

**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 RESPONSES TO QUESTIONS PRESENTED AT SECOND HEARING, 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 RESPONSES TO QUESTIONS  
PRESENTED AT SECOND HEARING**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, (Illinois EPA or Agency) by and through its counsel, and hereby submits its responses to questions presented at the second hearing as directed by the Hearing Officer Order dated October 22, 2013.

**1) Does the Illinois EPA acknowledge that Illinois has the authority to develop an approach that is not identical-in-substance with the federal requirements? (Exhibit 3, question 1; hearing transcript p. 11.)**

IEPA Response: The Illinois EPA’s ability to grant a variance under Illinois law must be consistent with the Clean Water Act (CWA). Illinois EPA cannot grant a variance from the CWA requirements unless such variance is also authorized under the CWA or federal regulations. Illinois EPA may be more stringent, but not inconsistent with the CWA.

**2) Why does Illinois EPA assert that it can dispense with some Illinois Statutory mandates regarding the issuance of variances? (Exhibit 3, question 4; hearing transcript p. 12.)**

IEPA Response: Illinois EPA has never asserted that it can dispense with Illinois statutory mandates regarding the issuance of variances under Illinois law. Under the

Environmental Protection Act (Act), the Board may grant individual variances beyond the limitations prescribed in the Act and Board regulations to the extent that such relief is consistent with applicable provisions of the CWA and regulations adopted pursuant thereto. 415 ILCS 5/35 (West 2012). The Agency believes that thermal relief through the Illinois variance process set forth in Section 35 of the Act is inconsistent with thermal relief under Section 316(a) of the CWA because the two processes have different burdens of proof. Under Section 35 of the Act, an applicant is entitled to a variance if the applicant can show that the existing limitations impose an arbitrary or unreasonable hardship. However, under Section 316(a), arbitrary or unreasonable hardship is not a factor that entitles one to thermal relief; instead, one must show the “effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection 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.” Because of the different standards of proof, Illinois EPA does not believe a Section 316(a) alternative thermal effluent limitation must conform to the variance requirements under Section 35 of the Act. This interpretation does not dispense with Illinois statutory mandates, but instead carries out the specific legislative intent that variances be consistent with the CWA. The Agency has further explained how the variance process is inconsistent with Section 316(a) relief in Illinois EPA’s Response to Board Staff Questions for Second Hearing and Care Comments, Exhibit B, P. 1-2.

**3) Does Illinois EPA similarly assert that the Illinois Pollution Control Board is not bound by existing statutory mandates regarding the issuance of variances? (Exhibit 3, question 4; hearing transcript p. 12.)**

IEPA Response: No. Please see IEPA Response to question 2 above.

**4) When were the 1977 federal regulations substantially changed? (Exhibit 3, question 5; hearing transcript p. 13.)**

IEPA Response: June 7, 1979. See 44 Fed. Reg. 32854-32956

**5) Do you have an agreement with the IDNR that makes this notification [of the 316(a) petition] compliant with the Illinois Endangered Species Protection Act consultation requirement or is that done in another way? (Hearing transcript p. 19.)**

IEPA Response: The Illinois Endangered Species Protection Act provides:

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.

The permittee is primary responsible to comply with the Illinois Endangered Species Act.

The Agency requests the permittee to provide proof of consultation with IDNR with regard to the Illinois Endangered Species Act at the time of application for a new or

expanded discharge. IDNR provides a process for conducting an initial consultation through its ECOCAT website. This ECOCAT process provides a method of identifying facilities or projects which may require further consultation with IDNR. If a permittee does not provide proof of such consultation, the Agency may undertake the consultation process itself, and provide proof in the permit record.

**6) Does Illinois EPA acknowledge that NPDES permits that are issued with a 316(a) variance must include a fact sheet that complies with 40 CFR Section 124.8 including an explanation of why the permitting Agency believes that a 316(a) variance is justified. (Exhibit 3, question 14; hearing transcript p. 24.)**

IEPA Response: Illinois EPA must comply with Part 309 when issuing NPDES permits. Section 309.109 of the Board's rules requires the Agency to circulate public notice of the completed application in a manner designed to inform interested and potentially interested persons of the discharge and the Agency's proposed determination. This notice must meet the requirements of the Act and the CWA. See 35 Ill. Adm. Code 309.109(a)(2)(D). Under Section 309.113, the Agency is required to prepare a fact sheet for discharges with a volume over 500,000 gallons on any day of the year. Reading both Section 309.109 and Section 309.113 together, any facts sheets circulated by the Agency for any permit must comply with CWA and federal regulations adopted thereunder.

Please see also Illinois EPA's Response to Board Staff Questions for Second Hearing and Care Comments, Exhibit B, P. 5-6.

**7) Does the Illinois EPA acknowledge that a NPDES permit containing a 316(a) variance must comply with public notice requirements in 40 CFR 124.10(d)(1) and 124.57? (Exhibit 3, question 17; hearing transcript p. 26.)**

IEPA Response: Please see IEPA Response to question 6 above.

**8) Should the Board include the following language in proposed Section 106.1170 : “may impose such conditions as may be necessary to accomplish the purposes of the Act” (Hearing transcript p. 32.)**

IEPA Response: yes.

**9) What is Illinois EPA’s interpretation of the relationship between provisional variances from thermal effluent standards in an NPDES Permit or in a provisional variance proceeding and an alternative thermal effluent limit granted as a result of this proposed rule? (Exhibit 3, question 22; hearing transcript p. 34.)**

IEPA Response: The Agency does not believe there is a relationship between provisional variances from thermal effluent limitations and Section 316(a) alternate thermal effluent relief. Provisional variances are granted on a short term basis when the applicant can show arbitrary or unreasonable hardship. 415 ILCS 5/35(b); 35 Ill. Adm. Code 104.Supbart C; 35 Ill. Adm. Code Part 180. As stated in response to question 2 above, this is not the basis for Section 316(a) relief. In addition, Section 316(a) relief is granted for a permit cycle while provisional variances should not exceed 45 days.

**10) United States Environmental Protection Agency Region 5 consult on Section 316(c) of the CWA. (Hearing transcript p. 51).**

IEPA Response: The Agency forwarded the Board's questions and the Agency's responses to Region 5. The Agency is still waiting to hear back from Region 5, and will include the result of the consultation with Region 5 in its post hearing comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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**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 RESPONSES TO QUESTIONS PRESENTED AT SECOND HEARING 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 November 13, 2013.

/s/Joanne M. Olson  
Joanne M. Olson



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