

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL)
PRAIRIE RIVERS NETWORK, and)
SIERRA CLUB,)
)
Petitioners,)
)
v.) PCB 13-17
) (Third-Party NPDES Permit Appeal)
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and DYNEGY MIDWEST)
GENERATION, INC.,)
)
Respondents.)

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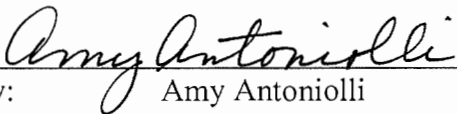
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **Reply in Opposition to Petitioners' Motion for Summary Judgment and In Support of Respondent DMG's Cross-Motion for Summary Judgment**, copies of which are herewith served upon you.

DYNEGY MIDWEST GENERATION,


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Dated: April 21, 2014

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**REPLY IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF RESPONDENT
DMG'S CROSS-MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION	1
ARGUMENT	1
I. NO APPLICABLE AUTHORITY REQUIRED IEPA TO CONDUCT A REASONABLE POTENTIAL ANALYSIS AND ESTABLISH A WQBEL IN THE ABSENSE OF FACILITY-SPECIFIC MONITORING DATA	1
A. IEPA Had the Discretion to Impose Monitoring Requirements Rather than a WQBEL in the Absence of Existing Facility-Specific Monitoring Data.....	2
B. The Agency Did Consider Outside Information That Constitutes Substantial Evidence.....	5
C. Petitioners Misconstrue Ameren Newton Mercury Data.....	8
D. Petitioners Misconstrue Text of IEPA’s Responsiveness Summary	12
II. IEPA’S ANTIDegradation ANALYSIS MET ALL REQUIREMENTS.....	15
A. IEPA Appropriately Characterized the Havana Scrubber/ACI Waste Stream and Concluded That There Would Be No Increased Loading to the Illinois River	15
1. Selenium and Arsenic	16
2. IEPA’s Alternatives Evaluation	17
3. Non-Identical Text Describing the Lack of an Increased Loading	18
4. Mercury Rule Testimony	18
B. All Four Antidegradation Criteria Were Satisfied by IEPA’s Antidegradation Analysis Regarding the Proposed New Scrubber/ACI Waste Stream.....	19
1. Newton Data	19
2. Hanlon Memo and Proposed ELG.....	20
3. Alternatives Evaluations for Bioaccumulative Parameters.....	22
4. Cross-Media Benefits.....	23
III. IEPA WAS NOT REQUIRED TO IMPOSE CASE-BY-CASE TBELs	24
A. Case-by-Case BAT-Based TBELs Are Not Required Because the Havana Station Scrubber/ACI Waste Stream Is Subject to the 1982 ELG.....	24

B.	Even Were the 1982 ELG to Somehow Not Apply to the Havana Station Scrubber/ACI Waste Stream, IEPA Was Not Required to Set Case-by-Case TBELs.....	30
C.	IEPA's Imposition of BPJ-Based Monitoring Requirements Was Appropriate	32
IV.	IEPA SATISFIED ALL PUBLIC PARTICIPATION REQUIREMENTS; JURISDICTION HAS NOT BEEN ESTABLISHED FOR PETITIONERS' RESPONSIVENESS SUMMARY CLAIM	33
V.	CONCLUSION.....	35

INTRODUCTION

Dynegy Midwest Generation respectfully submits this reply (the “DMG Reply”) in opposition to Petitioners’ Motion for Summary Judgment and in support of DMG’s Cross-Motion for Summary Judgment in accordance with the briefing schedule presented in Hearing Officer Webb’s March 27, 2014 hearing officer order.¹ This DMG Reply is provided to address mischaracterizations raised by Petitioners’ Reply Memorandum of Law in Support of Petitioners’ Motion for Summary Judgment (“Petitioners’ Reply”).²

The introduction of Petitioners’ Reply presents a narrative that is compelling fiction. In truth, as will be explained below, applicable law and substantial evidence (*i.e.*, that which a reasonable mind might find as adequate) well-supports IEPA’s determinations regarding reasonable potential (Part I), antidegradation (Part II), best professional judgment (“BPJ”) (Part III) and the Havana Station Responsiveness Summary (Part IV). Petitioners’ Motion should thus be denied in full. At the same time Parts I-IV below demonstrate the failings of each of Petitioners’ claims, they establish that DMG’s Motion should be granted.

ARGUMENT

I. NO APPLICABLE AUTHORITY REQUIRED IEPA TO CONDUCT A REASONABLE POTENTIAL ANALYSIS AND ESTABLISH A WQBEL IN THE ABSENSE OF FACILITY-SPECIFIC MONITORING DATA.

The DMG Response demonstrated that IEPA had the discretion to issue the Permit with monitoring requirements rather than a WQBEL in the absence of relevant existing facility-

¹ Unless otherwise expressly indicated, abbreviations used in this DMG Reply are defined in DMG’s Memorandum of Law in Opposition to Petitioners’ Motion for Summary Judgment and in Support of Respondent Dynegy Midwest Generation’s Cross-Motion for Summary Judgment filed on February 24, 2014 (the “DMG Response”). Citations to the 1982 ELG and Proposed ELG are also as provided in the DMG Response.

² On February 24, 2014, IEPA also filed Respondent Illinois Environmental Protection Agency’s Cross-Motion for Summary Judgment and Agency’s Combined Memorandum in Response to Petitioners’ Motion for Summary Judgment in Support of its Cross-Motion for Summary Judgment, which will be referred to throughout this brief as “IEPA Response, pp. ___.”

specific effluent monitoring data. DMG Response, pp. 8-15. Petitioners' attempt to rebut that position by (i) fabricating an IEPA duty to have considered Newton mercury effluent monitoring data, (ii) incorrectly asserting that IEPA failed to consider Newton mercury monitoring data, (iii) misconstruing Newton mercury effluent monitoring data, and (iv) contending that IEPA was somehow required to disregard other outside information that is inconveniently inconsistent with Petitioners' position. Each of these claims will be addressed below.³

A. IEPA Had the Discretion to Impose Monitoring Requirements Rather than a WQBEL in the Absence of Existing Facility-Specific Monitoring Data.

Petitioners assert that IEPA ignored "emphatically mandatory language" in certain regulations and statutes which somehow require the Agency to impose a WQBEL even in the absence of facility-specific effluent data. Petitioners' Reply, pp. 4-5. However, the regulatory and statutory provisions cited by Petitioners do not stand for what Petitioners purport: none of the cited provisions require the Agency to conduct a reasonable potential analysis and set a WQBEL in the absence of facility-specific effluent monitoring data. Rather, the only "mandatory" aspect of the cited provisions is a prohibition against violating water quality standards, a matter not relevant or at issue here.

A WQBEL is required only when "the Agency determines" a discharge "will cause or have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 35 Ill. Adm. Code § 309.143. Applicable state and federal statutes and regulations are decidedly silent when it comes to how the Agency must make this determination. *See* 35 Ill. Adm. Code § 309.143; *see also* 35 Ill. Adm. Code § 309.141(d)(1); 33 U.S.C. § 1312; 40 C.F.R. § 122.44(b). However, as DMG explained in the DMG Response, available U.S. EPA

³ The reasonable potential argument of Petitioners' Reply expressly addresses only mercury. Petitioners' Reply, pp. 3-15.

guidance (*e.g.*, the *1991 U.S. EPA TSD*) clearly provides that a reasonable potential analysis is best made when facility-specific data is available, that an agency need not develop an WQBEL in the absence of such data, and that an agency has discretion in considering whether to impose a WQBEL based on qualitative rather than quantitative factors and provides guidance regarding when data from other facilities may be informative. DMG Response, pp. 8-15. Petitioners' Reply attempts to contort the plainly discretionary language of the *1991 U.S. EPA TSD* and ignores similar guidance in U.S. EPA's *NPDES Permit Writers' Manual (2010)*.

As made clear in DMG's Response, the *1991 U.S. EPA TSD* provides that, in the absence of facility-specific monitoring data, "[i]f the regulatory authority so chooses, or if the circumstances dictate, the authority may decide to develop and impose a permit limit for whole effluent toxicity or for individual toxicants" *1991 U.S. EPA TSD* at 50; DMG Response, pp. 8-9. In Petitioners' Reply, Petitioners emphasize the "if the circumstances dictate" portion of this language. Petitioners' Reply, p. 6. In doing so, Petitioners fail to acknowledge that the phrases "if the regulatory authority so chooses" and "if the circumstances dictate" are both followed by the discretionary phrase "the authority may decide." Thus, this language clearly provides state agencies, such as IEPA, with discretion regarding when and how to develop and impose WQBELs in the absence of facility-specific data.

The *1991 U.S. EPA TSD* adds that: "[w]hen determining whether or not a discharge causes, has the reasonable potential to cause, or contribute to an excursion of a numeric or narrative water quality criterion for individual toxicants or for toxicity, the regulatory authority can use a variety of factors and information where facility-specific monitoring data are unavailable." *1991 U.S. EPA TSD* at 50 (emphasis added). Petitioners' Reply completely ignores this discretionary text. Instead, Petitioners interpret the text of page 51 of the *1991 U.S.*

EPA TSD to fabricate an IEPA duty to consider outside data when considering the reasonable potential of a discharge in the absence of facility-specific effluent data. Petitioners' Reply, p 6. Specifically, Petitioners quote the following italicized excerpt from a larger statement of page 51 of the *1991 U.S. EPA TSD*:

If the regulatory authority, *after evaluating all available information on the effluent, in the absence of effluent monitoring data is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to, an excursion above a numeric or narrative criterion*, the authority should require whole effluent toxicity or chemical-specific testing to gather further evidence. In such a case, the regulatory authority . . . may require the testing as a condition of the issued/reissued permit.

1991 U.S. EPA TSD at 51 (emphasis added). Petitioners contend that the phrase “after evaluating all available information on the effluent” imposes an affirmative duty for IEPA to consider third party information. *Id.* DMG disagrees. The guidance merely suggests that Agency should look at that reasonable information it believes is relevant to the effluent. The above-quoted text of page 51 of the *1991 U.S. EPA TSD* is, like the previously quoted text of page 50 of the same document, replete with discretion (should, may) – in no way does it even purport to mandate a specific agency action in the absence of facility-specific monitoring data.

The *NPDES Permit Writers' Manual (2010)* further illustrates the discretionary nature of a reasonable potential analysis in the absence of facility-specific effluent monitoring data. The first sentence under its section 6.3.3, entitled “Conducting a Reasonable Potential Analysis without Data,” states:

State implementation procedures might allow, or even require, a permit writer to determine reasonable potential through a qualitative assessment process without using available facility-specific effluent monitoring data or when such data is not available.

NPDES Permit Writers' Manual (2010) at 6-30. This statement demonstrates that U.S. EPA believes that state permitting authorities have the discretion to require a reasonable potential

analysis in the absence of facility-specific effluent data; federal law does not itself require such a reasonable potential analysis. As previously explained, no Illinois authority requires a reasonable potential analysis in the absence of facility-specific effluent monitoring data.

B. The Agency Did Consider Outside Information That Constitutes Substantial Evidence.

Although it was not required to do so, the Record is clear that the Agency did consider outside information in the absence of relevant existing Havana Station effluent monitoring data. As explained at length in DMG's Response, information the Agency considered included the *EPRI Study*, *2006 U.S. EPA Study*, and information regarding the specific operational design of and flow of wastewater at Havana Station, including that the scrubber/ACI waste stream was to be deposited in dry areas of pond 1 of the East Ash Pond System (and later in pond 2, if/when pond 1 was filled). DMG Response, p. 18; R. at 000654; R. at 000507, 000990-1019; R. Doc. #65. The prior pleadings in this matter make it clear that Respondents disagree with Petitioners about the merits of the *EPRI Study* and the *2006 U.S. EPA Study*. Because Petitioners' Reply (at its pages 10-14) rehashes its position on those studies without adding any meaningful new authority or argument, DMG will not here further address the same except to point out two things. First, in individually attacking the findings of the *EPRI Study*, *2006 U.S. EPA Study* and supportive testimony of the *Mercury Rule* as unreliable, Petitioners fail to recognize the cumulative nature of the information. That is, even if each study and testimony were somehow not independently substantial evidence, the collective weight of the information certainly is.

Second, Petitioners have failed to carry their burden to establish that the *EPRI Study* and *2006 U.S. EPA Study* (among other Record information) do not constitute substantial evidence which support the Agency's decision to issue the Permit. Petitioners unquestionably bear the burden to demonstrate that IEPA's decision is not supported by substantial evidence. *Des*

Plaines River Watershed Alliance v. IEPA, PCB 04-88, slip op. at 7 (Nov. 17, 2005) (citing *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, slip op. at 9 (Aug. 9, 2001); citing *Waste Management, Inc., v. IEPA*, PCB 84-45, 61, 68 (consol.), slip op. at 3-10 (Nov. 26, 1984)). While the Board's regulations and decisions do not specifically define what constitutes "substantial evidence," it is generally recognized that such is:

a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

U. S. v. Carlo Bianchi & Co., 373 U.S. 709, 715, (1963) (emphasis added); *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (internal citation omitted) ("substantial evidence" standard requires asking "whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'"); *People v. Illinois Commerce Comm'n*, 967 N.E.2d 863, 872 *appeal denied*, 979 N.E.2d 879 (Ill. 2012); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 937 N.E.2d 685, 698 (Ill. 2010) (internal citations omitted) (holding "substantial evidence" means "more than a mere scintilla; however it does not have to rise to the level of preponderance of the evidence . . . [i]t is evidence that a reasoning mind would accept as sufficient to support a particular conclusion."); *Boom Town Saloon, Inc. v. City of Chicago*, 892 N.E.2d 1112, 1118 (Ill. 2008) ("Substantial evidence has been defined as more than a mere scintilla and as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal quotations omitted); *Stone v. Dept. of Human Rights*, 700 N.E.2d 1105 (Ill. 1998).

In other words, the evidence IEPA considers when making a permitting decision need not be 100% dispositive; it simply needs to be reasonable evidence for the Agency to rely upon. Unquestionably, it was reasonable for the Agency to rely upon the *EPRI Study* and the *2006 U.S. EPA Study* as a basis for determining that the proposed new waste stream was not expected to

adversely impact Havana Station effluent concentrations. R. at 000994; R. Doc # 65 at xiii; R. at 000545 R. at 000679; R. at 000684. Understanding that facility-specific monitoring data required by the Permit would help assess the accuracy of the studies, IEPA appropriately imposed monitoring requirements in the Permit and allowed for the Permit to be reopened at a future date based on that monitoring data.⁴ See R. at 000696-000716 (Permit, Special Condition 8, General Condition 8).⁵

Moreover, contrary to Petitioners' claim that the Agency "declined to even consider"⁶ Newton data when issuing the Permit, the Record establishes that the Agency did consider mercury monitoring data from Newton. Indeed, the internal Agency email exchange Petitioners have repeatedly cited expressly references Newton mercury effluent data and the fact that such was the only ash pond data possessed by the Agency indicating an exceedance of the numeric water quality standard for mercury. R. at 000693.⁷ Petitioners are simply factually wrong to assert to that IEPA did not consider Newton data.⁸

⁴ In this case, because the relevant mercury human health water quality standard at issue is assessed as an annual average based on a minimum number of samples representative of the year, the Agency was inherently to have the opportunity to review effluent monitoring data before an exceedance would occur. 35 Ill. Adm. Code § 302.208 (c), (f).

⁵ Petitioners further suggest that U.S. EPA should have considered a 2010 U.S. EPA survey, a 2009 U.S. EPA Study and the *Hanlon Memo* when determining whether to set a WQBEL for mercury and that these documents somehow suggest that settling ponds are an ineffective means of removing dissolved mercury. Petitioners' Reply, p. 12. As explained in DMG's Response at footnote 103, the conclusion in the 2009 U.S. EPA study referenced by Petitioners addressed only FGD wastewater and not ACI wastewater systems. As explained in footnote 7, *infra*, the 2010 U.S. EPA survey actually provided little information regarding the impact of ACI wastewater. As explained in Parts II.B.2 and III.A, *infra*, just as the 2010 U.S. EPA survey and the 2009 U.S. EPA study, the *Hanlon Memo* focuses on FGD wastewater and is not material to determining the impact of mercury discharges at the Havana Station. See DMG Response (at its pages 23-24) for a delineation of the differences of these FGD wastewater and ACI wastewater.

⁶ Petitioners' Reply, p. 6.

⁷ Petitioners go on to contend that the Agency "could have readily obtained extensive data" U.S. EPA gathered in connection with a survey or information collection request ("ICR") for the Proposed ELG (Petitioners refer to this as the "2010 U.S. EPA Survey"). Petitioners' Reply, p. 7. That contention fails to recognize that the "extensive data" of the Proposed ELG concerning ACI wastewater consisted of limited information for one year from only 7 ICR responses (*i.e.* 6% of 120 ICR responses). "Based on the responses to the industry survey, in 2009 there were

C. Petitioners Misconstrue Ameren Newton Mercury Data.

Petitioners assert that IEPA “irrationally” refused to calculate a mercury WQBEL using effluent data from Newton. Petitioners’ Reply, p. 8. Part I.A above (and I.C of DMG’s Response) explained that it was not necessary, as a matter of law, for the Agency to use Newton data. With that in mind, it is not necessary for DMG to substantively address Petitioners’ mischaracterization of Newton data. Nonetheless, the discussion below will do so briefly to ensure a factually accurate record for the Board. Specifically, the paragraphs below will briefly explain how Petitioners have mischaracterized Newton mercury effluent data as “steadily increasing” post-ACI equipment installation, an Agency email exchange of the Record, and IEPA’s imposition of a mercury effluent limitation for Newton.

ACI waste was first deposited into the Newton ash pond in June 2009. Newton Power Station, Draft Modified NPDES Permit No. IL0049191, p. 2 (Jul. 14, 2011).⁹ Moreover, publicly available quarterly discharge monitoring reports for Newton demonstrate its ash pond had mercury discharges above 12 ng/l before operation of the ACI began (e.g., 18 ng/l was reported in March 2007; notably, said concentration is higher or equal to the post-ACI Newton

approximately 120 operating FGMC systems Approximately 90 percent of the currently operating FGMC systems are dry systems that do not generate or affect any wastewater streams. Approximately six percent of the currently operating systems are wet systems. For the remaining 4 percent of the systems, the type of handling system (e.g., wet or dry handling) is unknown.” Proposed ELG, 78 Fed. Reg. at 34450. In the Technical Development Document for the Proposed ELG, U.S. EPA further explained that it “[did] not have any sampling data on the wastewater characteristics of the FGMC transport water associated with these wet systems” and that it “[did] not have any sampling data demonstrating how the added mercury in the fly ash affects the characteristics of the fly ash transport water.” *U.S. EPA, Technical Development Document for the Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, EPA-821-R-13-002 at 6-17 to 6-18 (April 2013). Thus, no such “extensive data” existed. Further, given ACI requirements applicable to Illinois power plants in the one year applicable to the ICR (2009), DMG suspects that most, and perhaps all, of the 7 responses were from Illinois facilities (including, at least, DMG’s Havana, Wood River and Baldwin facilities and the Ameren Newton facility).

⁸ 35 Ill. Adm. Code 302.208(e), (f).

⁹ <http://www.epa.state.il.us/public-notice/2011/ameren-newton/index.pdf>.

effluent concentrations of 17.8 and 18 ng/l referenced at page 9 of Petitioners' Reply). U.S. EPA ICIS database, Newton Power Station.¹⁰ Also, rather than "increasing steadily" after the ACI equipment began operating as Petitioners claim,¹¹ the concentrations of mercury in Newton's Outfall 001 effluent varied quarter by quarter after the ACI began operation just as it had before ACI operation began, with many readings well below the 12 ng/l human health water quality standard, as well as some readings above, with no clear pattern of continual increase. *Id.* In fact, in response to a public comment during the Newton permitting process that mercury discharges at Newton had been "increasing steadily since 2009 when the facility began using activated carbon," the Agency noted that "[t]he mercury sample for the ash pond effluent for November 2011 is again very low, 3.42 ng/l." *NPDES Responsiveness Summary*, Newton Power Station, p. 15 (Jan. 31, 2012).¹² Additionally, IEPA noted that Ameren (the then operator of Newton) had examined the effluent using a microscope and "saw no evidence of carbon particles." *Id.* This serves as evidence that the mercury present in the effluent may not have come from the ACI waste. Thus, the data IEPA had from Newton at the time of Permit issuance in no way established a relationship between ACI waste and an increased concentration of mercury in Newton's ash pond effluent. The Record does establish otherwise.

Newton began reporting mercury effluent data in 2007 and became subject to a NPDES permit effluent limitation for mercury in 2012. *See NPDES Responsiveness Summary*, Newton Power Station; U.S. EPA ICIS database, Newton Power Station. In its responsiveness summary for the 2012 Newton NPDES permit, IEPA expressly said that it was adding "an annual mercury

¹⁰http://oaspub.epa.gov/enviro/ICIS_DETAIL_REPORTS_NPDESID.icis_tst?npdesid=IL0049191&npvalue=1&npvalue=13&npvalue=14&npvalue=3&npvalue=4&npvalue=5&npvalue=6&rvalue=13&npvalue=2&npvalue=7&npvalue=8&npvalue=11&npvalue=12

¹¹ Petitioners' Reply presents this same statement as purported fact known to IEPA. Petitioners' Reply, p. 8.

¹² <http://www.epa.state.il.us/public-notices/2011/ameren-newton/responsiveness-summary.pdf>

limit of 12 ng/l to Outfall 001, based on the monitoring results indicated above.” *NPDES Responsiveness Summary, Newton Power Station* at 15. (emphasis added)¹³ For other outfalls at Newton where mercury might also be discharged but for which monitoring data was not available, IEPA imposed only monitoring requirements. *Id.* at 12.

Petitioners cite to selective quotations from an IEPA email exchange as somehow providing support for their argument; however, this exchange does quite the opposite. In the exchange, the permit writer notes that (1) Newton is the only ash pond he is aware of where he has seen mercury in pond effluent exceeding water quality standards and (2) “[g]iven the timing of the decision to place mercury monitoring conditions in industrial permits (approx. 7 years ago or so) we have not reviewed very much data in the course of WQ analysis at permit renewal.” R. at 000692-693. This email exchange supports the conclusion that IEPA had little data regarding mercury in effluent at the time of Permit issuance and supports IEPA’s decision to require monitoring in order to gather additional data (and to require effluent limits at the Havana Station if the monitoring indicated the potential to cause or contribute to a water quality violation).¹⁴

Petitioners admit that “[i]t is possible . . . that the Newton facility is sufficiently unlike the Havana facility that a comparison of the two effluents is not useful.” Petitioners’ Reply, p. 9. That statement suggests that Petitioners believe IEPA had an affirmative duty to detail in the Record how Newton was dissimilar. If such an affirmative duty existed (it does not), query where it would end. That is, if IEPA has an affirmative duty to explain why Newton is dissimilar, it would presumably have a duty to detail differences for many other facilities that are

¹³ It is unclear from the Newton Responsiveness Summary whether IEPA actually calculated a reasonable potential for Newton based on available monitoring data. It may have been that due to monitoring effluent data exceeding 12 ng/l the Agency elected to specify the applicable water quality standard in that permit without actually conducting formal reasonable potential calculations.

¹⁴ See IEPA Response, p. 9.

different too. Perhaps understanding the effect of Petitioners' argument, section 6.3.3 (Conducting a Reasonable Potential Analysis without Data) of the *NPDES Permit Writers' Manual* directs that permit writers thoroughly justify decisions to include WQBELs in administrative records. It does not purport to require justifications for decisions not to impose a WQBEL in the absence of facility-specific effluent monitoring data.

The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where required by state and federal regulations. A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.

NPDES Permit Writers' Manual (2010) at 6-30 (emphasis added). With this in mind, it is clear that IEPA was not obligated to prove facility differences in the Record.

As pointed out in the DMG Response, there are many significant differences between Havana Station and Newton that would make using Newton data in conducting a reasonable potential analysis for the Havana Station illogical. Petitioners dismiss this information as irrelevant because it is not part of the Record. However, such information is publicly available (*e.g.*, via NPDES applications, construction applications, and other submissions)¹⁵ and the Board is able to take notice of them here. 35 Ill. Adm. Code § 101.630 (allowing the Board to take official notice of "all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board"); *Finish Line Exp. Inc. v. City of Chicago*, 379 N.E.2d 290, 291 (Ill. 1978) ("Judicial notice may be taken of [] public records."); *People v. Davis*, 357 N.E.2d 792 (Ill. 1976) (holding doctrine of judicial notice includes facts that, while not generally known, are readily verifiable from sources of undisputed accuracy).

¹⁵ See, *e.g.*, DMG Havana ICR U.S. EPA Effluent Limitation Guideline Response 2010 (submission to U.S. EPA as part of information collection request, which included information regarding Havana ACI operation and wastewater treatment); Newton Power Station, Draft Modified NPDES Permit No. IL0049191 (providing information regarding wastewater discharges and ash pond system at Newton).

D. Petitioners Misconstrue Text of IEPA's Responsiveness Summary.

Finally, Petitioners misconstrue statements by IEPA in the Havana Station Responsiveness Summary to assert that IEPA's decision to not include a WQBEL for mercury in the Permit was "irrational." Petitioners' Reply, pp. 14-15. Petitioners selectively quote from one portion of the Havana Station Responsiveness Summary to suggest that (i) the Agency contradicted itself by ignoring a hypothetical risk related to mercury discharges to the Illinois River, (ii) the IEPA permit writer "assumed the presence of a nonexistent mercury limit in the permit," and (iii) the Agency was factually incorrect.¹⁶ Petitioners' are wrong to do so – the particular Havana Station Responsiveness Summary text does not convey what Petitioners contend.

IEPA consistently points out in the Havana Station Responsiveness Summary that ACI waste was not expected to discharge to the Illinois River. DMG Response, p. 18-19. The excerpt quoted by Petitioners' Reply, when put in context and quoted in full, says nothing different. The full relevant dialog of the Havana Station Responsiveness Summary (with Petitioners' excerpt in italics) is as follows:

[Question] Will the sorbent be expected to sink to the bottom of the Illinois River or is it carried to the dead zone, and is there any build up over time? (T-12)

[Agency Response] The sorbent is expected to settle out into the ash pond. *Any sorbent that does discharge will settle in the Illinois River. Mercury is strongly attracted to sediments where it can be transformed into methyl mercury by bacteria. Mercury would remain in the sediments or become methylated. Mercury discharging in the permitted low parts per trillion range will not result in the contamination of sediments.* Sediment from other sources dilutes any low level of

¹⁶ Additionally, Petitioners' Reply states that the relevant question for a reasonable potential analysis is whether a waterbody is "use impaired," not just whether effluent numerically exceeds the in stream criteria protecting that use. Petitioners make this blanket statement but provide no authority for support. The relevant question under the regulations is clearly whether a discharge will or has a reasonable potential to violate a "water quality standard." 35 Ill. Adm. Code § 309.143. The only water quality standard Petitioners have pointed to is the 12 ng/L annual numerical human health standard in the Illinois regulations. There is no evidence in the Record that discharges from the Havana Station caused or had a reasonable potential to cause a violation of this numerical standard.

metals in an effluent such that deposited sediment in rivers does not end up with metals concentrations considered "contaminated".

R. at 000684. Plainly, the quote presented by Petitioners is part of an answer to a hypothetical question that assumed sorbent would somehow enter the Illinois River. In a part of the quote that Petitioners conveniently excluded, IEPA points out that “[t]he sorbent is expected to settle out into the ash pond,” *i.e.*, it was not expected to reach the Illinois River. *Id.* (emphasis added). Accordingly, Petitioners cannot reasonably point to this quote as a basis for irrationality in IEPA’s final Permit determination. The question assumes that sorbent will get to the river, but as the Agency explained in its answer to this question and elsewhere in the Record, the sorbent was not expected to reach the river. *See, e.g.*, R. at 000677-680; R. at 00748 (Mr. Mosher from IEPA noting that “[i]t’s our conclusion that there won’t be toxic concentrations as measured against the state’s water quality standards in the effluent coming out of the ash pond”); R. at 000749 (“[O]ur conclusion was that water quality standards would be met.”). In fact, at the public hearing attended by Petitioners, when IEPA was specifically asked, “Is or is not the mercury that is supposed to be bonded to the sorbent ever possibly going to be discharged into the Illinois River?” IEPA responded:

It’s not expected to discharge to the Illinois River. If there is any residue that for some reason discharges to the Illinois River, it will – the mercury will stay bonded to it so that the mercury will – the mercury itself will not come out and go into the ecosystem where it could be taken in by anyone or anything.

R. at 000753. When pressed about whether toxic mercury would build up in the river IEPA further explained:

Number one, all indications are that the mercury and activated carbon it’s sorbed to will remain in the ash pond. If it doesn’t for some reason – and this is a new type of technology. Dynegy is going to monitor for mercury in the final effluent. If it’s noted that the concentration of mercury begins to rise, we’ll note that, and we’ll step in. We’ll say, wait, you, -- you know, this wasn’t supposed to happen. Now, let’s fix it before water quality standards aren’t met. So I think before we start talking about what happens to the mercury discharged, we need to talk about,

number one, we don't think it's going to be discharged. Number two, there's only a certain amount of mercury that allowable to be discharged. It's a very, very low standard for mercury.

R. at 000754-755. Thus, IEPA consistently concluded that mercury from the sorbent was not expected to reach the Illinois River. To the extent there was a chance that some mercury from the sorbent might enter the Illinois River, IEPA noted that it was requiring monitoring at the Havana Station.

Additionally, Petitioners contend the reference of the above-stated Responsiveness Summary quote to "permitted low parts per trillion" range referenced some assumed limit in Permit. A more rational reading of that phrase is that the Agency was using the common meaning of the term "permitted," *i.e.*, allowed. Though there may not be a mercury effluent limit within the Permit, as IEPA pointed out in its hearing testimony, the Agency is monitoring mercury discharges at the Havana Station. Only "a certain amount" is "allowable to be discharged." To the extent the high levels of mercury are seen in the Havana Station's discharges, IEPA will "step in." Thus, IEPA's analysis of potential mercury discharges at the Havana Station has been consistent and rational.

With respect to the same Havana Station Responsiveness Summary quote, Petitioners further contend that IEPA's "statement concerning methyl mercury is the exact opposite of the truth, since methyl mercury is the more toxic form that accumulates in fish issue." Petitioners' Reply, p. 14.¹⁷ No information of the Record is cited to support Petitioners' assertion of a factual inaccuracy. The factual accuracy of any IEPA Record methyl mercury statement is, of course, a question of fact. To the extent Petitioners' Motion is at all predicated upon its

¹⁷ Unfortunately, Petitioners do not specify which of the three quoted statements regarding methyl mercury is inaccurate.

contention of a factually inaccurate IEPA statement regarding methyl mercury, it must thus be denied.¹⁸

II. IEPA'S ANTIDEGRADATION ANALYSIS MET ALL REQUIREMENTS.

As explained in the DMG Response, Petitioners' Memo failed to establish that IEPA's antidegradation analysis was insufficient as a matter of law or that the Record lacks substantial evidence supporting IEPA's antidegradation analysis, either with respect to loading or the four criteria of 35 Ill. Adm. Code 302.105(c)(2)(B). DMG Response, pp. 21-24. Petitioners' Reply attacks the DMG Response with a series of specious claims. The following two sections respectively address those claims as they related to loading (Part II.A) and the criteria of 35 Ill. Adm. Code 302.105(c)(2)(B)(i)-(iv) (Part II.B).

A. IEPA Appropriately Characterized the Havana Scrubber/ACI Waste Stream and Concluded That There Would Be No Increased Loading to the Illinois River.

Part II.A of the DMG Response demonstrated that IEPA appropriately characterized the Havana Station's proposed new scrubber/ACI waste stream and determined that its addition to dry and hydrologically distant areas of pond 1 of the East Ash Pond System would not result in an increased loading to the Illinois River. DMG Response, pp. 16-19. In an unpersuasive effort to rebut the same, Petitioners suggest that (1) loadings of selenium and arsenic were somehow not sufficiently characterized, (2) the fact that IEPA performed a complete antidegradation analysis somehow proves that IEPA concluded there would be an increased loading, (3) IEPA's use of non-identical terminology regarding its determination of no increased loading to the Illinois River somehow illustrates that the requisite characterization was not performed, and (4)

¹⁸ DMG's Motion is not all predicated on any IEPA methyl mercury statements made in response to a hypothetical question which was fundamentally answered with a conclusion that the waste stream at issue was not expected to result in increased effluent concentrations.

cited *Mercury Rule* testimony of IEPA and industry witnesses somehow does not support findings of the *EPRI Study* and *2006 U.S. EPA Study*. Petitioners' Reply, pp. 16, 18-20. Each of these misplaced claims is addressed below.

1. Selenium and Arsenic

To support their claim that DMG failed to properly identify and quantify selenium and arsenic loadings of the proposed scrubber/ACI waste stream, Petitioners contend that "the law requires specific 'identification and quantification' of pollutants in both the waste stream and the receiving water body." Petitioners' Reply, p. 19. Although Petitioners' Reply does not identify the law they believe to state that requirement, DMG suspects they may be referring to 35 Ill. Adm. Code § 302.105(f)(1)(B) cited at page 25 of Petitioners' Memo, and 35 Ill. Adm. Code § 302.105(f)(1)(A). In relevant part, these provisions state:

(f) Antidegradation Assessments. In conducting an antidegradation assessment pursuant to this Section, the Agency must comply with the following procedures. . . . (1) A permit application for any proposed increase in pollutant loading that necessitates the issuance of a new, renewed, or modified NPDES permit or a CWA Section 401 certification must include, to the extent necessary for the Agency to determine that the permit application meets the requirements of this Section, the following information: . . . (A) Identification and characterization of the water body affected by the proposed load increase or proposed activity and the existing water body's uses. Characterization must address physical, biological and chemical conditions of the water body. (B) Identification and quantification of the proposed load increases for the applicable parameters and of the potential impacts of the proposed activity on the affected waters.

Id. By its plain language, this text simply requires a permittee to provide IEPA with information that identifies and quantifies proposed loading increases. DMG identified and characterized the receiving water body in the antidegradation submittal to IEPA. R. at 000530. And, as previously established, DMG's antidegradation assessment identified and quantified the proposed loading increase to its East Ash Pond System. DMG Response, pp. 16-21. In doing so, DMG specifically provided analytical data identifying and quantifying selenium and arsenic. R.

at 000536. That data was consistent with the findings of the *EPRI Study* and *2006 U.S. EPA Study* which concluded that spent ACI sorbent was not expected to leach mercury, selenium and arsenic.¹⁹ DMG Response, p. 17.

Petitioners suggest that the public should not have to “scour every document” of the Record for references to pollutant loading information. Petitioners’ Reply, p. 19. DMG knows of no relevant authority supporting that position. The text of 35 Ill. Adm. Code § 302.105(f)(1)(B) certainly does not dictate the manner in which antidegradation information must be presented within an administrative record. Regardless, Petitioners’ apparent concern seems misplaced given that the aforementioned analytical data was provided with a document labeled as DMG’s antidegradation assessment and that both the *EPRI Study* and *2006 U.S. EPA Study* were referenced within a document labeled as IEPA’s antidegradation assessment. Surely, it is reasonable to expect a citizen interested in antidegradation to review those two documents and their supporting attachments/references.

2. IEPA’s Alternatives Evaluation

Petitioners strangely argue that the inclusion of any alternatives assessment (apparently even one which Petitioners criticize as cursory) within the Permit’s antidegradation analysis somehow proves that the discharge entailed an increased loading. Petitioners’ Reply, p. 19. That is, Petitioners claim that an alternatives evaluation was “not logical” if the increased mercury discharge did not exist at all. Petitioners’ Reply, p. 19. It is Petitioners’ argument that is not logical.

¹⁹ Petitioners falsely state (without authority) that the provided Baldwin sampling data did not include ACI waste. Petitioners’ Reply, p. 16. That is untrue. DMG’s antidegradation submission conveyed both that the Havana Station SDA residue would include spent ACI sorbent and that the provided Baldwin sampling SDA residue was representative of that that would be handled at the Havana Station. R. at 000531-2. Moreover, it is publically known via 35 Ill. Adm. Code 225.233(c)(1)(A) and *Dynegy Midwest Generation, Inc. v. IEPA*, PCB 09-48, slip op. 19-20 (May 7, 2009) that all SDA residue included ACI sorbent well before July 2, 2010 (the sampling date reflected at R. at 000536).

Based on information received from DMG that there would be increased loadings of scrubber/ACI waste to dry areas of the East Ash Pond System (see, DMG Response, p. 16), IEPA prudently performed an antidegradation analysis. Its analysis concluded that no detectable loading increase to the Illinois River was anticipated due to the proposed new scrubber/ACI waste stream. DMG Response, pp. 17-19. The fact that DMG and IEPA nonetheless wished to provide the public (and, in the case of DMG, IEPA) with alternatives information within antidegradation documents prepared before issuance of a draft NPDES permit and any public hearing cannot reasonably be said to prove an increased loading to the Illinois River. Rather, such practice reflects good policy – one would expect Petitioners to wish to encourage permittees and IEPA to provide more information than that which may be required.

3. Non-Identical Text Describing the Lack of an Increased Loading

Petitioners next take the absurd position that the differing text IEPA used in various Record documents and statements to express its loading finding somehow “signals confusion borne of failure to actually perform the required effluent characterization.” Petitioners’ Reply, p. 19. That argument fails because, as explained in the DMG Response, the differing text consistently reflects the same no increased loading conclusion. DMG Response, pp. 18-20. The only actual confusion at issue seems to be that of Petitioners, perhaps borne of their apparent desire to find an increased loading where it does not exist.

4. Mercury Rule Testimony

Petitioners attempt to discount evidence of record from the *Mercury Rule* that clearly supports positions of the *EPRI Study* and *2006 U.S. EPA Study*. They do so by characterizing the testifying expert witnesses as “proffered by industries with an interest in employing ACI technology.” Petitioners’ Reply, p. 20. Petitioners offer no support for that contention. Indeed, one of the three quoted witnesses was proffered by IEPA. The other two witnesses actually offered

testimony unresponsive of the then proposed mandate to use ACI technology in Illinois.²⁰ Regardless of their affiliations, all three were acknowledged in the rulemaking as experts in their field and each gave testimony supportive of the conclusions of the *EPRI Study* and *2006 U.S. EPA Study*.²¹

B. All Four Antidegradation Criteria Were Satisfied by IEPA's Antidegradation Analysis Regarding the Proposed New Scrubber/ACI Waste Stream.

Part II.B of the DMG Response demonstrated that IEPA's antidegradation analysis satisfied all four criteria of 35 Ill. Adm. Code 302.105(c)(2)(B)(i)-(iv). DMG Response, pp. 21-24. Petitioners' rebuttal consists of inaccurate assertions that (1) Newton data should have been considered as factually similar, (2) the *Hanlon Memo* and Proposed ELG²² somehow require a more robust alternatives assessment, (3) exhaustive alternatives evaluations are always required for discharges entailing a bioaccumulative pollutant and (4) cross-media benefits do not warrant consideration in a Havana Station antidegradation assessment. Each of these misplaced arguments are addressed below.

1. Newton Data

Petitioners claim IEPA was required to consider Newton data, describing it as a "factually similar permitting scenario." Petitioners' Reply, p. 18. In doing so, Petitioners offer no factual similarities other than the common usage of ACI technology nor any authority

²⁰ Both Dr. Murarka and Mr. Cichanowicz were proffered by Midwest Generation. Dr. Murarka testified regarding the various reasons why the use of ACI would make fly ash unmarketable. *Mercury Rule*, R06-25, Jul. 28, 2009 Pre-filed Testimony of Ishwar Prasad Murarka, Ph.D, p. 1. Mr. Cichanowicz testified that ACI was not yet sufficiently developed to provide high mercury removal given the varied conditions in Illinois. *Mercury Rule*, R06-25, Jul. 28, 2006 Pre-filed Testimony of J.E. Cichanowicz, pp. 3-4.

²¹ Dr. Murarka's statement that "arsenic and selenium may be leached at levels of potential environmental concerns" referred to his understanding of the preliminary findings of studies funded by the U.S. Department of Energy and EPRI at the time of his testimony in 2006 concerning the expected environmental impacts from the disposal of ACI-containing fly ash. *Mercury Rule*, R06-25, Testimony of Dr. Murarka, Aug. 17, 2006(pm), Tr. at 1050.

²² As the Board may be aware, U.S. EPA's estimated issuance date for the final updated version of the 1982 ELG has been extended by a modified consent decree to September 30, 2015 (http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/court-approved-stipulation_04-09-2014.pdf).

explaining that a single common piece of pollution control equipment mandated, as a matter of law, consideration of Newton information in IEPA's Havana Station antidegradation assessment.²³ To the contrary, Petitioners acknowledge that the two facilities may be dissimilar ("It is possible, as [DMG] suggests that the Newton facility is sufficiently unlike the Havana facility that a comparison of the two effluents is not useful."). Petitioners' Reply, p. 9. The only question then, is whether IEPA somehow had a duty to prove that the Havana Station was not a factually similar permitting scenario to Newton and other permitted facilities.²⁴ No authority imposes such a duty.

2. *Hanlon Memo and Proposed ELG*

Petitioners misplace reliance on the *Hanlon Memo* in arguing that IEPA's alternatives evaluation of its Havana Station antidegradation analysis did not meet basic requirements of law. Petitioners' Reply, pp. 17, 20-21. First, the *Hanlon Memo* does not at all address antidegradation requirements, let alone how or when to consider alternatives during such analyses. Rather, the *Hanlon Memo* expressly addresses the issue of TBELs for FGD wastewaters. It should thus be wholly disregarded in the context of assessing technically and economically reasonable measures to avoid or minimize the extent of any proposed increase under 35 Ill. Adm. Code § 302.105(c)(2)(B)(iii).

The antidegradation argument of Petitioners' Reply nonetheless seems to attempt to address DMG's prior explanation as to why the *Hanlon Memo* does not apply to ACI waste streams (which, as explained by the *EPRI Study* and *2006 U.S. EPA Study*, is not expected to entail dissolved metal concentrations) by selectively citing text of the *Hanlon Memo*.

²³ IEPA certainly has no duty to prove the absence of a factually similar permitting scenario. Petitioners have not alleged otherwise.

²⁴ Were such a duty to exist, it could be addressed in this appeal by the publically known factual differences between the two stations mentioned at pages 14-15 of the DMG Response.

Petitioners' Reply, p. 20. Contrary to Petitioners' appeal claim, the *Hanlon Memo* does not, in fact, contend that ash ponds are ineffective at removing the particulate metals of fraction of FGD wastewater.

Metals that are present mostly in particulate form can usually be removed by a well-operated settling process that has a sufficiently long residence time. However, other pollutants such as selenium, boron, and magnesium, are present mostly in soluble form and are not effectively and reliably removed by wastewater settling ponds. For metals present in both soluble and particulate forms (such as mercury), the settling pond will not effectively remove the dissolved fraction. Technologies more advanced than settling ponds are available for more effective at removing both soluble and particulate forms of metals

Hanlon Memo, Attachment A, p. 3. Petitioners elected to quote only the last sentence of this text. Obviously, when read in proper context, the final sentence does not suggest that settling ponds are at all ineffective at removing particulate metals. For ACI waste streams, however, U.S. EPA's own 2006 study (and the *EPRI Study*) indicates there will be no dissolved fraction of metals.

Petitioners also cite to the Proposed ELG. Petitioners' Reply, p. 20. It too does not support Petitioners' appeal point. The Proposed ELG plainly states "surface impoundments can effectively remove particulate forms of metals and other pollutants." 78 Fed. Reg. 34464. Without making any conclusion about whether the ACI waste stream does or does not contain dissolved metals, the language then concludes, "Effluent limits based on dry handling would completely eliminate the discharge of pollutants in FGMC wastewater." *Id.* This statement is not based on any conclusion as to whether ACI waste generates dissolved mercury. Moreover, these statements do not deduce that wet ash ponds are an insufficient form of control for the ACI waste stream. Rather they affirmatively state that ash ponds can effectively remove particulate

forms of metals.²⁵ Clearly, the distinction delineated at pages 23-24 of the DMG Response regarding FGD and ACI waste streams is valid – the *Hanlon Memo* aims to address dissolved metals of FGD wastewater and does not, facially or indirectly, apply to the sorbent particulates of ACI wastewater.

3. Alternatives Evaluations for Bioaccumulative Parameters

Petitioners contend that nothing less than a fully robust antidegradation assessment is needed whenever a discharge entails a bioaccumulative pollutant. Petitioners' Reply, p 21-23. While a proposed increased loading to a receiving water body of a bioaccumulative pollutant may well merit a close and careful review, no authority requires a heightened level of review when a bioaccumulative pollutant is determined to entail no increased loading to the receiving water body. Petitioners cite to various authorities they claim require a thorough alternatives analysis in every single antidegradation analysis. Petitioners' Reply, p. 21-23. Yet each authority to which Petitioners cite is based on some loading. For example, Petitioners state that “[n]othing in the Board’s holding in *New Lenox* suggests that the minimum analysis requirements it outlined . . . could be summarily dispensed with at IEPA’s discretion.”²⁶ Petitioners' Reply, p. 23. As the Board is well aware, the *New Lenox* case entailed (unlike this matter) a confirmed loading increase and facility-specific monitoring data.²⁷

Moreover, while the Region 8 guidance recognizes that persistent toxics should receive “special consideration,” the same guidance in no way establishes a blanket prohibition on the

²⁵ Petitioners claim that the overwhelming majority of coal-fired power plants surveyed no longer use wet ash pond technology. Petitioners' Reply, p. 24, fn. 15. However, the Proposed ELG presents that 69 plants utilize surface impoundments to treat FGD wastewater (more than half of the steam electric power plants surveyed). 78 Fed. Reg. 34451, 34483.

²⁶ *Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88 (Apr. 19, 2007) (“*New Lenox*”).

²⁷ *Id.* at 1.

discharge of bioaccumulative pollutants. Rather, the guidance provides such discharges are allowed under certain circumstances.²⁸ Regardless, this matter does not involve a new or increased loading of bioaccumulative pollutant to a receiving water; IEPA determined that there would be no such increase loading to the Illinois River. DMG Response, p. 17-19.

4. Cross-Media Benefits

Petitioners assert that cross-media benefits such as that which has accrued to Illinois waters due to the *Mercury Rule* do not warrant a lesser level of antidegradation review because the “social and economic benefits of a proposed new loading come into play only when it has been demonstrated that the new loading is ‘necessary’, *i.e.* that there are no alternatives to it, and hence prohibiting the discharge will interfere with the proposed project.” Petitioners’ Reply, p. 24. Among other deficiencies, that argument fails because it is predicated upon an assumption that the discharge entails an increased loading. That is not the case here. Moreover, federal guidance recommends that states identify the need to determine relative environmental impacts across media, reasoning it is a basic principle of environmental protection to minimize the adverse environmental effects in all media.²⁹ IEPA’s antidegradation analysis was consistent with this recommendation by recognizing a reduction in air deposition as a result of the *Mercury Rule*. DMG Response, pp. 26-27.

²⁸ “Tier 2.5 Questions. A proposed expansion of an industrial point source discharge would discharge directly into an [Outstanding State Resource Water] segment. The effluent is expected to contain bioaccumulative toxics. Can the expanded discharge be allowed? Yes, under certain circumstances. Pursuant to tier 2.5 requirements, a new or expanded source may be allowed provided that it would have *no effect* on the water quality of the OSRW (*i.e.*, effluent quality at or better than background quality.)” *EPA Region VIII Guidance, Antidegradation Implementation, Requirements, Options, and EPA Recommendations Pertaining to State/Tribal Antidegradation Programs*, U.S. EPA, Water Management Division, August 1993.

²⁹ *Region V Guidance for Antidegradation Policy Implementation for High Quality Waters – December 3, 1986*, U.S. EPA, pp. 12-13.

III. IEPA WAS NOT REQUIRED TO IMPOSE CASE-BY-CASE TBELs.

A. Case-by-Case BAT-Based TBELs Are Not Required Because the Havana Station Scrubber/ACI Waste Stream Is Subject to the 1982 ELG.

As made evident by the various prior pleadings in this matter concerning Petitioners' BPJ claim, a central issue is whether the 1982 ELG applies to the proposed Havana Station scrubber/ACI waste stream. If it applies, all parties agree that a case-by-case BPJ/BAT determination was unquestionably unnecessary.

The DMG Response detailed exactly why the 1982 ELG does apply to the scrubber/ACI waste stream. DMG Response, pp. 30-39. Specifically, that memorandum established that the Havana Station's scrubber/ACI waste stream is plainly captured by the 1982 ELG's definition of "low volume waste sources." DMG Response, p. 33. Such becomes clear simply by examining the 1982 ELG's definition of said term. Petitioners' attempt to confuse this straightforward analysis by suggesting that ACI technology did not exist in 1982. Petitioners' Reply, p. 27. That point (whether true or not) is irrelevant. U.S. EPA acknowledged as much in the Proposed ELG ("FGMC wastewater is currently included under the definition of low volume wastes"). DMG Response, p. 33. Not only does the Proposed ELG explicitly state that the FGMC wastewater (which is defined to include ACI waste) is currently included in the definition of low-volume wastes, it singles out and defines that waste stream for the first time in the proposed rule. It is clear from the context of the Proposed ELG, therefore, that U.S. EPA is not considering FGMC wastewater a low-volume waste for the first time, but rather it has consistently considered it as such and is only now differentiating it from other low-volume wastes.

Although U.S. EPA ultimately elected to omit associated effluent limits for mercury, selenium and arsenic in the 1982 ELG, the very terms of the 1982 ELG unquestionably show that they were among the parameters U.S. EPA considered when determining the appropriate

effluent limitations for low volume waste sources. “The following 24 toxic pollutants are excluded from national regulation because they were present in amounts too small to be effectively reduced by technologies known to the Administrator: . . . Arsenic . . . Mercury . . . Selenium . . .” 47 Fed. Reg. 52290, 52303 (Nov. 19, 1982). Obviously, U.S. EPA studied these parameters in order to conclude that they “were present in amounts too small.”

Both the Tennessee (*Tennessee Clean Water*) and Kentucky (*Kentucky Waterways Alliance*) decisions³⁰ agreed that U.S. EPA’s *NPDES Permit Writers’ Manual* is instructive in situations involving parameters for which an effluent guideline has not established a TBEL.³¹ *Tennessee Clean Water*, at 4; *Kentucky Waterways Alliance*, at 10. The version of that guidance in effect at the time of Permit issuance – issued after U.S. EPA’s issuance of the *Hanlon Memo* and the permit at issue in the *Kentucky Waterways Alliance* case - states as follows:

When effluent guidelines are available for the industry category, but no effluent guidelines requirements are available for the pollutant of concern (*e.g.*, a facility is regulated by the effluent guidelines for Pesticide Chemicals [Part 455] but discharges a pesticide that is not regulated by these effluent guidelines). The permit writer should make sure that the pollutant of concern is not already controlled by the effluent guidelines and was not considered by EPA when the Agency developed the effluent guidelines.

NPDES Permit Writers’ Manual (2010) at 5-45 to -46 (emphasis added). The decisions vary, however, in assessing whether mercury, selenium and arsenic were “considered” by U.S. EPA when it developed the 1982 ELG.

To the TN Board, the analysis was straightforward. Understandably so. The aforementioned statement of the 1982 ELG regarding mercury, selenium and arsenic clearly demonstrated

³⁰ Copies of these decisions were respectively attached to the DMG Response and Petitioners’ Memo.

³¹ Like the case at hand, both of these cases concerned the 1982 ELG’s consideration of mercury, selenium, and arsenic (among other parameters) within low volume waste source discharges. *In the Matter of: Tennessee Clean Water Network, et al v. TDEC and Tennessee Valley Authority* (“*Tennessee Clean Water*”), Case No. WPC10-0116 (Dec. 2013); *Ky. Waterways Alliance v. Energy and Env’tl. Cabinet* (“*Kentucky Waterways Alliance*”), No. 11-Ci-1613 (Franklin Cnty. Cir. Ct. Sept. 10, 2013).

that “EPA considered setting numeric limits” for those parameters. *Tennessee Clean Water*, at 5. The analysis thus appropriately stops there. Petitioners nonetheless criticize the TN Board decision as “thinly reasoned.” Petitioners’ Reply, p. 25. But, in truth, the analysis simply did not warrant further dialog.³²

The decision underlying *Kentucky Waterways Alliance* by the Kentucky Energy and Environment Cabinet mirrored that of the TN Board.³³ Judge Shepard of the Kentucky Franklin Circuit Court disagreed.

The hearing officer’s order determined that “the Trimble [flue gas desulfurization] . . . wastewater is subject to an applicable [ELG],” then citing the EPA Permit Writers’ Manual’s instruction that “BPJ-based effluent limits are not required for pollutants that were considered by EPA for regulation under the effluent guidelines, but for which EPA determined that no ELG was necessary.” The Court finds this determination arbitrary.

Id. Importantly, the quoted text (“BPJ-based effluent limits are not required for pollutants that were considered by EPA for regulation under the effluent guidelines, but for which EPA determined that no ELG was necessary.”) is from the 1996 version of U.S. EPA’s *NPDES Permit Writers’ Manual*. The 2010 version does not purport to require a U.S. EPA determination that no ELG was necessary.³⁴

³² Petitioners complain that *Tennessee Clean Water* did not discuss 30 years of technical advancement since the issuance of the 1982 ELG. Petitioners’ Reply, p. 30. Any such advancements are, however, irrelevant to the legal analysis posited by U.S. EPA’s *NPDES Permit Writers’ Manual*; *i.e.*, whether U.S. EPA considered the pollutants for regulation as low volume waste sources within the 1982 ELG.

³³ *Kentucky Waterways Alliance, et al v. Energy and Environment Cabinet and Louisville Gas and Electric* (“*Kentucky Cabinet Decision*”), 2010 WL 5421374, slip op. at 9-10 (Ky.Nat.Res.Env.Prot.Cab. 2010). A copy of this appealed hearing officer order is attached as Exhibit A.

³⁴ The permit at issue in the case was effective on April 1, 2010, prior to U.S. EPA’s September 2010 issuance of the 2010 version of the U.S. EPA *NPDES Permit Writer’s Manual (2010)*. *Kentucky Waterways Alliance*, at 2. Interestingly, although the Court found that the 2010 version was also relevant guidance it believed to be consistent with applicable statutes and regulations, it ultimately quoted and applied only text of the 1996 U.S. EPA *NPDES Permit Writers’ Manual*. *Id.* at 8.

Judge Shepard went on to state that the Court finds “it implausible that in 1982 the EPA concluded that setting technology based limits for these toxic pollutants was *unnecessary*” *Kentucky Waterways Alliance*, at 11 (emphasis added). Plainly, the Court predicated its finding on the 1996 *NPDES Permit Writers’ Manual’s* use of “necessary.”³⁵

Unlike the permit at issue in *Kentucky Waterways Alliance* but like that at issue in *Tennessee Clean Water*, the Permit was issued after U.S. EPA’s issuance of the *NPDES Permit Writers’ Manual (2010)*. The 2010 version is thus the most appropriate to apply to the Permit. In issuing the 2010 version of the *Manual* – again, after its earlier issuance of the *Hanlon Memo* - U.S. EPA stated that: “[f]irst released in 1996, the revised *NPDES Permit Writers’ Manual* has been thoroughly reviewed and updated to reflect current policy and guidance”³⁶ Under the updated guidance, the appropriate legal question is no longer whether U.S. EPA determined that an ELG was *necessary*, but whether U.S. EPA *considered* the pollutant while developing the applicable ELG.³⁷

Incredibly, Petitioners’ Memo completely ignored U.S. EPA’s most current and obviously relevant guidance concerning the establishment of case-by-case TBELs for dischargers

³⁵ Interestingly, the U.S. Chamber of Commerce and Kentucky Chamber of Commerce filed a joint *amicus curiae* brief in the pending appeal of *Kentucky Waterways Alliance* (2013-CA-1695 and 2013-CA-1742). The brief was accepted on April 8, 2014 ([http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20-%20L.GandE%20v.%20Kentucky%20Waterways%20Alliance%20\(Kentucky%20Court%20of%20Appeals\).pdf](http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20-%20L.GandE%20v.%20Kentucky%20Waterways%20Alliance%20(Kentucky%20Court%20of%20Appeals).pdf)). Both entities argue the Franklin Circuit Court erred in holding that a BPJ analysis was required and erroneously relied on the *Hanlon Memo*.

³⁶ U.S. EPA, *NPDES Permit Writers’ Manual*, 2010 Revised Edition, http://cfpub.epa.gov/npdes/newsemails.cfm?news_release_id=229.

³⁷ Though the *NPDES Permit Writers’ Manual (2010)* is guidance, courts have relied on both the 2010 edition and the previous addition, dated 1996 and referred to in this brief. See e.g. *United States v. United Water Environmental Services*, 2011 WL 33751303 (N.D. Ind. 2011) (referring to the 2010 edition); *Divers’ Environmental Conservation Organization v. State Water Resources Control Bd.*, 145 Cal. App. 4th 246, 256, 51 Cal.Rptr.3d 497 (Cal. App. 4 Dist. 2006) (referring to the 1996 edition). In addition, the only courts that have made determinations as to whether the permit issuer must perform BPJ analysis in issuing NPDES permits for steam electric power plant discharges have relied on one or both versions of the *NPDES Permit Writers’ Manual*. *Tennessee Clean Water*, at 2-3; *Kentucky Waterways Alliance*, at 9-10.

subject to an existing effluent guideline – the *NPDES Permit Writers' Manual (2010)* – and Petitioners strangely cite to it in Petitioners' Reply only with respect to U.S. EPA's occasional practice of setting effluent guidelines for indicator pollutants. Petitioners' Reply, p. 34. They make no attempt to apply the above-quoted text of the *NPDES Permit Writers' Manual (2010)* pages pp. 5-45 and -46. Instead, Petitioners fixate on the use of “excluded” in the 1982 ELG statement regarding mercury, selenium and arsenic in low volume waste sources. Petitioners' Reply, pp. 35, 36, 37, 38, 39, 40. That fixation is misplaced. As explained above, the pertinent question posited by applicable guidance is simply whether U.S. EPA *considered* the pollutants when developing the 1982 ELG. That the pollutants were intentionally excluded after consideration is inherent (and irrelevant). Petitioners' argument is circular – it is impossible to not be intentionally excluded after consideration. If that were not the case, the ELG would have established TBELs for those parameters.³⁸

Petitioners also give great weight to the 1982 ELG preamble's reservation of U.S. EPA's right to later issue effluent guidelines for other waste streams of this category. Petitioners' Reply, p. 26. No legal value can, however, reasonably be attributed to that reservation. That is, U.S. EPA's statement (“EPA is reserving effluent limitations for four types of wastewaters for a future rulemaking”) says only what is obviously and always true – U.S. EPA is always free to initiate a rulemaking to revise any ELG.³⁹

Like the TN Board, this Board should consider this issue by applying the guidance of the *NPDES Permit Writers' Manual (2010)* to answer the question: Does the 1982 ELG's statement

³⁸ In other words, only one of three results were possible - the pollutants were either (i) not considered at all, (ii) considered but excluded, or (iii) included. The text of the 1982 ELG itself prove that (i) and (iii) did not occur.

³⁹ The reservation could even be viewed as a notice to permit writers that additional TBELs were to follow and that they need not act in the meantime for the specifically mentioned waste streams.

regarding U.S. EPA's decision to not then impose TBELs for mercury, selenium, and arsenic in low volume waste sources demonstrate that those pollutants were *considered* by U.S. EPA when it developed the 1982 ELG? The answer is clear: the 1982 ELG expressly conveyed that these pollutants were considered by U.S. EPA during its development of the 1982 ELG. DMG's Motion on this issue should thus be granted.

In addition to *Kentucky Waterways Alliance*, Petitioners contend that the *Hanlon Memo* demonstrates that the Havana Station scrubber/ACI waste stream is not subject to 1982 ELG. Petitioners' Reply, pp. 27-29. The inapplicability of the *Hanlon Memo* was explained at pages 37-38 of the DMG Response. As explained at Part II.B.2, *supra*, Petitioners attempt to rebut that analysis is falsely predicated. In addition to the deficiencies of the *Hanlon Memo* presented in the DMG Response (at its pages 37-38), the *Hanlon Memo* relies on the aforementioned U.S. EPA reservation of rights which, as was just explained, is legally insignificant. *Hanlon Memo*, Attachment A, p. 3. The *Hanlon Memo* also contends that BAT limits for the FGD wastewaters were "outside the scope" of the rulemaking in apparent reliance on the aforementioned "excluded" reference. *Id.* Just as "exclude" does not indicate that the pollutants and waste stream were not considered, neither does "outside the scope." *Id.*

The approach posited by the *NPDES Permit Writers' Manual (2010)* (*i.e.*, not mandating a case-by-case TBEL when U.S. EPA has already considered doing so but elected not to) is good policy - it would be illogical and heavily burdensome to require a state permitting agency to do a difficult task (establishing a TBEL) that U.S. EPA could not accomplish after attempting to do so.⁴⁰ Despite the fact that DMG raised that point in the DMG Response, Petitioners did not address it. Moreover, Petitioners have not addressed the fact that U.S. EPA reviewed the Permit

⁴⁰ It is also good policy to establish a level playing field (*i.e.* uniform TBELs) for large national industry categories such as steam electric generation.

and offered detailed recommendations to various provisions, but did not object or raise any concerns with IEPA's approach to the scrubber/ACI waste stream.⁴¹ This implicitly indicates U.S. EPA agreement with IEPA's decision to not develop and impose a case-by-case TBEL for the Havana Station scrubber/ACI waste stream. "When the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than that specified by the State, the Region has an independent duty under CWA § 301(b)(1)(C) to include the more stringent permit limitation." *In re City of Jacksonville*, 4 E.A.D. 150, 158 (EAB 1992). Even the *Hanlon Memo*, which Petitioners so fervently embrace, asks Regions to use objection authority in cases where permits do not appropriately address technology-based or water quality-based permit limits to address FGD or CCR discharges consistent with 40 CFR § 122.44. *Hanlon Memo*, p. 2.

U.S. EPA's tacit endorsement of IEPA's approach to permitting the Havana Station scrubber/ACI waste stream is not surprising. Indeed, Petitioners do not cite to any instances in which an NPDES permitting authority has even attempted to develop and impose a case-by-case BPJ analysis for steam electric generating power category discharges beyond U.S. EPA's issuance of a draft NPDES permit to Merrimack Station in 2011.⁴² A final permit has not been issued, almost three years later.⁴³

B. Even Were the 1982 ELG to Somehow Not Apply to the Havana Station Scrubber/ACI Waste Stream, IEPA Was Not Required to Set Case-by-Case TBELs.

⁴¹ R. at 000634-35. U.S. EPA's letter to IEPA regarding its review of the Permit includes specific BPJ recommendations for TRC. *Id.*

⁴² Petitioners' Memo, p. 41. The draft permit is available at: <http://www.epa.gov/region1/npdes/merrimackstation/>.

⁴³ The lack of a common practice of case-by-case BPJ analysis in other permits in the same sector for similar waste streams seems to undercut the Petitioners' dubious contention that it was somehow "consistent with longstanding U.S. EPA policy." Petitioners' Reply, p. 33.

Contrary to Petitioners' contentions at pages 31 and 33 of Petitioners' Reply, DMG has not suggested that a case-by-case TBEL is discretionary in the absence of an applicable ELG. Indeed, the DMG Response cited many of the same cases stated in Petitioners' Reply to demonstrate that very point; a case-by-case TBEL is mandatory in the complete absence of an ELG. DMG Response, p. 31.

DMG has, however, contended that IEPA would have had the discretion to refrain from imposing a case-by-case TBEL for the Havana Station scrubber/ACI waste stream even had U.S. EPA not considered the pollutants when developing the 1982 ELG. DMG Response, p. 32. To support that position, DMG cited both the permissive "may" of 40 C.F.R. § 125.3(c)(3) and the preamble of the 1982 ELG ("For example, even if this regulation does not control a particular pollutant, the permit issuer may still limit such pollutant on a case-by-case basis when limitations are necessary to carry out the purposes of the Act").⁴⁴ DMG Response, pp. 31, 32.

While Petitioners criticized DMG's reliance on 40 C.F.R. § 125.3(c)(3),⁴⁵ they ignored the stated 1982 ELG preamble completely. Petitioners' Reply, p. 32. Instead, they point to text of the proposed version of the 1982 ELG and immediately assert that strong deference must be afforded to an agency's interpretation of its own regulations. Petitioners' Reply, p. 34.

⁴⁴ Courts have held that a regulatory preamble is an authoritative agency interpretation of the regulation: "[w]hile language in the preamble of a regulation is not controlling over the language of the regulation itself the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules, and therefore provides guidance in evaluating whether the agency's interpretation of its regulation is consistent with the structure and language of the rule." *In Re: Morton I. Friedman and Schmitt Construction Company*, 11 E.A.D. 302 (EAB 2004) (citing *HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000); citing *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)); see also *Vermont v. Thomas*, 850 F.2d 99, 103 (2nd Cir. 1988).

⁴⁵ Petitioners' opine that "may" of 40 C.F.R. § 125.3(c)(3) should not be read permissively because such would render statutory mandated requirements of (c)(1) and (c)(2) permissive as well. DMG agrees that CWA Sections 33 U.S.C. § 1311(b)(2)(A)(i) and 33 U.S.C. § 1342(a)(1) respectively mandate the same substantive activities contemplated by (c)(1) and (c)(2). DMG disagrees, however, that a permissive reading of "may" for all three subparts of 125.3(c) renders the statutorily mandated activities of CWA 33 U.S.C. § 1311(b)(2)(A)(i) and 33 U.S.C. § 1342(a)(1) at all optional. Statutory obligations obviously cannot be extinguished by rule.

Apparently, Petitioners believe it appropriate to afford strong deference to statements of a proposed rule while an inconveniently contradictory statement issued with a final rule should be disregarded.⁴⁶

C. IEPA's Imposition of BPJ-Based Monitoring Requirements Was Appropriate.

The DMG Response explained that the imposition of BPJ-based monitoring requirements in the Permit was appropriate under the circumstances and cited both the 1982 ELG and two reported cases from other jurisdictions. DMG Response, pp. 39-40. Petitioners attempt to restate the holding of one of those cases, *NRDC v. Costle*, in a way that twists the court's decision. Petitioners' Reply, p. 36; citing *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). DMG's reliance on *NRDC v. Costle* for the proposition that monitoring-only requirements are permissible effluent limits was not misplaced. Rather, it appears the Petitioners miss the significance of the holding. *NRDC v. Costle* indeed preceded 40 C.F.R. § 125.3, but it did not precede the statutory requirement to regulate point sources of pollution. The court in *NRDC v. Costle* found that while classes of point sources could not be excluded from the NPDES permit program, U.S. EPA had flexibility to structure permits according to the circumstances. In an effort to address the administrative burden that U.S. EPA bears in implementing the NPDES program, the court held that in some certain circumstances monitoring-only conditions are appropriate to include in permits especially when the extent of the pollution is unknown. The opinion in no way found, as inferred by the Petitioners, that this conclusion would be any different for the waste streams not at issue, or any other specific

⁴⁶ Petitioners also contend that case-by-case TBEL permitting provisions are somehow made mandatory pursuant to 40 C.F.R. § 122.44. Petitioners' Reply, p. 33. That regulation, by its own terms, merely establishes that NPDES permits must include meeting certain requirements "when applicable."

pollutant or source of pollutants. The court also recognized the importance of effluent limitation guidelines in providing “uniformity in the permit conditions imposed on similar sources within the same category by diverse state and federal permit authorities.” *NRDC v. Costle*, 568 F.2d at 1378. Petitioners attempt to discount the significance of *NRDC v. Costle* simply demonstrates their continued effort to impose an administratively infeasible burden on IEPA by requiring a case-by-case BPJ analysis for every similarly-situated applicant.

IV. IEPA SATISFIED ALL PUBLIC PARTICIPATION REQUIREMENTS; JURISDICTION HAS NOT BEEN ESTABLISHED FOR PETITIONERS' RESPONSIVENESS SUMMARY CLAIM

Petitioners claim that IEPA failed to comply with the public participation requirements under 35 Ill. Adm. Code §§ 166.192(a)(4) and (5) by not providing a summary of and response to Petitioners' public comments regarding setting TBELs in the Responsiveness Summary. 35 Ill. Adm. Code 166.192(a)(4), (5). As DMG and IEPA explained in their response memoranda, IEPA provided responses to all significant comments raised by Petitioners. (*See, e.g.,* DMG Response, pp. 40-41.) Petitioners' Responsiveness Summary claim fails for that reason alone.

Petitioners' Responsiveness Summary claim further fails for want of jurisdiction. First, as explained in the DMG Response, Petitioners were not (and have not even alleged that they were) prejudiced in any way by the alleged Responsiveness Summary deficiency. DMG Response, pp. 40, 41. The Act requires that in making its orders and determinations, the Board consider, among other things, “the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people.” 415 ILCS § 5/33(c)(i). This is consistent with other Illinois law, which requires an actual injury to be suffered before a person has standing to bring a claim. *See, e.g., Chicago Teachers Union, Local 1 v. Bd. of Educ. of City of Chicago*, 724 N.E.2d 914, 918 (2000) (to have standing “one must have sustained or be in immediate danger of sustaining a direct injury” and “[t]he claimed injury

must be (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief”); *Illinois Power Co. (Vermillion Units 1 and 2) v. IEPA*, PCB 84-89, slip op. at 1-2 (Oct. 12, 1984) (applying “injury in fact” requirement for standing to a Board case and holding that petitioner lacked standing to bring a claim regarding deficiency in the notice of a hearing when petitioner showed no “injury or threat to a particular right of their own”). In this case, Plaintiffs have suffered no injury concerning their Responsiveness Summary claim and, accordingly, have no standing to bring a claim for a violation of 35 Ill. Adm. Code §§ 166.192(a)(4) and (5).

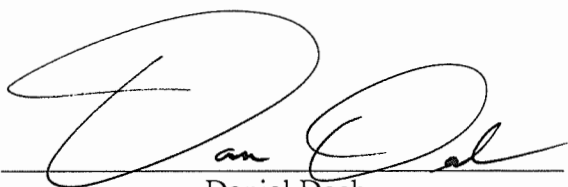
Furthermore, DMG questions whether Petitioners may properly bring a claim related to IEPA’s fulfillment of duties under 35 Il. Adm. Code § 166.192 to the Board. As Respondents previously mentioned, this regulation was promulgated by IEPA, not the Board. The appropriate inquiry and standard of review for the Board is whether IEPA’s actions in issuing a permit were consistent with the Act and the Board’s regulations (not IEPA’s regulations). Petitioners cite to a variety of cases, but none of them specifically allow the Board the authority to review IEPA’s compliance with its own regulation when issuing a permit. In fact, many of them support the opposite – that the Board’s review should be whether IEPA violated the Act or the Board’s regulations. *See, e.g., Illinois Env’tl. Prot. Agency v. Illinois Pollution Control Bd.*, 896 N.E.2d 479, 486 (Ill. App. 2008) (“petitioners [] alone bear the burden of proof in their appeal before the Board to prove that the permit, as issued, violated either the Act and/or the Board’s regulations”) (emphasis added); *Illinois Power Co. v. Illinois Pollution Control Bd.*, 426 N.E.2d 1258, 1261 (Ill. App. 1981) (noting that the Board has the authority to conduct hearings concerning violations of “its regulations” and that IEPA is simply not “the Board’s retainer in the interpretation of Board regulations.”).

V. CONCLUSION

WHEREFORE, for the reasons state above, Dynegy Midwest Generation respectfully requests that the Board deny Petitioners' Motion for Summary Judgment, grant Dynegy Midwest Generation's Cross-Motion for Summary Judgment and grant any other relief the Board deems appropriate.

Respectfully submitted,

DYNEGY MIDWEST GENERATION.

By: 
Daniel Deeb

Dated: April 21, 2014

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EXHIBIT A

2010 WL 5421374 (Ky.Nat.Res.Env.Prot.Cab.)

Environmental and Protection Cabinet
Commonwealth of Kentucky

***1 KENTUCKY WATERWAYS ALLIANCE, SIERRA CLUB, AND VALLEY WATCH, PETITIONERS**
v.
ENERGY AND ENVIRONMENT CABINET AND LOUISVILLE GAS AND ELECTRIC, RESPONDENTS

File No. DOW-41106-047

November 30, 2010

SECRETARY'S ORDER

THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer, Robert Layton. Having considered the Hearing Officer's Report and Recommendation, and any exceptions thereto, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Hearing Officer's Report and Recommendation filed in the record in this matter on Oct. 13, 2010, IS HEREBY ADOPTED AND INCORPORATED HEREIN BY REFERENCE and made a part hereof as if set forth verbatim in this Order.
2. Petitioners' request to withdraw its claims in Paragraphs 9(b), (c) and (d) as voluntarily withdrawn is GRANTED.
3. The Order Granting Motion for Partial Summary Disposition is adopted and incorporated herein by reference and summary disposition is GRANTED to the Respondents on the Petitioners' claim in Paragraph 9(a).
4. This is a final and appealable order.

So ORDERED this 30 day of Nov, 2010.

Leonard K. Peters
Secretary

APPEAL RIGHTS

In accordance with the provisions of [KRS 224.10-470](#) and [KRS 151.186](#), appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the Petition must be served upon the Cabinet.

HEARING OFFICER'S REPORT AND RECOMMENDED SECRETARY'S ORDER

Petitioners in the appeal have challenged the Kentucky Division of Water's (Division) decision to issue a final Kentucky Pollutant Discharge Elimination System (KPDES) permit to Louisville Gas & Electric for the Trimble plant for three reasons: (1) the permit fails to adequately limit or monitor dangerous metals and other pollutants from flue gas desulfurization (FGD) wastewater discharges; (2) the permit fails to account for known discharges from Trimble's ash pond; and (3) the permit allows high temperature discharges.

A final prehearing conference was conducted on September 30, 2010 for this appeal, which was scheduled for a five-day formal administrative hearing commencing Monday, October 11, 2010. Several motions were set to be addressed at the conference; however, the petitioners opened the conference by requesting an opportunity to talk settlement with the opposing parties outside of the presence of the hearing officer. A motion in limine on the petitioner's claims in paragraph 9(a) of their petition on appeal (which addressed the FGD wastewater discharges) had previously been addressed. That order of September 23 granted partial summary disposition on the paragraph 9(a) claim. Prior to September 30, the petitioners had withdrawn their claims in paragraphs 9(c) (pertaining to high temperature discharges) and 9(d) (pertaining to the Petitioners' catchall appeal claim).

*2 After discussing settlement outside of the presence of the hearing officer, the Petitioners stated on the record that they were withdrawing their remaining claim of paragraph 9(b) with prejudice. This claim asserted the permit fails to account for known discharges from the ash pond. The withdrawal was on the condition that the Respondents had agreed to acknowledge they would not be seeking costs or attorneys' fees in connection with this administrative proceeding. The Respondents made the acknowledgement that they would not be seeking costs or fees. Because the claim of paragraph 9(b) was the only remaining disputed claim before the hearing officer, the withdrawal by the Petitioners eliminated the necessity of a hearing for this appeal.

Claim 9(b) relates to the ash pond of the plant, which would be receiving additional material from the second plant permit. It alleges that there is a diffuse leak of water from coal ash contamination moving from the ash pond to groundwater. It also alleges there is a seep of water from the ash pond embankment to the surface of the embankment, and asserts that both of these flow from the groundwater into the Ohio River. The Respondents admit the seeping and leakage is occurring, (*See Cabinet's Prehearing Memo, p. 4*), but assert that any such leaks were not appropriate to address in the permitting process.

The hearing officer noted that the claims of 9(b), (c) and (d) were voluntarily dismissed with prejudice at the request of the Petitioners, and noted that the claims in paragraph 9(a) granting summary disposition to the Respondents would be incorporated into a recommended order which would allow the Petitioners to seek review by the Secretary of the Cabinet.

The Petitioners indicated they would like the opportunity to file a motion to reconsider before the hearing officer on the order granting summary disposition. The hearing officer stated that the 180-day timeframe for a recommendation to the Secretary in this matter precluded the motion, response and reply for such a motion to reconsider, but that if the Secretary disagreed with the order granting summary disposition the matter would be returned to the hearing officer to conduct an evidentiary hearing on claim 9(a).

The Petitioners could either request that the Secretary remand this matter for such a motion, or, in the alternative, could request from the Secretary an extension of the 180-day timeframe to allow such reconsideration. Solely in order to allow Petitioners additional time to review discovery for preparation of pleadings before the Secretary, the hearing officer indicated the recommendation to the Secretary would not be entered until this week. The delay was not authorized to allow additional pleadings to be filed before the hearing officer.

Therefore, the matters to be submitted before the Secretary are as follows: (1) the request for an extension of time for a Hearing Officer's Report and Proposed Secretary's Order, and the response to that request, and (2) the Hearing Officer's Report and Proposed Secretary's Order granting the Respondents' summary disposition on the claim in paragraph 9(a) of the Petitioner's Petition for Hearing, and the Exceptions and any other pleadings to be filed.

*3 The hearing officer does not take any position on the request for an extension of time, which Petitioners seek in order to more fully address their motion for the hearing officer to reconsider the granting of summary disposition in Petitioner's paragraph 9(a) claim.

The Secretary may also issue a final order affirming the summary disposition or an order granting the Petitioners' exceptions to the summary disposition. In the event that the Secretary grants the Petitioners' exceptions, this matter would be remanded to the undersigned for an evidentiary hearing solely on the claim contained in paragraph 9(a) of the Petitioners' Petition for Hearing.

Therefore, this Report **RECOMMENDS** that the Secretary enter the attached order **dismissing** the Petitioners' claims in paragraphs 9(b), (c) and (d) as voluntarily withdrawn by the Petitioners, and **granting** summary disposition to the Respondents on the Petitioners' claim in paragraph 9(a). The September 23, 2010 order of the hearing officer granting summary disposition, a copy of which is attached, is incorporated into this Report. This Report, along with any subsequently filed exceptions and responses will be submitted to the Secretary upon timely receipt.

October 13, 2010

Robert Layton
Chief Hearing Officer

EXCEPTION RIGHTS

Pursuant to [KRS 224.10-440](#), any party may file exceptions to this Report and Recommendation within four-

teen (14) days of receipt of this Report. The Secretary will then consider this Report, any Exceptions, and the recommended Order and decide this case.

ORDER GRANTING MOTION FOR PARTIAL SUMMARY DISPOSITION

This matter has been briefed by the parties on the Respondents' Joint Motion for Partial Summary Disposition. The Respondents, the Energy and Environment Cabinet and Louisville Gas and Electric, assert they are entitled to summary disposition on the claims found in Paragraph 9(a) of the Petition for hearing challenging the KPDES permit issued for the **Trimble County** coal-fired electric power generating facility. This order **GRANTS** the motion for partial summary disposition for the reasons set forth below. This order will be incorporated into the Recommended Report to be issued after a hearing in this appeal, and exception to this order may be taken by filing exceptions to the Recommended Report to be considered by the Secretary.

BACKGROUND

The **Trimble County** plant ("Trimble") is located near Bedford in **Trimble County**, Kentucky. It has been in operation since 1990, and is producing power at the 514 megawatt coal-fired steam generating unit known as Unit 1. LG&E recently built a new, 750 megawatt coal-fired generating unit at Trimble, known as Unit 2. The permit at issue in this appeal is a renewal of the prior KPDES permit issued to XG&E for various wastewater streams discharged at Trimble due to operation of Unit 1. This renewal is required because Trimble's wastewater handling will change with the addition of wastewater from Unit 2, based on the volume of wastewater generated, its constituent concentrations, and the way in which this wastewater is handled and discharged.

*4 Both use flue gas desulfurization ("FGD") control devices, which are also known as wet scrubbers, to remove pollutants from the exhaust created by burning coal combustion. Scrubbers use injected limestone slurry to remove sulfur dioxide gas from the units' air emissions. That wet scrubbing process creates a wastewater stream containing various pollutants that are removed from the flue gas.

The FGD wastewater streams will be discharged into a new Gypsum Storage Basin for sediment treatment before being combined with other wastewater and ultimately discharged into the Ohio River.

The Permit has effluent limitations limiting the constituents in the FGD wastewater that are subject to control through sedimentation, including limits on total suspended solids ("TSS"), which requires the Gypsum Storage Basin to reduce particulates, including metals, in solid form. The TSS, oil and grease, and pH are all subject to the technology-based limits established by EPA in its New Source Performance Standards ("NSPS") for electric generating facilities. The TSS limits required by the DOW in the Permit are more stringent than the NSPS, because DOW in the exercise of its Best Professional Judgment ("BPJ"), determined that the Trimble facility could obtain a greater degree of TSS reduction than the NSPS required. This reduction limits the discharge of solid metals. The permit also requires monitoring for total recoverable metals.

DISCUSSION

When setting required technology-based permit limits in discharge permits, DOW looks first to EPA-promulgated effluent limitation guidelines (“ELGs”) to determine the appropriate level of control. ELGs represent EPA’s determination as to the appropriate level of pollution control for application of BAT and NSPS for all sources within a particular source category nationwide. *See U.S. EPA, “NPDES Permit Writer’s Manual”*.

ELGs are the primary means of establishing technology-based effluent limitations in discharge permits. The Clean Water Act (“CWA”) prefers imposing uniform national guidelines, as opposed to ad hoc, case-by-case limitations.

Respondents are correct in asserting that DOW “may” conduct a case-by-case BPJ analysis even with an applicable ELG simply does not translate to a requirement to do so. The use of the word “may” gives DOW discretion to determine whether case-by-case BPJ limits are necessary when an applicable ELG is in place.

This order agrees that it would have properly been within DOW’s discretion to not conduct a case-by-case BPJ analysis or otherwise include case-by-case BPJ limits in the Permit for the Trimble FGD wastewaters since that wastewater is subject to an applicable ELG. By the authority conferred by the governing regulation, DOW was entitled to opt instead to apply only the NSPS requirements for low volume wastes. That discretion is not completely unrestricted, but is entitled to substantial deference.

*5 [40 CFR 125.3](#) says that where case-by-case BPJ limits are proper for establishment by the permitting authority, various factors are to be considered by the agency. In establishing case-by-case BPJ limits, the permit writer shall apply the appropriate factors listed in [§ 125.3\(d\)](#) and shall consider: (i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and (ii) Any unique factors relating to the applicant. [40 CFR 125.3\(c\)\(2\)](#).

[40 CFR 125.3\(d\)](#) states that in setting case-by-case limitations for BAT pursuant to [§ 125.3\(c\)](#), the permit writer is to consider the following factors: “(i) The age of equipment and facilities involved; (ii)The process employed; (iii)The engineering aspects of the application of various types of control techniques; (iv)Process changes; (v) The cost of achieving such effluent reduction; and (vi)Non-water quality environmental impact (including energy requirements).”

None of these key terms set forth above are defined by [40 CFR § 125.3\(c\)\(i\)-\(ii\)](#), [\(d\)](#), nor is the methodology for “considering” such factors or the weight to be given to each provided. Therefore, DOW’s decision as to the information it considers with respect to these factors and the methodology for such consideration is entitled to a high level of deference.” *See Catskill Mountains, 451 F.3d 77, 85* (when applying the [40 CFR 125.3](#) regulatory factors in his or her best professional judgment, the permit writer is afforded “considerable flexibility”); *Exhibit D, Permit Manual at p. 70* (“BPJ contains an element of judgment or educated opinion”); and *Commonwealth of Kentucky v. Alexander, 655 F.2d 714, 718 (6thCir. 1981)* (in a NEPA context, that where agency is charged with weighing multiple alternatives, the “specificity” to which the agency analyzes such alternatives is a matter of discretion).

The term “best professional judgment” itself as well as the term “case-by-case” also indicate that the DOW’s determination of such limits entrusted to the technical and policy judgment of the Cabinet is entitled to deference. The deference is not, as Petitioners suggest, based upon an ambiguity and the policy of use of tools of statutory and reg-

ulatory construction, including agency interpretation. Where DOW chooses to make a BPJ determination to supplement an established ELG, the determination as to the pollutants for which an analysis should be conducted and limits imposed is one made in the “appropriate judgment” of the permit writer.

DOW considered alternative treatment technologies, including the extent of the pollutant reduction that had been demonstrated by the technologies and the cost of such technologies, as well as other “unique factors”. Under this analysis, DOW considered and rejected the imposition of BPJ limitations more stringent than the EPA-promulgated ELGs with the exception of the limits on TSS which were set at 50% lower on a daily maximum basis than the limits established by the NSPS.

***6** The expert opinions offered by Petitioners in this matter in support of their BPJ claim contend there are various available treatment technologies and operating practices that could reduce mass loadings of pollutants in the FGD wastewater and that such technologies could have been considered by DOW in connection with a BPJ analysis for the Trimble FGD wastewater stream. Petitioners' experts do not opine as to the specific effluent limits that should have been imposed by DOW with respect to the Permit. Petitioners' experts also do not offer any opinions on other required BPJ factors as applied to this facility. Petitioners' proffered expert evidence is insufficient as a matter of law to overcome the high level of deference owed to DOW in conducting case-by-case BPJ analyses. Even if the opinions of Petitioners' experts were assumed to be true, no evidence has been presented that DOW would have or should have reached a different conclusion regarding the appropriate limits for the Trimble FGD wastestream .

The expert opinions offered by Petitioners in this matter in support of their BPJ claim contend only that there are various available treatment technologies and operating practices that could reduce mass loadings of pollutants in the FGD wastewater and that such technologies could have been considered by DOW in connection with a BPJ analysis for the Trimble FGD wastewater stream. Petitioners' experts do not offer any opinion as to the specific effluent limits that should have been imposed by DOW with respect to the Permit. Nor do Petitioners' experts offer any opinion on other BPJ factors as applied to this facility.

Petitioners point to three technologies they contend DOW should have considered-GE's ABMet(r) system, reverse osmosis, and Aquatech's ZLD system.” Petitioners have not offered expert testimony as to why these new technologies are appropriate for Trimble, *Petitioners' Response to LG&E Interrogatory No. 22*; see also, *Docket Entry Nos. 26 and 27*. Further, the potential availability of technologies is but one factor to be considered under the governing regulation. Petitioners' expert proof is silent regarding any of the other factors, or, equally importantly, how such factors are to be weighed to arrive at a different resulting limit than that imposed in the Permit. Petitioners' experts did not give an independent technical, expert review of the availability, applicability, effectiveness, cost or other factors to be considered in a BPJ analysis for the Trimble waste stream.

Although Kentucky cases acknowledge that normally proof may be offered through either expert or lay testimony, in this case, the Petitioners' lack of expert testimony on key issues relating to a BPJ analysis is fatal to their case, *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122 (Ky. 1991) (where the “nature of inquiry is such that [lay persons] are not competent to draw their own conclusions from the evidence”, expert testimony is required).

***7** Without such evidence, Petitioners cannot demonstrate a genuine issue of material fact as to whether the tech-

nologies they advocate were feasible at Trimble, much less how the regulatory factors should have otherwise been weighed, and thus cannot establish that the conclusion or determination made by DOW on this issue was in error. Petitioners' expert reports do not contradict or refute the analysis of BPJ factors set out in the LG&E expert report or the testimony of LG&E's expert or the testimony of the Cabinet regarding the "consideration" given to the relevant regulatory factors and, therefore, cannot carry their burden of proof. *Sierra Club v. NREPC and Eminence Wastewater Treatment Plant*, File No, DOW-21246-042 (Final Order entered July 9, 1996) (a petitioner cannot carry his burden of proof through mere cross examination of a respondent's expert witness; direct, affirmative evidence must be placed in the record in order to carry a petitioner's burden).

CONCLUSION

With respect to the claims raised by the Petitioners in Paragraph 9(a) of their petition, the Petitioners have failed to demonstrate the presence of a material issue of fact supporting their claim that DOW failed to comply with all applicable legal requirements in establishing the Permit effluent limitations for Trimble's FGD wastewater discharge, Respondents are accordingly entitled to summary disposition with respect to that claim.

November 23, 2010

Robert Layton
Chief Hearing Officer

2010 WL 5421374 (Ky.Nat.Res.Env.Prot.Cab.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 21st day of April, 2013, I have served electronically the attached **Reply in Opposition to Petitioners' Motion for Summary Judgment and In Support of Respondent DMG's Cross-Motion for Summary Judgment**, upon the following persons:

John Therriault, Clerk
Carol Webb, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

and electronically and by first class mail, postage affixed, upon:

Ann Alexander
Meleah Geertsma
Natural Resources Defense Council,
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