

ILLINOIS POLLUTION CONTROL BOARD
January 23, 2014

SOUTHERN ILLINOIS POWER)	
COOPERATIVE,)	
)	
Petitioner,)	
)	
v.)	AS 14-1
)	(Adjusted Standard)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

On December 12, 2013, Southern Illinois Power Cooperative (SIPC) filed a petition (Pet.) under Section 316(a) of the Clean Water Act (CWA) (33 U.S.C. § 1326(a)) and Section 304.141(c) of the Board’s water pollution regulations (35 Ill. Adm. Code 304.141(c)). SIPC seeks an alternative thermal effluent limit for heated effluent discharges to Lake of Egypt from SIPC’s Marion Generating Station located approximately seven miles south of Marion. Lake of Egypt is located in both Williamson and Johnson Counties. SIPC requests that the Board set a public hearing on its petition and consider its petition using the Board’s general procedural rules in 35 Ill. Adm. Code Part 101.

As discussed below, the Board finds that it may hear SIPC’s petition under its authority to grant adjusted standards in adjudicatory proceedings under Section 28.1 of the Act and procedural rules at 35 Ill. Adm. Code Part 104, or as a site specific rulemaking under Section 27 of the Act and the procedural rules at 35 Ill. Adm. Code Part 102. Alternatively, SIPC may avail itself of the Board’s forthcoming procedural rules for petitions requesting an alternative thermal limit under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c) which the Board proposed for second notice publication and Joint Committee on Administrative Rules (JCAR) review this same day.

Because SIPC did not timely file a certificate of publication, the Board dismisses this case and closes the docket. SIPC may file a new adjusted standard petition or a site specific rulemaking proposal, if it so chooses. Alternatively, SIPC may proceed under the forthcoming procedural rules for petitions requesting an alternative thermal limit under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c).

BOARD DISCUSSION

SIPC seeks an alternative thermal limit to discharge heated effluent to Lake of Egypt. SIPC requests an alternative thermal limit to replace a special condition in its National Pollutant Discharge Elimination System (NPDES) permit based on the Board’s water quality standards

found at 35 Ill. Adm. Code 302.211. Pet. at 4, 6. Such relief is allowed under CWA Section 316(a) and Section 304.141(c) of the Board's water pollution regulations.

CWA Section 316(a) provides the procedure for a point source to obtain relief from thermal effluent limitations. Specifically, this section provides

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

Accordingly, a facility may obtain relief when it demonstrates that the otherwise applicable thermal effluent limit is more stringent than necessary to assure the protection and propagation of the waterbody's balanced, indigenous population of shellfish, fish, and wildlife. *Id.*

The United States Environmental Protection Agency (USEPA) delegated to Illinois responsibility for administering the NPDES permit program. Current Board rules address CWA Section 316(a) and provide

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

SIPC notes that, under these provisions, the Board is authorized to grant alternative thermal limitations. Pet. at 2, 16. SIPC further notes that "[n]o separate rulemaking, variance, adjusted standard, nor site-specific rulemaking authority grants the nature of relief authorized under Section 304.141(c)." *Id.* at 2. SIPC urges that the Board may proceed with considering SIPC's petition using the Board's Part 101 procedural rules. *Id.*

The Board previously considered this issue of which procedural rules apply to petitions for alternative thermal limits. In *In re Petition of Exelon Generation, LLC*, Exelon Generation, LLC (Exelon) petitioned the Board for an alternative thermal limit under 35 Ill. Adm. Code 304.141(c) and argued that the Board's Part 101 procedural rules were sufficient to conduct the proceeding. *In re Petition of Exelon Generation, LLC*, AS 13-1, slip op. at 3 (Oct. 18, 2012).

Exelon asserted that the Board's procedural rules for variances, adjusted standards, heated effluent demonstrations, and artificial cooling lake demonstrations did not apply to a petition seeking an alternative thermal limit. *Id.* The Board agreed with Exelon that the Board had no existing specific procedures for implementing 35 Ill. Adm. Code 304.141(c) and thus invited a proposal to add a new subpart to the Board's Part 106 procedural rules. *Id.* at 4. Exelon had proposed that only certain sections of Part 101 would apply to the alternative thermal limit proceeding and the Board found that Exelon's cited sections were not sufficient. *Id.* Faced with these circumstances, the Board held that it could hear the petition under its authority to grant adjusted standards or as a site specific rulemaking. *Id.* at 5.

Subsequently, the Illinois Environmental Protection Agency (Agency) filed a proposal for rulemaking to establish procedural rules for petitions requesting an alternative thermal limit. Procedural Rules for Alternative Thermal Effluent Limitations Under Section 316(a) of the Clean Water Act: Proposed New 35 Ill. Adm. Code 106, Subpart K and Amended Section 304.141(c), R 13-20. The Board issued its first notice opinion and order on July 11, 2013 and has since conducted two hearings in that rulemaking. In an order issued this same day, the Board submitted its second notice opinion and order for JCAR review. The second notice period expires forty-five days following JCAR's receipt of the Board's second notice. 35 Ill. Adm. Code 102.606. The Board may then take final action on the rulemaking following JCAR's review. 35 Ill. Adm. Code 102.608.

SIPC acknowledges the prior Board orders and the pending rulemaking. Pet. at fn.1 and fn. 4. Yet, SIPC argues that "35 Ill. Adm. Code Part 101 provides an adequate framework of rules for filing documents and motions, holding hearings, and reviewing final board opinions and orders, among other procedures." *Id.* at 3. SIPC claims that its petition is timely and appropriate and is proceeding in this manner "because data collection and petition preparation preceded the pending rulemaking, and the NPDES permit is currently open and due for renewal." *Id.* at 16. SIPC also states that its thermal discharge "has remained consistent for the past nine years and is not expected to increase." *Id.* at 15.

Consistent with the above, the Board finds that it may hear SIPC's petition under its authority to grant adjusted standards in adjudicatory proceedings under Section 28.1 of the Act and procedural rules at 35 Ill. Adm. Code Part 104, or as a site specific rulemaking under Section 27 of the Act and procedural rules at 35 Ill. Adm. Code Part 102.

The Board docketed SIPC's petition as an adjusted standard and the Board's clerk verbally notified SIPC's attorney of this on the date the petition was filed. Section 104.410 of the Board's procedural rules required SIPC to file a certificate of publication with the Board by Monday, January 11, 2014, which was the first business day following the thirtieth day after the filing of the petition. 35 Ill. Adm. Code 104.410. The Board has not received such certificate to date. Accordingly, the Board dismisses this petition and closes the docket. On January 15, 2014, the Agency filed a motion for extension of time to file a responsive pleading. Because the Board dismisses this action, the Agency's motion for an extension of time is moot.

On January 22, 2014, SIPC filed a motion for consideration as a petition for alternate thermal standards (Mot.). SIPC reiterates its previous arguments and also acknowledges the procedural quandary presented by the Board's docketing of this proceeding as an adjusted

standard. *See* Mot. at 3. However, for the reasons discussed above, the Board is not persuaded to change its position.

The Board dismisses this petition and closes the docket. SIPC may file a new adjusted standard petition if it so chooses, in accordance with the Board's procedural rules at 35 Ill. Adm. Code Part 104. If SIPC wishes to proceed as a site specific rulemaking instead, it must file a regulatory proposal meeting the applicable requirements. Alternatively, SIPC may proceed under the forthcoming procedural rules for petitions requesting an alternative thermal limit under CWA Section 316(a) and 35 Ill. Adm. Code 304.141(c).

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 23, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board