

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD


SOUTHERN ILLINOIS POWER,)
 COOPERATIVE,)
)
 Petitioner,)
)
 v.)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

AS 14-1
 (Adjusted Standard - Water)

NOTICE OF FILING

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed electronically with the Office of the Clerk of the Illinois Pollution Control Board a MOTION FOR CONSIDERATION AS A PETITION FOR ALTERNATE THERMAL STANDARDS, copies of which are herewith served upon you.



 Amy Antonioli

Dated: January 22, 2014

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SOUTHERN ILLINOIS POWER,)
 COOPERATIVE,)
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 Petitioner,)
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 v.)
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 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
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 Respondent.)

AS 14-01
 (Adjusted Standard - Water)

**MOTION FOR CONSIDERATION AS A PETITION FOR
 ALTERNATE THERMAL STANDARDS**

NOW COMES the Petitioner, SOUTHERN ILLINOIS POWER COOPERATIVE (“SIPC”), by and through its attorneys, Schiff Hardin LLP, and pursuant to 35 Ill. Adm. Code 101.500(a) moves the Illinois Pollution Control Board (“Board”) to review SIPC’s Petition for Alternate Thermal Effluent Standards (“Petition”) as a petition for alternate thermal standards rather than as an adjusted standard.

Background

1. Prior to filing the Petition with the Board, SIPC met with Illinois Environmental Protection Agency (“IEPA”) on several occasions. SIPC and IEPA discussed SIPC’s thermal discharges and plan to seek relief in the form of a demonstration pursuant to Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a), also referred to as a “316(a) demonstration,” as authorized by the Board’s effluent standards, 35 Ill. Adm. Code 304.141(c).

2. On June 20, 2013, IEPA filed a proposal for rulemaking to adopt procedural rules for establishing alternate thermal effluent limitations pursuant to Section 316(a) of the Clean

Water Act (“CWA”) and 35 Ill. Adm. Code 304.141(c).¹ The Board has not yet adopted the rules for final notice.²

3. Petitioner SIPC filed the Petition with the Board on December 12, 2013. SIPC captioned the petition as a thermal demonstration.

4. Upon receipt, the Board changed the caption of the Petition to an adjusted standard (from a “PCB” to an “AS” caption), but to date has not yet accepted the matter for hearing or otherwise issued an order regarding the filing.

Discussion

5. SIPC respectfully requests that the Board consider the Petition as a petition for an alternate thermal limitation without delay for the following three reasons.

6. First, SIPC had not anticipated the Board would docket the Petition as an adjusted standard. It is doubtful that the United States Environmental Protection Agency (“USEPA”) would approve a National Pollutant Discharge Elimination System (“NPDES”) permit that incorporates adjusted standard relief. In a letter dated October 6, 2011 from USEPA addressed to IEPA and copied to the Board, USEPA expressed concerns regarding the process for granting thermal relief.³ The letter responded specifically to the Board’s grant of alternate limits via an artificial cooling lake demonstration. However, USEPA’s concerns were broad enough to cast doubt on any regulation that does not specifically authorize relief consistent with Section 316(a)

¹ *In the Matter of Procedural Rules for Alternate Thermal Limitations Under 316(a) of the Clean Water Act: Proposed New 35 Ill. Adm. Code Part 106.Subpart K and Amended Section 304.141(c)*, R 13-20 (filed June 20, 2013)

² First notice was published in Ill. Reg. Vol. 37, Issue 30, p. 11843 on July 26, 2013.

³ *Ameren Energy Generating Co. v. IEPA*, PCB 09-38 (Oct. 19, 2011) (letter from Tinka Hyde, USEPA, to Marcia Wilhite, IEPA, dated October 6, 2011).

of the CWA. For example, USEPA emphasized in the letter that a 316(a) determination is a temporary, not a permanent, limitation. However, an adjusted standard like an artificial cooling lake demonstration is a procedure intended to provide petitioners with permanent relief and allows for factors to be considered in rendering a decision not contemplated by the CWA.

7. Moreover, docketing the Petition as an adjusted standard rather than with a PCB caption triggers a different set of the Board's procedural rules and applicable deadlines. For example, in adjusted standard proceedings, the petitioner is required to publish notice of the petition and file a certificate of publication with the Board within 30 days after the filing of the petition. In addition, IEPA is required to file a recommendation within 45 days of the filing of the petition. Petitions for adjusted standards must also meet a different burden of proof. SIPC did not prepare the Petition as meeting the requirements for an adjusted standard petition and is still unclear about how the Board will consider the Petition. Therefore, SIPC will need to significantly amend the Petition or consider what other options might be available. IEPA agrees that the Petition should not proceed as an adjusted standard because SIPC is seeking 316(a) relief.

8. Second, SIPC began gathering data, preparing reports, and meeting with IEPA long before the proposed procedural rules. SIPC began characterizing the thermal effluent at Marion Station and preparing to request relief years before the proposed procedural rules were proposed to this Board and did not contemplate the Board's proposal. As SIPC gathered data and information on Lake of Egypt, it did so under the presumption that it could file an artificial cooling lake demonstration. Then, as noted above, SIPC became aware of uncertainty on behalf of USEPA in reviewing relief granted by the Board in the artificial cooling lake demonstration

context.⁴ Subsequent discussions with IEPA lead both SIPC and IEPA to consider SIPC's relief in terms of a 316(a) demonstration.

9. Third, SIPC respectfully asserts that the Illinois General Assembly and USEPA have both given the Board authority to grant alternate thermal standards even before final adoption of the pending procedural rules.

a. The Illinois General Assembly recognized the need for Illinois to issue permits consistent with the CWA ("it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to such federal law, as well as State law, which do not contain such terms and conditions as are required by federal law, or the issuance of which is contrary to federal law," 415 ILCS 5/11(a)(4)), while also recognizing that not every provision of the CWA and implementing regulations could be repeated in their entirety in the Act:

. . . the federal requirements for the securing of such NPDES . . . permit program approval, as set forth in the Federal Water Pollution Control Act, . . . and in regulations promulgated by the Administrator of the United States Environmental Protection Agency pursuant thereto are complex and detailed, and the General Assembly cannot conveniently or advantageously set forth in this Act all the requirements of such federal Act or all regulations which may be established thereunder. . . .

415 ILCS 5/11(a)(8). These provisions of the Act together with those granting the Board rulemaking authority (415 ILCS 5/5(b), 27, 28), authorize the Board to adopt regulations consistent with the CWA and incorporate provisions of the federal statute and implementing regulations by reference into the Illinois permit program.

⁴ *Ameren Energy Generating Co. v. IEPA*, PCB 9-38 (Mar. 18, 2010).

b. USEPA authorized the Board to grant alternate thermal standards in accordance with the federal regulations when it delegated Illinois authority to administer the NPDES permit program. IEPA applied for delegation to administer the NPDES permit program, pursuant to the Federal Water Pollution Control Act Amendments of 1972 (now, the CWA) in 1976. The application identified IEPA and the Board as administering the NPDES program. Prior to receiving delegation to administer the NPDES program, the Board adopted Rule 410(c) (later recodified as 35 Ill. Adm. Code 304.141(c)).⁵ Rule 410(c) allowed the Board to adopt alternate thermal standards for specific thermal discharges “in accordance with Section 316 of the CWA and applicable federal regulations.”⁶ With Rule 410(c) in place, IEPA applied for delegation in July 1977. The application stated that the demonstration requirements found in the federal regulations, 40 C.F.R. § 122,⁷ and supporting technical documents would be used to establish an alternate thermal standard pursuant to Rule 410(c) (“The Agency proposes that the demonstration requirements found in 40 CFR Part 122 and the supporting technical documents be utilized in the determination of an alternate thermal standard pursuant to Rule 410(c) . . .”).⁸

⁵ “It is obvious on a plain reading of the Regulation that the application of 410(c) is not contingent upon the adoption of the NPDES authority by the State of Illinois. Rather it determines the relationship between the Board, the standards of Chapter 3 with respect to thermal discharges, and Section 316 of the FWPCA, regardless of what authority is in charge of the NPDES permit system at any particular time.” *National Pollutant Discharge Elimination System Regulations (NPDES Regulations)*, R73-11, R73-12, slip op. at 2 (Sept. 30, 1976).

⁶ 35 Ill. Adm. Code 304.141(c) was adopted as Rule 410(c) in 1976. *NPDES Regulations*, R73-11, 73-12 (Sept. 30, 1976).

⁷ These regulations have since been moved to 40 C.F.R. § 125, Subpart H.

⁸ *Procedural Rules for Alternate Thermal Effluent Limitations*, R13-20, Statement of Reasons, Attach. A, pg. 27.

USEPA approved Illinois' application and plan for administering the NPDES permit program and delegated Illinois authority on October 23, 1977.⁹

Therefore, while IEPA's proposed rulemaking will further enhance and clarify the process outlined in the federal regulations for entities in the state seeking an alternate thermal standard, the General Assembly and USEPA have both authorized the Board to determine alternate thermal standards in accordance with the federal regulations and supporting technical documents even before final adoption of the pending procedural rules.

10. SIPC asserts that it will satisfy the requirements of Section 316(a) and implementing regulations in a proceeding before this Board. Section 316(a) of the CWA allows dischargers to seek alternate thermal standards:

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 on 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."

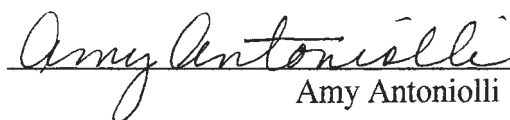
33 U.S.C. § 1326(a). In addition to the substantive showing identified above, the CWA requires an "opportunity for public hearing." The federal regulations provide procedures for the early screening of 316(a) demonstrations (40 C.F.R. § 125.72), and additional criteria for determining alternate effluent standards under Section 316(a). 40 C.F.R. § 125.73.

⁹ *Id.*, Statement of Reasons, pg. 2; *see NPDES Regulations*, R73-11, R73-12 (Nov. 10, 1977).

Conclusion

11. SIPC asks the Board to consider the Petition as a request for an alternate thermal standard under the federal regulations and Board procedural rules. The Board need not allow the process for granting thermal relief to come to a halt pending promulgation of the procedural rules for granting alternate thermal standards. There is a path forward, authorized by law, allowing the Board to utilize the available regulations for considering requests for 316(a) relief that USEPA will recognize. Moreover, it is critical that SIPC proceed in a timely fashion as SIPC's NPDES permit is currently pending reissuance by IEPA.

WHEREFORE, SIPC respectfully requests that the Board grant this motion and consider SIPC's Petition for Alternate Thermal Effluent Standards as a petition for alternate thermal standards, and docket the matter with a "PCB" caption, under the authority of 415 ILCS 5/11, 35 Ill. Adm. Code 304.141(c), and in accordance with the procedural rules of 40 C.F.R. § 125, Subpart H, and Part 101 of the Board's procedural rules (35 Ill. Adm. Code § 101 *et seq.*).



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Dated: January 22, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 22nd day of January, 2014, I have served electronically the attached MOTION FOR CONSIDERATION AS A PETITION FOR ALTERNATE THERMAL STANDARDS, upon the following persons:

John Therriault, Assistant Clerk
Carol Webb, Hearing Officer
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and electronically and by first class mail, postage affixed, upon:

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