

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

AMEREN ENERGY GENERATING  
COMPANY,

Petitioner,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

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)  
) PCB 09-38  
) (Thermal Demonstration)  
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**NOTICE OF FILING**

TO:

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PLEASE TAKE NOTICE that I have electronically filed with the Office of the Clerk of the Pollution Control Board, **POST-HEARING REPLY BRIEF OF AMEREN ENERGY GENERATING COMPANY**, copies of which are herewith served upon you.

Ameren Energy Generating Company

  
By: Amy Antoniolli

Dated: September 28, 2009

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 28<sup>th</sup> day of September, 2009, I have served electronically the attached, **POST-HEARING REPLY BRIEF OF AMEREN ENERGY GENERATING COMPANY**, upon the following persons:

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September 28, 2009

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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v.	)	PCB 09-38
	)	(Thermal Demonstration)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Respondent.	)	

**POST-HEARING REPLY BRIEF OF AMEREN ENERGY GENERATING COMPANY**

NOW COMES AMEREN ENERGY GENERATING COMPANY (“Ameren” or “the Petitioner” of “the Company”), by and through its attorneys, SCHIFF HARDIN LLP, and provides this post-hearing reply brief for consideration by the Illinois Pollution Control Board (“Board”).<sup>1</sup>

**I. INTRODUCTION**

The post-hearing brief of the Illinois Environmental Protection Agency (“Agency”) does not contradict or dispute any of the evidence or testimony introduced into this record by the Petitioner. In this reply, Ameren responds to the mischaracterizations of the record and errors in analysis set forth by the Agency in its post-hearing brief. The Agency also did not respond in any way to Ameren’s proposed amended language or the Board’s question regarding conditions to the requested relief at hearing.

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<sup>1</sup> New information provided with this brief in response to public comment received by the Board in this proceeding is provided in the nature of public comment.

**II. THE AGENCY'S REASONS FOR RECOMMENDING DENIAL ARE BASED ON SPECULATION AND MISCHARACTERIZATION OF THE OPINIONS OF AMEREN'S EXPERTS**

The Agency's reasons for recommending denial of Ameren's petition are based on either speculative propositions unsupported by any evidence of record or gross mischaracterizations of the evidence and conclusions of the experts and scientific reports. The Agency selectively quotes from the experts' testimony, and misconstrues the testimony far beyond its true meaning. The Agency does this repeatedly. The Board should ignore these arguments.

The Agency quotes Dr. McLaren, of ASA Analysis and Communication Inc. ("ASA"), out of context numerous times throughout its post-hearing brief. For example, the Agency quotes Dr. McLaren's response to a question about the number of times degree-day data has been used to establish new water quality standards. Dr. McLaren responded that that would not be an appropriate use of that kind of data. Tr. at 135. The Agency then attempts to discredit Dr. McLaren's use of degree-day data, and all of his testimony by asserting that he relied on the concept of degree days to support the requested relief. This argument tortures his testimony about how and why he used degree-day data. It does so because it ignores the purpose of degree days as well as the bulk of data and analysis that he used in conducting his retrospective and prospective analyses.

As is clear from his report and as he explained extensively at hearing, Dr. McLaren utilized the degree days concept as an analytical tool, as is customary in ecological investigations, to show that the requested modified temperature limits for the month of May would not result in any carryover of warmer temperatures into the later summer months. Tr. at 30-33, 37. Dr. McLaren gathered data and performed his degree day analysis for a specific purpose, which was to determine whether there was any carryover of increased temperatures in May to the later summer months. Degree-days was also used as a measure of the time-integrated

thermal regime of the fish community during 1997-2004 to demonstrate no negative relationship between the thermal regime and the populations parameters of growth, condition (relative weight), and abundance of fish. The degree days concept was not used as exclusive support for Ameren's requested relief, or to justify a particular temperature. Instead, it provided one line of evidence to answer a particular question regarding the possible effects in June, July, and August of warmer May temperatures. The Agency's suggestion that Dr. McLaren used degree days to justify a new water quality standard, grossly mischaracterizes the expert's work.

The Agency again quotes Dr. McLaren out of context on the topic of lethal endpoints for the representative important species ("RIS"). The Agency cites to testimony acknowledging that temperatures in certain parts of the Lake would exceed the reported lethal endpoints. Ag. Brief at 4-5<sup>2</sup>; *citing* Tr. at 152-155. It uses that testimony to argue that such conditions are *per se* unacceptable for the Lake and the fish. Ag. Brief at 5. This argument simply ignores the work of the many scientists that have studied the Lake. The Agency's argument implies that Coffeen Lake is isothermal at temperatures measuring above the lethal endpoints for the RIS and that such conditions render the Lake incapable of supporting fish, shellfish, and wildlife. Such a proposition is absurd (inasmuch as it would mean fish could not survive in Coffeen Lake, which is plainly not true) and is exactly the opposite of the findings of the Southern Illinois University-Carbondale ("SIUC") studies and ASA reports. SIUC has noted "striking" water temperature differences recorded between the surface and at depths in the mixing zone (Ameren Brief at 15-16<sup>3</sup>; 2005 SIUC Report, pg. 4) which means that at times when the water approaches the thermal

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<sup>2</sup> The Agency's post-hearing brief, filed September 14, 2009 will be cited to throughout this brief as "Ag. Brief at \_\_\_."

<sup>3</sup> Ameren's post-hearing brief, filed August 28, 2009 will be cited to throughout this brief as "Ameren Brief at \_\_\_."

limits during May and October, temperatures in many areas of and depths in the Lake would be in the 80s or lower – well within the range of temperatures tolerated by RIS life stages. Pet. Exh. 11, pg. 4-1. The ASA Report concluded that Coffeen Lake provides diverse temperature regimes in various portions of the Lake that provide adequate habitat for the resident species at any given time during the year.<sup>4</sup> Pet. Exh. 11, pg. 5-2. Indeed, this is likely the key finding of the SIUC studies and the ASA report. The Agency completely ignores this point in its brief. The Agency offered no expert testimony or other evidence to contradict these findings and conclusions. The Agency's selective parsing of testimony and report language attempts to turn the experts' conclusions inside out, and this effort should be disregarded.

The standard is not whether the temperature at any point in the Lake would ever exceed the UILTs for fish, but whether the Lake as a whole provides conditions capable of supporting shellfish, fish and wildlife. As noted in uncontested testimony at hearing, Coffeen Lake supports a balanced indigenous community and robust recreational fishery and is expected to continue to do so even under the requested modification. Ameren Brief at 8-10. The record, consisting of SIUC reports, the ASA report, and testimony at hearing, amply supports that at any given time during the year, adequate suitable habitat is available in Coffeen Lake that can provide optimal water temperatures or serve as a nursery for young fish or thermal refuge for adult fish. Ameren Brief at 11. The fact that the RIS and less heat-tolerant species exist through natural reproduction in Coffeen Lake demonstrates that they are adapted to the Lake's thermal regime.

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<sup>4</sup> Federal water quality criteria guidance recognizes that fish adapt behaviorally to their thermal regime, stating: "Juvenile and adult fish usually thermoregulate behaviorally by moving to water having temperatures closest to their thermal preference. This provides a thermal environment which approximates the optimal temperature for many physiological functions, including growth (Neill and Magnuson. 1974)." Quality Criteria for Water 1986 ("The Gold Book"), USEPA, EPA 440/5-86-001, May 1986.

Next, the Agency quotes Dr. McLaren out of context in discussing the Agency's reference to IDNR comments in the 2007 Lake Management Status Report. *See* Pet. Exh. 12. The IDNR report does not state, and the Agency has not introduced evidence to support the conclusion, that the channel catfish population in Coffeen Lake does not meet IDNR objectives due to Ameren's thermal effluent. While Dr. McLaren appropriately responded that he had no idea what the author of the report meant by stating a channel catfish population "continues in anguish," the Agency jumps to the conclusion in its post-hearing brief that not only channel catfish but *all RIS* are "in anguish" because of the current *thermal regime*. Such assumptions are simply not supported by the record. The reality is that Ameren is not proposing any temperatures higher than those the Lake has already seen in other months of the year.

As Ameren has noted many times throughout this proceeding, there are many factors that can contribute or result in the numbers in the IDNR report, but there is no evidence in the record that states that the success of the RIS is in jeopardy due to Ameren's thermal effluent. In its rulemaking establishing thermal effluent standards for discharges to cooling lakes, the Board found no evidence of harm to fish from thermal plumes from electric generating stations, observing that "although some species in Sangchris have, at times, shown signs of poor condition (*i.e.*, weight-to-length ratio), this fact is offset by population densities within those species." In the Matter of: Water Quality and Effluent Standards Amendments, Cooling Lakes ("Cooling Lakes"), R75-2 slip op. at 20 (Sept. 29, 1975). The same is true for Coffeen Lake. The record shows that the numbers in the 2007 Lake Management Status Report more likely reflect competition with other species for food, angling pressure, an increasing predator base, or the cyclical nature of a particular species rather than harm from the thermal plume from Coffeen Station. Ameren Brief at 10-12.



**III. AMEREN HAS MET ITS BURDEN OF PROOF FOR AN ARTIFICIAL COOLING LAKE DEMONSTRATION**

The Board's water quality standards require the petitioner to show that the heated effluent complies with the applicable water quality standards other than the temperature limits. 35 Ill. Adm. Code 302.211(j)(2). The Agency asserts that as part of this review, the Board should consider whether there is "any degradation of water quality" attributable to the power plant's thermal effluent. Ag. Brief at 5-6; *citing* Cooling Lakes, slip op. at 16. The Agency further contends it has presented evidence showing that Coffeen Lake is out of compliance and that the requested relief would exacerbate those conditions.

Ameren first notes that the Agency has presented no evidence in this proceeding. Second, the evidence of record is consistent with the Cooling Lakes inquiry. In Cooling Lakes, the Board concluded there was no degradation of water quality attributable to the thermal effluent of the power station despite data showing that deeper portions of the Lake may not comply with dissolved oxygen ("DO") standards at times. The Board concluded in Cooling Lakes, that the "chemical and physical parameters would appear to be more dependent on the watershed providing the lake's water, and on the age of the lake, than on any other factor." Cooling Lakes, R75-2, slip op. at 17. Similarly, in this proceeding, Dr. Shortelle of MACTEC Engineering and Consulting, Inc. ("MACTEC") has opined that any increases in mercury methylation or internal loading of phosphorus attributable to the proposed increase in thermal limits for May and October are expected to be *de minimis* even under the most conservative estimates. Ameren Brief at 19-22. The Lake's impairment listings for mercury and phosphorus are more dependent on the watershed providing the Lake's water, and on the age of the Lake, than on any other factor. The Agency simply ignores this testimony.

The Agency also asserts that the proposed modification might result in violations of the DO water quality standard. For support, the Agency cites to Dr. Shortelle's conclusion that increased temperatures in May and October may increase the number of anoxic days in Coffeen Lake. There is no expert testimony, or any other testimony, to explain how or why increased anoxic days would translate to violations of the DO water quality standards. Dr. Shortelle's report studied anoxic conditions at the lowest reaches of the Lake (*i.e.* the Lake bottom). The DO standard applies to the water above the thermocline of thermally stratified lakes and reservoirs. 35 Ill. Adm. Code 302.206(b). After an examination of the available data, Dr. McLaren concluded that DO concentrations will likely remain sufficient to sustain the aquatic community even under the proposed May and October limits. Ameren Brief at 18. Thus, the uncontested testimony at hearing is that Coffeen Lake provides conditions capable of supporting shellfish, fish and wildlife and will continue to do so under the requested relief.

The next water quality issue the Agency raises concerns discharges from the Lake to East Fork Shoal Creek. It notes that any discharge from the Lake to the East Fork Shoal Creek must meet the thermal standards in 35 Ill. Adm. Code 302.211(b)–(e). Ag. Brief at 7-8. As the evidence in this proceeding shows, Ameren has had almost no opportunities to collect the data one would need to make such a demonstration. The discharge from Coffeen Lake to the East Fork Shoal Creek is so infrequent that the opportunity to collect such data has been exceedingly rare over the years. *See* Petition at 8. The Board's regulations make clear that such a demonstration is **not** a prerequisite to the granting of the relief. Rather, the regulations specify that the Board's order granting relief is the appropriate manner in which to address the issue of compliance of the Lake's discharge with 302.211(b)-(e). See 35 Ill. Adm. Code 106.200(a)(2)(C)(i) ("A Board order providing alternate thermal standards . . . will include . . .

the following conditions: . . . (i) all discharges from the artificial cooling lake to other waters of the State must comply with the applicable provisions of 35 Ill. Adm. Code 302.211(b) through (e).”) Accordingly, Ameren would not object to a condition consistent with 35 Ill. Adm. Code 106.200(a)(2)(C)(i) as part of the relief granted by the Board.

Ameren will soon begin construction on a project that will positively impact water quality in Coffeen Lake. As Ameren has previously noted, Ameren will install new flue gas desulphurization (“FGD” or “scrubber”) systems on both generation units at Coffeen Station to comply with applicable air emissions regulations. The first unit is scheduled for completion in late 2009, and the second unit is to be completed in early 2010. Post-installation, additional water is needed for plant operations and to operate the scrubbers. To avoid Lake drawdown and any associated impacts to water quality in Coffeen Lake, Ameren sought and obtained permission to construct a new gate structure in the East Fork Shoal Creek that will allow the transfer of water to Coffeen Lake. The proposed project will consist of constructing a new gate structure on East Fork Shoal Creek, expanding the existing pump station with increased pumping capacity, dredging the existing intake channel, and constructing a new pipe to convey water from the pump station to Coffeen Lake. The U.S. Army Corps of Engineers issued the Section 404 permit for this project on September 22, 2009 (Permit No. MVS-2007-159, P-2638) and the Agency issued a Section 401 water quality certification on September 8, 2009 (Log No. C-0122-07). The pump station project will have a positive impact on water quality for dissolved oxygen and temperature. The impact is expected to be greater in May during times of greater seasonal precipitation and water pumped from East Fork Shoal Creek is comprised primarily of well-aerated storm water. The cooler, well-oxygenated water will be discharged at surface level into the cooling loop where it will mix with warmer waters coming from the thermal plume.

**IV. THE AGENCY'S ASSERTION OF ECONOMIC REASONABLENESS IS NOT SUPPORTED BY THE RECORD AND IGNORES AMEREN'S REQUEST FOR RELIEF**

The Agency inaccurately asserts that two options explored by Ameren, the use of cooling towers and continued de-rating, are economically reasonable. Ag. Brief at 8. If they were economically reasonable options, Ameren would not have invested the significant time and costs to initiate this proceeding. Nowhere in its recommendation or at hearing did the Agency present evidence that a helper cooling tower or continued de-rating would be economically reasonable solutions for Ameren to implement.

The Agency erroneously states that "Ameren's definition of economic reasonableness in this context is whether or not a thermal technology will allow Ameren to generate enough additional power so as to see an actual profit on the investment in the supplemental cooling capacity." Ag. Brief at 8-9. This mischaracterizes or misconstrues the testimony of Mr. James Williams. Mr. Williams' testimony made clear that that they are not one and the same. Mr. Williams testimony, quoted on pages 10 through 11 of the Agency's brief, stated that an economic reasonableness standard must factor in whether a project is economically viable for a company – this analysis ultimately lets a company know whether the investments it makes will allow it to cover its costs. He did not say, as the Agency asserts, that a project must lead to increased profits. The Agency thus misconstrues the testimony by equating the idea that an investment pays for itself to the idea that an investment makes a profit for the company.

Not only did the Agency mischaracterize Mr. Williams' testimony, but it also conveniently ignored another essential component of the economic reasonableness standard, which requires consideration of benefit to the environment. The Company's investment analysis of both the helper cooling tower and continuing to de-rate also considered that the requested relief will have no measurable negative impact to the environment. Because the projects were

costly and did not provide commensurate benefit, the Company found that neither option would be economically reasonable. *See Ameren Brief at 27-29.*

Ameren is well aware that the Board's economic reasonableness standard in an artificial cooling lake demonstration does not include a consideration of whether a petitioner will make a profit. Ameren is also confident that by granting Ameren's requested relief, the Board will not be jeopardizing the basis of any regulatory decisions that require a consideration of economic reasonableness. As explained at great length in this proceeding, the two alternatives the Agency identifies are not economically reasonable. Ameren Brief at 24-29.

Ameren has devoted significant resources to reducing the effects of its thermal effluent. In its post-hearing brief, the Agency erroneously attributes to Ameren the arguments made by Central Illinois Public Service Company (CIPS) in the 1997 variance request regarding the cost of installing cooling technologies at Coffeen Station. Central Illinois Public Service Co. v. IEPA, PCB 97-131 (Jun. 5, 1997). Further, the Agency fails to mention that only after the variance granted to CIPS was terminated in 1999 did Ameren construct and implement the 70-acre cooling basin and 48-cell cooling tower system. The Agency would have the Board believe that these efforts were done strictly to make a profit for the company. Contrary to the Agency's assertion, Ameren's efforts illustrate that Ameren is cognizant of its thermal discharge limits and has acted diligently to remain in compliance and to balance the goals of utilizing the cooling lake for its intended purpose as well as enhancing its use as a recreational facility for the state of Illinois.

The Agency's conclusory statement that the installation of additional cooling systems and de-rating are economically reasonable (Ag. Brief at 11) does not explain how the Agency arrives

at that conclusion in light of the facts of record, which identify the losses Ameren would sustain if it continues to de-rate or installs one of the evaluated cooling enhancement technologies.

Ameren believes that the additional proposed conditions to the request provide a sound basis for moving forward. Ameren is proposing to include specifics of its best management practices to be included in the requested relief. If the relief is granted, Ameren will also continue extensive studies on Coffeen Lake to determine the thermal effects of the proposed limits on the RIS of Coffeen Lake.

**V. AMEREN'S SHOWING PURSUANT TO THE BOARD'S REGULATIONS IS PRECISELY THE DEMONSTRATION REQUIRED BY FEDERAL LAW**

In arguing that Ameren has failed to show that the requested relief is consistent with federal law, the Agency has put the cart before the horse and raised a question that is not ripe for consideration in this proceeding. Federal law specifically provides that the Administrator or delegated authority, where appropriate, can set alternate thermal limits. 33 U.S.C. §1326(a) (Section 316(a)). Illinois has created a procedure for setting alternate thermal limits specifically for artificial cooling lakes. 35 Ill. Adm. Code 302.211(j). The Board's approval of a modified thermal standard serves as the requisite showing under Section 316(a) as that authority has been delegated to the Board.

The Agency first argues that effluent limits must be treated as a water quality standard change in order to be consistent with the Clean Water Act. Ag. Brief at 15; *citing In the Matter of: Site Specific Rule for City of Effingham Treatment Plant Fluoride Discharge*, 35 Ill. Adm. Code 304.233, R03-11 (Jul. 24, 2003). The Agency's argument might hold true for parameters other than heat, where constituents may continue to concentrate rather than dissipate over time and distance. The argument might also hold true in cases where there is more than one discharger on a single waterbody and one discharger's effluent may affect another discharger's

ability to comply with water quality standards. The artificial cooling lake demonstration, however, recognizes the unique characteristics of heat and the unique dynamic of the power plant discharger to an artificial lake created and designed to cool the plant's thermal effluent.

In the broader water quality standard context, both State and federal regulations recognize the alternate thermal limit promulgation process as separate and apart from other water quality standards when undergoing antidegradation review. For example, the federal antidegradation policy regulations state: "[i]n those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act." 40 C.F.R. 131.12(a)(4). *See also* 35 Ill. Adm. Code Section 302.105(d)(4) (antidegradation assessment is not required for thermal discharges that have been approved through a 316(a) demonstration). Moreover, temperature is the only constituent for which USEPA recommends that states apply species-dependent criteria in setting water quality standards.<sup>5</sup>

The Agency argues that a Board-promulgated specific thermal limit is a change in water quality standards requiring Section 303(c) review. 33 U.S.C. §1313 (Section 303(c)). The Agency's argument is backwards as it has the Agency arguing the thermal standard should not be promulgated because Section 303(c) review is necessary. Section 303(c) review, if it applies, occurs *after* the promulgation of new water quality standards. This entire argument, of course, assumes that a modified thermal limit must undergo independent Section 303(c) review. Whether or not that is required is still undetermined. The 1977 USEPA guidance document for 316(a) determinations states "[t]hose States which have been delegated the administration of the NPDES permit program by EPA have the lead role for making 316(a) decisions within the State.

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<sup>5</sup> See National Recommended Water Quality Criteria: <http://www.epa.gov/waterscience/criteria/wqctable/> (referencing The Gold Book).

The EPA retains what amounts to a veto capability through the requirement that they continue to review all permits before they are issued.”<sup>6</sup> Since a Section 302.211(j) thermal demonstration is analogous to a Section 316(a) determination in that it considers site-specific conditions in setting thermal effluent limits for individual power plants, this guidance supports the conclusion that USEPA retains only veto authority over permit issuance once the Board-issued specific thermal limit is incorporated into an NPDES permit.

In any case, whether Section 303(c) review is necessary will be addressed once the State has taken action to promulgate a new water quality standard. The Board is the only state agency with authority to adopt a modified thermal limit (or a water quality standard). Section 303(c) review, therefore, is only relevant after the Board has created a new standard and a denial by the Board based on such review would be premature. In this proceeding, Ameren’s demonstration that the requested relief will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on Coffeen Lake is consistent with federal law.

## **VI. CONCLUSION**

As Ameren notes in its post-hearing brief, Ameren has met each element of the requirements for a modified thermal limit as set out in the Board’s procedural rules. It has also met its burden of proof as set forth in the requirements for an artificial cooling lake demonstration and the Illinois Environmental Protection Act (415 ILCS 5/27(a) and 28.1).

In its post-hearing brief, the Agency mischaracterizes the burden of proof, pulls statements out of context, and offers flawed legal analysis of the federal review process required under the Clean Water Act. None of these arguments provide substantive reasons to deny

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<sup>6</sup> Interagency 316(a) Technical Guidance Manual and Guide for Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements (DRAFT), May 1, 1977, pp. 8-9 (available at: <http://www.epa.gov/npdespub/pubs/owm0001.pdf>).




Ameren's request for relief in the form of a modified thermal limit. The Agency still has made no effort to rebut the evidence presented by Ameren.

WHEREFORE, Ameren respectfully requests that the Pollution Control Board grant the requested modified thermal limit, as set forth in the Petition and subject to the conditions provided in Ameren's post-hearing brief.

Respectfully submitted,

AMEREN ENERGY GENERATING  
COMPANY

by:

  
One of Its Attorneys

Dated: September 28, 2009

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