

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE OF FILING

To: Attached Certificate of Service

On this 11th day of December 2013, we filed Exelon Generation's Comments on the Proposed Procedural Rules for Alternate Thermal Effluent Limitations Applications Under Section 316(a) of the Clean Water Act with the Office of the Clerk of the Illinois Pollution Control Board.

Respectfully submitted,

EXELON GENERATION LLC

By: Alan P. Bielawski / wcd
One of Its Attorneys

Alan P. Bielawski
William G. Dickett
Jason E. James
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
Phone: (312) 853-7000
Fax: (312) 853-7036
Email: abielawski@sidley.com
wdickett@sidley.com
jjames@sidley.com

CERTIFICATE OF SERVICE

I hereby certify that I served the attached "Exelon Generation's Comments on the Proposed Procedural Rules for Alternate Thermal Effluent Limitations Applications Under Section 316(a) of the Clean Water Act" by filing said document with:

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

and by mailing said document to:

Daniel Robertson, Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601-7447

Joanne M. Olson, Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Matthew J. Dunn, Chief
Office of the Attorney General
Environmental Bureau North
69 West Washington Street, Suite 1800
Chicago, IL 60602

Illinois Department of Natural Resources
Office of Legal Services
One Natural Resources Way
Springfield, IL 62702-1271

Christine G. Zeman
City of Springfield
Office of Public Utilities
800 East Monroe, 4th Floor
Municipal Building East
Springfield, IL 62757-0001

Alec M. Davis, General Counsel
Illinois Regulatory Group
215 East Adams Street
Springfield, IL 62701

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker
Suite 750
Chicago, IL 60606

by depositing it in the United States Mail, postage prepaid, on this 11th day of December 2013.



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

EXELON GENERATION’S COMMENTS ON THE PROPOSED PROCEDURAL RULES FOR ALTERNATE THERMAL EFFLUENT LIMITATIONS APPLICATIONS UNDER SECTION 316(a) OF THE CLEAN WATER ACT

I. Introduction

Exelon Generation LLC (“Exelon”) is participating in this rule-making because of the importance it attaches to assuring that the provisions of Section 316(a) of the Clean Water Act (“Section 316(a)”) are implemented in Illinois. As recited in the Illinois Environmental Protection Agency’s (“Illinois EPA”) Statement of Reasons filed in this matter, Section 316(a) provides a unique process by which dischargers of heated effluent may obtain alternate, site-specific thermal effluent limitations by demonstrating that the otherwise applicable thermal requirements are more stringent than necessary to protect the indigenous biotic community affected by the discharge. The Illinois Pollution Control Board’s (“Board”) regulations expressly authorize the issuance of thermal standards under Section 316(a) in Illinois. 35 Ill. Adm. Code 304.141(c) (“Section 304.141(c)”).

Exelon operates electrical generating facilities in Illinois that discharge heated effluent. In September 2012, after having conducted years of biological and thermo-hydraulic studies concerning the thermal discharges from its Quad Cities Nuclear Generating Station (“Quad

Cities Station”), Exelon petitioned the Board to approve alternate thermal limits for the plant pursuant to Section 316(a) and Section 304.141(c). In response to that petition, the Board ruled that, although it was empowered to grant relief under Section 316(a), rules establishing the process for adjudicating Section 316(a) petitions by the Board needed to be promulgated before the Board could act on Exelon’s petition. Order of the Board in the Matter of Petition of Exelon Generation, LLC Under 35 Ill. Adm. Code 304.141(c) for Alternative Thermal Standards, Quad City Nuclear Generating Station, AS 13-1 (Oct. 18, 2012).

This rule-making proceeding was initiated by Illinois EPA in response to the Board’s ruling. During the pendency of this proceeding and until final rules are promulgated by the Board, Exelon is being denied the right to obtain relief for Quad Cities Station authorized by Section 316(a) and Section 304.141(c). For that reason, Exelon requests that the Board proceed expeditiously with consideration and issuance of the proposed rules.

II. Illinois EPA’s Proposed Rules

Illinois EPA proposes to add a new Subpart K to Part 106 of the Board’s rules that specifies a process for requesting, reviewing and issuing thermal effluent limits pursuant to Section 316(a) and Section 304.141(c). Exelon supports Illinois EPA’s approach. Part 106 governs proceedings before the Board pursuant to specific rules and statutory provisions, such as Section 316(a) and Section 304.141(c), that require an adjudication by the Board.¹ Exelon also supports Illinois EPA’s proposal to integrate the process set forth in 40 CFR Part 125, Subpart H into Illinois EPA’s proposed Subpart K rules. Section 304.141(c) requires that thermal limits

¹ Section 106.110 recites the specific proceedings addressed in Part 106. If the Board adopts Illinois EPA’s approach to add Subpart K to Part 106, Section 106.110 should be amended to include a reference to proceedings under Section 316(a) and Section 304.141(c).

authorized pursuant to that section be issued in accordance with applicable federal regulations. 40 CFR Part 125, Subpart H establishes the process by which the United States Environmental Protection Agency (“USEPA”) reviews and issues effluent limitations under Section 316(a) when it is the National Pollutant Discharge Elimination System (“NPDES”) permitting authority. Therefore, the Section 316(a) process in Illinois should conform to 40 CFR Part 125, Subpart H, as proposed by Illinois EPA. Finally, Exelon supports Illinois EPA’s proposal that Section 304.141(c) be amended to recognize that Illinois EPA is the authorized NPDES-permitting entity in Illinois.

III. Questions Raised During First Notice Period

A number of questions were raised concerning Illinois EPA’s proposed rules during the First Notice period. Illinois EPA’s responded to the questions, in some instances by offering revisions to the rules. As noted below, Exelon agrees with Illinois EPA’s responses and proposed revisions.

1. 316(a) Technical Guidance

The Board questioned whether Section 106.1160, which sets forth the burden a petitioner must satisfy to obtain Section 316(a) thermal limits, should include language derived from the “Interagency 316(a) Technical Guidance Manual And Guide For Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements, May 1, 1977” (“Technical Manual”). While the Technical Manual serves as useful guidance to parties seeking alternate thermal limits, and in fact was used by Exelon in preparing its 316(a) Demonstration for Quad Cities Station, Exelon agrees with Illinois EPA that it is neither necessary nor advisable for Section 106.1160 to include language from the Technical Manual. The corresponding federal regulation (40 CFR

125.73) does not include any such language, nor does it reference the Technical Manual. The Technical Manual should remain as guidance to Section 316(a) petitioners, to be revised and updated as circumstances warrant.²

2. Zone of Passage

The Board questioned the interplay between the Board's mixing zone rules and thermal limits issued under Section 316(a). Thermal limits under Section 316(a) may be expressed as end-of-pipe limits or limits measured at the edge of a mixing zone. In either case, the discharger seeking Section 316(a) limits must be able to show that the limits it is requesting – including where and how compliance with those limits is measured – will assure the protection and propagation of the balanced, indigenous biotic community ("BIC"), as required by Section 316(a). Exelon agrees with Illinois EPA that the Board's determination regarding whether that burden of proof has been met by a particular petitioner needs to be made on a case-by-case basis. *See Illinois EPA's Response to Board Staff Questions for First Hearing, R13-20 (Aug. 28, 2013).*

There is no question that the Board is authorized to approve alternate Section 316(a) limits that are expressed as limits measured at the end of a mixing zone, even if the mixing zone does not conform with the generally applicable criteria governing mixing zones, set forth at 35 Ill. Adm. Code §302.102. Section 304.141(c) provides that "[t]he standards of this Chapter shall apply to thermal discharges unless . . . in accordance with Section 316 of the CWA . . . the Administrator and the Board have determined that different standards shall apply to a particular

² As pointed out by Illinois EPA, the Technical Manual is quite old and, to this day, remains in draft form.

thermal discharge.”³ The “standards of this Chapter” include the water quality standards of Part 302, including the provisions of §302.102 that allow for compliance to be achieved via a mixing zone. The test is whether the petitioner meets the burden of proof mandated by Section 316(a).

Thus, if a petitioner is proposing Section 316(a) limits for which compliance is to be measured at the edge of a mixing zone, and if the proposed mixing zone deviates from the generally applicable criteria governing mixing zones, the petitioner should be required to demonstrate that the proposed limits *and* the site-specific mixing zone are sufficiently protective of the BIC. In response to the Board’s inquiry, Illinois EPA proposes that Section 106.1130 be revised to clarify that, if applicable, a petitioner is required to state that it is seeking a modified mixing zone as part of its Section 316(a) relief. *See Illinois EPA’s Response to Board Staff Questions for First Hearing*, R13-20 (Aug. 28, 2013). Exelon agrees with Illinois EPA’s proposed revision.

3. Section 316(c)

The Board questioned what impact the provisions of Section 316(c) of the Clean Water Act (“Section 316(c)”) have on the duration of alternate thermal limits issued under Section 316(a). Section 316(c) grants a discharger that elects to modify its facility in order to comply with then-current thermal requirements a 10-year grace period during which the discharger is not required to comply with any new thermal limits that may be enacted. Section 316(c), by its terms, does not apply to dischargers that obtain relief from generally applicable thermal limits under Section 316(a), and therefore the 10-year grace period provided by Section 316(c) is not

³ As discussed above, Illinois EPA correctly proposes to substitute the Agency for the “Administrator” as part of this rule-making.

relevant to limits issued under Section 316(a). As Illinois EPA points out, USEPA has determined that Section 316(a) limits are subject to review and approval with each NPDES permit renewal, generally every 5 years.

4. Applicability of Illinois Variance Requirements

Citizens Against Ruining the Environment (“CARE”) raised a number of questions concerning the relationship between the statutory and regulatory requirements that govern the issuance of variances in Illinois to the Section 316(a) process. Because thermal limits issued under Section 316(a) are sometimes referred to as “Section 316(a) variances” in the federal regulations and guidance documents, CARE asserts that Section 316(a) limits must be considered “variances” under Illinois law, and thus subject to the substantive and procedural requirements for variances under the Illinois Environmental Protection Act and Board rules.

Section 316(a) entitles a discharger to obtain site-specific thermal limits if the discharger shows that the proposed limits will be sufficiently protective of the BIC. Under Section 316(a) and the USEPA regulations that implement Section 316(a), the site-specific thermal limits may remain in place for as long as the discharger continues to show that the BIC is protected. (*See* 40 CFR 125.72.) In contrast, variances authorized by the Illinois Environmental Protection Act are temporary, relatively short-term vehicles that allow a discharger to avoid immediate compliance with generally applicable requirements based on a showing of hardship and that the short-term cost of immediate compliance outweigh corresponding environmental benefits. Under the Act and Board rules, a discharger subject to a variance is required to show that it will implement measures to come into compliance with generally applicable requirements when the variance expires.

Clearly, Section 316(a) limits are entirely separate and distinct from variances authorized by the Act. Section 316(a) limits are an alternate means of complying with thermal discharge requirements, not a short-term means of avoiding compliance while a permanent solution is put in place. The procedural and substantive requirements that govern the issuance of variances under Illinois law are inapplicable to the process for reviewing and issuing thermal limits under Section 316(a) and Section 304.141(c), notwithstanding CARE's assertions to the contrary.

5. Consideration of Other Thermal Sources

In response to CARE's concern that proposed Section 106.1160, as worded, did not require that existing dischargers take into account other pollutants in the receiving stream and other thermal sources, Illinois EPA suggests revisions to the provision that would clarify that existing dischargers in fact are required to consider and analyze how other pollutants and thermal sources may interact with Section 316(a) limits. Illinois EPA's Response to Board Staff Questions for Section Hearing and CARE Comments, R13-20 (Oct. 11, 2013). Exelon agrees with Illinois EPA's proposed revisions.

6. Illinois Department of Natural Resources and U.S. Fish and Wildlife Service

CARE maintains that the rules should mandate consultation with Illinois Department of Natural Resources ("IDNR") and U.S. Fish and Wildlife Service ("USFWS") during the early screening phase and detailed study phase of the review process. Clearly, these agencies play an important role in assessing impacts to receiving waters, and their input and consultation is required if there are any questions concerning possible impacts to threatened or endangered species. Moreover, as a practical matter, Exelon believes that Section 316(a) applicants will do exactly what Exelon did in designing and implementing the Section 316(a) studies for Quad

Cities Station, which was to involve IDNR and USFWS early in the planning process. Such consultation helps assure that the costly and time-consuming studies will not need to be redone. Exelon supports Illinois EPA's suggested revision to 106.1125 which would require that a petitioner serve a copy of the Section 316(a) petition on IDNR.

IV. Conclusion

Exelon appreciates the opportunity to participate in this important rulemaking proceeding. As previously stated, Exelon requests that the Board expedite its review and issuance of the rules so that Exelon may proceed with having its long-delayed petition seeking Section 316(a) relief for Quad Cities Station considered by the Board.

Respectfully submitted,

EXELON GENERATION LLC

By: Alan P. Bielawski / wcd
One of Its Attorneys

Alan P. Bielawski
William G. Dickett
Jason E. James
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
Phone: (312) 853-7000
Fax: (312) 853-7036
Email: abelawski@sidley.com
wdickett@sidley.com
jjames@sidley.com

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