BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:	)	
	)	
PROCEDURAL RULES FOR ALTERNATIVE	)	R2013-20
THERMAL EFFLUENT LIMITATIONS	)	(Rulemaking – Water)
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)	)	

NOTICE OF FILING

ORIGINAL

To: see attached Certificate of Service

On the 10th Day of December, 2013, I filed Post Hearing Comments on behalf of Citizens Against Ruining The Environment with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

By: Keith Harley
Keith Harley, Chicago Legal Clinic, Inc.

Dated: December 10, 2013

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CERTIFICATE OF SERVICE

I, Keith Harley, the undersigned attorney, hereby certify that I served the attached document – First Notice Comments on behalf of Citizens Against Ruining the Environment – by delivering it to:

John Therriault, Clerk
Illinois Pollution Control Board
100 West Randoph, Suite 11-500
Chicago, IL 60601-7447

and by mailing it to:

Daniel Robertson, Hearing Officer
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by depositing it in the United States Mail, postage prepaid, from 211 W. West Wacker, Suite 750, before the hour of 5:00 p.m., on this 10th day of December, 2013.

Keith Harley

Keith Harley, Chicago Legal Clinic, Inc.

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POST HEARING COMMENTS
OF CITIZENS AGAINST RUINING THE ENVIRONMENT

Keith Harley of the Chicago Legal Clinic, Inc. respectfully submits the following Post Hearing Comments on behalf of Citizens Against Ruining the Environment ("CARE").

CARE submitted extensive comments as part of First Notice. Because of the Board's procedural approach to this rulemaking, it has not issued an Opinion and Order addressing the substance of CARE's First Notice Comments. Consequently, today's Post Hearing Comments will supplement rather than restate CARE's First Notice Comments. Based on its participation in the October 16th hearing and its review of information subsequently submitted into the record, CARE reaffirms its First Notice Comments supplemented by today's filing.

Post Hearing Comment One: An Alternative Thermal Effluent Limit Is A Variance That Must Meet the Requirements of Both the Clean Water Act And The Illinois Environmental Protection Act.

The IL EPA and CARE agree on two things:

1. an alternative thermal effluent limit is a variance; and,

2. this type of variance may only be granted if it ensures protection of a balanced indigenous population.

For CARE, because an alternative thermal effluent limit is a variance, the implementing regulations must also meet the variance requirements mandated by the Illinois Environmental Protection Act. 415 ILCS 5/35 – 5/38. By contrast, for IL EPA, the relationship between 316(a) and 415 ILCS 5/35 is "either-or". For CARE, it is "both-and". For example, for CARE, an applicant for thermal relief must demonstrate both the protection of a balanced indigenous population (the federal requirement) and that existing limitations impose an arbitrary and unreasonable hardship (the Illinois requirement). For IL EPA, these two requirements are "inconsistent" and cannot both be incorporated into the proposed regulation. Illinois EPA's Responses to Questions Presented at Second Hearing, p. 2.

IL EPA is incorrect to urge the Board to adopt regulations that do not incorporate the clear mandates for variance issuance under Illinois law. As IL EPA acknowledges, Illinois may establish regulations that are more stringent, but not inconsistent with the Clean Water Act. Id. at 1. The critical Illinois variance requirement – the arbitrary and unreasonable hardship demonstration – is not inconsistent with the Clean Water Act. It does not displace the federally mandated BIP determination, but rather, addresses an entirely separate and distinct issue. The effect of an alternative limit on aquatic life in the receiving water is a separate and distinct inquiry than determining the arbitrary and unreasonable hardship created by the existing limit on the discharger. CARE likewise concedes that the Illinois legislature mandated more frequent review of variances than would be required under the federal baseline. 415 ILCS 5/36(b). Simply, CARE acknowledges that obtaining thermal relief in Illinois is subject to a more stringent set of requirements than imposed under 316(a). Nonetheless, CARE asserts longstanding Illinois law speaks plainly and decisively to the requirements to obtain a variance in this State, and cannot be avoided.

As a policy matter, this Board should be wary of regulatory proposals that avoid plain Illinois statutory requirements. Under the Act, the Board has an authority to "determine, define, and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act." 415 ILCS 5/5(b). Because an administrative agency is a creature of statute, any power or authority that it claims must be found under the statute which created the agency. *Granite City Div. of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 171 (1993). It is well established in Illinois that an administrative agency may not promulgate regulations that exceed or alter its statutory power or that are contrary to the legislative purpose and intent of the statute. *Eastman Kodak Co. v. Fair Employment Practices Comm.*, 86 Ill.2d 60, 70 (1981). An administrative agency has authority to regulate and execute the statute's provisions and to carry out the powers conferred on the agency. Id.; see also, *Ill. Dep't of Revenue v. Ill. Civil Serv. Comm'n*, 357 Ill. App. 3d 352, 363 (Ill. App. Ct. 1st Dist. 2005). The Illinois Appellate Court has stated that "It is axiomatic that the authority of an administrative agency to adopt rules and regulations is defined by the statute creating that authority, and such rules and regulations must be in accord with the standards and policies set forth in the statute." *Popejoy v. Zagel*, 115 Ill. App. 3d 9, 11 (Ill. App. Ct. 4th Dist. 1983); *Pye v. Marco*, 13 Ill. App. 923, 926 (Ill. App. Ct. 4th Dist. 1973). As Illinois courts have stated explicitly, "...an administrative body cannot extend or alter the operation of a statute by exercise of its rule-making powers." *Popejoy*, 115 Ill. App. 3d at 11; see also *Northern Ill. Automobile Wreckers & Rebuilders Ass'n v. Dixon* (1979), 75 Ill. 2d 53, 60, 387 N.E.2d 320, 324. Because of clear Illinois statutory standards for a variance, the Board must adhere to these standards in the present rulemaking.

Post Hearing Comment Two: As Demonstrated by Illinois Mixing Zone Regulations, It Is Necessary and Feasible for a Broader Range of Regulatory Factors to be Considered As Part of Evaluating and Issuing An Alternative Thermal Effluent Limit.

CARE recommended that this Board should mandate a broader range of regulatory factors in deliberations on alternative thermal effluent limits. First Notice Comments Of Citizens Against Ruining The Environment, pp. 9 - 10. These factors were not devised by CARE, but instead are derived directly from U.S. EPA Technical Guidance. While not entirely discounting the value of these factors, IL EPA's proposal adheres narrowly to the minimal federal regulatory requirements for granting 316(a) relief.

In response, CARE calls the Board's attention to the Board's prudent regulatory approach in an analogous circumstance, the promulgation of regulations for mixing zones found in 35 Ill. Adm. Code 302.102. These analogous regulations specifically establish twelve factors that must be incorporated into the deliberative process as part of establishing a mixing zone. 35 Ill. Adm. Code 302.102(b)(1)-(12). Notably, as in the present case, the establishment of a mixing zone is subject to broad mandate. In the present case, the broad mandate is for protection of a balanced, indigenous population of aquatic life. In the context of a mixing zone, Board regulations invoke a similarly broad requirement by reference to an existing regulatory mandate in 35 Ill. Adm. Code 304.102 ("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."). Importantly, the Board's mixing zone regulations did not rely solely on broad mandate, but instead, specifically directed consideration of twelve factors. Many of these requirements overlap with the factors recommended by CARE in the present rulemaking, for example, impacts

on endangered species and endangered species habitat, impacts on zones of passage, and limits on mixing zones where water quality standards are already being violated.

Notably, the Board's mixing zone approach was upheld by the Illinois Supreme Court, in no small part because of the detailed, prescriptive nature of the regulations. *Granite City Div. of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149 (1993). Because of the detailed, prescriptive nature of the regulations, the regulations withstood challenges based on unconstitutional vagueness, an improper (overly broad) delegation of authority to the IL EPA and failure to give appropriate weight to technical feasibility. Id. at 156, 176.

In the context of the present rulemaking, because the Board will ultimately decide whether to grant an alternative thermal effluent limit, the *Granite City* decision underscores the importance of having clear, well-defined regulatory standards to support Board decisions. To rely on broad mandates invites challenges. It is critical to identify decision factors in regulations to ensure decisions are made in a consistent, even-handed and rational manner. Explicitly identifying the decision factors in regulations provides certainty and clarity for regulated entities, the IL EPA and for members of the public. Explicitly stating decision factors prevents arbitrary decisions and ensures similar situations are being addressed in a consistently reliable and rigorous manner. Incorporating prescriptive decision factors into regulations will direct the deliberative processes of Agency and Board members in a more fixed and permanent manner. The regulations will have greater credibility and will be more likely to withstand the kinds of challenges on display in *Granite City*. Most importantly, the resulting thermal limits will be more likely to achieve the purpose of being protective of aquatic life now and in the future.

Post Hearing Comment Three: A Source Should Not Be Eligible For Both a Mixing Zone and An Alternative Limit for Thermal Effluent

Mixing zones apply to the full range of pollutants, including thermal effluent. For sources that have mixing zone relief, the following determinations have already been made:

1) Mixing must be confined in an area or volume of the receiving water no larger than the area or volume which would result after incorporation of outfall design measures to attain optimal mixing efficiency of effluent and receiving waters. Such measures may include, but are not limited to, use of diffusers and engineered location and configuration of discharge points.

2) Mixing is not allowed in waters which include a tributary stream entrance if such mixing occludes the tributary mouth or otherwise restricts the movement of aquatic life into or out of the tributary.

3) Mixing is not allowed in water adjacent to bathing beaches, bank fishing areas, boat ramps or dockages or any other public access area.

4) 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 well being 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.

5) Mixing is not allowed in waters which contain intake structures of public or food processing water supplies, points of withdrawal of water for irrigation, or watering areas accessed by wild or domestic animals.

6) Mixing must allow for a zone of passage for aquatic life in which water quality standards are met. However, a zone of passage is not required in receiving streams that have zero flow for at least seven consecutive days recurring on average in nine years out of ten.

7) The area and volume in which mixing occurs, alone or in combination with other areas and volumes of mixing, must not intersect any area of any body of water in such a manner that the maintenance of aquatic life in the body of water as a whole would be adversely affected.

8) The area and volume in which mixing occurs, alone or in combination with other areas and volumes of mixing must not contain more than 25% of the cross-sectional area or volume of flow of a stream except for those streams where the dilution ratio is less than 3:1. In streams where the dilution ratio is less than 3:1, the volume in which mixing occurs, alone or

in combination with other volumes of mixing, must not contain more than 50 % of the volume flow unless an applicant for an NPDES permit demonstrates, pursuant to subsection (d) of this section, that an adequate zone of passage is provided for pursuant to Section 302.102(b)(6).

9) No mixing is allowed where the water quality standard for the constituent in question is already violated in the receiving water.

10) No body of water may be used totally for mixing of single outfall or combination of outfalls, except as provided in Section 302.102(b)(6).

11) Single sources of effluents which have more than one outfall shall be limited to a total area and volume of mixing no larger than that allowable if a single outfall were used.

12) 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 the mixing encompass a surface area larger than 26 acres. 35 Ill. Adm. Code 302.102(b)(1)-(12).

Further, as a condition of having an approved mixing zone, "...all water quality standards must be met at every point outside of the area and volume of the receiving water within which mixing is allowed." 35 Ill. Adm. Code 302.102(c).

Because of the comprehensive, exacting nature of the mixing zone determination, CARE recommends that if a source has a mixing zone for thermal effluent, it should be ineligible for additional regulatory relief in the form of an alternative thermal effluent limit:

> "If a source is utilizing an approved mixing zone pursuant to 35 Ill. Adm. Code 102 for thermal effluent, it shall be ineligible for an alternative thermal effluent limit under this Section."

Regulated entities would be able to choose which form of regulatory relief is better tailored to their purposes, but would be barred from adding two forms of distinct regulatory relief together. For example, a mixing zone will necessarily include limits based on the determination "...that the area and volume in which mixing occurs, alone or in combination with other areas

and volumes of mixing, must not intersect any area of any body of water in such a manner that the maintenance of aquatic life in the body of water as a whole would be adversely affected." 35 Ill. Adm. Code 302.102(b)(7). If a thermal mixing zone is already and necessarily premised on a determination of what is protective of aquatic life in the receiving body of water, CARE asserts it is inappropriate to contemplate providing an additional extension of regulatory relief. This does not eliminate the possibility of an alternative thermal effluent limit, but instead, requires a regulated entity to decide which form of regulatory relief best accomplishes its objectives. It prohibits regulated entities from creating a daisy chain of thermal regulatory relief that risks creating layer-upon-layer of regulatory complication, rendering any thermal standards ineffective and practically unenforceable.

Post Hearing Comment Four: Illinois Law Is Clear That Illinois Agencies, Not Regulated Entities, Are Responsible For Compliance With The Requirements of the Illinois Endangered Species Act.

As IL EPA acknowledges, the Illinois Endangered Species Protection Act mandates:

> It is the public policy of all agencies of the State and local governments to utilize their authorities in furtherance of the purposes of this Act by evaluating through a consultation process with the Department whether actions authorized, funded or carried out by them are likely to jeopardize the continued existence of Illinois listed endangered and threatened species or are likely to result in the destruction or adverse modification of the designated essential habitat of such species, which policy shall be enforceable only by writ of mandamus; and where a State or local agency does so consult in furtherance of this public policy, such State or local agency shall be deemed to have complied with its obligations under the "Illinois Endangered Species Act", provided the agency action shall not result in the killing or injuring of any Illinois listed animal species, or provided that authorization for taking a listed species has been issued under Section 4, 5, or 5.5 of this Act. 520 ILCS 10/11.

Given the plain language of this statute, it is difficult to understand how IL EPA can conclude that the legal responsibility for consultation with IDNR is imposed on regulated entities ("The

permittee is primarily responsible to comply with the Illinois Endangered Species Act"). Illinois EPA's Responses to Questions Presented at Second Hearing, p. 2. CARE recognizes that consultation can include the participation of a regulated entity, but asserts agencies of state government bear the ultimate responsibility for consultation and for Endangered Species Act compliance. Consistent with this plain mandate, CARE again asserts that any IL EPA review of a request for an alternative thermal effluent limit must include Agency consultation with the Illinois Department of Natural Resources, and that the results of this consultation should be explicitly incorporated in the Agency's recommendations to this Board.

Respectfully Submitted,

Keith Harley, Chicago Legal Clinic, Inc.

Date: December 10, 2013

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