

Before the Illinois Pollution Control Board

Questions for the Illinois Environmental Protection Agency by Keith Harley,  
Attorney for Citizens Against Ruining the Environment, October 16, 2003, In The  
Matter of: Procedural Rules for Alternative Thermal Effluent Limitations Under  
Section 316(a) of the Clean Water Act: Proposed New 35 Ill. Adm. Code Part 106,  
Subpart K and Amended Section 304.141(c), R2013-20

1. From IL EPA's perspective, is relief pursuant to 316(a) a variance?
  
  
  
  
  
  
  
  
  
  
2. Does IL EPA acknowledge that Illinois has the authority to develop an approach to variances that is not identical-in-substance with federal requirements?
  
  
  
  
  
  
  
  
  
  
3. Does IL EPA acknowledge that Illinois has the authority to develop variance standards that are more stringent than federal requirements?
  
  
  
  
  
  
  
  
  
  
4. In the context of this rulemaking, why does IL EPA assert that it can dispense with some Illinois statutory mandates regarding the issuance of variances? Does IL EPA similarly assert that the IPCB is not bound by existing statutory mandates regarding the issuance of variances in developing regulations in this matter?
  
  
  
  
  
  
  
  
  
  
5. In its response to Board Staff Question 1, the IL EPA asserts the 1977 federal rules have been substantially changed since U.S. EPA issued its 1977 Interagency 316(a) Technical Guidance Manual. When were the 1977 federal regulations substantially changed? (Exhibit to be introduced by leave of Hearing Officer).



6. Since U.S. EPA in 2008 asserted the 1977 technical guidance is still relevant to issuing a variance, why does IL EPA discount the applicability of this guidance?

7. Why wouldn't IL EPA consultation with USFWS produce better informed agency decisionmaking?

8. Why wouldn't IL EPA consultation with IDNR produce better informed agency decisionmaking?

9. In the absence of consultation with IDNR and/or USFWS, how will IL EPA gain independent, expert knowledge about potential adverse impacts of a variance on state or federal endangered species?

10. In the absence of consultation with IDNR and/or USFWS, how will IL EPA gain independent, expert knowledge about potential adverse impacts of a variance on critical habitat for state or federal endangered species?

11. In the absence of consultation with IDNR and/or USFWS, how will IL EPA gain independent, expert knowledge about potential adverse impacts of a variance on zones of passage for state or federal endangered species?

12. How will IL EPA evaluate the relationship between thermal discharges and the growth of nuisance organisms?

13. Who at the IL EPA will review these variance applications and what expertise would they have?

#### Fact Sheet and Public Notice

14. Calling attention to IL EPA's response to CARE Comment Six on the bottom of Page 5, does IL EPA acknowledge that NPDES permits that are issued with a § 316(a) variance must include a fact sheet that complies with 40 C.F.R. § 124.8, including an explanation of why the permitting agency believes the § 316(a) variance is justified?

15. Calling attention to IL EPA's response to CARE Comment Six on the bottom of Page 5, did IL EPA mean to state that a fact sheet is issued when a *draft* permit is issued (not when a permit is issued).

16. Calling attention to IL EPA's response to CARE Comment Six on the bottom of Page 5, in the context of a fact sheet, does IL EPA expect to summarize the Board Opinion granting a variance? Is it IL EPA's expectation that a member of the public will be required to read a Board Opinion in order to understand the basis for a previously issued thermal variance?

17. Calling attention to IL EPA's response to CARE Comment Six on the bottom of Page 5, does IL EPA acknowledge that a NPDES permit containing a § 316(a) variance must comply with public notice requirements in 40 C.F.R. §§ 124.10(d)(1) and 124.57?

### Renewal of § 316(a) Variances

18. When a permittee that was issued a § 316(a) variance applies for renewal, what is the extent of documentation that must be submitted under proposed rule § 106.1180(b) regarding “the discharger’s actual operation experience during the previous permit term”?

19. In the context of a variance renewal, why wouldn’t review by the IPCB produce better informed decisionmaking?

### Agency’s Power to Impose Thermal Limits More Stringent Than What Applicant Requested:

20. Calling your attention to the Agency’s Response to CARE Comment Two, page 2, is it IL EPA’s view that if a variance applicant *cannot* demonstrate that its proposed variance will assure the protection and propagation of the BIP, IL EPA has the authority to impose variance conditions that it believes will assure the protection and propagation of the BIP? Does IL EPA acknowledge that if this scenario were true, then it could also simply reject the variance application, and is not required to issue an alternative thermal effluent limitation?

21. Does IL EPA acknowledge that the CWA § 316(a) *authorizes*, but does not *command* IL EPA to grant a thermal discharger an alternative thermal effluent limitation once protection and propagation of the BIP has been satisfied? Does IL EPA acknowledge that the CWA § 316(a) states only that EPA “may” set alternative thermal effluent limits, not that it “shall” or “must” do so?

Relationship Between Provisional Variance and Alternative Thermal Effluent Limit

22. What is IL EPA's interpretation of the relationship between provisional variances from thermal effluent standards in an NPDES permit and an alternative thermal effluent limit granted as a result of this proposed rule?

23. In IL EPA's "Response to Board Staff Questions for First Hearing," at the beginning of page 12, IL EPA states that an alternative thermal effluent limit could take various forms, including "Additional excursion hours only, with the discharge otherwise complying with a maximum temperature and mixing zone rules." In IL EPA's view, would an alternative thermal effluent limitation in the form of granting additional excursion hours be the same as the relief that IL EPA previously granted in the form of provisional variances that granted additional excursion hours?

24. Does IL EPA plan to discontinue using provisional variances to grant relief from thermal limits in NPDES permits after this proposed rule is implemented? (and in light of U.S. EPA's letter from Tinka Hyde to Maria Willhite, dated February 25, 2013, to be entered as Exhibit by leave of the Hearing Officer).

