

ILLINOIS POLLUTION CONTROL BOARD

February 20, 2014

IN THE MATTER OF:)
)
PROCEDURAL RULES FOR)
ALTERNATIVE THERMAL EFFLUENT)
LIMITATIONS UNDER SECTION 316(a) OF) R13-20
THE CLEAN WATER ACT: PROPOSED) (Rulemaking - Water)
NEW 35 ILL. ADM. CODE PART 106,)
SUBPART K AND AMENDED SECTION)
304.141(c))

Adopted Rule. Final Opinion and Order.

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

The Board today adopts amendments to its procedural and water regulations. The adopted amendments will become final upon filing with the Secretary of State. The amendments establish procedural rules for petitions requesting alternative thermal effluent limitations under Section 316(a) of the Clean Water Act (CWA). 33 U.S.C. § 1326. Specifically, the amendments add a new Subpart K to the Board's procedural rules in Part 106 and update Section 304.141(c). 35 Ill. Adm. Code 106.Subpart K, 304.141(c).

The Agency initiated this proceeding by filing a rulemaking proposal on June 20, 2013, pursuant to Sections 13, 26 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/13, 26 and 28 (2012)) and Section 102.202 of the Board's procedural rules (35 Ill. Adm. Code 102.202).

In this opinion, the Board first provides the procedural history of this rulemaking. The Board then summarizes the Agency's proposal followed by the Board's discussion on the proposal. The order following the opinion directs the Clerk to provide for publication of the adopted rules in the *Illinois Register*.

PROCEDURAL HISTORY

On June 20, 2013, the Agency filed a proposal to establish a new Subpart K of Part 106 of the Board's procedural rules. On July 11, 2013, the Board adopted the Agency's proposed procedural rules for first notice publication without commenting on the substantive merits of the Agency's proposal. The proposed procedural rules were published in the *Illinois Register* on July 26, 2013 starting a 45-day comment period. 37 Ill. Reg. 11843 (July 26, 2013); *see also* 5 ILCS 100/5-40(b) (2012) (establishing 45-day comment period). The Board received one comment during this period as discussed below.

In a letter dated July 18, 2013, the Board requested that the Department of Commerce and Economic Opportunity (DCEO) conduct an economic impact study of the Agency's rulemaking proposal. *See* 415 ILCS 5/27(b) (2012). In response, in a letter dated July 26, 2013,

DCEO stated that DCEO “is unable to undertake such an economic impact study” and, therefore, declined the Board’s request. On July 24, 2013, JCAR filed its first notice version of the proposed rules for use in creating second notice changes. JCAR also filed two separate requests for analysis of economic and budgetary effects of this rulemaking on August 9, 2013 and August 14, 2013, respectively.

The Board’s hearing officer scheduled two hearings: August 27, 2013 in Springfield and October 16, 2013 in Chicago. Notice of the hearings was published in the *State Journal Register* on August 1, 2013 and the *Chicago Sun Times* on August 2, 2013.

The Board conducted the first hearing on August 27, 2013 (Tr.1). The Board did not receive any prefiled testimony for the hearing. The Agency presented four witnesses at hearing, all employees of the Agency: Darin LeCrone, Roy Smoger, Sanjay Sofat, and Scott Twait. The hearing officer received and entered two exhibits into the record: the Agency’s responses to the Board’s questions for first hearing (Hearing Exh. 1) and United States Environmental Protection Agency (USEPA) draft guidance titled “Interagency 316(a) Technical Guidance Manual and Guide for Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements (DRAFT)” (Hearing Exh. 2). Alec Davis of the Illinois Environmental Regulatory Group (IERG) and Alan Bielawski on behalf of Exelon Generation, LLC (Exelon) asked questions of the Agency witnesses. No other witnesses presented testimony at the first hearing.

On September 5, 2013, the Board received a public comment (PC1) from Citizens Against Ruining the Environment (CARE). The Board directed the Agency to respond to CARE’s comment and the Agency filed its response on October 11, 2013 (Agency Resp. Exh. B). The Board also asked the Agency to respond to additional questions from the Board and the Agency responded on October 11, 2013 (Agency Resp. Exh. A).

The Board conducted the second hearing on October 16, 2013 (Tr.2). The Board did not receive any prefiled testimony for the hearing. The Agency presented one witness at hearing: Scott Twait. Keith Harley on behalf of CARE asked questions of the Agency witness. The hearing officer received and entered two additional exhibits into the record: CARE’s questions to the Agency (Hearing Exh. 3) and a letter dated February 25, 2013 from Tinka Hyde of USEPA to Marcia Willhite of the Agency (Hearing Exh. 4). No other witnesses presented testimony at the second hearing.

After the second hearing, on November 13, 2013, the Agency filed its response to questions raised at the second hearing (Agency Hearing Resp.). On December 10, 2013, CARE filed post-hearing comments (CARE Br.). On December 11, 2013, the Agency (Agency Br.), Exelon (Exelon Br.), and IERG (IERG Br.) each filed post-hearing comments.

On January, 23, 2014, the Board adopted a second notice opinion and order for review by JCAR. JCAR, at its meeting on February 18, 2014, issued a certificate of no objection to the Board’s proposed amendments.

AGENCY'S PROPOSAL

The Agency proposed procedural rules for establishing alternative thermal effluent limitations under Section 316(a) of the CWA. Statement of Reasons (SR) at 1; Tr.1 at 7. Specifically, the Agency proposed that the Board adopt a new Subpart K of the Board's Part 106 procedural rules and update Section 304.141 of the Board's water regulations to include a cross-reference to the new Subpart K.

CWA Section 316(a) allows a point source to obtain relief from thermal effluent limitations. This section provides:

With respect to any point source otherwise subject to the provisions of section 1311 of this title or section 1316 of this title, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water. SR at 2, quoting 33 U.S.C. § 1326.

Accordingly, the Agency explained, a facility may obtain relief when it demonstrates that the otherwise applicable thermal effluent limitation is more stringent than necessary to assure the protection and propagation of the waterbody's balanced, indigenous population of shellfish, fish, and wildlife. Tr.1 at 7-8.

The Agency noted that USEPA delegated to Illinois responsibility for the National Pollutant Discharge Elimination System (NPDES) permit program in 1977. SR at 2. In seeking that delegation, the Agency addressed how CWA Section 316(a) would be implemented in Illinois. *Id.* The Agency asserted that current Board rules address CWA Section 316(a) and provide:

The standards of this Chapter shall apply to thermal discharges unless, after public notice and opportunity for public hearing, in accordance with Section 316 of the CWA and applicable federal regulations, the Administrator and the Board have determined that different standards shall apply to a particular thermal discharge. SR at 3, quoting 35 Ill. Adm. Code 304.141(c).

The Agency stated that, over the years, the electric generating industry used the heated effluent demonstration procedure in 35 Ill. Adm. Code 302.211(f)-(i) to obtain thermal relief from the Board's regulations under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c). SR at 3.

Such heated effluent demonstrations were to be made between April 7, 1977 and April 7, 1978 for existing facilities. *Id.* at 2-3; *see also* 35 Ill. Adm. Code 302.211(f). Since 2008, the Agency “has been working with [USEPA] Region V to review the status of Illinois electric generation facilities and their thermal discharges to ensure consistency with Section 316(a) of the [CWA].” *Id.* at 4.

The Agency observed that the Board does not have specific procedural rules covering proceedings to obtain relief under CWA Section 316(a) or Section 304.141(c) of the Board’s rules. Tr.1 at 8. Regulated entities may seek regulatory relief through adjusted standards, variances, and site specific rulemakings. *Id.* These relief mechanisms, in the Agency’s view, “do not match the type of relief given under Section 316(a) and applicable federal rules.” *Id.* The Agency based its proposed procedure for CWA Section 316(a) relief on federal procedures found at 40 C.F.R. §§ 125.70 through 125.73 and integrated the federal rules with Board procedures. *Id.* at 9-10.

Technical Feasibility and Economic Reasonableness

The Agency characterized its proposal as a nonsubstantive procedural rule that does not require treatment technology. SR at 10. Accordingly, the Agency concluded that its proposal is technically feasible and economically reasonable. *Id.* Further, the Agency stated “[f]ailure to establish procedural rules to allow relief from otherwise applicable thermal effluent standards pursuant to Section 316(a) of the Clean Water Act could result in the requirement to install cooling technologies at potentially large costs.” *Id.* at 10-11.

Potentially Affected Facilities

The Agency stated that its proposal impacts “any facility with a thermal effluent limit that seeks to demonstrate such effluent limit is more stringent than necessary to protect a balanced, indigenous population of fish, shellfish and wildlife.” SR at 11. Generally, the affected facilities are nuclear and coal-fired steam electric generating facilities. *Id.* The Agency estimated that there are twenty-five such facilities that may seek to use the proposed procedure. *Id.* However, the Agency also clarified at hearing that the proposed procedural rules would apply to any facility with a thermal effluent limit. Tr.1 at 20.

Communication with Interested Entities

The Agency stated that it “shared with representatives of the electric generating industry and environmental groups” a copy of the Agency’s proposal. SR at 11. The Agency also submitted a draft of the proposal to USEPA. *Id.*

BOARD DISCUSSION

Regulatory Authority

The Agency filed this proposal pursuant to Sections 13, 26, and 28 of the Environmental Protection Act (Act) (415 ILCS 5/13, 26 and 28 (2012)) to establish procedural rules to

implement CWA Section 316(a) (33 U.S.C. § 1326). Section 13(a) of the Act provides that the Board “pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes and provisions of this Title [III: Water Pollution].” 415 ILCS 5/13(a) (2012). The Act requires the Board to adopt procedures “necessary or appropriate to enable the State of Illinois to implement and participate in” the NPDES program under the CWA. 415 ILCS 5/13(b) (2012). Section 26 of the Act authorizes that

[t]he Board may adopt such procedural rules as may be necessary to accomplish the purposes of this Act. In adopting such rules the Board shall follow the rulemaking procedures of the Illinois Administrative Procedure Act. 415 ILCS 5/26 (2012).

Section 28 of the Act provides procedures the Board must follow in conducting a rulemaking proceeding. 415 ILCS 5/28 (2012). For example, Section 28(a) provides:

No substantive regulation shall be adopted, amended, or repealed until after a public hearing within the area of the State concerned. In the case of state-wide regulations hearings shall be held in at least two areas. . . . All such hearings shall be open to the public, and reasonable opportunity to be heard with respect to the subject of the hearing shall be afforded to any person. . . . After such hearing the Board may revise the proposed regulations before adoption in response to suggestions made at the hearing, without conducting a further hearing on the revisions. 415 ILCS 5/28(a) (2012).

Similarly, the Board’s procedural rules address Board action on rulemaking proposals and provide that “[t]he Board may revise the proposed regulations before adoption upon its own motion or in response to suggestions made at hearing and in written comments made prior to second notice. No additional hearing on the revisions need be held.” 35 Ill. Adm. Code 102.600(a).

As additional background, the federal CWA imposes requirements on state permitting authorities for control of thermal discharges. CWA Section 301 requires that NPDES permits include any applicable state standard. 33 U.S.C. § 1311. CWA Section 402 further requires thermal discharges to be permitted under NPDES procedures. 33 U.S.C. § 1342.

Illinois law authorizes the Board to adopt water quality and effluent standards, including thermal standards. 415 ILCS 5/13 (2012). The Board's generally applicable water quality temperature standards are found at 35 Ill. Adm. Code 302.211. *See also* 35 Ill. Adm. Code 303.Subpart C (site specific temperature standards). Additionally, the Board’s procedural rules in 35 Ill. Adm. Code 106.Subpart B include provisions for making certain thermal effluent demonstrations under 35 Ill. Adm. Code 302.211. Both Section 302.211 and the Part 106 Subpart B procedural rules reference CWA Section 316(a) and are intended to be consistent with CWA Section 316(a). *See* 35 Ill. Adm. Code 106.202(b)(2)(C), 302.211(j)(4) (artificial cooling lake demonstrations).

With this in mind, the Board considered the Agency’s proposal to establish procedural

rules implementing CWA Section 316(a). Under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c), the Board may establish an alternative thermal effluent limitation based on a demonstration that the alternative limitation will assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in and on the receiving body of water. 33 U.S.C. § 1326. USEPA rules implementing CWA Section 316(a) are codified at 40 C.F.R. § 125.Subpart H. USEPA provides draft guidance on CWA Section 316(a) demonstrations in “Interagency 316(a) Technical Guidance Manual and Guide for Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements (DRAFT)” dated May 1, 1977 (Draft USEPA Manual) (document can be found in the record as Hearing Exh. 2). The Draft USEPA Manual states that it “is intended to be used as a general guidance and as a starting point for discussions,” and that delegated state agencies “are not rigidly bound by the contents of this document.” Hearing Exh. 2 at 8-9.

Under the above described authority, the Board evaluated the Agency’s proposal and comments on that proposal. As described below, the Board proposed for second notice publication procedural rules making determinations on CWA Section 316(a) requests for alternative thermal effluent limitations. The Board explained changes it made to the Agency’s proposal. The Board first addressed general issues that pertain to more than one section of the Agency’s proposal and then turned to a section-by-section discussion.

“Variance”

CARE argued that a petitioner seeking an alternative thermal effluent limitation should be required to demonstrate that compliance with applicable thermal standards creates an arbitrary and unreasonable hardship to the petitioner. PC1 at 1. In addition, the petitioner should be required to comply with other requirements to obtain a variance under the Act, specifically 415 ILCS 5/35-38. *Id.*; CARE Br. at 2.

CARE noted that federal CWA regulations define the term “variance” as

Any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in applicable “effluent limitations guidelines” which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of [the] CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA. PC1 at 1, quoting 40 C.F.R. § 122.2.

CARE argued that “federal law is clear that an action under [Section] 316(a) of the [CWA] is a variance” under this federal definition. *Id.* CARE asserted that federal law provides “broad discretion to states with regard to variances” subject to federal approval of the variance. *Id.*, citing 40 C.F.R. § 131.13.

Noting that the Act “broadly requires the Board to act consistently with the [CWA] in making variance decisions,” CARE argued that “the federal characterization of [CWA Section] 316(a) relief as a variance is decisive.” PC1 at 2. Thus, CARE asserted that Illinois

statutory requirements for a variance found at Section 35 of the Act (415 ILCS 5/35 (2012)) should apply to requests for alternative thermal effluent limitations under CWA Section 316(a). *Id.* at 1-2. CARE urged the Board “to adhere to its mandate under Illinois law and its own well-established regulations” and direct the Agency to amend its proposal to follow Illinois variance procedures. *Id.* at 2-3.

The Agency responded that neither the CWA nor federal regulations require a showing of arbitrary and unreasonable hardship to obtain an alternative thermal effluent limit. Agency Resp. Exh. B at 1. To maintain consistency with the CWA, the Agency argued that a showing of arbitrary and unreasonable hardship should not be included in these procedural rules. *Id.*; *see also* Agency Hearing Resp. at 2. Further, the Agency noted that the period of relief varies between alternative thermal effluent limits and Illinois variances. *Id.* CWA Section 316(a) relief is incorporated into an NPDES permit and the NPDES permit cycle is five years. *Id.* Under Section 35 of the Act, a variance may be granted for up to five years and extended year to year if the facility shows progress toward compliance. *Id.* Finally, the Agency noted that CWA Section 316(a) does not require a showing of how the facility will return to compliance with the applicable thermal standard or the cost of compliance alternatives, both of which are required to obtain a variance under the Act. *Id.* at 2. Exelon made similar arguments and opposed treating petitions for an alternative thermal effluent limitation as variance petitions under Illinois law. Exelon Br. at 6-7.

The Board declined to include additional requirements in these procedural rules analogous to Illinois requirements to obtain a variance under Section 35 of the Act. The federal use of the term “variance” differs from the use of the term “variance” in Section 35 of the Act. *Compare* 40 C.F.R. § 122.2 to 415 ILCS 5/35 (2012). It does not follow that because USEPA uses the term “variance” that Illinois must apply its statutory variance procedures to petitions for alternative thermal effluent limitations.

CWA Section 316(a) provides the standard for granting an alternative thermal effluent limitation and federal regulations at 40 C.F.R. §§ 125.70 through 125.73 provide the procedures for considering such requests. While the Board may establish a more stringent procedure for these demonstrations, the Board was not persuaded that it was necessary in this instance. The Board, therefore, proposed at second notice to follow the federal procedures in this regard, as proposed by the Agency and revised in the Board’s second notice proposal. The Board also noted that the proposed rules are also based on the procedural rules requirements for adjusted standards found in 415 ILCS 5/28.1 (2012) and 35 Ill. Adm. Code 104.Subpart D.

Additional Controls

CARE argued that the Board has authority to impose additional controls on a petitioner requesting an alternative thermal effluent limitation if necessary to ensure the protection and propagation of a balanced indigenous population. PC1 at 3. CARE pointed to a federal administrative decision in *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407 (2007), where the federal Environmental Appeals Board (EAB) upheld USEPA’s issuance of an NPDES permit. *Id.* In that case, a facility sought an alternative thermal effluent limitation under CWA Section 316(a) but USEPA determined that the requested limit was not sufficiently protective of

the balanced indigenous population. *Id.* at 4. Rather, USEPA issued a permit with more stringent thermal limits than requested but less stringent than the applicable regulatory limit. *Id.* The EAB upheld the thermal limit contained in the permit issued by USEPA. *Id.* Based on this case, CARE contended that the Board may impose an alternative thermal effluent limitation less stringent than applicable standards but more stringent than what the petitioner requests. *Id.* at 5. Furthermore, CARE argued the Board may impose a more stringent limit than requested even if compliance with that alternative limit would require the petitioner to install additional controls. *Id.*

The Agency responded that a petition for an alternative thermal effluent limitation relies on case-specific and site-specific factors and any relief granted by the Board will also be case-specific and site-specific. Agency Resp. Exh. B at 2. The Agency noted that the Board may not grant relief if the petitioner fails to demonstrate that the alternative thermal effluent limitation will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife. *Id.* The Agency agreed with CARE that the Board may in certain circumstances grant an alternative thermal effluent limitation different from what the petitioner requested. *Id.*

CARE did not request any specific change in the proposed rule language. Proposed Section 106.1170 requires the Board to include certain information in the Board's order. In response to a question from the Board, the Agency suggested adding the following clarifying language: "In granting an alternative thermal effluent limitation, the Board may impose such conditions as may be necessary to accomplish the purposes of the Act." Tr.2 at 32; Agency Hearing Resp. at 5; Agency Br. at 10. The Board proposed Section 106.1170 with this language.

The Board stated at second notice that, in determining what conditions the Board might impose, the Board will look for information concerning the balanced indigenous population of shellfish, fish, and wildlife and what is necessary to assure the protection and propagation of a balanced indigenous population, including the impacts of the requested relief on the various life stages of this population. The Board anticipated that the record would include information from sources such as the United States Fish and Wildlife Service (FWS), the Illinois Department of Natural Resources (DNR), the Illinois Natural History Survey (NHS), and other similar agencies that study or collect information on streams, lakes and rivers.

Communication with Other Agencies

CARE claimed that a petition for an alternative thermal effluent limitation involves "complicated biological factors," and CARE was uncertain whether the Agency possesses the capacity or expertise to evaluate these factors in making its recommendation to the Board under proposed Section 106.1145. PC1 at 10-11. Accordingly, CARE urged the Board to require the Agency to confer with DNR and FWS. *Id.* CARE suggested that this communication occur early in the process during the development of a plan of study. Tr.2 at 17, 19. CARE requested that the Agency also be required to inform the Board whether DNR and FWS concur with the Agency's recommendation to the Board. PC1 at 11.

The Agency objected to the Board requiring in its rules that the Agency confer with DNR and FWS during the early screening phase in proposed Section 106.1115 or in the detailed plan

of study phase in proposed Section 106.1120. Agency Resp. Exh. B at 5. The Agency explained at hearing that “when we need additional expertise . . . we’ll seek out these consultations.” Tr.2 at 16; *see also* Tr.2 at 17-18, 20. However, the Agency worried that making such discussions mandatory would be problematic. *See id.* at 16, 17, 18.

The Agency agreed, however, that DNR should be notified when an alternative thermal effluent limitation petition is filed with the Board and suggested requiring petitioners to serve a copy of the petition on DNR in proposed Section 106.1125. The Board at second notice found it appropriate for a petitioner to notify DNR when filing a petition for an alternative thermal effluent limitation. Such notice will allow DNR to participate in the Board proceeding if DNR deems participation appropriate. Accordingly, the Board proposed for second notice publication in Section 106.1125 that petitioners notify DNR of the filing of their petitions.

The Board noted at second notice that it has no statutory authority to require another state agency like DNR or a federal agency like FWS to consult with the Agency regarding these petitions. Therefore, the Board did not adopt CARE’s suggestion to require communication among these agencies. CARE framed its suggestion as a requirement for the Agency to consult with DNR and FWS. However, without statutory authority to require the agencies’ participation, the process for obtaining CWA Section 316(a) relief would stall if these agencies fail to respond. *See* Tr.2 at 16 (noting example of federal government shutdown at the time of the second hearing in this rulemaking). Nevertheless, as stated at second notice, the Board encourages these agencies and any other interested entities to participate in proceedings on petitions for alternative thermal effluent limitations. The Board also encourages petitioners to utilize the resources of those agencies in preparing studies. Likewise, NHS could offer substantial information to petitioners in performing studies.

The Board noted that the Agency acknowledged at hearing that it does confer with DNR on temperature issues. Tr.2 at 17. Both the Agency and CARE quoted from a statement of public policy in the Illinois Endangered Species Protection Act setting forth that it is Illinois policy for Illinois agencies to consult with DNR when an agency’s actions are likely to jeopardize Illinois-listed endangered or threatened species. Agency Hearing Resp. at 3; CARE Br. at 8, quoting 520 ILCS 10/11 (2012). The Agency contended that the permittee has “primary responsib[ility]” to comply with the Illinois Endangered Species Protection Act. Agency Hearing Resp. at 3. Accordingly, the Agency requested permit applicants to provide proof of consultation with DNR such as through DNR’s Ecological Compliance Assessment Tool (EcoCAT) process. *Id.* at 3-4. When issuing a permit, the Agency may also undertake the consultation itself. *Id.* at 4.

CARE responded that the Agency itself is responsible for complying with the Illinois Endangered Species Protection Act. CARE Br. at 9. Specifically, CARE contended that the Agency must consult with DNR in its review of a request for an alternative thermal effluent limitation. *Id.* The quoted language from the Illinois Endangered Species Protection Act, by its terms, is a statement of public policy. Further, it was unclear to the Board whether the Agency’s activity in CWA Section 316(a) proceedings, unlike the issuance of a permit, constituted “actions authorized, funded or carried out by them” triggering the consultation process with DNR. *See* 520 ILCS 10/11 (2012).

As the Board stated at second notice, regardless of how this language is interpreted by DNR, other Illinois agencies, or courts, nothing in these proposed procedural rules allows a petitioner to avoid compliance with other applicable requirements, including both federal and state requirements to protect threatened or endangered species. As Exelon noted, it may be advisable for petitioners to evaluate these requirements as early as possible in the process. Exelon Br. at 8. The Draft USEPA Manual provides that USEPA will find a CWA Section 316(a) demonstration successful if, among other requirements, “[t]here will be no adverse impact on threatened or endangered species,” and “[t]here will be no destruction of unique or rare habitat without a detailed and convincing justification of why the destruction should not constitute a basis for denial.” Hearing Exh. 2 at 70-71.

As explained at second notice, the Board does not have authority to require communication between the Agency and DNR. Nevertheless, the Board found that it was appropriate for the Agency to inform the Board of communications with DNR or FWS with respect to threatened or endangered species as well as any other topics within their expertise raised by the petition such as the identification of representative important species. Accordingly, the Board proposed including such a requirement in Section 106.1145(b)(6), as well as including a requirement for the petitioner to serve a copy of its petition on DNR. Further, proposed Section 106.1130(e)(4) requires that the petition include the criteria and methodology used to assess the protection of threatened and endangered species.

Public Notice Like That for Draft NPDES Permits

CARE requested that the Board “prescribe in its regulations the specific public notice requirements that must be incorporated as part of the NPDES permitting process that will include an alternative thermal limitation.” PC1 at 13. CARE pointed to a report by the USEPA Office of the Inspector General characterized by CARE as finding deficiencies in public notices for draft NPDES permits that include alternative thermal effluent limits. *Id.* at 12. CARE argued that the Board should seek “to avoid this problem in Illinois.” *Id.* at 13. CARE did not recommend specific regulatory language.

The Board declined to follow CARE’s suggestion to establish additional notice requirements for describing any granted alternative thermal effluent relief in notices for subsequent NPDES permits incorporating alternative thermal effluent limitations. The Board found that prescribing the contents of such NPDES permit notices was not appropriate in these procedural rules covering the alternative thermal effluent limitation demonstration. Notices required for NPDES permits are covered elsewhere, and including additional requirements for NPDES permitting here is inappropriate. *See* 40 C.F.R. § 124.57(a); 35 Ill. Adm. Code 309.109 to 309.111, 309.113; *see also* Agency Hearing Resp. at 4. Accordingly, the Board declined to follow CARE’s suggestion in the Board’s proposed rules for second notice.

Mixing Zones and CWA Section 316(a) Demonstrations

CARE argued that sources should not be eligible for both a mixing zone and an alternative thermal effluent limitation. CARE Br. at 6. CARE noted that Board regulations

provide twelve requirements to demonstrate that a mixing zone is appropriate. CARE Br. at 6-7, quoting 35 Ill. Adm. Code 302.102(b). If a discharger has obtained a mixing zone under these criteria, CARE maintained that such a discharger “should be ineligible for additional regulatory relief in the form of an alternative thermal effluent limit.” *Id.* at 7. CARE asserted that regulated entities must choose which form of relief to pursue rather than allowing them to layer differing forms of relief. *Id.* at 7-8.

Exelon asserted that thermal limits under CWA Section 316(a) may be end-of-pipe limits or limits measured at the edge of a mixing zone. Exelon Br. at 4. In either case, the discharger must make the demonstration required in CWA Section 316(a). *Id.* Exelon argued that the Board may grant an alternative thermal effluent limitation under CWA Section 316(a) expressed as a limit at the edge of a mixing zone even if the mixing zone does not meet the criteria in 35 Ill. Adm. Code 302.102. *Id.* Exelon pointed to the language of Section 304.141(c) providing that the generally applicable standards for mixing zones do not apply to thermal discharges if the Board determines that different standards should apply. *Id.* at 4-5. Rather, if a petitioner requests CWA Section 316(a) relief for which compliance is to be measured at the edge of a mixing zone, the petitioner must demonstrate that the proposed limit and the mixing zone are sufficiently protective. *Id.* at 5.

The Agency explained that CWA Section 316(a) relief may take a variety of forms and depends on the relief sought in the petition. Hearing Exh. 1 at 12. The Agency stated that it prefers that an alternative thermal effluent limitation be expressed in the NPDES permit as an end-of-pipe limit. *Id.* However, when a mixing zone is part of the relief, the Agency asserted that “relief from the traditional rules governing when mixing is allowed is a part of Section 316(a) thermal relief.” *Id.* Rather than the requirements in 35 Ill. Adm. Code 302.102, a petitioner for CWA Section 316(a) relief must make the demonstration in proposed Section 106.1160. The Agency argued that proposed Section 106.1160 “is sufficient and accomplishes the same goals as mixing zone rules in Section 302.102.” *Id.* Therefore, the Agency concluded that a petitioner should not be required to show that it is entitled to a mixing zone under 35 Ill. Adm. Code 302.102 as a part of its CWA Section 316(a) demonstration. *Id.*

The Board agreed with the Agency that petitions for CWA Section 316(a) relief must be evaluated on a case-by-case basis depending on the demonstration made by the petitioner and the requested relief. Such petitions may propose or rely upon a mixing zone. USEPA contemplates that a CWA Section 316(a) demonstration may address a mixing zone. The Draft USEPA Manual provides in part that USEPA will find a CWA Section 316(a) demonstration successful if, among other requirements,

3. Receiving water temperatures outside any (State established) mixing zone will not be in excess of the upper temperature limits for survival, growth, and reproduction, as applicable, of any [representative important species] occurring in the receiving water.
5. A zone of passage will not be impaired to the extent that it will not provide for the normal movement of populations of [representative important species], dominant species of fish, and economically

(commercial or recreational) species of fish, shellfish, and wildlife.
Hearing Exh. 2 at 70-71.

To clarify the interplay between mixing zone rules in 35 Ill. Adm. Code 302.102 and a CWA Section 316(a) demonstration, the Agency suggested additional language as proposed Section 106.1130(g)(2). Agency Resp. Exh. A at 2. The Board found that the Agency's language provided clarification and included it in the second notice proposal as Section 106.1130(g)(2).

The Board at second notice recognized that thermal dischargers may petition the Board for alternate standards from the Board's thermal water quality standards, *e.g.* 35 Ill. Adm. Code 302.211, as well as from the Board's mixing zone rules, 35 Ill. Adm. Code 302.102, or other water quality standards. As stated by the Board, such a hybrid petition must demonstrate that the requested alternative thermal effluent limitation satisfies CWA Section 316(a) and proposed Section 106.1160. Such a hybrid petition also must justify any requested alternate standard from other water quality standards, *e.g.* 35 Ill. Adm. Code 302.102, consistent with 415 ILCS 5/28.1 (2012) and 35 Ill. Adm. Code 104.Subpart D. However, a thermal discharger seeking an alternative thermal effluent limitation who does not request other relief from 35 Ill. Adm. Code 302.102, or other water quality standards, needs to satisfy the requirements of proposed 35 Ill. Adm. Code 106.Subpart K.

Section-by-Section Analysis of the Proposal

Section 106.100 Applicability

The Board noted that updates to Section 106.100 were not proposed at first notice and therefore the Board did not open this section at second notice. However, Section 106.100 requires updating to include a reference to proposed Subpart K, and the Board intends to make this update next time the section is re-opened. Likewise, Section 106.100 will also be updated to include references to Subparts H, I, and J.

Section 106.1100 Purpose

Proposed Section 106.1100 provides that Subpart K describes procedures for establishing alternative thermal effluent limitations under CWA Section 316(a). SR at 7. As suggested by the Agency in its response to Board questions, the Board deleted "and" in the phrase "Clean Water Act and in permits." *See* Hearing Exh. 1 at 1. This change is consistent with the language in 40 C.F.R. § 125.70.

Section 106.1105 General

Proposed Section 106.1105 describes the relief available under CWA Section 316(a), the parties to an alternative thermal effluent proceeding, and filing and service requirements. The Agency referred to 35 Ill. Adm. Code 106.300(b) and (c) in drafting this section. SR at 7. As suggested by the Agency in its response to Board questions, the Board changed the word "limit" to "limitation" to use consistent terms in this section. *See* Hearing Exh. 1 at 2.

Section 106.1110 Definitions

Proposed Section 106.1110 lists general definitions derived from the Act, Board regulations, and 40 C.F.R. § 125.71. SR at 7. The Agency explained that “Alternative thermal effluent limitations,” “Representative important species,” and “Balanced, indigenous community” are taken directly from the federal regulations. *Id.*; *see also* 40 C.F.R. § 125.71(a), (b), (c). As suggested by the Agency in its response to Board questions, the Board added the phrase “under Chapter I of Subtitle C” after “otherwise applicable thermal limitations” in the definition of “Balanced, indigenous community.” *See* Hearing Exh. 1 at 2. Also in this definition, JCAR proposed removing the word “by” from “by a lack of domination” but the Agency objected to this change on the grounds that it is inconsistent with federal language. Tr.1 at 28. The Board declined to make JCAR’s suggested revision and maintained consistency with the language in 40 C.F.R. § 125.71(c).

Section 106.1115 Early Screening

Proposed Section 106.1115 requires a petitioner to submit information to the Agency before filing a petition with the Board. SR at 7. The Agency explained that this requirement is found in the federal rules at 40 C.F.R. § 125.72(a). *Id.* The Agency added, at proposed Section 106.1115(a)(4), a requirement for the petitioner to submit a representative important species list to the Agency. *Id.* at 8. As suggested by the Agency in its response to Board questions, the Board made clarifying changes to the pre-petition communications between the Agency and the petitioner. *See* Hearing Exh. 1 at 3-5. The Agency’s suggested revision also addressed a change requested by JCAR.

Section 106.1120 Detailed Plan of Study

Proposed Section 106.1120 provides for submittal of a detailed plan of study to the Agency after establishing the representative important species list, but before conducting the study or filing a petition with the Board. SR at 8. The Agency stated that this section is based on 40 C.F.R. §§ 125.72(b) and (e). *Id.* In addition to the federal language, the Agency proposed subsection (g) to require the petitioner to complete the study prior to filing a petition with the Board. *Id.* As suggested by the Agency in its response to Board questions, the Board made clarifying changes to the pre-petition communications between the Agency and the petitioner. *See* Hearing Exh. 1 at 3-6. The Board also added clarifying language in the event that no Agency response is provided within 90 days of petitioner’s submittal of its detailed plan of study.

Section 106.1125 Initiation of Proceeding

Proposed Section 106.1125 provides that a petitioner initiates a proceeding by filing a petition with the Board and serving the Agency. SR at 8. As suggested by the Agency in its response to CARE comments, the Board added a requirement that the petitioner serve a copy of the petition on DNR. *See* Agency Resp. at 5.

Section 106.1130 Contents of Petition

Proposed Section 106.1130 lists the required contents of a petition. SR at 8. The Agency explained that it relied on two sources for the petition requirements: 40 C.F.R. § 125.72(b) and (e) and Section 106.202(a) of the Board’s rules for heated effluent demonstrations (35 Ill. Adm. Code 106.202(a)). The Agency added in subsection (c) a requirement to submit “a summary of compliance or non-compliance with thermal requirements at the facility in the past five years.” *Id.*

As suggested by the Agency in its response to Board questions, the Board added requirements to include in the petition the plan of study and any Agency response as well as listed specific information to be included in the results of the study. *See* Hearing Exh. 1 at 7-8. The Board also clarified, at the Agency’s suggestion, the language regarding additional information that a petitioner may submit to support its petition. *See id.* at 9. As explained above in the discussion on mixing zones, the Board included in its proposal for second notice additional language regarding the relief requested in subsection (g).

Section 106.1135 Petition Notice Requirements

Proposed Section 106.1135 provides public notice requirements. SR at 8-9. The Agency stated that both CWA Section 316(a) and Section 304.141(c) of the Board’s rules require public notice and opportunity for a public hearing and this section is intended to meet those requirements. *Id.* As suggested by the Agency in its response to Board questions, the Board changed the words “mailed to” to “filed with” to use consistent terms in this section, and adds the phrase “and a general description of the petitioner’s activity that is the subject of the alternative thermal effluent limitation proceeding” to the notice requirement. *See* Hearing Exh. 1 at 2; Tr.2 at 50-51; Agency Br. at 8.

Section 106.1140 Proof of Petition Notice Requirements

Proposed Section 106.1140 requires a petitioner to demonstrate that it has complied with the public notice requirements. SR at 9. The Agency explained that it modeled this provision on Section 104.410 of the Board’s rules for adjusted standard proceedings. *Id.* As suggested by the Agency in its response to Board questions, the Board clarified that the petitioner must file the certificate of publication with the Board. *See* Hearing Exh. 1 at 10.

Section 106.1145 Recommendation and Response

Proposed Section 106.1145 requires the Agency to provide a recommendation to the Board within 45 days of a petitioner filing a petition. SR at 9. The Agency stated that this provision facilitates the Board’s decisionmaking process. *Id.* As suggested by the Agency in its response to Board questions, the Board made clarifying changes to this section and added specific topics which must be included in the Agency’s recommendation. *See* Hearing Exh. 1 at 10-11. As discussed above regarding communication with other agencies, the Board proposed adding a subsection (b)(6) as follows:

whether the Agency communicated with or received comments from the Illinois Department of Natural Resources, the United States Fish and Wildlife Service, or the United States Environmental Protection Agency and the content of those communications.

Section 106.1150 Request for Public Hearing

Proposed Section 106.1150 provides procedures for the public to request that a hearing be held on a petition for an alternative thermal effluent limitation. SR at 9. The Board proposed for second notice the language contained in the Agency's proposal.

Section 106.1155 Notice and Conduct of Hearing

Proposed Section 106.1155 provides procedures for conducting a hearing and providing public notice of the hearing. SR at 9. The Board proposed for second notice the language contained in the Agency's proposal.

Section 106.1160 Burden of Proof

Proposed Section 106.1160 provides the burden of proof necessary for the Board to grant an alternative thermal effluent limitation. SR at 9. The Agency stated that this provision is taken from the federal rules. *Id.*; see 40 C.F.R. § 125.73. JCAR suggested changing the word "to" to "on" in the phrase "the additive effect of other thermal sources to a balanced, indigenous community" but the Agency objected to this change on the grounds that it is inconsistent with federal language. Tr.1 at 29. The Board declined to make JCAR's suggested revision because it may change the meaning of the phrase and the Board preferred to maintain consistent language with 40 C.F.R. § 125.73(c)(1)(i).

The Board considered two changes to this section suggested by CARE.

All Contributing Sources. CARE argued that a petitioner for an alternative thermal effluent limitation should be required to analyze all contributing thermal sources to demonstrate that there is no appreciable harm on a balanced indigenous community of shellfish, fish and wildlife. PC1 at 5-6. CARE asserted that proposed Section 106.1160(d)(1)(A) contained appropriate language to account for other sources but that Section 106.1160(d)(1)(B) did not. *Id.* CARE claimed that Section 12 of the Act requires the Board to evaluate all contributing sources and all pollutants when deciding to grant an alternative thermal effluent standard. *Id.* at 6, quoting 415 ILCS 5/12(a) (2012). CARE argued that a petitioner must evaluate other sources of thermal effluent both in impaired waters and waters complying with existing water quality standards.

For impaired waters not complying with existing thermal water quality standards, CARE argued that a petitioner for an alternative thermal effluent limitation should be required to "analyze all sources of thermal loading over a range of conditions." PC1 at 7. CARE cited to the CWA and federal regulations for establishing a total maximum daily load (TMDL) for an

impaired water to argue that the procedural rules should require this analysis so that an alternative thermal effluent limitation does not violate a TMDL. *Id.*

For nonimpaired waters complying with existing thermal water quality standards, CARE argued that a petitioner for an alternative thermal effluent limitation also should be required to evaluate all contributing sources. PC1 at 7. CARE asserted that this analysis is necessary to prevent degrading nonimpaired waters. *Id.* CARE cited to statutory anti-backsliding requirements to argue that NPDES permits cannot be renewed, reissued, or modified to contain effluent limitations less stringent than current effluent guidelines. *Id.* at 8, citing 33 U.S.C. § 1342(o).

The Agency responded that proposed Section 106.1160(d)(1)(B) derives directly from 40 C.F.R. § 125.73(c)(1)(ii) and requires a petitioner for an alternative thermal effluent limitation to consider other pollutants and other thermal sources. Agency Resp. Exh. B at 3. The Agency explained the interplay between paragraphs (A) and (B) in proposed Section 106.1160(d)(1). Proposed Section 106.1160(d)(1)(A) sets a threshold for determining that a discharge causes no appreciable harm taking into account other pollutants and other sources. Proposed Section 106.1160(d)(1)(B) then allows that if there is such a harm the discharger may obtain an alternative thermal limitation if it demonstrates that the balanced indigenous community will be protected. The Agency argued that the two paragraphs must be read together, as the EAB did in *In re Public Service Co. of Indiana, Inc.*, 1 E.A.D. 590 (1979). *Id.* Thus, proposed Section 106.1160(d)(1)(B) requires a petition to address, and the Board to consider, other pollutants and the additive effect of other thermal sources. *Id.*

The Agency suggested language clarifying proposed Section 106.1160(d)(1)(B). Exelon agreed with the Agency's suggestions. Exelon Br. at 7. The Board concurred with the Agency's analysis that paragraphs A and B in proposed Section 106.1160(d)(1) read together require a petition to address, and the Board to consider, other pollutants and the additive effect of other thermal sources. Further, the Board preferred to maintain the federal language of 40 C.F.R. § 125.73(c)(1) in this proposed section. Accordingly, the Board proposed for second notice the language contained in the first notice proposal.

Additional Factors. CARE also argued that proposed Section 106.1160(d)(1) should include seven additional factors taken from the Draft USEPA Manual. PC1 at 9. CARE noted that the Agency's proposed Section 106.1160(d)(1) requires a petitioner for an alternative thermal effluent limitation to demonstrate that no appreciable harm has occurred and the alternative limitation will assure protection. PC1 at 9, citing 40 C.F.R. § 125.73(c)(1). However, CARE claimed that these factors are broad and need additional specificity. *Id.* CARE urged the Board to include the seven factors from the Draft USEPA Manual because they "provide a more defined basis for making credible Agency recommendations" and considering these factors will "culminate in higher quality information and decisionmaking." *Id.* at 10. CARE also justified its suggestion by analogizing to the Board's rules on mixing zones that, according to CARE, require evaluation of twelve specific factors based on a broad regulatory mandate. CARE Br. at 4-5, citing 35 Ill. Adm. Code 302.102.

The Agency included with its proposal a USEPA memorandum dated October 28, 2008 that “provide[s] a framework for reviewing permit application materials that summarizes existing requirements to ensure consistency with section 316(a) of the CWA and its implementing regulations.” SR at Att. C. In the memorandum, USEPA states that the Draft USEPA Manual “provides valuable technical information on conducting 316(a) demonstrations, useful to both facilities and permitting authorities.” *Id.* at 2. Accordingly, the Board asked the Agency whether proposed Section 106.1160 should include the seven factors or other language derived from the Draft USEPA Manual. The Agency responded that proposed Section 106.1160 should not include language from the Draft USEPA Manual but rather should track the language of 40 C.F.R. § 125.73. Agency Resp. Exh. A at 1; *see also* Tr.2 at 45. The Agency noted that this manual is a nonfinal draft and is based on the 1977 federal rules that have changed since 1977. *Id.*

The Board declined to propose additional factors from the Draft USEPA Manual. As the Agency explained, proposed Section 106.1160(d)(1) is derived from 40 C.F.R. § 125.73(c). The Board noted the Agency’s acknowledgement that the Agency may look to the manual for guidance in reviewing a petition for relief under CWA Section 316(a). Tr.1 at 16-17; Tr.2 at 22, 45. In addition, at hearing, the Agency agreed that the manual provides valuable guidance. Tr.2 at 15. Under these circumstances, the Board found it appropriate to maintain consistency with 40 C.F.R. § 125.73(c) and proposed at second notice the Agency’s proposed language as revised by the Agency.

Section 106.1165 Evidentiary Matters

Proposed Section 106.1165(a) identifies additional Board procedural rules applicable to Subpart K proceedings. SR at 9. Proposed Section 106.1165(b) contains the following provision nearly identical to the federal rules at 40 C.F.R. § 125.73(b):

In determining whether or not the protection and propagation of the affected species will be assured, the Board may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the USEPA under section 304(a) of the CWA, or any other information the Board deems relevant.

At hearing, IERG questioned whether the phrase “any other information the Board deems relevant” would allow the Board to consider information outside the record. Tr.1 at 20. The Agency responded that it intended that information be contained in the record. *Id.* at 21. IERG argued that the Act and the APA require that the Board’s decision be based on evidence in the record. IERG Br. at 2-3, citing 5 ILCS 100/1-35(c), 415 ILCS 5/41(b) (2012). IERG, therefore, requested clarifying language as underlined: “any other information in the record the Board deems relevant.” *Id.* at 3.

To address this concern, the Agency proposed adding to proposed Section 106.1165(b): “The Board shall include any information considered pursuant to this subsection in the record as a matter officially noticed, and shall provide the parties with an opportunity to comment.” Agency Br. at 4.

Both suggestions achieved the same result and the Board appreciated the concern raised by IERG. The Board proposed the language suggested by IERG in the second notice proposal.

Section 106.1170 Opinion and Order

Proposed Section 106.1170 requires the Board to include certain information in the Board's order and the duration of the relief. SR at 10. In response to a question from the Board, the Agency suggested adding the following clarifying language: "In granting an alternative thermal effluent limitation, the Board may impose such conditions as may be necessary to accomplish the purposes of the Act." Tr.2 at 32; Agency Hearing Resp. at 5; Agency Br. at 10; *see also* above discussion regarding additional controls.

Section 106.1175 Post-Hearing Procedures

Proposed Section 106.1175 identifies additional Board procedural rules applicable to Subpart K proceedings. SR at 10. This section also provides a mechanism for the Agency to notify the Board when USEPA objects to an alternative thermal effluent limitation and allows the Agency to move to reconsider the Board's grant of such limit. *Id.* The Board proposed for second notice the language contained in the Agency's proposal.

Section 106.1180 Renewal of Alternative Thermal Effluent Limitations

Proposed Section 106.1180 provides the process to renew an alternative thermal effluent limitation. SR at 10. The Agency proposed a screening process for the Agency to evaluate whether the conditions on which the prior relief was based have changed. *Id.* The Board proposed for second notice the language contained in the Agency's proposal.

Section 304.141(c) NPDES Effluent Standards

The Agency proposed updating Section 304.141(c) to include a cross-reference to the new Subpart K and update the language to reflect USEPA's delegation of permitting authority to the Agency. SR at 10. JCAR suggested changing the location of commas in subsection (c) but the Agency objected to this change on the grounds that it may change the meaning. Tr.1 at 29. The Agency intended that there be two sets of standards applying to CWA Section 316(a) relief: (1) CWA Section 316(a) and applicable federal regulations; and (2) procedural rules in 35 Ill. Adm. Code 106.Subpart K. *Id.* The Board declined to make JCAR's suggested revision to maintain the Agency's intent.

Section 304.141(c) currently provides that "the Administrator and the Board" may make a determination that different standards shall apply to a particular thermal discharge. 35 Ill. Adm. Code 304.141(c). The Agency proposed to replace "Administrator" with "Agency" so that the Agency and the Board may determine that different standards apply. At hearing, IERG asked the Agency whether it "intends . . . to play a role in determining that a different standard applies?" Tr.1 at 26. The Agency stated that the Agency has a role in "affirming" the standard in proposed Section 106.1180. *Id.* Proposed Section 106.1180 specifically allows that when a

permittee demonstrates that the nature of a thermal discharge has not changed then the Agency may include the alternative thermal effluent limitation in the permittee's renewed NPDES permit.

The Board noted that Section 304.141(c), formerly known as Rule 410(c), was adopted to allow an applicant to request and demonstrate that alternative thermal effluent limitations should apply to a particular thermal discharge. *See National Pollutant Discharge Elimination System Regulations*, R 73-11, 73-12 (consol.), slip op. at 8 (Dec. 5, 1974). The intent of the rule was to provide that petitions for such alternative standards would be made to the Board and the Board would conduct any public hearing. *Id.* The proposed Subpart K procedure for considering requests for relief under CWA Section 316(a) provides extensive Agency involvement prior to filing a petition, requires the Agency to file a recommendation with the Board, and details certain post-hearing Agency activities. In light of the above, the Board proposed at second notice to clarify in Section 304.141(c) that the Board makes determinations on petitions filed with the Board requesting relief under CWA Section 316(a).

Technical Feasibility and Economic Reasonableness

Section 27(a) of the Act directs the Board to take into account the “technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution” when conducting a rulemaking. 415 ILCS 5/27(a) (2012). Section 27(b) of the Act requires the Board to determine whether a proposed substantive regulation “has any adverse economic impact on the people of the State of Illinois.” 415 ILCS 5/27(b) (2012). For the reasons below, the Board at second notice found that the proposed rules are technically feasible and economically reasonable and will not have an adverse economic impact on citizens of Illinois.

As an initial matter, the Board noted that as required by Section 27(b) of the Act (415 ILCS 5/27(b) (2012)), the Board requested that DCEO conduct an economic impact study of the Agency's rulemaking proposal. As noted above, DCEO declined to undertake such a study. During each hearing, the hearing officer afforded those present an opportunity to address the Board's request for a study and DCEO's response. Tr.1 at 31; Tr.2 at 55. No participant offered testimony or comment on the request or response.

The Agency stated that its proposal impacts “any facility with a thermal effluent limit that seeks to demonstrate such effluent limit is more stringent than necessary to protect a balanced, indigenous population of fish, shellfish and wildlife.” SR at 11. Generally, the affected facilities are nuclear and coal-fired steam electric generating facilities. *Id.* The Agency estimated that there are twenty-five such facilities that may seek to use the proposed procedure. *Id.* However, the Agency also clarified at hearing that the proposed procedural rules would apply to any facility with a thermal effluent limit. Tr.1 at 20. The Agency stated that it “shared with representatives of the electric generating industry and environmental groups” a copy of the Agency's proposal. SR at 11. The Agency also submitted a draft of the proposal to USEPA. *Id.*

The Board stated at second notice that nothing in this rulemaking record showed that the proposed procedural rules were technically infeasible or economically unreasonable. The Board maintains that same position now. The proposed procedural rules do not involve any new

technology and impose no new technical requirements. *See* SR at 10. The proposed procedural rules do not require regulated entities to incur costs for treatment technology or pollution controls. Rather, the proposed procedural rules provide a process for regulated entities to petition the Board for relief under CWA Section 316(a) to establish a site-specific alternative thermal effluent limitation. Further, the Agency noted that “[f]ailure to establish procedural rules to allow relief from otherwise applicable thermal effluent standards pursuant to Section 316(a) of the Clean Water Act could result in the requirement to install cooling technologies at potentially large costs.” SR at 10-11.

Based on the record, the Board finds that the proposed procedural rules are technically feasible, economically reasonable, and will not have an adverse economic impact on the people of Illinois.

JCAR's Suggested Changes

The Board included for second notice publication JCAR’s suggested non-substantive changes to the procedural rules, except for the three changes discussed above under Sections 106.1110, 106.1160, and 304.141(c) for the reasons discussed above in the section-by-section analysis.

At second notice, JCAR proposed additional, non-substantive changes to the rulemaking language. JCAR’s proposals and the Board’s responses have been made part of the Board’s record. The Board does not discuss the changes here, and includes all but two of them in the adopted rule language in the order below.

Conclusion

On January 23, 2014, the Board proposed amendments to Part 106 and Section 304.141 for second notice review by JCAR. The Board has made non-substantive changes to the second-notice rule language based on comments received by JCAR that are contained in the record.

ORDER

The Board directs the Clerk to submit the following adopted rules to the Secretary of State for publication in the *Illinois Register*. Proposed additions appear underlined and proposed deletions appear stricken.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER I: POLLUTION CONTROL BOARD

PART 106
PROCEEDINGS PURSUANT TO SPECIFIC RULES OR STATUTORY PROVISIONS

SUBPART A: GENERAL PROVISIONS

Section	
106.100	Applicability
106.102	Severability
106.104	Definitions

SUBPART B: HEATED EFFLUENT, ARTIFICIAL COOLING LAKE, AND SULFUR
DIOXIDE DEMONSTRATIONS

Section	
106.200	General
106.202	Petition Requirements
106.204	Additional Petition Requirements in Sulfur Dioxide Demonstrations
106.206	Notice
106.208	Recommendation and Response
106.210	Burden of Proof

SUBPART C: WATER WELL SETBACK EXCEPTION PROCEDURES

Section	
106.300	General
106.302	Initiation of Proceeding
106.304	Petition Content Requirements
106.306	Response and Reply
106.308	Hearing
106.310	Burden of Proof

SUBPART D: REVOCATION AND REOPENING OF
CLEAN AIR ACT PERMIT PROGRAM (CAAPP) PERMITS

Section	
106.400	General
106.402	Definitions
106.404	Initiation of Proceedings
106.406	Petition Content Requirements
106.408	Response and Reply
106.410	Hearing
106.412	Burden of Proof
106.414	Opinion and Order
106.416	USEPA Review of Proposed Determination

SUBPART E: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY
DETERMINATIONS

Section	
106.500	General
106.502	Definitions

106.504	Initiation of Proceedings
106.506	Petition Content Requirements
106.508	Response and Reply
106.510	Hearing
106.512	Burden of Proof
106.514	Board Action

SUBPART F: CULPABILITY DETERMINATIONS FOR PARTICULATE MATTER LESS THAN OR EQUAL TO 10 MICRONS (PM-10)

Section	
106.600	General
106.602	Initiation of Proceedings
106.604	Petition Content Requirements
106.606	Response and Reply
106.608	Hearing
106.610	Burden of Proof

SUBPART G: INVOLUNTARY TERMINATION OF ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSAs)

Section	
106.700	Purpose
106.702	Applicability
106.704	Termination Under Section 52.3-4(b) or (b-5) of the Act
106.706	Who May Initiate, Parties
106.707	Notice, Statement of Deficiency, Answer
106.708	Service
106.710	Notice of Hearing
106.712	Deficient Performance
106.714	Board Decision
106.716	Burden of Proof
106.718	Motions, Responses
106.720	Intervention
106.722	Continuances
106.724	Discovery, Admissions
106.726	Subpoenas
106.728	Settlement Procedure
106.730	Authority of Hearing Officer, Board Members, and Board Assistants
106.732	Order and Conduct of Hearing
106.734	Evidentiary Matters
106.736	Post-Hearing Procedures
106.738	Motion After Entry of Final Order
106.740	Relief from Final Orders

SUBPART H: AUTHORIZATIONS UNDER THE REGULATION OF PHOSPHORUS IN DETERGENTS ACT

Section	
106.800	General
106.802	Definitions
106.804	Initiation of Proceeding
106.806	Petition Content Requirements
106.808	Response and Reply
106.810	Hearing
106.812	Burden of Proof

SUBPART I: AUTHORIZATIONS FOR CERTAIN LANDSCAPE WASTE AND COMPOST APPLICATIONS AND ON-FARM COMPOSTING FACILITIES

Section	
106.900	General
106.902	Initiation of Proceeding
106.904	Petition Content Requirements
106.906	Petition Notice Requirements
106.908	Proof of Petition Notice Requirements
106.910	Response and Reply
106.912	Hearing
106.914	Burden of Proof

SUBPART J: TEMPORARY LANDFILL BAN WAIVERS UNDER THE ELECTRONIC PRODUCTS RECYCLING AND REUSE ACT

Section	
106.1000	General
106.1002	Definitions
106.1004	Initiation of Proceeding
106.1006	Petition Content Requirements
106.1008	Response and Reply
106.1010	Burden of Proof
106.1012	Board Decision

SUBPART K: ALTERNATIVE THERMAL EFFLUENT LIMITATIONS PURSUANT TO SECTION 316(a) OF THE CLEAN WATER ACT AND 35 ILL. ADM. CODE 304.141(c)

<u>Section</u>	
<u>106.1100</u>	<u>Purpose</u>
<u>106.1105</u>	<u>General</u>
<u>106.1110</u>	<u>Definitions</u>
<u>106.1115</u>	<u>Early Screening</u>
<u>106.1120</u>	<u>Detailed Plan of Study</u>
<u>106.1125</u>	<u>Initiation of Proceeding</u>
<u>106.1130</u>	<u>Contents of Petition</u>
<u>106.1135</u>	<u>Petition Notice Requirements</u>
<u>106.1140</u>	<u>Proof of Petition Notice Requirements</u>
<u>106.1145</u>	<u>Recommendation and Response</u>

<u>106.1150</u>	<u>Request for Public Hearing</u>
<u>106.1155</u>	<u>Notice and Conduct of Hearing</u>
<u>106.1160</u>	<u>Burden of Proof</u>
<u>106.1165</u>	<u>Evidentiary Matters</u>
<u>106.1170</u>	<u>Opinion and Order</u>
<u>106.1175</u>	<u>Post-Hearing Procedures</u>
<u>106.1180</u>	<u>Renewal of Alternative Thermal Effluent Limitations</u>

106.APPENDIX A Comparison of Former and Current Rules (Repealed)

AUTHORITY: Implementing and authorized by Sections 5, 14.2(c), 21(q), 22.4, 26, 27, 28, 28.1, 28.5, 35, 36, 37, 38, 39.5 and 52.3 of the Environmental Protection Act (the Act) [415 ILCS 5/5, 14.2(c), 21(q), 22.4, 26, 27, 28, 28.1, 28.5, 35, 36, 37, 38, 39.5 and 52.3], and Section 5 of the Regulation of Phosphorus in Detergents Act [415 ILCS 92/5] and Section 95 of the Electronic Products Recycling and Reuse Act [415 ILCS 150/95].

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, p. 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(A) at 13 Ill. Reg. 12094, effective July 10, 1989; amended in R88-5(B) at 14 Ill. Reg. 9442, effective June 5, 1990; amended in R93-24 at 18 Ill. Reg. 4230, effective March 8, 1994; amended in R93-30 at 18 Ill. Reg. 11579, effective July 11, 1994; amended in R99-9 at 23 Ill. Reg. 2697, effective February 16, 1999; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 550, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8817, effective June 8, 2005; amended in R10-19 at 34 Ill. Reg. 11486, effective July 23, 2010; amended in R12-21 at 36 Ill. Reg. 9236, effective June 7, 2012; amended in R12-11 at 36 Ill. Reg. 16581, effective November 5, 2012; amended in R13-20 at 38 Ill. Reg. _____, effective _____.

SUBPART K: ALTERNATIVE THERMAL EFFLUENT LIMITATIONS PURSUANT TO SECTION 316(a) OF THE CLEAN WATER ACT AND 35 ILL. ADM. CODE 304.141(c)

Section 106.1100 Purpose

This Subpart describes the factors, criteria, and standards for the establishment of alternative thermal effluent limitations under 35 Ill. Adm. Code 304.141(c) and section 316(a) of the Clean Water Act (33 USC 1251) and in permits issued under 35 Ill. Adm. Code 309.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1105 General

- a) Description. This Subpart applies to any point source that discharges pollutants to waters of the United States who seeks to demonstrate, pursuant to 35 Ill. Adm. Code 304.141(c) and section 316(a) of the Clean Water Act that any effluent

limitation proposed for the control of a thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

- b) Parties. The person making the demonstration must be named the petitioner. The Agency must be named as a respondent. Any interested person may become a participant in the alternative thermal effluent limitation demonstration proceeding in accordance with 35 Ill. Adm. Code 101.110 and 101.628.
- c) Filing and Service. The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C apply to the proceedings of this Subpart.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1110 Definitions

In addition to these definitions, all definitions of the Illinois Environmental Protection Act [415 ILCS 5], and 35 Ill. Adm. Code 301, apply to this Subpart. For the purpose of this Subpart:

"Alternative thermal effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge that are established under 35 Ill. Adm. Code 304.141(c), Section 316(a) of the CWA and this Subpart.

"CWA" means the Federal Water Pollution Control Act, as amended, (33 USC 1251 et seq., Public Law 92-500 enacted by Congress October 18, 1972, as amended by the Clean Water Act, Public Law 95-217, enacted December 12, 1977, as amended).

"Representative important species" means species that are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish, and wildlife in the body of water into which a discharge of heat is made.

"Balanced, indigenous community" is synonymous with the term "balanced, indigenous population" in the CWA and means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species, and by a lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the CWA; and may not include species whose presence or abundance is attributable to alternative thermal effluent limitations imposed pursuant to this Subpart or through regulatory relief from otherwise applicable thermal limitations

under Chapter I of Subtitle C or standards granted by the Board.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1115 Early Screening

- a) Prior to filing a petition for an alternative thermal effluent limitation, the petitioner must submit the following early screening information to the Agency:
- 1) A description of the alternative thermal effluent limitation requested;
 - 2) A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;
 - 3) A general description of the type of data, studies, experiments and other information that the discharger intends to submit for the demonstration; and
 - 4) A proposed representative important species list and supporting data and information ~~such data and information as may be available to assist the Agency in approving the selection of the appropriate representative important species.~~
- b) Within 30 days after the early screening information is submitted ~~receipt of the early screening information~~ under subsection (a) ~~of this Section~~, the petitioner shall consult with the Agency to discuss the petitioner's early screening information.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1120 Detailed Plan of Study

- a) Within 60 days after the early screening information is submitted pursuant to Section 106.1115, the petitioner shall submit to the Agency ~~for the Agency's approval~~ a detailed plan of study that the petitioner will undertake to support its alternative thermal effluent limitation demonstration.
- b) The petitioner shall specify the nature and extent of the following types of information to be included in the plan of study:
- 1) biological, hydrographical, and meteorological data;
 - 2) physical monitoring data;
 - 3) engineering or diffusion models;

- 4) laboratory studies;
 - 5) representative important species; and
 - 6) other relevant information.
- c) In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards.
 - d) The petitioner shall provide any additional information or studies that the Agency subsequently determines necessary to support the alternative thermal effluent limitation demonstration, including such field or other studies as may be necessary to select representative important species.
 - e) In making the alternative thermal effluent limitation demonstration, the petitioner shall consider any information or guidance published by USEPA to assist in making such demonstrations.
 - f) Within 90 days after petitioner's submittal of its detailed plan of study, the Agency shall respond in writing, either approving the detailed plan of study and representative important species; or recommending necessary revisions ~~approve the plan or specify any recommended revisions to the plan.~~
 - g) After receiving ~~obtaining Agency approval,~~ or the Agency's response pursuant to subsection (f), or after 90 days have passed with no Agency response, the petitioner may proceed with the plan of study with or without making the Agency's recommended revisions.,~~the~~ The petitioner shall complete the plan of study prior to filing the petition for an alternative thermal effluent limitation with the Board.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1125 Initiation of Proceeding

After completion of the plan of study pursuant to Section 106.1120, the petitioner may file a petition for an alternative thermal effluent limitation with the Clerk of the Board and must serve one copy ~~upon~~ on the Agency and one copy on the Illinois Department of Natural Resources.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1130 Contents of Petition

A petition for an alternative thermal effluent limitation must include the following:

- a) Information providing a general plant description, including, as applicable:

- 1) Generating capacity;
 - 2) Type of fuel used;
 - 3) Operating characteristics of the condenser cooling system;
 - 4) History of the load factor of the plant for the last 5 years;
 - 5) Projected load factors of the plant for the next 5 years;
 - 6) Estimated date of retirement for each unit at the plant and any plans for additional units at the plant;
 - 7) History of plant shutdowns for the last 5 years;
 - 8) Planned and emergency shutdowns with frequency and duration for the last 5 years; and
 - 9) Planned and projected shutdowns with frequency and duration for the next five years;
- b) Description of Method for Heat Dissipation:
- 1) Type of system used (such as once-through, mechanical, and draft cooling towers) in narrative form; and
 - 2) Summary information on temperature of discharge to receiving waters in narrative form;
- c) A summary of compliance or non-compliance with thermal requirements at the facility in the past five years;
- d) ~~The results of the studies conducted pursuant to the detailed plan of study submitted under Section 106.1120;~~ The detailed plan of study submitted to the Agency pursuant to Section 106.1120(a); and the Agency's written response pursuant to Section 106.1120(f);
- e) The results of the studies conducted pursuant to the detailed plan of study submitted under Section 106.1120, including, but not limited to:;
- 1) background on the proposed thermal standards;
 - 2) information on data collection program and methodologies;
 - 3) summaries of physical, chemical, biological; and technical data supporting

the demonstration, along with a discussion of the data; and

- 4) criteria or methodology used to assess whether a balanced indigenous community of shellfish, fish, and wildlife will be maintained in the receiving waters and the protection of threatened and endangered species; and
- e) Any information or guidance published by USEPA to assist in making alternative thermal effluent limitation demonstrations that the Board should consider in evaluating the petition; and
- f) Any additional information or studies, including information or guidance published by USEPA, that the petitioner judges to be appropriate to support the alternative thermal effluent limitation demonstration; and
- g) A statement of the requested relief, including:
 - 1) the alternative thermal effluent limitation;
 - 2) any relief from the mixing zone regulations in 35 Ill. Adm. Code 302.102, if applicable; and
 - 3) any other relief sought.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1135 Petition Notice Requirements

- a) Within 14 days after the filing of the petition, the petitioner must publish notice of the filing of the petition by advertisement in a newspaper of general circulation in the county where the facility is located.
- b) The notice must contain the name and address of the petitioner and it must state that the petitioner has filed with the Board a petition for an alternative thermal effluent limitation. The notice must also provide the date on which the petition was filed, the Board docket number, the regulatory standard (with appropriate Administrative Code citation) from which the alternative thermal effluent limitation is sought, the proposed alternative thermal effluent limitation, a general description of the petitioner's activity that is the subject of the alternative thermal effluent limitation proceeding, and the location of the facility. The concluding portion of the notice must read as follows:

"Any person may cause a public hearing to be held in the above-described proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number for the proceeding, as found in this

notice, and must be filed with ~~mailed to~~ the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601."

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1140 Proof of Petition Notice Requirements

Within 30 days after the filing of the petition, the petitioner must file a certificate of publication with the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601. This certification must be issued by the newspaper that published the notice and must certify when the notice was published and the information the notice contained.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1145 Recommendation and Response

- a) Unless otherwise ordered by the hearing officer or the Board, the Agency must file with the Board a recommendation within 45 days after the filing of a petition or amended petition for an alternative thermal effluent limitation, or ~~wherewhen~~ a hearing has been scheduled, at least 30 days before hearing, whichever is earlier.
- b) The recommendation must state the following:
 - 1) whether the Board should grant the petitioner's requested alternative thermal effluent limitation;
 - 2) the rationale for the Agency's position;
 - 3) whether the plan of study sufficiently addresses the Agency's response pursuant to Section 106.1120(f) of this Part;
 - 4) whether the petition has met the requirements of this Part;
 - 5) any information ~~which~~ the Agency believes is relevant to the Board's consideration of the proposed alternative thermal effluent limitation; and
 - 6) whether the Agency communicated with or received comments from the Illinois Department of Natural Resources, the United States Fish and Wildlife Service, or USEPA~~the United States Environmental Protection Agency~~ and the content of those communications.
- c) The petitioner, any party to the proceeding, or any interested person may file a response to the Agency recommendation within 21 days after the Agency files its recommendation.

Within 45 days after the filing of a petition for an alternative thermal effluent limitation, the Agency must file with the Board a recommendation as to whether the Board should grant the petitioner's requested alternative thermal effluent limitation. The petitioner, any party to the proceeding, or any interested person may file a response to the Agency recommendation within 21 days after the Agency files its recommendation.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1150 Request for Public Hearing

Any person can request that a public hearing be held in a proceeding under this Subpart. The requests must be filed with the Clerk of the Board no later than 21 days after the date of the publication of the petition notice in accordance with Section 106.1135. Requests for hearing should make reference to the Board docket number assigned to the proceeding.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1155 Notice and Conduct of Hearing

- a) The Board shall hold a public hearing on the petition and alternative thermal effluent limitation demonstration when one is requested in accordance with Section 106.1150, ~~or~~ when requested by the petitioner, or if the Board, in its discretion, determines that a hearing would be advisable.
- b) The hearing officer will schedule the hearing to be held in the county likely to be affected by the petitioner's activity.
- c) The Clerk will give notice of the hearing in accordance with 35 Ill. Adm. Code 101. The proceedings will be conducted in accordance with 35 Ill. Adm. Code 101.Subpart F.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1160 Burden of Proof

- a) The burden of proof is on the petitioner.
- b) The petitioner must demonstrate to the satisfaction of the Board that the otherwise applicable effluent limitations under Chapter I of Subtitle C ~~of this Title~~ are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.
- c) The demonstration must show that the alternative thermal effluent limitation desired by the petitioner, considering the cumulative impact of its thermal discharge, together with all other significant impacts on the species affected, will

assure the protection and propagation of a balanced indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

- d) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies.
- 1) When the petitioner bases the alternative thermal effluent limitation demonstration upon the absence of prior appreciable harm, the demonstration must show:
- A) That no appreciable harm has resulted from the normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or
- B) That despite the occurrence of such previous harm, the desired alternative thermal effluent limitation (or appropriate modifications thereof) will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.
- 2) In determining whether prior appreciable harm has occurred, the Board shall consider the length of time during which the petitioner has been discharging and the nature of the discharge.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1165 Evidentiary Matters

- a) The provisions of 35 Ill. Adm. Code 101 regarding admissible evidence, written narrative testimony, official notice, viewing premises, admitting business records, examining adverse parties or agents and hostile witnesses and compelling them to appear at hearing, and amendment and variance of pleadings and proof will apply to proceedings under this Subpart.
- b) In determining whether the protection and propagation of the affected species will be assured, the Board may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the USEPA under section 304(a) of the CWA, or any other information in the record the Board deems relevant.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1170 Opinion and Order

- a) After an opportunity for a public hearing and upon a satisfactory alternative thermal effluent limitation demonstration, the Board may order the Agency to include thermal discharge effluent limitations or standards in the petitioner's NPDES permit that are less stringent than those required by applicable standards and limitations if the thermal component of the discharge, taking into account the interaction of such thermal component with other pollutants, will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water.
- b) In granting an alternative thermal effluent limitation, the Board may impose such conditions as may be necessary to accomplish the purposes of the Act.
- ~~c)~~ If the petitioner intends for the alternative thermal effluent limitation granted by the Board pursuant to this Subpart to continue beyond the expiration of the petitioner's NPDES permit, the petitioner must apply for renewal of the alternative thermal effluent limitation pursuant to Section 106.1180.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1175 Post-Hearing Procedures

- a) The provisions of 35 Ill. Adm. Code 101 regarding default, transcripts, the record, motions, briefs, and oral arguments apply to proceedings under this Subpart.
- b) In addition to the provisions of 35 Ill. Adm. Code 101.520 and 101.902, if USEPA objects pursuant to 40 CFR 123.44 to issuance in the petitioner's NPDES permit of the alternative thermal effluent limitation ordered by the Board, the Agency is given leave to file a motion for reconsideration of the Board's order granting the effluent limitation pursuant to 35 Ill. Adm. Code 101.520 within 35 days after the Agency's receipt of USEPA's objection.

(Source: Added at 38 Ill. Reg. _____, effective _____)

Section 106.1180 Renewal of Alternative Thermal Effluent Limitations

- a) The permittee may request continuation of an alternative thermal effluent limitation granted by the Board, pursuant to this Subpart, as part of its NPDES permit renewal application.
- b) Any application for renewal should include sufficient information for the Agency to compare the nature of the permittee's thermal discharge and the balanced, indigenous population of shellfish, fish, and wildlife at the time the Board granted the alternative thermal effluent limitation and the current nature of the petitioner's thermal discharge and the balanced, indigenous population of shellfish, fish, and

wildlife. The permittee should be prepared to support this comparison with documentation based upon the discharger's actual operation experience during the previous permit term.

- c) If the permittee demonstrates that the nature of the thermal discharge has not changed and the alternative thermal effluent limitation granted by the Board has not caused appreciable harm to a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is made, the Agency may include the alternative thermal effluent limitation in the permittee's renewed NPDES permit.
- d) If the nature of the thermal discharge has changed materially or the alternative thermal effluent limitation granted by the Board has caused appreciable harm to a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is made, the Agency may not include the thermal relief granted by the Board in the permittee's renewed NPDES permit. The permittee must file a new petition and make the required demonstration pursuant to this Subpart before the alternative thermal effluent limitation may be included in the permittee's renewed NPDES permit.

(Source: Added at 38 Ill. Reg. _____, effective _____)

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE C: WATER POLLUTION
 CHAPTER I: POLLUTION CONTROL BOARD

PART 304
 EFFLUENT STANDARDS

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304.APPENDIX A References to Previous Rules

AUTHORITY: Implementing Section 13 and authorized by Section 27 of the Environmental Protection Act [415 ILCS 5/13 and 27].

SOURCE: Filed with the Secretary of State January 1, 1978; amended at 2 Ill. Reg. 30, p. 343, effective July 27, 1978; amended at 2 Ill. Reg. 44, p. 151, effective November 2, 1978; amended at 3 Ill. Reg. 20, p. 95, effective May 17, 1979; amended at 3 Ill. Reg. 25, p. 190, effective June 21, 1979; amended at 4 Ill. Reg. 20, p. 53, effective May 7, 1980; amended at 6 Ill. Reg. 563,

effective December 24, 1981; codified at 6 Ill. Reg. 7818; amended at 6 Ill. Reg. 11161, effective September 7, 1982; amended at 6 Ill. Reg. 13750, effective October 26, 1982; amended at 7 Ill. Reg. 3020, effective March 4, 1983; amended at 7 Ill. Reg. 8111, effective June 23, 1983; amended at 7 Ill. Reg. 14515, effective October 14, 1983; amended at 7 Ill. Reg. 14910, effective November 14, 1983; amended at 8 Ill. Reg. 1600, effective January 18, 1984; amended at 8 Ill. Reg. 3687, effective March 14, 1984; amended at 8 Ill. Reg. 8237, effective June 8, 1984; amended at 9 Ill. Reg. 1379, effective January 21, 1985; amended at 9 Ill. Reg. 4510, effective March 22, 1985; peremptory amendment at 10 Ill. Reg. 456, effective December 23, 1985; amended at 11 Ill. Reg. 3117, effective January 28, 1987; amended in R84-13 at 11 Ill. Reg. 7291, effective April 3, 1987; amended in R86-17(A) at 11 Ill. Reg. 14748, effective August 24, 1987; amended in R84-16 at 12 Ill. Reg. 2445, effective January 15, 1988; amended in R83-23 at 12 Ill. Reg. 8658, effective May 10, 1988; amended in R87-27 at 12 Ill. Reg. 9905, effective May 27, 1988; amended in R82-7 at 12 Ill. Reg. 10712, effective June 9, 1988; amended in R85-29 at 12 Ill. Reg. 12064, effective July 12, 1988; amended in R87-22 at 12 Ill. Reg. 13966, effective August 23, 1988; amended in R86-3 at 12 Ill. Reg. 20126, effective November 16, 1988; amended in R84-20 at 13 Ill. Reg. 851, effective January 9, 1989; amended in R85-11 at 13 Ill. Reg. 2060, effective February 6, 1989; amended in R88-1 at 13 Ill. Reg. 5976, effective April 18, 1989; amended in R86-17(B) at 13 Ill. Reg. 7754, effective May 4, 1989; amended in R88-22 at 13 Ill. Reg. 8880, effective May 26, 1989; amended in R87-6 at 14 Ill. Reg. 6777, effective April 24, 1990; amended in R87-36 at 14 Ill. Reg. 9437, effective May 31, 1990; amended in R88-21(B) at 14 Ill. Reg. 12538, effective July 18, 1990; amended in R84-44 at 14 Ill. Reg. 20719, effective December 11, 1990; amended in R86-14 at 15 Ill. Reg. 241, effective December 18, 1990; amended in R93-8 at 18 Ill. Reg. 267, effective December 23, 1993; amended in R87-33 at 18 Ill. Reg. 11574, effective July 7, 1994; amended in R95-14 at 20 Ill. Reg. 3528, effective February 8, 1996; amended in R94-1(B) at 21 Ill. Reg. 364, effective December 23, 1996; expedited correction in R94-1(B) at 21 Ill. Reg. 6269, effective December 23, 1996; amended in R97-25 at 22 Ill. Reg. 1351, effective December 24, 1997; amended in R97-28 at 22 Ill. Reg. 3512, effective February 3, 1998; amended in R98-14 at 23 Ill. Reg. 687, effective December 31, 1998; amended in R02-19 at 26 Ill. Reg. 16948, effective November 8, 2002; amended in R02-11 at 27 Ill. Reg. 194, effective December 20, 2002; amended in R04-26 at 30 Ill. Reg. 2365, effective February 2, 2006; amended in R08-9B at 36 Ill. Reg. 2586, effective February 2, 2012; amended in R13-20 at 38 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL EFFLUENT STANDARDS

Section 304.141 NPDES Effluent Standards

- a) No person to whom an NPDES Permit has been issued may discharge any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in his permit.
- b) No person may discharge any pollutant subject to, or which contributes or threatens to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline or other limitation, promulgated pursuant to the CWA or the Act, unless limitation for such a pollutant has been set forth in an applicable NPDES Permit. However, the Agency may, by permit condition,

provide that the permittee may discharge pollutants present in its water supply intake sources in concentrations not greater than the concentrations in the intake sources, or which are added in trace amounts by normal domestic water usage.⁴

BOARD NOTE: Section 304.141(b) was declared invalid in *Peabody Coal Co. v. PCB*, 3 Ill. App. 3d 5 (5th District, 1976) and declared valid in *U.S. Steel v. PCB*, 52 Ill. App. 3d 1 (2d District, 1977).

- c) The standards of this Chapter shall apply to thermal discharges unless, after public notice and opportunity for public hearing, in accordance with ~~section~~Section 316 of the CWA, ~~and~~ applicable federal regulations, ~~and~~ procedures in 35 Ill. Adm. Code 106.Subpart K, the Agency Administrator and the Board ~~has~~have determined that different standards shall apply to a particular thermal discharge.

⁴~~Section 304.141(b) was declared invalid in *Peabody Coal Co. v. PCB*, 3 Ill. App. 3d 5 (5th District, 1976) and declared valid in *U.S. Steel v. PCB*, 52 Ill. App. 3d 1 (2d District, 1977).~~

(Source: Amended at 38 Ill. Reg. _____, effective _____)

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 20, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board