

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROCEDURAL RULES FOR	)	
ALTERNATIVE THERMAL EFFLUENT	)	R13-20
LIMITATIONS UNDER SECTION 316(a)	)	(Rulemaking – Water)
OF THE CLEAN WATER ACT	)	
PROPOSED NEW 35 ILL. ADM. CODE	)	
PART 106, SUBPART K AND	)	
AMENDED SECTION 304.141(c)	)	

**NOTICE OF FILING**

TO: Mr. John T. Therriault	Mr. Daniel Robertson
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 W. Randolph Street	100 W. Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA U.S. MAIL)</b>

**(SEE PERSONS ON ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP, a copy of which is herewith served upon you.

Respectfully submitted,

By: /s/ Alec M. Davis  
Alec M. Davis

Dated: December 11, 2013

Alec M. Davis  
General Counsel  
Illinois Environmental Regulatory Group  
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(217) 522-5512

**THIS FILING SUBMITTED ON RECYCLED PAPER**

**CERTIFICATE OF SERVICE**

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP upon:

John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

via electronic mail on December 11, 2013; and upon:

Daniel Robertson  
Hearing Officer  
Illinois Pollution Control Board  
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on December 11, 2013.

By: /s/ Alec M. Davis  
Alec M. Davis

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**FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorney, Alec M. Davis, and in accordance with the October 22, 2013 Hearing Officer Order, hereby submits its Final Comments in the above-captioned matter to the Illinois Pollution Control Board (“Board”) for its consideration.

**I. INTRODUCTION**

The Illinois Environmental Regulatory Group would like to thank the Board for the opportunity to submit these comments in regard to the Board’s proposed procedural regulations and corresponding amendment to its water pollution effluent standards dealing with alternative thermal effluent limitations pursuant to Section 316(a) of the Clean Water Act (“CWA”). IERG believes that the 316(a) process will prove useful to businesses throughout the State of Illinois, and is generally supportive of the First Notice proposal’s adoption. IERG participated in the Board’s August 27, 2013 hearing dedicated to this matter, and offers these comments in follow-up to issues raised during that hearing, and to respond to issues raised by Citizens Against Ruining the Environment (“CARE”).

**II. SECTION 106.1165 – EVIDENTIARY MATTERS**

At the August 27, 2013 hearing, IERG questioned the Illinois EPA's witness regarding the information that the Board could consider in determining whether or not the protection and propagation of the affected species will be assured, pursuant to the proposed Section 106.1165(b). August 27 Transcript, *In the Matter of: Procedural Rules for Alternative 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)*, R13-20 at 20 (Ill.Pol.Control.Bd. Sep. 13, 2013) (rulemaking hereinafter "R13-20"). Specifically, IERG questioned whether the language "any other information the Board deems relevant" was intended by the Agency to empower the Board to consider information that had not been entered into the record for the proceeding. *Id.* In response, the Agency indicated that it intended that the information being considered by the Board be part of the record, but didn't want to limit the Board's ability to consider other information that it deems relevant. *Id.*, at 21-23. The Agency emphasized that its proposed language was modeled after U.S. EPA's regulations, citing 40 C.F.R. 125.73. *Id.*, at 23-24.

IERG recognizes that the Agency's proposal is based on the federal regulations, and that those regulations seemingly give the U.S. EPA Administrator the discretion to consider any information he deems relevant; however, in proceedings before the Illinois Pollution Control Board, IERG believes it is important for participants to have an opportunity to review and respond to any information that may serve as a basis for a Board decision. IERG interprets the proposed procedural rules to establish a process that most closely aligns with the "contested case" proceeding under the Illinois Administrative Procedures Act (5 ILCS 100/1-30, hereinafter "IAPA"), and that the Board's determination of "whether or not the protection and propagation of the affected species will be assured" is a finding of fact, which the IAPA specifies must be

based “exclusively on the evidence and on matters officially noticed.” 5 ILCS 100/1-35(c).

Similarly, the Illinois Environmental Protection Act (“the Act”) specifies that “any final order of the Board under this Act shall be based solely on the evidence in the record of the particular proceeding involved...” 415 ILCS 5/41(b).

Because Illinois law requires that the Board base its decisions on the record, IERG believes that the proposed regulations should make the point clear. Accordingly, IERG suggests that the Board amend the proposed 106.1165(b) to read:

In determining whether or not the protection and propagation of the affected species will be assured, the Board may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the USEPA under 304(a) of the CWA, or any other information in the record the Board deems relevant.

Alternatively, if the Board prefers to include a process by which it introduces additional information into the record and affords participants to the proceeding an opportunity to review and respond, that would satisfy IERG’s concerns as well.

### **III. CARE’S CONCERNS**

IERG is generally satisfied with the Illinois EPA’s responses to questions and issues raised by CARE, however, there are a number of overlying concepts that deserve additional attention.

First, a number of CARE’s concerns appear to stem from the misconception that because U.S. EPA regulations have characterized the 316(a) alternative thermal effluent limitation as a “variance” it must also be subject to the variance requirements specific to Illinois law. While IERG agrees that if the proposed 316(a) process sought a “variance” under Illinois law it would have to comply with the requirements in the Act and Board rules, the Board has specifically found that the 316(a) process and resultant alternative effluent limitation do not fall under its

existing procedural rules or regulatory relief structures (including those for adjusted standards and variances), thereby necessitating this matter. *See In the Matter of: Petition of Exelon Generation, LLC, Under 35 Ill. Adm. Code 304.141(c) for Alternative Thermal Standards, Quad Cities Nuclear Generating Station, AS13-1 and Exelon Generation LLC (Quad Cities Nuclear Generation Station) v. Illinois EPA, PCB13-31.* IERG supports the Illinois EPA's responses indicating that it does not believe the Illinois variance limitations are applicable in this matter.

Second, a number of CARE's concerns appear to stem from objections to the substantive requirements of the proposal. Arguments that the Board should require petitioners to perform various studies or provide additional showings than required by the proposal fail to recognize that the immediate rulemaking is intended to establish a procedural process, and that process is intended to be as broadly crafted as possible to allow for the wide range of site-specific circumstances and alternative limitations sought that would necessarily require different studies to be performed. Rather than try to specify all possible requirements that the Board might want to see in this rulemaking, the Agency's proposal allows for petitioners to assemble and provide the studies and information that the Board might require to weigh in determining whether to approve the requested alternative limitation.

In all other aspects, IERG agrees with the responses provided by the Illinois EPA to the comments and questions raised by both CARE and the Board.

#### **IV. ILLINOIS EPA'S REVISED LANGUAGE**

IERG is aware of two additional revisions suggested by the Illinois EPA in response to questions of the Board or CARE comments. *See Illinois EPA's Response to Board Staff Questions for Section Hearing and CARE Comments, R13-20 (Ill.Pol.Control.Bd. Oct. 11, 2013).* IERG has no objection to the revision to Section 106.1130(g) making clear that a

petitioner can specify that, in addition to the alternative thermal effluent limitation, a petitioner can also seek relief from mixing zone regulations (if applicable) and other relief. *Id.* at Exhibit A, p. 2. IERG also has no objection to the revision to Section 103.1160(d) making clear that in some instances a petitioner must consider other pollutants or the additive effect of other thermal sources. *Id.* at Exhibit B, p. 4.

**V. CONCLUSION**

IERG is generally supportive of this rulemaking proposal, as it puts in place a process by which businesses in Illinois can avail themselves of the statutory alternative effluent limitation demonstration offered by the Clean Water Act. IERG thanks the Board for the opportunity to participate in this rulemaking, for its efforts to move forward with this rulemaking expeditiously, and appreciates its consideration of these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP

Dated: December 11, 2013

By: /s/ Alec M. Davis  
Alec M. Davis

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