

ILLINOIS POLLUTION CONTROL BOARD

June 4, 2015

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9 (Subdocket D)
EFFLUENT LIMITATIONS FOR THE) (Rulemaking - Water)
CHICAGO AREA WATERWAY SYSTEM)
AND LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 ILL.)
ADM. CODE 301, 302, 303, and 304)

ORDER OF THE BOARD (by D. Glosser):

On March 19, 2015, the Board adopted a second-notice opinion and order in this rulemaking. The Board filed the rule with the Joint Committee on Administrative Rules (JCAR) pursuant to the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-40(c) (2014)). On May 12, 2015, the Board agreed with JCAR to extend the second notice period for this rulemaking in order to allow the Board to seek additional public comment on temperature.

On May 21, 2015, the Board reopened the public comment period to allow participants to provide additional public comment on temperature to the Board until June 1, 2015. At the Board's May 21, 2015, Board meeting, the Board heard comments from John Quail, Director, Watershed Policy for Friends of the Chicago River; Robert Hirschfeld, Prairie Rivers Network; and Katrina Phillips, Clean Water Organizer, Sierra Club, Illinois Chapter.

The Board received four comments from participants by the June 1, 2015 deadline. Those comments are from: Exxon Mobil Oil Corporation (ExxonMobil), PC 1517; Stepan Company (Stepan), PC 1518; Midwest Generation, L.L.C (Midwest Generation), PC 1519¹; and, Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council, and Openlands (Environmental Groups), PC 1520. In addition, 271 single page comments expressing support for the Board's rule were received. The Board will not summarize each of the 271 comments, but the Board will briefly describe the content. The Board next summarizes the four comments from participants. For the reasons discussed below, the Board will not suggest to JCAR any changes in the standards or delayed effective date, but will ask JCAR to consider agreeing to a change based upon Stepan's comment.

¹ Effective April 1, 2014, NRG Energy, Inc. (NRG) purchased certain subsidiaries of Midwest Generation including the Will County Station and Joliet Station, Units 9 and 29. The Will County Station discharges to the Chicago Sanitary and Ship Canal, and the Joliet Stations discharges to the Upper Dresden Island Pool. PC 1418 at 2.

COMMENTS FROM CITIZENS

The Board received 271 comments from individuals that support the Board's second notice proposal. These comments indicate that the rules should not be relaxed and that the three-year delayed effective date is sufficient. *See e.g.* PC 1535, 1555. The comments continue noting that entities that cannot comply may seek a variance, and the Board has a substantial record that should allow the Board to move forward. *Id.* The comments also ask that the rule protect aquatic life and be implemented as soon as possible. *See e.g.* PC 1432, 1433.

The Board is deeply appreciative of these comments and the time and effort that these individuals took to provide the comments.

EXXONMOBIL

ExxonMobil participated throughout this rulemaking proceeding, focusing on the appropriate water quality standards for the Upper Dresden Island Pool (UDIP) Aquatic Life Use (ALU) waters. PC 1517 at 1. ExxonMobil's refinery (refinery) discharges to the UDIP ALU waters, and its heated effluent is at 104 million British Thermal Units per hour (MBTU/hr). *Id.* at 2. ExxonMobil explains that larger upstream thermal dischargers impact the temperatures in the UDIP more significantly. As an illustration, ExxonMobil notes that Midwest Generation power stations add 7,000 MBTU/hr of heat load when the supplemental cooling towers at Joliet 29 are not being used. *Id.*

While ExxonMobil supports the numeric thermal standards and delay in the applicability of the standards proposed by the Board at second notice, ExxonMobil seeks fair implementation of the new thermal standards. PC 1517 at 2. ExxonMobil argues that it cannot properly design a compliance plan or controls during the delay in applicability as the future temperature characteristics of the UDIP are unknown. *Id.* Specifically, ExxonMobil cannot plan on how to comply with the new temperature standards until larger upstream discharges are in compliance. *Id.* at 2-3.

ExxonMobil notes that under the Board's proposed rule, the existing thermal standards will apply for three years following the adoption of Section 302.408, but more stringent standards will apply at the end of the three years. PC 1517 at 4. ExxonMobil believes that the delayed effective date does "alleviate some uncertainties and allow more time to develop a compliance plan and permit and construct thermal controls." *Id.* However, that delay does not remedy the uncertainty for those dischargers downstream from large thermal dischargers. *Id.* ExxonMobil opines that even if larger dischargers achieve compliance or obtain relief, downstream dischargers will not have the time to craft and implement a compliance plan as the compliance plan will be dependent on the temperature of the UDIP. *Id.*

ExxonMobil explains that mixing zones are not allowed when the water quality standards are already exceeded in the receiving stream. If there is no mixing zone allowed, the water quality standard must be met at the discharge point. PC 1517 at 5. ExxonMobil would be required to install costly thermal controls if no mixing is allowed. *Id.* ExxonMobil states that regardless of the mixing zone availability, it cannot properly design a compliance plan until the

temperature of the UDIP is characterized. *Id.* ExxonMobil continues that the characterization cannot occur until larger upstream dischargers, such as Midwest Generation, achieve compliance with the more stringent thermal standards. *Id.*

ExxonMobil's recent modeling indicates that the refinery's thermal discharge accounts for a maximum temperature rise above the refinery's intake temperature at the I-55 bridge of 0.4° F in the winter and 0.2° F in the summer. PC 1517 at 5. ExxonMobil maintains that as long as the UDIP meets the water quality standards, a mixing zone would be available to ExxonMobil and the refinery could achieve compliance with that mixing zone. *Id.*

ExxonMobil notes that Midwest Generation has an adjusted standard that applies at the I-55 bridge, with specified excursion hours. PC 1517 at 5-6. ExxonMobil states that even with the alternative limits, Midwest Generation sought and received provisional variances from the thermal standards in 2011 and 2012. *Id.* at 6. ExxonMobil opines that absent operational changes or regulatory relief, "it is logical to conclude" that Midwest Generation's discharges could lead to thermal exceedances at the discharge point of the refinery. *Id.* at 6-7. Therefore, ExxonMobil argues it should be able to consider Midwest Generation's compliance approach before developing its own plan. *Id.* at 7.

ExxonMobil explains that the Illinois Environmental Protection Agency (IEPA) will incorporate the new temperature standards into National Pollutant Discharge Elimination System (NPDES) permits. PC 1517 at 7. However, ExxonMobil claims IEPA does not have a reliable method to prioritize larger upstream dischargers before smaller downstream dischargers. *Id.* ExxonMobil clarifies that IEPA may impose the thermal standards on downstream dischargers in NPDES permits before larger upstream dischargers comply with the new standards. *Id.* ExxonMobil argues that IEPA never provided an implementation solution for downstream dischargers and accordingly there is no requirement that upstream thermal dischargers achieve compliance before smaller dischargers. *Id.*

In summary, ExxonMobil states:

ExxonMobil supports the numeric thermal standards proposed by the Board at Second Notice but continues to urge the Board to adopt a mechanism for bringing large dischargers into compliance with new thermal limits first. Due to the interdependent nature of thermal dischargers, new thermal standards must provide protections for dischargers downstream of large thermal dischargers. PC 1517 at 8.

STEPAN

Stepan participated throughout this proceeding and offers additional comment on temperature. PC 1518 at 1-2. Stepan offers two comments:

First, the proposed temperature criteria should apply "at representative locations in the main river," consistent with how General Use temperature criteria are applied. Second, if the proposed narrative temperature criteria are retained, then

language in those proposed criteria referring to natural conditions or natural temperatures or natural temperature fluctuations should be changed to reflect the unique characteristics of the waters of the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR). *Id.* at 2.

Representative Locations In The Main River

Stepan notes that the General Use temperature criteria, on which the Board based the proposed second notice temperature standards, apply at representative locations in the main river. PC 1518 at 2. Stepan quotes Section 302.211(e):

In addition, the water temperature at representative locations in the main river shall not exceed the maximum limits in the following table during more than one percent of the hours in the 12-month period ending with any month. *Id.*, quoting 35 Ill. Adm. Code 302.211(e).

Stepan opines that the Board omitted this key language in the proposed temperature criteria and by omitting the language the criteria apply more broadly in CAWS and LDPR. *Id.* Thus, Stepan claims the proposed language is more stringent than the General Use water quality standards. *Id.* at 3.

Stepan offers that the Board found that adopting more stringent standards than General Use was inappropriate. PC 1518 at 3. Stepan raised this issue in its comments at second notice; however, the Board did not modify the rule and did not explain the Board's reasoning. *Id.* Stepan suggests that the Board may have overlooked this key language; however, the failure to limit application of the temperature standard to the main river is inconsistent with the Board's decision to decline to adopt more stringent standards. *Id.*

Natural Temperatures Or Natural Temperature Fluctuations

Stepan reiterates that the narrative temperature criteria are not appropriate for CAWS and LDPR waters, but if the Board adopts the standards the standards should be modified to reflect the unique characteristics of CAWS and LDPR. PC 1518 at 4. Stepan notes that the Board repeatedly acknowledged the unique characteristics of CAWS and LDPR and even defended its findings to the United States Environmental Protection Agency (USEPA) that CAWS and LDPR could not meet the Clean Water Act goals. *Id.* at 4-5. Stepan explains that those unique characteristics reflect the use designations adopted by the Board. *Id.* at 6. These unique characteristics include that CAWS and LDPR are effluent dominated. *Id.*

Stepan states that despite the "overwhelming evidence of the unique character of CAWS and LDPR", the Board failed to change a "single word of the General Use narrative criteria". PC 1518 at 7. Stepan argues not changing the General Use narrative criteria is "diametrically opposed" to findings that the waters of CAWS and LDPR are unique. *Id.* at 8. Stepan is unconvinced by the Board's explanation at second notice. *Id.*

MIDWEST GENERATION

Midwest Generation asserts that “[i]f finalized in its current form” the proposed thermal water quality standard “without special and uncertain thermal variance relief” would result in closure of “certain industrial facilities” along the Chicago Sanitary and Ship Canal (CSSC) and the LDPR. PC 1519 at 1. Midwest Generation:

supports a six-year extension of the thermal water quality standards for existing sources to allow enough time to (1) design and obtain concurrence from regulators on which studies should be performed. (2) conduct the biological and thermal studies, (3) consult with regulators on the studies’ results and proposed variance terms; (4) prepare a thermal variance petition for filing with the Board and (5) allow adequate time for both the Board variance proceeding and subsequent USEPA review of any Board-approved thermal variance(as well as possible legal challenges). *Id.*

Midwest Generation notes that the Board’s proposed standards are more stringent than the existing standards that apply to CAWS and LDPR. PC 1519 at 1. Midwest Generation further notes that the Board’s use designations of ALU A, ALU B, and UDIP ALU are a lower water quality than General Use. *Id.* Midwest Generation explains that the Board’s adoption of General Use standards applies the strictest existing thermal water quality standards under Illinois law. *Id.*

Midwest Generation asserts that its Joliet Station and the Will County Station will not be able to comply with the new standards and cannot receive adequate regulatory relief in three years. PC 1519 at 2. Midwest Generation states:

In proposing a three-year extension of the General Use thermal standards, the [Board] expressed a preference that any revision of the existing thermal water quality standards for these waters should instead start with a rulemaking to update the General Use standards using current science and consistent methods which would then be followed by a second rulemaking to develop new thermal standards for lower use waters like CAWS and UDIP. Second Notice Order at pp. 71, 78-7. It is unreasonable to expect that these two sequential rulemakings could be initiated and completed within a three-year period. *Id.*

Midwest Generation argues that it is unreasonable to impose “temporary” standards that threaten to shut down electric generating units and cause the loss of jobs. *Id.* Midwest Generation opines that given the multi-year effort to develop this rule, it is unlikely that the Board and IEPA will complete the process of two thermal standards rulemakings within a three-year period. *Id.*

Midwest Generation claims that “the Board’s proposed three-year extension of the proposed General Use thermal standards’ effective date would not provide an adequate amount of time for individual thermal dischargers to seek and obtain alternative thermal standards relief.” PCB 1519 at 2. Midwest Generation notes that the Board’s second notice order indicated that Midwest Generation needs to collect additional “more recent” biological data on

these waterways. *Id.* Development of such data would necessitate the design and implementation of future in-stream biological studies to collect such additional data. *Id.* Midwest Generation opines that in-stream studies usually require a minimum of two years to collect, and the warmer summer months need to be included in the study period. *Id.* Midwest Generation maintains that because there is not an adequate amount of time to design and begin implementing such studies during the summer of 2015, the earliest that such studies could begin collecting such warm weather data is in the summer of 2016. *Id.* Even when the studies have been completed additional time is needed to evaluate the new data, and consult with regulators regarding the studies' findings. Midwest Generation does not believe this can be accomplished in three years and thus asks the Board to provide for a six-year extension for existing thermal dischargers in the effective date of the thermal standards. *Id.*

ENVIRONMENTAL GROUPS

The Environmental Groups oppose any attempts to weaken the temperature standards as proposed by the Board as well as any further delay in the implementation of the effective date of the updated temperature standards beyond three years from the effective date of the rules as the Board proposed at second notice. PC 1520 at 1. The Environmental Groups assert that the Board's proposed rule "already represents a compromise of the input of the parties who have participated in the eight years of the rulemaking process." *Id.*

The Environmental Groups state that they and IEPA had originally proposed temperature standards that were more stringent than the thermal standards for General Use waters; whereas, Midwest Generation had proposed standards that were less protective than what IEPA had proposed. PC 1520 at 1. Instead, the Board adopted General Use temperature standards for all ALU designations in CAWS and LPDR, being "unconvinced that the standards proposed by Midwest Generation would be protective of aquatic life expected to be in the UDIP waters". *Id.* at 1 and 2. The Environmental Groups opine that the Board's proposed rule to apply General Use temperature standards "is a reasonable compromise and is based on standards that were approved by USEPA in the past." *Id.* at 2.

The Environmental Groups note that in the Board's first notice opinion and order, the Board proposed that the effective date of the temperature standards be 18 months after the effective date of the rules. PC 1520 at 2; *see* Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9(D), slip op. at 70 (Sept. 18, 2014). They further note that Midwest Generation, in its first notice comments, requested "a three-year delay to allow for resolution of compliance issues facing thermal dischargers". The Environmental Groups remind that they opposed the additional delayed effective date as proposed by Midwest Generation. *Id.* They argued at first notice that "It is unclear that even the [18-month] delay that the Board allowed is now needed".

The Environmental Groups urge the Board to adhere "to its original compromise of extending the effective date of the temperature standards until three years after the effective date of the rules." PC 1520 at 2. They note this is the request made by Midwest Generation in November 2014. The Environmental Groups assert that "there is no need to further delay the

establishment of updated temperature standards to protect aquatic life in CAWS and LPDR”, despite NRG’s “attempting a second bite at the apple, requesting even more changes to the rules outside of the Board’s public process.” *Id.*

The Environmental Groups “note that the details of NRG’s back-room attempt to change the PCB’s rule are not known to the public. If there are other changes proposed to the rule beyond the delay of implementation, this public comment announcement regarding ‘temperature’ has not given Environmental Groups the detail necessary to respond to any such proposals. Due process and fairness require that no such changes be made unless they are presented for review and comment by all interested parties”. PC 1520 at 2. The Environmental Groups close by reiterating their opposition “to any changes to the temperature standards that have not been vetted by the Board in the broad light of day.” *Id.*

DISCUSSION

The Board appreciates the substantive comments it received in such a short period of time. The Board addresses the concerns reiterated or raised for the first time in these comments. The Board reminds that pursuant to Section 5-40(c) of the IAPA “[a]fter commencement of the second notice period, no substantive change may be made to a proposed rulemaking unless it is made in response to an objection or suggestion of” JCAR. 5 ILCS 100/5-40(c) (2014).

Second Notice Proposed Thermal Standards

At second notice, the Board reviewed the extensive comments received concerning the first notice proposed thermal standards. The Board declined “to adopt the alternative proposals put forth by IEPA, Midwest Generation, and the Environmental Groups. Instead, the Board will move forward with the temperature standards proposed at first notice with certain changes, including a three-year delayed effective date” for ALU A, ALU B, and UDIP waters. Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9(D), slip op. at 70 (Mar. 19, 2015).

In considering economic reasonableness and technical feasibility, the Board stated that:

Participants raise a number of concerns about the ability of industry to meet the proposed temperature standards at the end of pipe. The Board understands those concerns; however, the Board finds that the record establishes that the existing General Use water quality standards are necessary to protect the designated aquatic life uses for CAWS and LDPR. Further, as the Board is proposing to allow for a delayed effective date, this will provide opportunity for participants to seek alternative relief from the standards. The Board encourages participants to consider site-specific relief for individual facilities. R08-9(D), slip op. at 78 (Mar. 19, 2015).

Thus, the Board’s proposed second notice thermal standards represent a compromise between the thermal standards proposed to the Board by IEPA, industry, and the environmental groups.

Further, the Board's proposed second notice thermal standards are protective of the aquatic life uses designated by the Board.

Relief Mechanisms

At second notice, the Board stated:

The Board is cognizant that variances have been used in the past as a relief mechanism but may not be feasible for CAWS and LDPR now due to recent USEPA actions. However, adjusted standards and site-specific rules are available and variances under the Act may again be available in the future. Further, relief from temperature standards may be available through a thermal demonstration under Section 316(a) of the CWA [Clean Water Act], 33 U.S.C. § 1326(a), and 35 Ill. Adm. Code 304.141(c), as well as the Board's Subpart K procedural rules, 35 Ill. Adm. Code 106.Subpart K. The Board notes that Citgo/PDV in effect provided information to support a site-specific rule in this proceeding. Furthermore, the Board specifically indicated with chloride water quality standards that other participants could consider site-specific relief. Therefore, even if the standards proposed were technically infeasible or economically unreasonable to a specific discharger, relief mechanisms are available. Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9(D), slip op. at 69 (Mar. 19, 2015).

The Board notes that Section 28.1(e) of the Environmental Protection Act (Act) provides:

If any person files a petition for an individual adjusted standard in lieu of complying with the applicable regulation within 20 days after the effective date of the regulation, the operation of the regulation shall be stayed as to such person pending the disposition of the petition . . . 415 ILCS 5/28.1(e) (2014).

Further Section 38(b) of the Act provides:

If any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition . . . 415 ILCS 5/38(b) (2014).

Thus, by statute, if a variance or an adjusted standard is sought within 20 days of the effective date of a rule, that rule is stayed pending disposition of the petition. The effective date of any rule is the date the rule is filed with the Secretary of State unless a later date is specified in the rulemaking. 5 ILCS 100/5-40(d) (2014). The Board will specify the effective date of these rules on the notice page of the filing with the Secretary of State.

ExxonMobil

The Board understands ExxonMobil's concern that it might be subject to standards before large thermal dischargers even though ExxonMobil has a smaller thermal load. And, as ExxonMobil's comment indicates, IEPA would address some of this in permitting. ExxonMobil's special circumstances would seem to be exactly the type of circumstance that the Board could address in an adjusted standard or variance proceeding, where an exception not only to the thermal standards could be sought, but perhaps from other regulations as well. Based on this record, the Board is reluctant to ask JCAR to allow the Board to carve out an exception for ExxonMobil, but as noted above the filing of an adjusted standard or variance petition would stay the rule while the adjusted standard or variance is considered. The Board's reluctance is deepened given the uncertainty of what other relief mechanisms may be sought by other dischargers. If ExxonMobil is correct, compliance with the new standards by larger thermal dischargers such as Midwest Generation might mean that a mixing zone would be all that was necessary for ExxonMobil. Therefore, the Board will not seek agreement from JCAR to make any changes in response to this comment.

Stepan

Stepan addresses two issues concerning the proposed temperature standards. First, Stepan states that "the proposed temperature standard should apply 'at representative locations in the main river,' consistent with the application of the General Use temperature" standards. Second, Stepan argues that if the Board retains the proposed narrative temperature standards, then the proposed narrative standards referring to natural conditions or natural temperatures or normal temperature fluctuations should be changed to reflect the unique characteristics of CAWS and LDPR. PC 1518 at 2.

Application of Proposed Thermal Standards

The Board notes that the General Use temperature standard at Section 302.211(e) sets forth that "the water temperature at representative locations in the main river" must not exceed the numeric limits. This provision was adopted by the Board in 1972 in Docket 71-14 as Rule 203 (i). See Water Quality Standards Revisions, R71-14, (Mar. 7, 1972). In that rulemaking, the Board explained that the temperature standards incorporated the "newly adopted standards for the Mississippi, Ohio, and Wabash Rivers." *Id.* at 9. Further, Rule 203 (i) defined the main river temperatures as "temperatures of those portions of the river essentially similar to and following the same thermal regime as the temperatures of the main flow of the river." *Id.* at 8. This definition is now codified at 35 Ill. Adm. Code 302.104. Additionally, in adopting the Mississippi River thermal standards, the Board explained that the application of the thermal standards to the main river would "afford adequate protection against excessive temperature in the naturally warmer shallow backwaters." See Mississippi Thermal Standards, R70-16, (Nov. 23, 1971). Further, the Board noted in the Ohio-Wabash Rivers thermal standards that the maximum temperature rise limit of 5° F above natural temperature assures that temperature in shallow areas are not excessive. See Ohio-Wabash Thermal Standards, R71-12, (Sept. 30, 1971).

As noted by Stepan, the Board did not address the omission of the “main river” language in the proposed temperature standard at Section 302.408(f), due to an oversight. However, given the Board’s intent in adopting the “main river” language for the General Use temperature standards and the definition of the “main river temperatures”, the Board finds that applying the temperature standards at “representative locations in the main river” for CAWS and LDPR would be appropriate. While the Board recognizes that large portions of CAWS and LDPR include manmade channels, the main river temperatures in those segments will be the temperatures following the same thermal regime as the main flow, as defined at Section 302.104. In light of this, the Board would agree to make the following changes to Section 302.208(f), if requested by JCAR:

- bf) Water temperature **at representative locations in the main river** shall not exceed the maximum limits in the applicable table in subsections ~~(b)~~, ~~(c)~~ and ~~(d)~~ (g), (h), and (i), during more than one percent of the hours in the 12-month period ending with any month. Moreover, at no time shall the water temperature exceed the maximum limits in the applicable table that follows by more than 1.7 °C (3.0 °F).

Natural Conditions, Normal Temperature Fluctuations or Natural Temperatures

As noted above, Stepan objects to the use of the terms “natural conditions,” “normal daily and seasonal temperature fluctuations,” and “natural temperatures” in the proposed narrative standards at Sections 302.408(c), (d) and (e) because those terms do not recognize the unique characteristics of the CAWS and LDPR waters. The Board notes that the aquatic life use designations adopted by the Board for CAWS and LDPR clearly recognize the unique characteristics of the waterways. Further, the use of the terms noted by Stepan in Sections 302.408 (c), (d) and (e) is intended for the purpose of implementing the narrative thermal standards to protect aquatic life. Given that CAWS and LDPR were altered over 100 years ago, and significant changes in their function or operation are not expected in the foreseeable future, the term “natural” in the temperature standards relates to “ambient” conditions in the waterways not affected by the significant thermal discharges. With this clarification of the intent, the Board declines to propose any changes to JCAR at this stage of the rulemaking without seeking input from IEPA and other participants on this issue.

Rulemaking On General Use Thermal Standards

The Board notes that at second notice the Board attempted to resolve some confusion regarding the potential for amendments to the General Use thermal standards. Based on Midwest Generation’s comment at second notice, that confusion appears to remain. The Board does not believe that a change to the General Use thermal water quality standards would require a change to the proposed thermal standards for ALU A, ALU B, or UDIP ALU. In suggesting that IEPA propose changes to the General Use thermal standards, the Board was merely reacting to claims by IEPA that the current General Use thermal standards were outdated. The claims by IEPA that the General Use thermal standards are outdated were used in an attempt to argue for more stringent thermal standards for the ALU A, ALU B, and UDIP ALU waters. The Board did not propose and would not propose standards for ALU A, ALU B, and UDIP ALU waters that

were more stringent than the current General Use thermal standards. The Board's suggestion to IEPA to propose amendments to the General Use thermal standards was made in response to that argument and further bolsters the Board's decision to adopt the current General Use thermal standards for ALU A, ALU B, and UDIP ALU waters.

In no case does the Board believe that the proposed thermal standards for ALU A, ALU B, and UDIP ALU waters in this rulemaking are temporary. Absent a new proposal for new standards, the Board's thermal standards will take effect in three years. While the proposed thermal standards for ALU A, ALU B, and UDIP ALU waters mirror in many ways the existing General Use thermal water quality standards, if the General Use thermal water quality standards are amended in the future, those amended standards are not linked to the proposed standards for ALU A, ALU B, and UDIP ALU waters.

Three-Year Delay of Thermal Standards

Midwest Generation, for the first time in its comment, asserts before the Board that the adoption of the Board's proposal will result in the closure of "certain industrial facilities". PC 1519 at 1. Midwest Generation states that its facilities cannot comply with the proposed standards, and three years is insufficient time to seek regulatory relief. *Id.*

The Board is puzzled by these assertions. The Board recognized that some dischargers would need to seek additional relief. To allow for that relief, the Board proposed at first notice delaying the effective date of the thermal standards by 18 months. R08-9(D), slip op. at 17 (Mar. 19, 2015). The Board was not made aware of the potential for closure of facilities that Midwest Generation now asserts due to the implementation of the thermal standard required to protect aquatic life in the UDIP and CSSC. However, even before these assertions were made, the Board noted that relief mechanisms were available and may need to be sought by particular dischargers. Thus, the Board anticipates that before closing a facility, Midwest Generation would seek relief and supply site-specific information including economic detail and biological support for that relief.

Further, Midwest Generation also understood that relief may need to be sought and at second notice Midwest Generation supplied comment to the Board on the issue of the delayed effective date for the thermal standards. The Board summarized that comment:

According to Midwest Generation, the Board's decision to postpone the effective date of the General Use thermal standards will allow affected dischargers time to seek appropriate regulatory relief, but 18 months is inadequate, in part because Midwest Generation will need to collect additional biological data and conduct further studies. PC 1418 at 5. Midwest Generation, therefore, suggests the postponement of the thermal standards for ALU B, and UDIP waters for a period of three years. *Id.* at 6. R08-9(D), slip op. at 38 (Mar. 19, 2015).

In response to this comment and others, the Board agreed:

with Midwest Generation that an additional three-year delay of the effective date would be helpful to address compliance issues facing thermal dischargers to the affected waters, including ALU A waters. Specifically, a three-year delayed effective date will allow resolution of variance issues at the federal level and provide clarity to affected dischargers. At the same time, the additional delay of effective date will also allow thermal dischargers like Midwest Generation, ExxonMobil, Ingredion [Incorporated] and the [Metropolitan Water Reclamation] District [of Greater Chicago] sufficient time to determine their compliance options, including operational changes, treatment options, CWA Section 316(a) thermal demonstrations, or site-specific thermal standards. R08-9(D) slip op. at 77 (Mar. 19, 2015).

Thus, the Board's proposed three year delayed effective date for thermal standards was proposed at the request of Midwest Generation.

The three year delayed effective date was opposed by the Environmental Groups. The Board summarized the Environmental Groups argument as follows:

First, [Environmental Groups] argue that it is unclear now whether the delay proposed by the Board will be needed given the proposed plans for Midwest Generation's Will County and Joliet stations. [PC 1428 at 6]. Second, the Environmental Groups argue that Midwest Generation's claims of the regulatory uncertainty that exists now are not valid; such uncertainty "will always be present". *Id.* at 7. They further state that any issues regarding temperature loadings and the need for regulatory relief should be addressed "after it becomes clear there is some compliance problem". *Id.* R08-9(D) slip op. at 64 (Mar. 19, 2015).

As evidenced by these summaries from the second notice opinion and order as well as the Environmental Groups' most recent comments, the Board's acceptance of Midwest Generation's request to delay the effective date of the thermal standards for three years was a compromise between the interests presented to the Board.

Midwest Generation now claims that it needs six years to be able to receive regulatory relief based, in part, on the need to design and obtain concurrence from regulators on what studies need to be performed before conducting the studies. However, very little detail or explanation accompanies these claims. The Board has received comments from ExxonMobil and the Environmental Groups supporting the Board's second notice proposal. In addition, 271 citizens of the State have asked that the Board not retreat from the proposed thermal standards and that the Board implement rules protecting aquatic life as soon as possible. Based on the record, the Board cannot find support for additional delay in the effective date of the proposed thermal standards. However, if Midwest Generation seeks relief through any of the relief mechanisms available, and provides information supporting such relief, the Board would consider the request and might reach a different conclusion, based on the record in that proceeding. But based on this record, including these comments, the Board declines to ask JCAR for an agreement to extend the three -year delayed effective date for thermal standards.

CONCLUSION

The Environmental Groups support the rule as proposed at second notice, recognizing that the proposal is a compromise between many competing interests. ExxonMobil also supports the proposed thermal standards and delayed effective date. The Board is convinced that the compromise reached on temperature is a sound one and well supported by the record. Where dischargers may have compliance issues, regulatory relief may be sought, and the Board is prepared to hear such requests. Therefore, the Board will not suggest to JCAR any changes in the thermal standards or delayed effective date. However, the Board will ask JCAR to consider agreeing to the change discussed in response to Stepan's comment.

IT IS SO ORDERED.

Board Member G.M. Keenan voted present.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 4, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board