

ILLINOIS POLLUTION CONTROL BOARD
February 7, 2013

EXELON GENERATION LLC)	
(QUAD CITIES NUCLEAR GENERATION)	
STATION),)	
)	
Petitioner,)	
)	
v.)	PCB 13-31
)	(Variance - Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.K. Zalewski):

In this order, as explained below, the Board specifies deficiencies in this variance petition, and directs that an amended petition be filed within 45 days of the date of this order. The 45-day time for the filing of a Recommendation begins upon the filing of any amended petition.

THE PETITION

On December 19, 2012, Exelon Generation LLC (Exelon) filed a petition (Pet.) for a five year variance to authorize the discharge of heated cooling water from its Quad Cities Nuclear Generation Station into the Mississippi River in excess of the maximum monthly temperature standards set in 35 Ill. Adm. Code 303.331, subject to terms and conditions set out in its petition. Exelon waived hearing on the petition. Pet. at 18.

In summary, Exelon summarizes its petition as

requesting the Board to grant the Quad Cities Station a five-year variance that would allow the Plant to discharge heated cooling water to the Mississippi River in accordance with alternate thermal limits proposed by Exelon, pursuant to Section 316(a) of the Clean Water Act [(CWA)]. The five-year variance period will allow sufficient time for the Illinois Environmental Protection Agency (“Illinois EPA”) and the Board to put in place procedural rules and requirements needed for conducting proceedings under Section 304.141(c) of the Board’s rules (35 Ill. Admin. Code 304.141(c)) to implement Section 316(a) Pet. at 1.

Exelon reminds the Board that it had requested that the Board establish alternative thermal standards (ATS) in a petition the Board docketed as Petition of Exelon Generation, LLC, AS 13-1. Exelon recites that the Board explained by order of October 18, 2012 that the Board had no existing specific procedures implementing Section

304.141, and invited Exelon to resubmit its petition as one for either an adjusted standard or a site specific rulemaking. Exelon did not do so, and the Board dismissed AS 13-1 by order of January 10, 2013.

Exelon explains here that:

neither the adjusted standard nor the site specific rulemaking approach suggested by the Board provide an adequate remedy for Exelon. Either approach would require that Exelon address and demonstrate more than is required by Section 304.14 1(c) to obtain alternate thermal standards under Section 316(a). Moreover, even if Exelon were to pursue thermal relief as an adjusted standard or site specific rule, it is doubtful USEPA ultimately would approve an NPDES permit that incorporates such relief.¹

The deficiency in the Board’s rules — the absence of a clear process for implementing Section 316(a) and Section 304.141(c) — needs to be cured to allow parties, such as Exelon, the right to obtain alternate thermal limits provided for in those provisions. By this Petition, Exelon is seeking a variance that would allow Exelon to operate Quad Cities Station in accordance with the alternate thermal limits sought in its ATS Petition, while the Board and Illinois EPA take steps needed to cure that deficiency. Pet. at 4.

BACKGROUND

Under the Environmental Protection Act (Act) (415 ILCS 5/35-38 (2010)), the Board is responsible for granting variances when a petitioner demonstrates that compliance would impose an “arbitrary or unreasonable hardship” on petitioner. *See* 415 ILCS 5/35(a) (2010); *see also* 415 ILCS 5/37(a) (2010) (burden of proof is on petitioner). A “variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board.” *See* 35 Ill. Adm. Code 104.200(a)(1).

The Board may grant a variance, however, only to the extent consistent with applicable federal law. *See* 415 ILCS 5/35(a) (2010). Further, the Board may issue a variance with or without conditions, and for only up to five years. *See* 415 ILCS 5/36(a) (2010). The Board may extend a variance from year to year if the petitioner shows that it has made “satisfactory progress.” *See* 415 ILCS 5/36(b) (2010).

Specifically, as it relates to Exelon’s request for variance, the Act provides:

To the extent consistent with applicable provisions of the Federal Water Pollution Control Act, as now or hereafter amended . . . and regulations pursuant thereto
 . . . :

¹ Exelon’s petition contains no rationale or other support for this statement.

The Board may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. 415 ILCS 5/35(a) (2010); *see also* 35 Ill. Adm. Code 104.200, 104.208, 104.238.

In granting a variance the Board may impose such conditions as the policies of this Act may require.

* * *

[A]ny variance granted pursuant to the provisions of this Section shall be granted for such period of time, not exceeding five years, as shall be specified by the Board at the time of the grant of such variance, and upon the condition that the person who receives such variance shall make such periodic progress reports as the Board shall specify. 415 ILCS 5/36(a), (b) (2008); *see also* 35 Ill. Adm. Code 104.200, 104.242, 104.244.

The Act requires the Agency to provide public notice of a variance petition, including notice by publication in a newspaper of general circulation in the county where the petitioner's facility is located. *See* 415 ILCS 5/37(a) (2010); 35 Ill. Adm. Code 104.214. The Board will hold a hearing on the variance petition if the petitioner requests a hearing, if the Agency or any other person files a written objection to the variance being granted within 21 days after the newspaper notice, or if the Board, in its discretion, concludes that a hearing would be advisable. *See* 415 ILCS 5/37(a) (2010); 35 Ill. Adm. Code 104.224, 104.234.

The Act requires the Agency to appear at hearings on variance petitions (415 ILCS 5/4(f) (2008)) and to investigate each variance petition and "make a recommendation to the Board as to the disposition of the petition" (415 ILCS 5/37(a) (2010); 35 Ill. Adm. Code 104.216). The burden of proof is on the petitioner. *See* 415 ILCS 5/37(a) (2010); *see also* 35 Ill. Adm. Code 104.200(a)(1), 104.238(a). In a variance proceeding then, the burden is on the petitioner to prove that immediate compliance with Board regulations would cause an arbitrary or unreasonable hardship that outweighs the public interest in compliance with the regulations. *See Willowbrook Motel v. PCB*, 135 Ill. App. 3d 343, 349-50, 481 N.E.2d 1032, 1036-1037 (1st Dist. 1985).

AGENCY FILINGS

On January 14, 2013, the Agency filed a certificate that newspaper notice of the petition for variance had been filed as required by Section 37(a) of the Act and the Board's procedural rules. 415 ILCS 5/37(a) (2010), and 35 Ill. Adm. Code 104.214(f). The notice was published in the *Moline Dispatch/Rock Island Argus* on January 9, 2013. Accordingly, any requests from the public requesting a hearing were due to be filed or postmarked no later than January 31, 2013. To date, the Board has received no hearing requests.

On January 30, 2013, the Agency filed a motion (Mot.) seeking a 45-day extension of the time for filing its Recommendation, which was due to be filed on or before February 4, 2013.

The Agency stated:

It has been nearly two decades since a regulated entity has directly requested relief from the Board pursuant to Section 316(a) of the Clean Water Act. However, the Agency anticipates that Exelon will be the first of several Illinois utilities to bring such cases to the Board in the near future. As a result of the Board's holding that it lacks authority to hear petitions brought pursuant to 35 Ill. Adm. Code 304.141(c) and 316(a) of the Clean Water Act in the absence of procedural regulations applicable to such cases, the Agency has had to consider some complex legal and policy issues in this proceeding that may impact other facilities and future proceedings. As a result, the 45-day time line has not been sufficient to develop a final Agency recommendation that takes these legal and policy considerations into account and has been reviewed by the appropriate management staff at the Agency.

On January 24, 2013, counsel for the Petitioner agreed to extend the deadline for the Agency's recommendation for an additional 45 days until March 20, 2013. Mot. at 2-3.

PETITION DEFICIENCIES SPECIFIED REQUIRING AMENDED PETITION

The Board's procedural rules for variances at 35 Ill. Adm. Code 104.Subpart B establish various petition content requirements. The opening paragraph to Section 104.204 provides that

If the petitioner believes that any of these requirements are not applicable to the specific variance requested, the petition must so state and explain the reasoning. 35 Ill. Adm. Code 104.204.

The Board's procedural rules provide that the Board may order the petitioner to submit additional information to cure any petition deficiencies under the rules, or the Board may dismiss the petition. *See* 35 Ill. Adm. Code 104.228 and 104.230. Below, the Board specifies deficiencies and, as is the Board's custom, allows Exelon the option of filing an amended petition within 45 days. The filing of an amended petition will restart the Agency's 45-day time clock for the filing of a Recommendation. *See* 35 Ill. Adm. Code 104.226 and 104.232.

Compliance Plan (Section 104.204(F))

Among the required elements in a variance petition requirement is a plan for reaching compliance by the end of the variance period. *See* 35 Ill. Adm. Code 104.204(f). Here, Exelon addresses the compliance plan requirement as follows:

Generally, a variance petitioner is required to commit to a detailed description of its plan to achieve compliance with the requirement from which the variance is sought during the term of the variance. However, under certain special circumstances a detailed plan calculated to achieve compliance with existing Board rules may not be required. (Commonwealth Edison Co. v. Illinois EPA,

PCB 91-29 (Nov. 21, 1991). . . Exelon’s compliance plan is to submit its 316(a) Demonstration for Quad Cities in accordance with the process adopted to implement Section 316(a), once those measures are adopted. The 316(a) Demonstration will support the issuance of alternate thermal limits for the Plant, in lieu of limits mandated by the Board’s generally applicable thermal requirements, from which Exelon is seeking a variance. Exelon believe (sic) that the five-year variance period should provide sufficient time for Illinois EPA and the Board to adopt corrective measures and for Exelon to have its Section 316(a) Demonstration considered and ruled upon. Pet at 14.

Exelon has not provided reasoning, argument, or precedential authority to persuade the Board that it has either proposed an adequate compliance plan or that no compliance plan should be required here. The Board has, under appropriate circumstances, granted relief when regulatory standards are being examined in pending rulemakings, and the petitioner has been an active participant in such proceedings. *See, e.g. ExxonMobil Oil Corporation v. IEPA*, PCB 11-86 and PCB 12-46 (cons.) (Dec. 1, 2011). But, “*the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain.*” 415 ILCS 5/35(a) (2010).

Here, there is no pending rulemaking, and Exelon has declined to submit a procedural rulemaking proposal either for an appropriate Board proceeding to implement the CWA’s Section 316(a), to amend its petition for adjusted standard in AS 13-1, or to propose a site specific rulemaking to obtain the relief requested here or in AS 13-1. The petition does not provide information on whether the Agency is preparing a rulemaking petition for filing with the Board. As the petition is currently drafted, Exelon proposes to achieve compliance if and only if the Board and the Agency commit resources to developing a procedure that will guarantee that the petition Exelon has already prepared will result in issuance of relief that will result in an NPDES permit approvable by USEPA.

Accordingly, the Board directs Exelon to file an amended petition concerning the compliance plan issue within 45 days of the date of this order. Additionally, the Board identifies the following deficiencies in Exelon’s petition each of which also must be addressed in an amended petition.

Facility Information: Section 104.204(b)(5)

35 Ill. Adm. Code 104.204(b) requires various information about the facility. Exelon is directed to state the number of persons employed by the petitioner’s facility at issue as required by 35 Ill. Adm. Code 104.204(b)(5).

Variance Conditions and Related Information: Sections 104.204(j), 302.102 and 304.102

The Board’s variance procedural rules require that the petition contain any suggested variance conditions. 35 Ill. Adm. Code 104.204(j). Exelon suggests any variance should be subject to four specific conditions. The suggested conditions raise questions that Exelon must address in an amended petition, as described below.

Exelon's proposed Condition 2 would have the Board designate a mixing zone as a condition if the variance were to be granted. Proposed Condition 2 states:

During the variance period, the mixing zone for the Quad Cities Station must not contain more than 34% of the cross-sectional area or volume of flow of the Mississippi River. Pet. at 15.

Board rules address the specifics of mixing zones in the water quality standards at 35 Ill. Adm. Code 302.102. Subsection (a) provides:

Whenever a water quality standard is more restrictive than its corresponding effluent standard, or where there is no corresponding effluent standard specified at 35 Ill. Adm. Code 304, an opportunity shall be allowed for compliance with 35 Ill. Adm. Code 304.105 by mixture of an effluent with its receiving waters, provided the discharger has made every effort to comply with the requirements of 35 Ill. Adm. Code 304.102 ["Dilution" in the Board's effluent standards]. 35 Ill. Adm. Code 302.102(a).

Consistent with this rule, then, to the extent that Exelon is proposing to use a mixing zone to demonstrate it will achieve the proposed ATS if the variance is granted², Exelon's petition must additionally address the information requirements of Section 302.102(a) and 304.102.

In so stating, the Board is aware that Exelon asserts that neither the ATS requirements of Section 316(a) of the Clean Water Act nor Ill. Adm. Code 304.141(c) "require the discharger to present evidence of the financial costs of complying with the generally applicable thermal requirements or alternate limits, nor do these provisions require or suggest that the Board should

² The Board has previously commented that, typically, the Agency will define a mixing zone in accordance with Board mixing zone regulations through the NPDES permitting process. The Board found that it could grant a mixing zone in an adjusted standard proceeding, but declined to do so, stating:

Although the Board has the authority to designate a mixing zone in an adjusted standard, here the Board leaves that designation for the Agency to make in Noveon's NPDES permit. The Illinois Supreme Court has stated that the mixing zone is formally defined by the Agency in the NPDES permitting process and, if granted, is included as a condition in the permittee's NPDES permit. Granite City Steel, Co. v. PCB, 155 Ill. 2d 149, 160, 613 N.E.2d 719 (1993). The Board acknowledges that the Agency is typically charged with reviewing an NPDES permit application requesting recognition of a mixing zone pursuant to its responsibilities as permittee. See Amendments to Title 35, Subtitle C (Toxics Control), R88-21(A) (Jan. 25, 1990). It is then the Board's position to resolve disputes between permit applicants and the Agency. Noveon, Inc. v. IEPA, AS 02-5, slip op. at 20 (November 4, 2002) (footnote omitted).

weigh or consider these costs in deciding whether a discharger has met its burden under 316(a).” Pet. at 12. Whatever the merits of this contention may be, Exelon’s separate request for a mixing zone falls under the Board’s effluent standards which does so provide, as explicitly stated in 35 Ill. Adm. Code 304.102(a). Accordingly, as long as Exelon is requesting a mixing zone in addition to the alternate thermal standards, Exelon must also address 304.102(a).

Best Degree of Treatment: Section 304.102(a)

35 Ill. Adm. Code 304.102(a) of the Board’s effluent standards provides in part:

Dilution of the effluent from a treatment works or from any wastewater source is not acceptable as a method of treatment of wastes in order to meet the standards set forth in this Part. Rather, it shall be the obligation of any person discharging contaminants of any kind to the waters of the state to provide the best degree of treatment of wastewater consistent with technological feasibility, economic reasonableness and sound engineering judgment.

Exelon describes the existing diffuser pipe system. *See* Pet. at 7, Exh. 1 at 14. Exelon presents two compliance alternatives in the petition: (1) using cooling towers or ponds and (2) reducing electrical power output. Pet. at 11. Exelon’s CWA Section 316(a) demonstration petition (appended to the variance petition) also refers to studies done to evaluate the performance of and to optimize the diffuser pipe system. Pet. Exh. 1 at A-11 to A-12, D-5 to D-6, E-5. But Exelon does not assert that the system supplies “the best degree of treatment” within the meaning of Section 304.102(a), given the proposed increase in excursion hours and maximum temperature limits. To the extent that the Agency may make a determination regarding the best degree of treatment in permitting decisions, Exelon’s petition does not address whether the Agency has done so or plans to do so for Exelon. Exelon must remedy this informational deficiency in an amended petition.

Mixing Zone Dilution Ratio: Section 302.102(b)(8)

In proposing a mixing zone with a cross-sectional area larger than 25 percent, Exelon does not appear to specifically indicate if the dilution ratio is less than 3:1 as provided for in Section 302.102(b)(8). Exelon must address this point in an amended petition.

Diffuser Pipe Optimization: Section 302.102(b)(12)

Exelon’s petition does not specifically state whether the existing diffuser pipe system could be optimized to ensure that the size of the mixing zone is as small as practicable under the proposed variance as required under 35 Ill. Adm. Code 302.102(b)(12)³. Exelon must address this point in an amended petition.

³ 35 Ill. Adm. Code 302.102 (b)(12) states that:

The area and volume in which mixing occurs must be as small as is practicable under the limitations prescribed in this subsection, and in no circumstances may

Areas of Important Aquatic Life Habitat: Section 302.102(b)(4)

35 Ill. Adm. Code Section 302.102(b)(4) provides:

Mixing is not allowed in waters containing mussel beds, endangered species habitat, fish spawning areas, areas of important aquatic life habitat, or any other natural features vital to the wellbeing of aquatic life in such a manner that the maintenance of aquatic life in the body of water as a whole would be adversely affected.

Exelon's variance petition states that the federally endangered Higgin's Eye mussel is found in several beds in Pool 14, and the CWA Section 316(a) demonstration petition (appended to the variance petition) identifies six unionid bed monitoring areas near the Quad Cities Nuclear Generating Station. Pet. at 17, Exh. 1 at E-22. However, Exelon does not appear to specifically address whether the proposed larger mixing zone itself would contain any of the features listed in 302.102(b) or whether they are vital to the well-being of aquatic life as provided for in 302.102(b)(4). Exelon must address this point in an amended petition.

FILING OF AMENDED PETITION AND EXTENSION OF TIME FOR THE FILING OF AGENCY RECOMMENDATION

As is the Board's custom, the Board will allow Exelon 45 days in which to file an amended petition to remedy the noted deficiency, noting that the filing of an amended petition restarts the decision deadline under 104.232. *See* 35 Ill. Adm. Code 104.228. Failure to file an amended petition will render the petition subject to dismissal for deficiency under Section 104.230.

The Agency's motion for extension of time to file its Recommendation is granted in part, to the extent that the Board finds no Recommendation was due on February 4, 2013 concerning the original, deficient petition. However, no Recommendation is due on the March 30, 2013 date suggested by the Agency. Exelon's filing of any amended petition will restart the Agency's 45-day time clock for the filing of an amended petition, as provided in 35 Ill. Adm. Code 104.226.

IT IS SO ORDERED.

Chairman T.A. Holbrook abstained.

the mixing encompass a surface area larger than 26 acres.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board,
certify that the Board adopted the above order on February 7, 2013 by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board