

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R13- 20
PROCEDURAL RULES FOR)	(Rulemaking- Water)
ALTERNATIVE THERMAL 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))	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS EPA'S POST HEARING COMMENTS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/Joanne M. Olson
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ILLINOIS EPA’S POST HEARING COMMENTS

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, (Illinois EPA or Agency) by and through its counsel, and hereby submits its Post Hearing Comments as directed by the Hearing Officer Order dated October 22, 2013.

Procedural Background

On June 6, 2013, the Illinois EPA filed its proposal to amend the Illinois Pollution Control Board’s (Board) rules in Part 106 and Section 304.141. The Agency’s purpose in proposing these amendments is to establish procedural rules for alternative thermal effluent limitations under Section 316(a) of the Clean Water Act (CWA) and Section 304.141 of Title 35 of the Illinois Administrative Code. The Board accepted the Agency’s proposal on July 11, 2013, and first notice of the proposed rulemaking was published in the Illinois Register on July 26, 2013.

Two hearings were held on this rulemaking proposal. The first hearing was held in Springfield Illinois on August 27, 2013. The Board prefiled questions for the Agency, and the Agency submitted written answers as Hearing Exhibit 1. Citizens Against Ruining the Environment (CARE) filed first notice comments with the Board on September 5, 2013. The Agency responded to CARE’s comments as well as additional questions posed by the Board at

the second hearing, held on October 16, 2013, in Chicago Illinois. The Illinois EPA filed written responses to questions raised at the second hearing on November 11, 2013.

Agency Comments

A. Alternative Thermal Effluent Limitation and Variances

The Agency believes the proposed rule provides the necessary procedures for the Board to grant an alternative thermal effluent limitation under the CWA and the Illinois Environmental Protection Act (Act). The Agency's proposal was carefully crafted after the CWA, federal regulations, and existing procedural Board rules. The Agency acknowledges that the burden of proof under the CWA, federal regulations and the Agency's proposed rule differs from the regular burden of proof necessary to obtain a variance under the Section 35 of the Act. However, in this case, the federal standard must be followed as allowed for under the Act. Section 35 specifically provides that variances can be granted to the extent consistent with the CWA. The Board must not require the petitioner to show a thermal effluent limitation is an arbitrary and unreasonable hardship, as such a showing is not required under the CWA or federal regulations. Imposing this additional burden of proof on petitions for alternative thermal relief is inconsistent with the Clean Water Act.

B. Section 316(c) of the Clean Water Act

In Illinois EPA's Response to Questions Presented at Second Hearing, the Illinois EPA indicated that Region 5 had not responded to Illinois EPA's questions regarding the applicability of Section 316(c). Since that filing, Region 5 has contacted the Agency, and provided the following response:

Section 316(c) of the Clean Water Act provides for a moratorium period on more stringent limits after a thermal limit established under Section 301 or 303 is included in a permit and complied with by a modification of the thermal discharge. 316(a) alternate thermal effluent limitations are not established under Section 301 or 306 and as such

316(c) does not apply when a 316(a) limit is imposed in a permit.

EPA reviewed federal cases and EAB decisions available in LEXUS and found no references to Section 316(c) applying to 316(a) limits in the decisions. EPA also found no decisions where 316(c) was applied to a facility to provide the moratorium period.

The Agency does not believe Section 316(c) of the CWA applies to alternative thermal effluent limitations.

C. Illinois Administrative Procedure Act

During the first hearing, questions arose regarding the Board's ability to consider information contained or referenced in any thermal water quality criteria and thermal water quality information published by USEPA or any other information it deems relevant, and the petitioner's ability to respond to Board's consideration of additional information. See Proposed Section 106.1165; August 27, 2103 Hearing Transcript, pp. 20-25. Under the Illinois Administrative Procedures Act (IAPA), the record in contested cases includes, among other things, all pleadings, all evidence received, a statement of matters officially noticed, proposed findings and any decision by the administrative body. 5 ILCS 100/10-35(a). Any publication or additional information considered by the Board would become a part of the record by as a matter officially noticed.

Under the rules, as proposed by the Agency, the petitioner and the Agency have an opportunity to respond when the Board considers additional information. Proposed Section 106.1175(a) provides that the provisions of 35 Ill. Adm. Code 101 regarding default, transcripts, the record, motions briefs and oral arguments apply to alternative thermal effluent limitation proceedings. Under Section 101.612, the hearing officer must establish a schedule to complete the record, with a complete record at least 30 days before the decision date. 35 Ill. Adm. Code 101.612(a). Under the IAPA, the record must include a statement of matters officially noticed,

and therefore, the parties will have knowledge of additional materials considered by the Board 30 days before the Board issues its decision. Within this 30 day period, any party could file a brief regarding the matters officially noticed. Even if the Board considers materials after the completion of the record pursuant to Section 101.612(a), the parties will be able to respond in a motion to reconsider, pursuant to Section 101.502. To ensure the parties are informed of the material considered by the Board, the Agency proposes including the following language to proposed Section 106.1165(b): “The Board shall include any information considered pursuant to this subsection in the record as a matter officially noticed, and shall provide the parties with an opportunity to comment.”

Summary of Changes to the Agency's Proposal

During the course of this proceeding, numerous changes were suggested by the Board and by the Illinois EPA in response to comments or questions. The following is a summary of the changes to the proposal that the Illinois EPA supports.

Section 106.110¹

This 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.

Section 106.1105 General²

- a) Description. This Subpart applies to any point source that discharges pollutants to waters of the United States who seeks to demonstrate pursuant to 35 Ill. Adm. Code 304.141(c) and Section 316(a) of the Clean Water Act that any effluent limitation~~limit~~ proposed for the control of a thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the 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.

¹ See August 27, 2013, Hearing Exhibit 1, Page 1.

² See August 27, 2013, Hearing Exhibit 1, Page 2.

Section 106.1110 Definitions³

“Balanced, indigenous community” is synonymous with the term “balanced, indigenous population” in the CWA and means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species, and by a lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with Section 301(b)(2) of the CWA; and 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 under Chapter I of Subtitle C of this Title granted by the Board.

Section 106.1115 Early Screening⁴

- 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 Study⁵

- 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~~

³ *Id.*

⁴ See August 27, 2013, Hearing Exhibit 1, Page 3-6.

⁵ *Id.*

~~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.

Section 106.1125 Initiation of Proceeding⁶

After completion of the plan of study pursuant to Section 106.1120, the petitioner may file a petition for an alternative thermal effluent limitation with the Clerk of the Board and must serve one copy upon the Agency and one copy on the Illinois Department of Natural Resources.

Section 106.1130 Contents of Petition⁷

- 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.
- 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 studies published by USEPA, that the petitioner judges to be appropriate to support the alternative thermal effluent limitation demonstration.
- g) a statement of the requested relief, including:
 - 1) the alternative thermal effluent limitation;
 - 2) any relief from the mixing zone regulations in 35 Ill. Adm. Code 302.102, if applicable; and
 - 3) any other relief sought.

⁶ See Illinois EPA's Response to Board Staff Questions for Second Hearing and Care Comments, Exhibit B, Page 5.

⁷ See August 27, 2013, Hearing Exhibit 1, Page 7-9; Illinois EPA's Response to Board Staff Questions for Second Hearing and Care Comments, Exhibit A, Page. 2.

Section 106.1135 Petition Notice Requirements⁸

- b) The notice must contain the name and address of the petitioner and it must state that the petitioner has filed with the Board a petition for an alternative thermal effluent limitation. The notice must also provide the date on which the petition was filed, the Board docket number, the regulatory standard (with appropriate Administrative Code citation) from which the alternative thermal effluent limitation is sought, the proposed alternative thermal effluent limitation, ~~and~~ the location of the facility, and a general description of the petitioner's activity. The concluding portion of the notice must read 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.”

Section 106.1140 Proof of Petition Notice Requirements⁹

Within 30 days after the filing of the petition, the petitioner must file a certificate of publication Clerk of the Board. This certification must be issued by the newspaper that published the notice and must certify when the notice was published and the information the notice contained.

Section 106.1145 Recommendation and Response¹⁰

- a) Unless otherwise ordered by the hearing officer of the Board, the Agency must file with the Board a recommendation within~~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:~~as to~~
- 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

⁸ See October 16, 2013 Hearing Transcript, pages. 50-51; August 27, 2013, Hearing Exhibit 1, Page 9.

⁹ See August 27, 2013, Hearing Exhibit 1, Page 10.

¹⁰ See August 27, 2013, Hearing Exhibit 1, Page 10-11.

- 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 106.1160 Burden of Proof¹¹

- d) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies.
 - 1) When the petitioner bases the alternative thermal effluent limitation demonstration upon the absence of prior appreciable harm, the demonstration must show:
 - A) That no appreciable harm has resulted from the ~~thermal~~normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or
 - B) That despite the occurrence of ~~such~~ previous harm from the thermal component of the discharge, the desired alternative thermal effluent limitation (or appropriate modifications thereof), taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources, will nevertheless 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 made.
 - 2) In determining whether or not prior appreciable harm has occurred, the Board shall consider the length of time during which the petitioner has been discharging and the nature of the discharge.

Section 106.1165 Evidentiary Matters

- b) 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 section 304(a) of the CWA, or any other information the Board deems relevant. The Board shall include any

¹¹ See Illinois EPA's Response to Board Staff Questions for Second Hearing and Care Comments, Exhibit B, P. 3-4.

information considered pursuant to this subsection in the record as a matter officially noticed, and shall provide the parties with an opportunity to comment.

Section 106.1170 Opinion and Order¹²

- a) After an opportunity for a public hearing and upon a satisfactory alternative thermal effluent limitation demonstration, the Board may order the Agency to include thermal discharge effluent limitations or standards in the petitioner's NPDES permit that are less stringent than those required by applicable standards and limitations if the thermal component of the discharge, taking into account the interaction of such thermal component with other pollutants, will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water.
- b) In granting an alternative thermal effluent limitation, the Board may impose such conditions as may be necessary to accomplish the purposes of the Act.
- c) If the petitioner intends for the alternative thermal effluent limitation granted by the Board pursuant to this Subpart to continue beyond the expiration of the petitioner's NPDES permit, the petitioner must apply for renewal of the alternative thermal effluent limitation pursuant to Section 106.1180.

WHEREFORE, The Illinois EPA respectfully submits these comments, and requests the Board to proceed expeditiously to Second Notice.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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¹² See Illinois EPA's Responses to Questions Raised at Second Hearing, page5; October 16, 2013 Hearing Transcript, pg. 32.

CERTIFICATE OF SERVICE

Joanne M. Olson, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING and ILLINOIS EPA'S POST HEARING COMMENTS upon persons listed on the Service List by mailing, unless otherwise noted on the Service List, a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on December 11, 2013.

/s/Joanne M. Olson
Joanne M. Olson

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