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AUG 28 2013

STATE OF ILLINOIS
Pollution Control Board

Illinois EPA's Response to Board Staff Questions for First Hearing

Section 106.1100 Purpose

1. This section states, "[t]his Subpart describes the factors, criteria, and standards for the establishment of alternative thermal effluent limitations under 35 Ill. Adm. Code 304.141(c) and Section 316(a) of the Clean Water Act and in permits issued under 35 Ill. Adm. Code 309."

Please clarify if the word "and" between the words "Clean Water Act" and "in permits" should be deleted to track the federal rule language under 40 CFR 125.70.

Agency Response: The word "and" should be deleted to track the federal rule.

Section 106.1105 General

2. Section 106.1105(a) states, in part, "[t]his Subpart applies to any point source that discharges pollutants to waters of the United States."

Please explain why the applicability of the proposed rules is defined by discharges to "waters of the United States" instead of discharges to "waters of the state." The Board notes that the National Pollutant Discharge Elimination System (NPDES) permit regulations refer to "navigable waters" and "waters of the state." See 35 Ill. Adm. Code 309.101 and 309.102.

Agency Response: When the federal Clean Water Act rules were first promulgated, they used the term "navigable waters". The term "navigable waters" was used to encompass those waters which were subject to the requirements of the Clean Water Act, or jurisdictional waters. The federal rule has changed "navigable waters" to "waters of the United States" to refer to jurisdictional waters. Currently, Section 122.21 provides: "The NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States.'" 40 C.F.R. §122.21 (2012). Illinois EPA drafted these proposed regulations to be consistent with the current federal terminology.

The Illinois EPA also believes that using the language "waters of the State" could lead to ambiguity. While the Illinois EPA would interpret this language in the NPDES permitting context to mean all waters of the United States located within the territorial boundaries of the State of Illinois, it is possible the language could be construed to mean all "waters" within the State of Illinois that meet the definition of "waters" found in the



Environmental Protection Act, 415 ILCS 5/3.550.¹ This possible interpretation would require NPDES permitting of discharges into waters other than jurisdictional waters or “waters of the United States” under the Clean Water Act. This directly contradicts Section 12(f)² of the Environmental Protection Act which prohibits the Illinois EPA from requiring a permit when one would not be required under the Clean Water Act or regulations thereunder. Therefore, to be consistent with Section 12(f) of the Environmental Protection Act and the federal Clean Water Act regulations, the Illinois EPA chose to use the language “waters of the United States.”

3. The proposed language at Section 106.1105(a) states, “that any effluent limit.”

Should “limit” be “limitation” to be consistent with the subsequent wording in the same subsection, “will require effluent limitations more stringent,” as well as 316(a) of the Clean Water Act (CWA) and 40 CFR 125.70?

Agency Response: The word “limit” should be “limitation.”

Section 106.1110 Definitions

4. The definition of “[b]alanced, indigenous community” sets forth in part that a balanced community “may not include species whose presence or abundance is attributable to alternative thermal effluent limitations imposed pursuant to this Subpart or through regulatory relief from otherwise applicable thermal limitations or standards granted by the Board.”

Please clarify whether “otherwise applicable thermal limitations” are those under Chapter I, Subtitle C of Title 35. If so, would it be acceptable to the Agency if a citation is included in the rule language similar to the one proposed under Section 106.1160(b)?

Agency Response: “[O]ther applicable thermal limitations” are those under Chapter I, Subtitle C of Title 35. The Board’s proposed change would be acceptable to the Agency.

¹“Waters’ means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550.

² “No permit shall be required under this subsection and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.” 415 ILCS 5/12(f).

Section 106.1115 Early Screening

5. The proposed early screening provision at Section 106.1115(a)(4) requires a petitioner to submit a proposed representative important species (RIS) list for the Agency's approval.

Please clarify whether the proposed intent of subsection (a)(4) is to allow the Agency to review the proposed RIS list and recommend changes if necessary. If so, please comment on whether it be acceptable to the Agency if the wording of subsection (a)(4) is revised as shown below.

- (a)(4) A proposed representative important species list and such data and information as may be available to assist the Agency in reviewing ~~approving~~ the selection of the appropriate representative important species.

Agency Response: The purpose of Section 106.1115 is to specify the beginning steps the petitioner must take to establishing an alternative thermal effluent limitation. While the Illinois EPA took this language from 40 C.F.R. §125.72(a), the Illinois EPA believes the intent of this Section is to provide the petitioner and the Illinois EPA with the opportunity to discuss the petitioner's proposed plans, including the RIS list. The 30 day meeting between the petitioner and the Illinois EPA required by proposed subsection (b) will give both parties the opportunity to ask questions and provide recommendations.

To simplify both proposed Section 106.1115 and proposed Section 106.1120, the Illinois EPA proposes removing references to "approving" the RIS or detailed plan of study in Sections 106.1115(d), Section 106.1120(a) and (g). In Section 106.1120(f), the Illinois EPA proposes clarifying that it will respond to the detailed plan of study and the RIS in writing within 90 days, and the Illinois EPA's response will either approve or recommend necessary revisions. In Section 106.1120(g), the Illinois EPA proposes clarifying that the petitioner may proceed with the detailed plan of study without making Illinois EPA's recommended revisions.

The Agency proposes the following changes:

Section 106.1115 Early Screening

- a) **Prior to filing a petition for an alternative thermal effluent limitation, the petitioner must submit the following early screening information to the Agency:**
- 1) **A description of the alternative thermal effluent limitation requested;**

- 2) A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;
 - 3) A general description of the type of data, studies, experiments and other information that the discharger intends to submit for the demonstration; and
 - 4) A proposed representative important species list and supporting such data and information ~~as may be available to assist the Agency in approving the selection of the appropriate representative important species.~~
- b) Within 30 days ~~after from receipt of~~ the early screening information is submitted under subsection (a) of this Section, the petitioner shall consult with the Agency to discuss the petitioner's early screening information.

Section 106.1120 Detailed Plan of Study

- a) Within 60 days after the early screening information is submitted pursuant to Section 106.1115 of this Part, the petitioner shall submit ~~for the Agency's approval~~ a detailed plan of study that the petitioner will undertake to support its alternative thermal effluent limitation demonstration.
- b) The petitioner shall specify the nature and extent of the following types of information to be included in the plan of study:
 - 1) biological, hydrographical, and meteorological data;
 - 2) physical monitoring data;
 - 3) engineering or diffusion models;
 - 4) laboratory studies;
 - 5) representative important species; and
 - 6) other relevant information.
- c) In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards.

- d) The petitioner shall provide any additional information or studies that the Agency subsequently determines necessary to support the alternative thermal effluent limitation demonstration, including such field or other studies as may be necessary to select representative important species.
 - e) In making the alternative thermal effluent limitation demonstration the petitioner shall consider any information or guidance published by USEPA to assist in making such demonstrations.
 - f) Within 90 days of petitioner's submittal of its detailed plan of study, the Agency shall respond in writing, either approving the detailed plan of study and representative important species, or recommending necessary revisions ~~approve the plan or specify any recommended revisions to the plan.~~
 - g) After obtaining Agency's response pursuant to subsection (f) of this Section, approval or the Agency's recommended revisions, the Petitioner may proceed with the plan of study with or without making the Agency's recommended revisions. ~~The~~ the petitioner shall complete the plan of study prior to filing the petition for an alternative thermal effluent limitation with the Board.
6. Section 106.1115(b) sets forth that the petitioner must consult with the Agency "[w]ithin 30 days from receipt of the early screening information."

Please comment on whether it would be acceptable to the Agency if the wording of subsection (b) is changed as shown below to be consistent with the timeframe specified under Section 106.1120(a).

- b) Within 30 days after ~~from receipt~~ of the early screening information is submitted under subsection (a) of this Section, the petitioner shall consult with the Agency to discuss the petitioner's early screening information.

Agency Response: The Illinois EPA agrees with the Board's proposed language.

Section 106.1120 **Detailed Plan of Study**

- 7. Section 106.1120(a) requires the petitioner to submit "for the Agency's approval a detailed plan of study that the petitioner will undertake to support its alternative thermal effluent limitation demonstration."

Please clarify whether the submission of the detailed plan of study is intended for the Agency to review the plan and recommend revisions if necessary. If so, please comment on whether the Agency is amenable to the following revisions to subsections (a), (f) and (g):

- a) Within 60 days after the early screening information is submitted pursuant to Section 106.1115 of this Part, the petitioner shall submit for the Agency's review approval a detailed plan of study that the petitioner will undertake to support its alternative thermal effluent limitation demonstration.
- f) Within 90 days of petitioner's submittal of its detailed plan of study, the Agency shall review approve the plan, and notify the petitioner of the completion of the review along with ~~or specify~~ any recommended revisions to the plan.
- g) After receiving obtaining Agency notification under subsection (f) approval or the Agency's recommended revisions, the petitioner shall complete the plan of study prior to filing the petition for an alternative thermal effluent limitation with the Board.

Agency Response: The Illinois EPA believes the intent of Section 106.1120(a) is to specify when the petitioner must submit its detailed plan of study to the Agency. Therefore, the Agency proposes deleting the phrase "for the Agency's approval" from this subsection. Please see Illinois EPA's response to the Board's question #5 above for the language.

The intent of Section 106.1120(f) is to state when the Illinois EPA must respond to the detailed plan of study and the RIS list. In its response, the Illinois EPA would either approve the RIS list and the detailed plan of study, or recommend necessary revisions. Please see Illinois EPA's response to the Board's question #5 above for the Agency's proposed language.

The intent of Section 106.1120(g) is to state when the petitioner may proceed with the plan of study and that the plan of study must be completed before the petition is filed with the Board. The Illinois EPA believes that the petitioner should be able to proceed with the plan of study with or without making the Agency's recommended necessary revisions. However, the Illinois EPA believes that if the petitioner proceeds without making the necessary revisions, the Illinois EPA will include an evaluation of whether the plan of study sufficiently addresses the Agency's response pursuant to Section 106.1120(f) of this Part in its recommendation. Please see Illinois EPA's response to the Board's question #5 above for the Agency's proposed language.

8. Please comment on whether a petitioner is free to file a petition for alternative thermal effluent limitations with the Board after receiving the Agency's notification pursuant to Section 106.1120(f), above, if the petitioner rejects any of the Agency's recommendations.

Agency Response: Under the Illinois EPA's proposal, the Petitioner must complete the plan of study before filing a petition with the Board. Before it can complete the plan of study, it must submit early screening information to the Agency, meet with the Agency, submit the detailed plan of study to the Agency, and then obtain the Agency's response to the detailed plan of study. The Agency's response may be either an approval or a recommendation of necessary revisions. The Illinois EPA does not propose that the petitioner must follow its recommendation of necessary revisions. However, the rule should require that the Petitioner wait for the Agency's response before proceeding with the study. Please see Illinois EPA's response to the Board's question #5 above for the Agency's proposed language.

9. Section 106.1120(c) states, "[i]n selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards."

Please clarify whether "applicable water quality standards" are those under Chapter I, Subtitle C, Part 302 of Title 35. If so, would it be acceptable to the Agency if a citation is included in the rule language? If not, please provide citations to the "applicable water quality standards."

Agency Response: The applicable water quality standards may exist in Illinois regulations outside of Part 302. Examples include variances, adjusted standards, site-specific rulemakings, or other parts of Subtitle C of Title 35. For these reasons, the Illinois EPA believes that a cross reference to "Chapter I, Subtitle C, Part 302 of this Title" may be too prescriptive.

Section 106.1130 **Contents of Petition**

10. Please comment on whether it would be acceptable to the Agency if the petitioner is required to include a copy of the detailed plan and any Agency recommendations pursuant to Section 106.1120 in the petition.

Agency Response: The Illinois EPA agrees that the petitioner should be required to include a copy of the detailed plan of study and a copy of the Agency's response to the detailed plan of study in the petition. The Illinois EPA proposes adding this requirement to Section 106.1130(d) as follows:

- d) The detailed plan of study submitted to the Agency pursuant to Section 106.1120(a) of this Part, and the Agency's written response pursuant to Section 106.1120(f) of this Part;
 - e) The results of the studies conducted pursuant to the detailed plan of study submitted under Section 106.1120 of this Part, including, but not limited to:
 - 1) background on the proposed thermal standards;
 - 2) information on data collection program and methodologies;
 - 3) summaries of physical, chemical, biological, and technical data supporting the demonstration, along with a discussion of the data; and
 - 4) criteria or methodology used to assess whether a balanced indigenous community of shellfish, fish and wildlife will be maintained in the receiving waters and the protection of threatened and endangered species.
11. Section 106.1130(d) requires a petitioner to submit the "results of the studies conducted pursuant to the detailed plan of study submitted under Section 106.1120".

Please comment on whether the rules should provide more specificity regarding the types of information that the "results" report must include. In this regard, would it be acceptable to the Agency if subsection (d) is revised to require the petitioner to submit a detailed report on studies conducted pursuant to the detailed plan under Section 106.1120 that includes: background on the proposed thermal standards; information on data collection program and methodologies; summaries of physical, chemical, biological and technical data supporting the demonstration along with a discussion of the data; and criteria or methodology used to assess whether a balanced indigenous community of shellfish, fish and wildlife will be maintained in the receiving waters; protection of threatened and endangered species; and results of prospective and retrospective assessments.

Agency Response: The Illinois EPA agrees with the Board's recommendation of additional specificity; however, the Illinois EPA does not believe the list should include "results of prospective and retrospective assessments" as this is redundant. Please see Illinois EPA's response to the Board's question #10 above for the Agency's proposed language.

12. Section 106.1130(e) allows a petitioner to submit “[a]ny information or guidance published by USEPA to assist in making alternative thermal effluent limitation demonstrations that the Board should consider in evaluating the petition.”

Please comment on whether a petitioner would be able to submit any United States Environmental Protection Agency (USEPA) guidance under the proposed requirement under Section 106.1130(f), which allows the petitioner to submit “[any] additional information or studies that the petitioner judges to be appropriate to support the alternative thermal effluent limitation demonstration.” Please comment on whether the following revisions would be acceptable to the Agency:

- e) ~~Any information or guidance published by USEPA to assist in making alternative thermal effluent limitation demonstrations that the Board should consider in evaluating the petition; and~~
- f) ~~Any additional information or studies, including information or guidance published by USEPA,~~ that the petitioner judges to be appropriate to support the alternative thermal effluent limitation demonstration.

Agency Response: The petitioner would be able to submit any USEPA guidance under the proposed requirement of Section 106.1130(f). The Illinois EPA agrees with the Board’s proposed language.

Section 106.1135 Petition Notice Requirements

13. Please comment whether it would be acceptable to the Agency if the word “filed” is used instead of “mailed” in the concluding portion of the notice in subsection (b) as follows:

“Any person may cause a public hearing to be held in the above-described proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number for the proceeding, as found in this notice, and must be filed with ~~mailed to~~ the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601.”

Agency Response: The Illinois EPA agrees with the Board’s proposed language.

Section 106.1140 **Proof of Petition Notice Requirements**

14. This section requires petitioner to file a certificate of publication within 30 days after filing of the petition, but does not specify where such a certificate must be filed.

Please comment on whether it would be acceptable to the Agency if the rule language is clarified to indicate that the certificate of publication must be filed with the Board.

Agency Response: **The Illinois EPA agrees with the Board's proposed language.**

Section 106.1145 **Recommendation and Response**

15. This section sets forth the time frames similar to the Board's adjusted standard procedures under 35 Ill. Adm. Code 106.416(a) for the Agency's recommendation (within 45 days of filing of the petition), and any response by the petitioner or participants (within 21 days of the filing of the Agency's recommendation). However, the proposed provision does not require the Agency to file its recommendation at least 30 days before hearing, if one is required to be held. *See* 35 Ill. Adm. Code 106.416. Additionally, Section 106.1145 does not specify the information to be included in the Agency's recommendation similar to the adjusted standard provision under Section 106.416(a).

Please comment on whether the following revisions to Section 106.1145 that track the existing adjusted standard procedural rules are acceptable to the Agency:

Unless otherwise ordered by the hearing officer or the Board, the Agency must file with the Board a recommendation ~~W~~ within 45 days after the filing of a petition or amended petition for an alternative thermal effluent limitation, or where a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. ~~the Agency must file with the Board a r~~The recommendation must state as to whether the Board should grant the petitioner's requested alternative thermal effluent limitation. The recommendation must set forth the rationale for the Agency's position and may present any information which the Agency believes is relevant to the Board's consideration of the proposed alternative thermal effluent limitation. If the Agency recommends a denial of the petition due to informational deficiencies within the petition, the recommendation must identify the types of information needed to correct the deficiencies.

Agency Response: **The Illinois EPA generally agrees with the Board's proposed language. The Board's proposed language does not include the**

last sentence of the Agency proposed language regarding the petitioner's response to the Agency's recommendation. The Illinois EPA also believes this Section should include a statement that the Agency's recommendation may include an evaluation of whether the plan of study sufficiently addresses the Agency's response pursuant to Section 106.1120(f) of this Part.

The Illinois EPA proposes the following language:

- a) Unless otherwise ordered by the hearing officer of the Board, the Agency must file with the Board a recommendation within 45 days after the filing of a petition or amended petition for an alternative thermal effluent limitation, or where a hearing has been scheduled, at least 30 days before hearing, whichever is earlier, the Agency must file with the Board a
- b) The recommendation must state the following:
- 1) whether the Board should grant the petitioner's requested alternative thermal effluent limitation;
 - 2) the rationale for the Agency's position;
 - 3) whether the plan of study sufficiently addresses the Agency's response pursuant to Section 106.1120(f) of this Part;
 - 4) whether the petition has met the requirement of this Part; and
 - 5) any information which the Agency believes is relevant to the Board's consideration of the proposed alternative thermal effluent limitation.
- c) The petitioner, any party to the proceeding, or any interested person may file a response to the Agency recommendation within 21 days after the Agency files its recommendation.

Section 106.1170 **Opinion and Order**

16. If a petitioner is granted an alternative thermal effluent limitation and the Agency includes it in the petitioner's NPDES permit, please describe how the limitation would be implemented in the permit and how a discharger would demonstrate compliance with the thermal water quality standards in the receiving stream. If the permit would entail designation of a mixing zone, should the alternative thermal effluent demonstration also address the provisions of 35 Ill. Adm. Code 302.102?

Agency Response: To obtain an alternative thermal effluent limitation, the petitioner must show that the thermal relief will “assure protection 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 thermal relief in the permit depends on the relief sought in the petition and granted by the Board. Thermal relief could be in forms such as:

- 1) Relief from a maximum temperature at the edge of the mixing zone (under existing mixing zone rules);
- 2) No temperature relief, but relief from existing mixing zone rules;
- 3) Relief from both a maximum temperature as well as relief from limits on the size and shape of the mixing zone, or
- 4) Additional excursion hours only, with the discharge otherwise complying with a maximum temperature and mixing zone rules.

Illinois EPA prefers that the 316(a) thermal relief be expressed in the NPDES permit as an end-of-pipe effluent limitation because of the ease of administration and compliance demonstration.

The Illinois EPA recognizes that mixing of the thermal effluent with the receiving stream will occur. However, the Illinois EPA believes that relief from the traditional rules governing when mixing is allowed is a part of the Section 316(a) thermal relief. Instead of being bound by the requirements in 35 Ill. Adm. Code 302.102, the petitioner must meet its burden of proof under proposed Section 106.1160—demonstrating that the alternative thermal effluent limitation, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made. This demonstration is sufficient and accomplishes the same goals as mixing zone rules in Section 302.102. For these reasons, the Illinois EPA believes the petitioner should not be required to show that it is entitled to mixing zone pursuant to 35 Ill. Adm. Code 302.102 as a part of its 316(a) demonstration.

Section 106.1180

Renewal of Alternative Thermal Effluent Limitations

17. The proposed language of Section 106.1180 provides that “[t]he permittee may request continuation of an alternative thermal effluent limitation . . . as part of its NPDES permit renewal application” and that “[a]ny application for renewal should include sufficient information.”

Section 316(c) of the CWA provides a 10-year “[p]eriod of protection from more stringent [thermal] effluent limitations following discharge point source modification.” Please comment on the implications of Section 316(c) on the proposed Section 106.1180, and if necessary propose additional language.

Agency Response: The Illinois EPA does not believe Section 316(c) of the Clean Water Act has any implication on proposed Section 106.1180.

