envtl. Prot. Agency v. Ill. Pollution Control Bd.*, 896 N.E.2d 479, 487 (Ill. App. Ct. 3d 2008). Petitioners' burden related to the instant claim is thus to demonstrate that there is not substantial evidence in the record to support the findings required by Subpart K. *See Des Plaines River Watershed Alliance v. IEPA*,

PCB 04-88 at 12 ("The Board does not affirm the IEPA's decision on the permit unless the record supports the decision.").

Respondents' briefs instead cast the lack of substantial evidence in the record as a reason to insulate the Agency's decisions from scrutiny. For example, related to the finding required under Subpart K that "the nature of the thermal discharge has not changed," 35 Ill. Adm. Code §§ 106.1180(c), the Agency states that it "found no indication in the record that the location of the Facility's thermal plume had changed in any material way." This is not surprising, because the record is crystal clear that no one has investigated the nature of that thermal plume in four decades, despite the "dramatic" operational changes that undisputedly occurred at the facility. (*See* Pet'r Post-Hr'g Br. at 8-12.) The Agency failure to require substantial evidence to support a finding "the nature of the thermal discharge has not changed" does not shift the burden to Petitioners to conduct the thermal plume study that Midwest Generation should have done. Petitioners meet their burden by showing that such evidence is absent from the record.

Similarly, Midwest Generation tries to capitalize on the lack of evidence in the record regarding the second required finding under Subpart K, that "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." 35 Ill. Adm. Code § 106.1180(c). The Midwest Generation brief emphasizes that "there was no evidence in the record indicating that the Waukegan Station's thermal effluent was affecting the aquatic community," (MWG Post-Hr'g Br. at 24), and that "there was absolutely no scientific data before the Agency indicating that the Thermal AEL was causing appreciable harm to the aquatic community." (MWG Post-Hr'g Br. at 26). Petitioners do not disagree that there was no evidence to that effect in the record, but would point out that the statements are

incomplete: the whole truth is that there is no evidence in the record for the Agency to make a finding one way or another about the effect of the thermal discharges on the aquatic community.

Subpart K does not establish an "innocent until proven guilty" paradigm for renewals of thermal variances. The Agency must make an affirmative finding that the discharges are not causing appreciable harm to aquatic life, and that finding must be supported by substantial evidence in the record. Petitioners have met their burden by showing that the record contains no studies whatsoever about the impacts of the thermal discharges on aquatic life, past or present. Neither Midwest Generation nor IEPA has presented evidence to the contrary.

C. The evidence relied upon by Respondents does not support the findings required by Subpart K.

The Midwest Generation post-hearing brief summarizes the evidence relied upon by the agency:

> This information included the description of the data relied on by the Board in 1978, as provided in the Board's 1978 Order, and more recent daily monitoring reports, both of which the Agency relied on. Agency staff also utilized data from MWGen's actual operation experience during the permit term—both the PIC study indicating overall stability in the local aquatic community and the 2009 USGS study compiling data from Waukegan and other parts of the lake.

(MWG Post-Hr'g Br. at 25 (internal citations omitted).) Each type of information identified lacks both reliability and credibility as to the issues presented to the Board and should be given minimal weight by the Board.

First, the Agency relies almost entirely on the *findings* the Board made when it granted the thermal variance in 1978. The term "findings" is painstakingly distinguished from any actual scientific information that supported those findings. (Tr. at 56:1-5 ("I am wording my questions in a very specific way. My question asks, did the Agency's consideration include consideration of the findings of various studies that formed the basis for the Board's 1978 Order?").) The

findings that Respondents are putting forward as "evidence" state summarily that in the 1970s the thermal discharges "had caused 'virtually no' environmental impact," (IEPA Post-Hr'g Br. at 8; MWG Post-Hr'g Br. at 23 (citing R. 2)), and that they "have not caused and cannot be reasonably expected to have cause significant ecological damage to receiving waters." (MWG Post-Hr'g Br. at 13 (citing R. 1116).) No one knows what specific facts led the Board to make those conclusions in 1978. The information that supported those conclusory findings cannot be located, is not contained in the administrative record, and cannot properly be relied upon to support the Agency decision. (*See* Pet'r Post-Hr'g Br. at 13-15.)

Thus, with no factual or scientific basis for the conclusory statements, no one can credibly speak to whether the same conclusions could be drawn after the significant operational and ecological changes that have occurred in relation to these discharges. Nonetheless, Respondents present fanciful extrapolations spun from those conclusions. As to the problem that the record is silent regarding how the operational charges have affected the size, shape or other attributes of the thermal plume, Respondents begin with the mere fact that thermal plume studies were conducted in the 1970s (they are not included in the record), then speculate about what those studies might have said. (IEPA Post-Hr'g Br. at 6; MWG Post-Hr'g Br. at 22 ("He credibly testified at hearing that the studies before the Board in 1978 would have advised the Board whether the plume was capable of shifting between areas of different thermal sensitivity, and whether appreciable harm could result.").) That assertion is not only baseless, it is functionally useless for evaluating the effects of the thermal plume under changed circumstances forty years later.

Next, Midwest Generation cites the "daily monitoring reports" and the "PIC study" as evidence supporting the Agency's decision to renew the thermal variance. As explained in

Petitioners' post-hearing brief, the Agency admits it did not analyze the Discharge Monitoring Reports in order to determine thermal impacts on aquatic life. (Pet'r Post-Hr'g Br. at 10.) The Proposal for Information Collection (PIC) is not a "study" at all, and is neither reliable nor credible evidence for the purposes it is being offered. (Pet'r Post-Hr'g Br. at 12-13, 28.) Given the lack of quality control and scientific analysis, it is especially inappropriate to assert that the preliminary data being referenced in the PIC indicate anything, let alone "overall stability in the local aquatic community." (*See* MWG Post-Hr'g Br. at 25.)

This claim of ecological stability is contradicted by the last type of information referenced by Midwest Generation: "a 2009 USGS study compiling data from Waukegan and other parts of the lake." (MWG Post-Hr'g Br. at 25.) Respondents both acknowledge that studies in the record document ecological declines in aquatic communities in Lake Michigan. (MWG Post-Hr'g Br. at 24; IEPA Post-Hr'g Br. at 8-9.) But Respondents overextend the Agency's subsequent hypothesis that the observed ecological decline was "the result of lake productivity declines and invasive species proliferation," (IEPA Post-Hr'g Br. at 8-9), to mean that the thermal discharges have not caused appreciable harm to the aquatic community. The study says no such thing. No evidence exists in the entire record that evaluates how thermal discharges interact with or exacerbate an already-weakened ecosystem.

Nor is there any evidence to support the Agency's speculation that because harm is occurring on a lakewide basis there can be no adverse impacts from the thermal discharges. (*See* IEPA Post-Hr'g Br. at 9.) The applicable standard does not require thermal impacts to be the sole cause of observed ecological harm. That the principal cause of the declines observed in the overall ecosystem is not thought to be thermal discharges does not mean that those discharges are not causing appreciable harm to aquatic life. Furthermore, the USGS study did not evaluate

how thermal pollution may influence or exacerbate the observed ecological declines. (R. 221-35.)

Finally, Respondents present the Board with factual findings that have no basis in the record. IEPA asserts that the "retirements of Units 5 and 6 … *correspondingly reduced the Facility's thermal impact on aquatic life in its vicinity*." (IEPA Post-Hr'g Br. at 9.) Midwest Generation contends that "[t]he Agency reasonably concluded that the reduction in the Waukegan Station's thermal loading rate since the Thermal AEL was originally granted did not constitute a 'material change' *because the reduced thermal output would have no negative effect on the local aquatic community*." (MWG Post-Hr'g Br. at 21.) Contrary to both statements, there is not a scintilla of factual evidence in the record that shows whether or how the operational changes have changed the thermal impact on aquatic life. Reducing the flow of the thermal discharges could change key attributes of the thermal plume, impacting sensitive nearshore habitats in ways the original variance did not contemplate.

Subpart K requires the Agency to make a finding of *no appreciable harm* based on substantial evidence in order to grant relief from thermal water quality standards. There is simply no evidence in the record to support a finding that appreciable harm has not occurred to aquatic life, in light of the "dramatic" change in the operation of the plant and the documented overall weakening of the Lake Michigan ecosystem. Accordingly, we ask the Board to invalidate IEPA's purported grant of a thermal variance to Waukegan Station.

II. Respondents have not Shown that the Agency Supported a Best Professional Judgment Determination Regarding the Cooling Water Intake System with Substantial Evidence

As with the thermal variance issue, Respondents' briefs come up short with regard to the standard that must be applied to the cooling water intake structure, the burden that Petitioners must meet to prevail, and the evidence in the record that can support the Agency's action.

A. The interim BTA standard requires the Agency's Best Professional Judgment.

Although the Board's Order established that, under 40 C.F.R. § 125.98(b)(6), "'the [permitting authority] must establish interim BTA [Best Technology Available] requirements in the permit based on the [permitting authority's] best professional judgment on a site-specific basis in accordance with § 125.90(b) and 40 CFR 401.14," (Order at 15), Midwest Generation appears to be arguing for a different standard. The Midwest Generation brief assumes that the interim Best Technology Available standard is "lower" than the final Best Technology Available standard that will ultimately be required of cooling water intake structures at existing facilities. (MWG Post-Hr'g Br. at 10.) There is no basis for this characterization in the law. The site-specific Best Professional Judgment determination merely establishes a different procedure to arrive at the interim Best Technology Available for a given facility. The Agency agrees, (Tr. 83:18-20), testifying that even closed-cycle cooling is not precluded as an interim BTA; rather it depends on the Agency's best professional judgment under the circumstances. (Tr. at 83:1-84:2 ("Interim BTA is a requirement under the new 2014 [Phase II] rule. And it's based on best professional judgment. BTA has specific requirements under the new rule."). What matters is that the Agency must actually make a best professional judgment determination based on substantial evidence, something that did not occur here. Agreeing to look the other way for a five-year permit term cannot be a valid exercise of the Agency's best professional judgment.

B. Petitioners' burden is to show the agency action is not supported by substantial evidence.

As discussed in Section I.B. above, Petitioners' burden of proof is to demonstrate that the administrative record lacks substantial evidence to support the Agency's action. Nonetheless, with regard to the cooling water intake structures, Respondents again imply that the burden is on Petitioners to prove that the Agency's (undefined) interim BTA was incorrect. IEPA emphasizes its staff testimony that "[t]here is nothing in the record that indicates [the cooling water intake structure at the Waukegan Facility] would not constitute an interim Best Technology Available based on our best professional judgment." (IEPA Post-Hr'g Br. at 12.) Once again, this has the standard entirely backwards: the problem is that there is no evidence in the record to support the Agency's decision that the operation of cooling water intake structure *is* appropriate as an interim best technology available. As demonstrated in Petitioners' post-hearing brief, the Agency signed off on the status quo without considering aquatic life impacts of the cooling water intake structure, and without evaluating any near-term options available to reduce those impacts. (Pet'r Post-Hr'g Br. at 21-29.)

Midwest Generation's brief goes even further to imply that the U.S. EPA rule requiring the agency to use its best professional judgment to establish an interim best technology available is optional. It speculates that U.S. EPA "simply wanted to give regulators an opportunity in appropriate cases to require easily implemented, effective and cost-efficient interim technologies if found." (MWG Post-Hr'g Br. at 41-42.) 40 C.F.R. § 125.98(b)(6) is not an "opportunity," it is a requirement—one that IEPA failed to meet.

C. The Agency's best professional judgment determination is not supported by substantial evidence in the record.

As discussed in Petitioners' post-hearing brief, the Agency's claim that, in its best professional judgment, the "operation of the cooling water intake structure" is the interim best

technology available is belied by the fact that the Agency could not identify a single attribute of the cooling water intake structure that acted to minimize adverse environmental impacts. Further, the Agency failed to examine other potentially available control technologies as candidates for the interim BTA, and did not base its determination on reliable or current information regarding the impingement and entrainment impacts of the cooling water intake structure as it was presently operated. Again, Respondents seek to hide behind this dearth of information, stating that "the Agency had no evidence of a problem that new technology was needed to address." (MWG Post-Hr'g Br. at 39.) Not only does the interim BTA requirement lack a precondition of a "problem that needs a new technology," any lack of evidence about impacts and control technologies in the record is a problem entirely of Respondents' making.

As was the case regarding the thermal variance, Midwest Generation continues to state facts that have no basis whatsoever in the record. One such fallacy was included in the conclusion. The sentence begins, "New 2005 studies of the Intake Structure's operations indicated that its impact on aquatic life had not significantly changed since 1978." (MWG Post-Hr'g Br. at 44.) As Petitioners have stated, no "study" was ever completed, nor could a Proposal for Information Collection outlining future study plausibly reach such a conclusion. But it goes on to state "that any major reductions in impingement mortality would benefit almost exclusively invasive species, and thus produce no ecological benefit." (*Id*.) That factual assertion is utterly without support in the record.

D. The permits from other jurisdictions Midwest Generation seeks to reference should be excluded as irrelevant.

Midwest Generation has attached to its post-hearing brief a number of what appear to be permit documents from other jurisdictions, (MWG Post-Hr'g Br., Exs. D, E, F.), with the apparent purpose of creating an illusion of authority that supports IEPA's failure to make a

legitimate best professional judgment determination. But those documents are not proper legal authority, binding or persuasive. Nor should they be considered as evidence in this proceeding.

Just as the documents that were put forward in Midwest Generation's Motion *Instanter* to Supplement the Record, (MWG Post-Hr'g Br., Exs. H, I, J), the permit documents from other jurisdictions are irrelevant to the matters before the Board and are thus inadmissible. (*See* Pet'r Resp. to MWG Mot. to Suppl. R.) Under Illinois Rules, "[e]vidence which is not relevant is not admissible." Ill. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401. In the context of permit challenges, the only relevant evidence that may be considered is the record that the Agency relied on in making its decision. In reviewing a permit issued by the Agency, the Board "shall hear the petition…exclusively on the record before the Agency." 415 ILCS § 5/40(e)(3). Board rules require the Agency to compile its administrative record, which must include specifically identified documents as well as "[a]ny other information the Agency relied upon in making its final decision." 35 Ill. Adm. Code § 105.212. Neither Midwest Generation nor the Agency contends that these documents were relied upon in making its final decision. Furthermore, their inclusion only serves to confuse the issues. Any of these permits might be under appeal in their home jurisdictions for the same shortcomings Petitioners have identified here. Accordingly, the proper treatment of Exhibits D, E, and F is to disregard them as inadmissible and irrelevant.

III. U.S. EPA's Failure to Object to a Permit Cannot Be Interpreted as U.S. EPA Approval of the Terms of a Draft Permit

Contrary to Midwest Generation's claims, U.S. EPA's decision not to object to a permit does not provide substantial evidence to support a state agency's decision to approve it. In its post-hearing brief, Midwest Generation cites "[t]he U.S. EPA's . . . decision not to object to the renewal of the Thermal AEL" as evidence supporting the Illinois EPA's conclusion that the draft permit "met the requirements of the Clean Water Act." (MWG Post-Hr'g Br. at 24.) U.S. EPA Deputy Administrator Joel Beauvais dispelled this notion in a recent letter, stating, "[I]n cases when [U.S. EPA] does not object to an NPDES permit, or specific conditions or lack of conditions in a permit, it should not be read as an affirmation that the EPA has concluded that the permit fully complies with the Clean Water Act." (Ex. A at 1.)

Simply stated, the U.S. EPA opting not to object to a permit is not an endorsement of the renewal. For facilities in Illinois, the decision to grant a renewed NPDES permit is entirely up to the Illinois EPA. U.S. EPA's oversight role, and decisions concerning the unusual step of objecting to a permit, are influenced by many factors, including resources available to pursue legal action to stop a permit. As a practical matter, U.S. EPA rarely blocks issuance of a permit. Thus, the agency's non-objection cannot be used as evidence of support or approval of permit terms in any sense. The mere fact that U.S. EPA did not take the exceptional measure of overriding Illinois EPA to block the permit renewal does not, as Midwest Generation erroneously supposes, suggest that renewal under the specific terms included in the permit was proper.

IV. Midwest Generation's Arguments Regarding Standing and the Application of Subpart K have Already been Decided on Summary Judgment

In its Order on summary judgment, the Board held that the Environmental Groups have standing and that Subpart K applies to IEPA's purported reissuance of the thermal variance. (Order at 8, 10-11.) Now, Midwest Generation has dedicated over one-third of its post-hearing brief to rehashing those already-decided arguments. Midwest Generation's disrespect for the Board's disposition of those issues should be disregarded. Attempts to re-litigate questions the Board already ruled on in summary judgment are a distraction from the issues at hand.

Midwest Generation does not argue, let alone establish, any sign of error or change of facts. Rather, Midwest Generation repeats the same arguments the Board rejected in its partial grant of summary judgment. The Board already decided the issues of Petitioner's standing and the application of Subpart K. (*Id.*)

Midwest Generation argues that Environmental Groups do not have standing to bring this appeal because the legal arguments at issue in this appeal were not included in permit comments. Indeed, some of the legal arguments (*e.g.*, those under the Subpart K rules that were adopted in 2014) did not exist at the time the public notice period on the draft permit closed in 2013. Environmental Groups have presented evidence that they adequately raised the substantive issues regarding the thermal effluent limitations the cooling water intake structure at issue in this proceeding during the permit process. (*See, e.g.*, Pet'r Reply & Resp., Jan. 21, 2016, at 3-5; Pet. for Review ¶5.) That additional legal theories have later emerged does not foreclose the legal interest Petitioners established in those issues being addressed in accordance with law. Permit comments are not legal briefs that require citation of every possible legal authority, including changes in such legal authority that may occur between the public notice period and permit

issuance. The Board's April 7, 2016 Order recognizes this interpretation as consistent with the requirement that the Environmental Protection Act be construed liberally to effect the purpose of providing an opportunity for IEPA to act on information provided by third-party members of the public, holding, "Petitioners do not need to show they raised specific legal arguments during the comment period." (Order at 9.) Accordingly, the Board properly found that "the Environmental Groups have standing to bring their appeal." *(Id.*)

Furthermore, Environmental Groups' April 29, 2015 Petition for Review meets the requirement in Section 40(e)(2)(A) that the petition include "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 Petition contains a statement that "[m]embers of the Petitioners … appeared at the hearing held in this proceeding or submitted comments in opposition to the permit," (Pet. for Review ¶5), and the Agency's responses to those comments are included in the Responsiveness Summary attached to the petition. (Pet. for Review, Ex. 2.) The Board's finding of facts based upon the administrative record affirms that Petitioners indeed raised these issues in permit comments and statements at the public hearing. (Order at 5-6.) Midwest Generation's argument on this issue is meritless.

On summary judgment, the Board also held that the Subpart K procedures adopted in 2014 control here because the IEPA action to issue a final permit occurred after those rules were in effect, and "a permit must reflect regulations in place at the time it was issued." (Order at 10.) This was consistent with Petitioners' argument that the final agency action that must comply with law in force at the time of that action was issuance of the permit, not some earlier deliberative step of developing the permit. (Pet'r Resp. & Reply at 20-22.) Indeed, a holding that Subpart K does not apply to the permit that was issued in 2015 would leave the Agency

without any regulatory authority to renew a thermal variance under that Subpart in the first place. Nonetheless, Midwest Generation disregards the Board's order in its post-hearing brief, arguing that "[t]he [r]etroactive [a]application of Subpart K to the Waukegan Station [p]ermit [r]enewal is [c]ontrary to Illinois [l]aw and [v[iolates Due Process." (MWG Post-Hr'g Br. at 29.)

The Board granted summary judgment on these issues, thereby foreclosing both of them moving forward. Midwest Generation was a party to this summary judgment. They litigated both of these issues then, and the Board ruled against them. Midwest Generation has presented no basis to raise these issues again now. Therefore, the Board should ignore these arguments and proceed with the resolution of the issues still in dispute.

CONCLUSION

Respondents have not identified substantial evidence in the record to support IEPA's renewal of the thermal variance or its interim Best Technology Available determination. Petitioners have shown that such evidence does not amount to more than a mere scintilla. Both actions therefore violated the Act and Board regulations and were arbitrary, capricious, and not in accordance with law. Furthermore, as discussed in Petitioners' post-hearing brief, the Agency did not have authority to renew a variance that was not issued pursuant to Subpart K, and the Agency cannot base a renewal on a long-expired variance from 1978 that was never properly renewed after it expired many years ago. (Pet'r Post-Hr'g Br. at 17-20.) Therefore, the Board must find for Petitioners on both counts, invalidate Special Condition 4 and Special Condition 7 in the 2015 Final Permit, and remand the permit to IEPA with instructions to establish thermal effluent limitations based on applicable water quality standards and determine the interim Best Technology Available to control impacts from the cooling water intake structure. Further, because the issuance of the 2015 permit occurred fully ten years after the previous permit

expired, Petitioners ask that the Board set a deadline for the Agency to finalize the required permit conditions. We suggest a date no later than six months from the date of the Board's decision.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONERS' POST-HEARING REPLY** was served to all parties of record listed below via mail and electronic mail, on December 14, 2016.

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EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 19 2016

Mr. Albert Ettinger
Counsel to the Mississippi River Collaborative
53 W. Jackson Boulevard
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OFFICE OF WATER

Dear Mr. Ettinger:

Thank you for your November 9, 2015, letter expressing concern with inferences that could be drawn in cases where the Environmental Protection Agency has not objected to a National Pollutant Discharge Elimination System permit. I am writing to confirm that, in cases when the Agency does not object to an NPDES permit, or specific conditions or lack of conditions in a permit, it should not be read as an affirmation that the EPA has concluded that the permit fully complies with the Clean Water Act.

Authorized States submit draft or proposed permits to the EPA for review, and the EPA may review and issue objections to those permits as part of the EPA's State program oversight. See the CWA 402(d) and 40 CFR 123.43, 123.44. While EPA has the authority to review and object to State proposed or draft NPDES permits, it is within the EPA's discretion whether or not to review and/or object to any specific permit. There are currently over 40,000 active or administratively continued individual NPDES permits. Reviewing a proposed or draft State NPDES permit takes a considerable amount of staff time and effort, and the EPA is able to review only a fraction of such permits. The resource constraints the agency faces require careful and judicious selection of proposed or draft permits to review to ensure proper administration of the CWA. When the EPA reviews a draft or proposed permit, it is also within the EPA's discretion whether to object to any deficiencies. The EPA's objection to a proposed or draft State permit triggers a process that can lead to the transfer of permit issuing authority from the State to the EPA for that specific permit. The EPA must balance a number of considerations when deciding whether to make such an objection.

In addition, the EPA objection to permits is not the only tool available to ensure that State-issued permits comply with the CWA. Another avenue for review, related to permit objections, is the public notice and comment process that each permit is subject to before it becomes final. The EPA encourages citizens and interested parties to comment on draft State-issued or EPA-issued NPDES permits.

Please note that nothing in this letter is intended to represent the EPA's views regarding the specific matters mentioned in your letter.

Again, thank you for your letter. The EPA will continue its oversight of State programs through the many tools it has at its disposal. If you have questions, feel free to contact Louis Eby of the Water Permits Division at eby.louis@epa.gov or (202) 564-6599.

Sincerely,

Joel Beauvais
Deputy Assistant Administrator