

BEFORE THE 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))

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STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: see attached Certificate of Service

Pctt1

On the 5th Day of September, 2013, I filed First Notice 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.



ORIGINAL

Dated: September 5, 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
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Chicago, IL 60601-7447

and by mailing it to:

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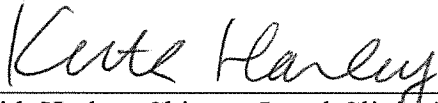
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by depositing it in the United States Mail, postage prepaid, from 211 W. West Wacker,
Suite 750, before the hour of 5:00 p.m., on this 5th day of September, 2013.



Keith Harley, Chicago Legal Clinic, Inc.

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FIRST NOTICE COMMENTS
OF CITIZENS AGAINST RUINING THE ENVIRONMENT

Keith Harley of the Chicago Legal Clinic, Inc. respectfully submits the following First Notice Comments on behalf of Citizens Against Ruining the Environment (“CARE”).

COMMENT ONE: IN ORDER TO OBTAIN AN ALTERNATIVE THERMAL EFFLUENT LIMITATION, AN APPLICANT SHOULD BE REQUIRED TO MEET THE REQUIREMENTS TO OBTAIN A VARIANCE, INCLUDING DEMONSTRATING THAT COMPLIANCE WITH APPLICABLE THERMAL STANDARDS WILL BE AN ARBITRARY AND UNREASONABLE HARDSHIP.

Although the Illinois EPA proposed regulation is careful to avoid the term “variance”, federal law is clear that an action under § 316(a) of the Clean Water Act (CWA) is a variance:

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable “effluent limitations guidelines” which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of [the] CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

40 CFR § 122.2.

Federal law provides broad discretion to states with regard to variances, albeit subject to federal approval. 40 CFR § 131.13. For its part, Illinois law speaks clearly to the requirements for a variance. 415 ILCS 5/35. These variance requirements constrain the

Board's actions in the present case. Under Illinois law, the Board may grant a variance from any rule, regulation, requirement, or Board order when compliance would be an arbitrary or unreasonable hardship. *Id.* The Board need not find the hardship standard met simply because a standard is under review and compliance costs are substantial and certain. *Id.* A Board-issued variance can be for up to five years and can include reporting requirements. 415 ILCS 5/36(b). Renewals can be granted by the Board on a yearly basis, conditioned on a demonstration of "substantial progress." *Id.* The Illinois Environmental Protection Act broadly requires the Board to act consistently with the Clean Water Act in making variance decisions. 415 ILCS 5/35. Consequently, the federal characterization of § 316(a) relief as a variance is decisive. 40 CFR § 122.2. At the same time, Illinois is not precluded from adopting limitations respecting discharges of pollutants that are more stringent than existing federal effluent limitations or other limitations or standards of performance. 33 U.S.C. § 1370; 40 CFR § 131.4(a); *In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 187 Vt. 142 (2009).

Because an alternative thermal effluent limitation is, in fact, a variance, it is CARE's position that this Board should view an alternative thermal effluent limitation as a category of a variance under Illinois law. The Board has comprehensive, well-established regulations for issuing variances. *See* 35 IAC 104.200 *et seq.* Many of these procedural and substantive variance requirements are not found in IL EPA's proposal. The IL EPA's proposal is fundamentally flawed because it attempts to recast a variance as a different type of action subject to its own independent set of procedural and substantive requirements. 40 CFR § 122.2. CARE urges the Board to adhere to its mandate under Illinois law and its own well-established regulations by rejecting the

existing proposal, and directing IL EPA to amend its regulatory proposal to be an application of existing variance proceedings to a specific category of regulated activity.

COMMENT TWO: A REQUEST FOR AN ALTERNATIVE THERMAL EFFLUENT LIMITATION CAN CULMINATE IN STANDARDS REQUIRING ADDITIONAL THERMAL CONTROLS

In a recent § 316(a) case, Region 1 issued a final NPDES permit that imposed thermal limitations under § 316(a) and cooling water intake structure limits under § 316(b) that effectively required the electric generator permit holder to retrofit its generating units from open to closed-cycle cooling systems at considerable cost. *See In re: Dominion Energy Brayton Point, L.L.C. Permit No. MA 0003654*, 13 E.A.D. 407 (E.P.A.), 2007 WL 3324213. On appeal the Environmental Appeals Board (EAB) upheld Region 1's permit, despite the fact that no party disputed that compliance with the EPA's new thermal limits could only be achieved through retrofitting the plant to closed-cycle cooling.¹ *Id.*

Section § 311(b)(1) of the CWA requires NPDES permits to contain the more stringent of thermal limits based on either available technology or water quality standards. 33 U.S.C. § 1311(b)(1) (2012). While § 316(a) allows the permitting agency to impose less stringent thermal limits if such limits will ensure the protection and propagation of the balanced indigenous population, if the agency determines that a proposed thermal variance *will not* assure protection and propagation, then EPA *must reject* the proposed variance, and may develop its own thermal limits. *Dominion Energy Brayton Point* at 12 (emphasis added). When the permitting agency develops its own

¹ Additionally, Region 1 determined under § 316(b) that the "best technology available" to minimize adverse environmental effects was closed-cycle cooling, and thus it imposed cooling water intake limits to reflect closed-cycle cooling. As a result, Region 1's new thermal limits, which it arrived at through determinations made under § 316(a) and (b), independently required closed-cycle cooling for BPS.

thermal limits pursuant to § 316(a), it must demonstrate that the limits are reasonable and will assure protection and propagation, but it need not demonstrate that its limits are the least stringent necessary. *Id.*; citing 33 U.S.C. § 1326(a) (2012).

In *Dominion Energy Brayton Point*, BPS sought a § 316(a) alternative effluent standard that US EPA rejected on the basis that the limits would not assure protection and propagation of the BIP. *Id.* at 12. Region 1 imposed more stringent thermal limits than BPS had proposed, though still less stringent than the original thermal limits. *Id.* The Region determined that to protect the BIP, no more than 10% of thermal discharges may exceed 24 °C (75 °F) for more than five days from June through September. *Id.* The EAB upheld the Region's imposition of the five-day temperature exceedance frequency as rational given the Region's obligation to assure the protection and propagation of a BIP, unavoidable scientific uncertainty, and available data. *Id.* at 13. The EAB held that in the face of scientific uncertainty, the Region was authorized if not required to use discretion and judgment, and thus the Region's rationale in selecting the five-day exceedance was reasonable. *Id.* at 15-16; citing 40 C.F.R. § 125.73 (Region may consider any information Regional Administrator deems relevant in determining whether BIP protection and propagation will be assured).

Further, despite BPS' disagreement over how to interpret a scientific study that the Region used in arriving at its thermal limits, the EAB stated that under clear error review (which is a reviewable exercise of discretion) it generally defers to the Region's expertise when disagreements like this arise. *Id.* at 18, citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). Accordingly, the EAB held that the Region's selection of a five-day exceedance frequency was rational in light of available information, and thus it

found no clear error to support review of the exceedance frequency or the thermal limit based on the frequency. *Id.* at 20. As a result, despite the fact that compliance with the Region's thermal limits would require installation of closed-cycle cooling technology, the EAB upheld the Region's determinations underlying the new thermal limits and stated that the permitting agency need not set the least stringent limits possible. *Id.* at 5.

Dominion Energy Brayton Point is an important case for the Board to consider regarding IL EPA's proposed rule. First, it shows that permitting agencies may impose thermal limits that are less-stringent than what currently apply but are also more stringent than what the § 316(a) applicant requested, and in the process require retrofit of cooling technology through imposition of alternate thermal limits. Second, the holding shows that the EAB will respect a well-documented and well-reasoned permitting agency's decision that will impose substantial compliance costs on a regulated entity through required cooling technology retrofits in the § 316(a) setting. Notably, if an alternative effluent standard is granted such that technology must be upgraded to attain BIP protective standards, the alternative standard may be moot because new controls may be capable of achieving thermal standards over a range of conditions.

COMMENT THREE: IN ORDER TO RECEIVE AN ALTERNATE THERMAL EFFLUENT STANDARD, APPLICANTS SHOULD BE REQUIRED, AMONG OTHER REQUIREMENTS, TO CONDUCT AN ANALYSIS THAT INCLUDES ALL OTHER CONTRIBUTING THERMAL SOURCES, OVER A RANGE OF CONDITIONS, TO ASSURE ADEQUATE AQUATIC LIFE AND WATER QUALITY PROTECTION

Section 106.1160(d)(1)(A) of the proposed rule expressly and prudently requires a petitioner to account for "other pollutants" and "the additive effect of other thermal sources" in order to demonstrate that there has been no appreciable harm on a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into

which the discharge has been made. By contrast, the immediately following provision, Section 106.1160(d)(1)(B) allows for assurances of future protection without reference to other pollutants or the additive effect of other thermal sources. The failure to include “other pollutants” and the “additive effect of other thermal sources” in Section 106.1160(d)(1)(B) is inconsistent with the Illinois Environmental Protection Act and the mandates for the ongoing protection of water quality standards in Illinois waters.

The Illinois Environmental Protection Act provides a clear mandate for the Board to require all contributing sources and all pollutants to be evaluated as part of deciding an alternative thermal standard under this proposed rule:

Sec. 12. Actions prohibited. No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.”

415 ILCS 5/12(a).

The Illinois Environmental Protection Act establishes a broad definition of contaminant that is inclusive of thermal energy in wastewater effluent. Pursuant to 415 ILCS 5/3.165, a contaminant is any solid, liquid, or gaseous matter, any odor, **or any form of energy**, from whatever source (emphasis added). The Act’s emphasis on the combined effects of the discharge of any contaminants from other sources dictates that any forward-looking assurance about the absence of thermal effects must include an analysis of other sources and pollutants.

The Illinois Environmental Protection Act’s mandate is consistent with similar obligations under the Clean Water Act, with which the Board must adhere in making variance decisions. 415 ILCS 5/35. An alternative thermal limit should not be allowed

when the applicant's thermal effluent, alone or in combination with pollutants from other sources, will not protect a BIP, will cause backsliding from applicable water quality standards or will inhibit the resolution of a water quality impairment.

TMDLs: All Contributing Sources

TMDLs are regulated under Section 303(d) of the CWA and applicable regulations at 40 C.F.R. § 130.7(b)(2). Specifically, § 303(d)(1)(B) and (D) require a state to identify waters where thermal controls are not stringent enough for protection and propagation of a balanced indigenous population, to develop thermal TMDLs that will ensure protection and propagation, and to then apportion the TMDL amongst NPDES permit holders. See 33 U.S.C. § 1313(d)(1)(B) & (D). Accordingly, the proposed rule for implementing § 316(a) should require the applicant to analyze all sources of thermal loading over a range of conditions where a thermal impairment already exists. An alternative effluent limit (also known as a variance) should not be allowed where it will prevent or inhibit the resolution of a thermal impairment, viewed in the context of other contributing sources and other pollutants.

Anti-backsliding and Antidegradation: All Contributing Sources

Further, even if a water body is in compliance with a thermal WQS, anti-backsliding provisions exist to prevent waters that meet water quality standards from degrading. It is CARE's position that a § 316(a) applicant must conduct an "all contributing sources" thermal input analysis every time it applies for a thermal variance, to both protect against violating TMDLs *and* to prevent degrading waters that comply with WQS.

Anti-backsliding provisions prohibit permits from being renewed, reissued, or modified with new effluent limits that are less stringent than the previous limits when the

original effluent limits were established under § 1311(b)(1)(C) or 1313(d) or (e), unless the permit is modified under § 316(a). *See* 33 U.S.C. § 1342(o)(1), (2)(D) (2012) (Section 1342 is also known as § 402). In other words, under § 402(o)(3), a permit subject to § 402(o)(1) may never be renewed, reissued, or modified to contain effluent limitations that are less stringent than what the current effluent guidelines require when the permit would be renewed, reissued, or modified. 33 U.S.C. § 1342(o)(3) (2012). And, permits subject to § 402(o)(1) also may never be renewed, reissued, or modified to contain less stringent effluent limits if the new limits would result in a violation of WQSs under § 1313. *Id.* Section 402(o)(2) and the antidegradation provision in § 303(d)(4) provide independent exceptions to the ban on relaxing permit conditions, meaning if either is met, limits can be relaxed and § 402(o) does not apply; however, § 404(o)(3) still trumps these two exceptions. *See* Melissa A Thorme, *Antibacksliding: Understanding One of the Most Misunderstood Provisions of the Clean Water Act*, 31 ENVIRONMENTAL LAW REPORTER 10322 (2001).

The anti-backsliding provisions provide strong textual support for the proposition that despite the existence of § 316(a), which allows less stringent thermal limits to be imposed in a permit, standards that are less stringent than the effluent guidelines cannot become a part of permits that are subject to § 402(o)(1). Secondly, if a permit is subject to § 402(o)(1), this section acts as a blockade to backsliding by prohibiting less stringent thermal limits from resulting in a violation of WQSs. While § 402(o)(1) acknowledges that alternate thermal limits may be imposed under § 316(a), it flatly prohibits thermal limits that are less stringent than effluent guidelines, and flatly prohibits thermal limits that contribute to violations of applicable water quality standards. Accordingly, there is

ample support for the proposition that a NPDES permit cannot be renewed or modified if it will cause backsliding², which can likely only be determined by requiring an applicant to conduct an “all contributing sources” analysis when applying for a § 316(a) variance.

COMMENT FOUR: A SUCCESSFUL § 316(a) DEMONSTRATION SHOULD INCLUDE A BROADER RANGE OF FACTORS THAN THOSE IN THE PROPOSED RULE

In its regulatory proposal, IL EPA puts forward two standards that must be satisfied in order to receive an alternative thermal effluent limit. With the goal of protecting a balanced indigenous population, an applicant must demonstrate (1) that no appreciable harm has occurred and also (2) provide assurances of future protection. These standards are derived from 40 CFR § 125.73(c)(1)(i) and (ii).

Because of the breadth of these indicators, U.S. EPA identified a series of other more specific factors that help ensure the requirements of 40 CFR § 125.73(c)(1)(i) and (ii) are met by a § 316(a) variance applicant. In its “Interagency 316(a) Technical Guidance Manual And Guide For Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements” (1977), U.S. EPA identifies the following factors as being essential for a successful § 316(a) demonstration:

1. There is no convincing evidence that there will be damage to the balanced, indigenous community, or community components, resulting in such phenomenon as those identified in the definition of appreciable harm.
2. Receiving water temperatures outside any (State established) mixing zone will not be excess of the upper temperature limits for survival, growth, and reproduction, as applicable, of any RIS occurring in the receiving water.

² In the § 316(a) context, backsliding can be thought of as either lowering thermal standards below current effluent guidelines, and or thermal standards that are at or above effluent guidelines and yet still contribute to WQS violations in an area where there previously were none.

3. The receiving waters are not of such quality that in the absence of the proposed thermal discharge excessive growth of nuisance organisms would take place.
4. A zone of passage will not be impaired to the extent that it will not provide for the normal movement of populations of RIS, dominant species of fish, and economically (commercial or recreational) species of fish, shellfish, and wildlife.
5. There will be no adverse impact on threatened or endangered species.
6. There will be no destruction of unique or rare habitat without a detailed and convincing justification of why the destruction should not constitute a basis for denial.
7. The applicant's rationales present convincing summaries explaining why the planned use of biocides such as chlorine will not result in appreciable harm to the balanced indigenous population.

Id. at 70-71. R2013-20 Exhibit 2 and: <http://www.epa.gov/npdespub/pubs/owm0001.pdf>

CARE recommends that this list of factors should be included in any final rule. These factors provide a more defined basis for making credible Agency recommendations pursuant to Section 106.1145 and Board Orders pursuant to proposed Section 106.1170. At the same time, these factors introduce essential inquiries – for example, impacts on endangered species and valuable habitat – that will culminate in higher quality information and decisionmaking.

COMMENT FIVE: THE DETERMINATION OF BIP, RIS AND OTHER FACTORS SHOULD INCLUDE MANDATORY CONSULTATION WITH THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES AND THE U.S. FISH AND WILDLIFE SERVICE

Many of the decisions regarding alternative thermal effluent limits will be made based on complicated biological factors. It is not clear to CARE that Illinois EPA possesses the inherent capacity and expertise to evaluate these factors as part of making its

recommendations to the Board. CARE is concerned that the Illinois EPA will be in a position of inherent disadvantage in relationship to applicants and their experts. Consequently, CARE asserts that in making a recommendation pursuant to Section 106.1145, IL EPA should be required to demonstrate that it has consulted with IDNR and U.S. FWS, including inviting these agencies to participate from the beginning of the Agency's deliberative process in developing its recommendation and indicating if these agencies concur with the IL EPA's recommendation. These agencies possess the expertise to engage biological considerations and, in the case of the IDNR, primary jurisdictional responsibilities for Illinois waterways. *See* 17 IAC 3704 Appendix A. This is also consistent with the approach recommended by U.S. EPA for § 316(a) in its "Interagency 316(a) Technical Guidance Manual And Guide For Thermal Effects Sections of Nuclear Facilities Environmental Impact Statements" (1977).

COMMENT SIX – THE BOARD SHOULD INCLUDE DETAILED REGULATORY MANDATES ADDRESSING PUBLIC NOTICE REQUIREMENTS

Recently, the US EPA Office of Inspector General (OIG) released a report that details EPA oversight of regional and state compliance with § 316(a) program requirements. *See EPA Oversight Addresses Thermal Variances and Cooling Water Permit Deficiencies But Needs to Address Compliance With Public Notice Requirements*, 13-P-0264 (May 23, 2013) [hereinafter EPA Oversight]. This report found that 75% of the reviewed fact sheets associated with § 316(a) thermal variance proceedings contained an explanation of the issuing agency's decision to issue a § 316(a) alternative thermal standard. *Id.* at 6. A fact sheet lists a description of the facility and proposed discharge, significant legal and policy questions, and reasons why the alternative standard is or is not justified; a fact

sheet is required for NPDES permits that incorporate an alternative standard under § 316(a) regulations. *See* 40 C.F.R. § 124.8.

Conversely, *none* of the reviewed public notices contained *all* of the required statements for describing a proposed § 316(a) alternative thermal standard. *EPA Oversight* at 1. A public notice for a draft NPDES permit that will include a § 316(a) alternative standard must include, among other requirements, a description of the proposed effluent limitations and a statement that less stringent effluent limitations may be imposed. *See* 40 C.F.R. § 124.57(a)(1)-(3).

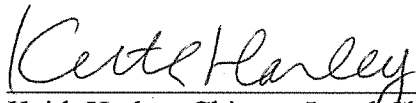
As further evidence of the serious issues associated with a failure to follow and implement § 316(a) regulations, the EPA OIG first investigated issues with § 316(a) administration in North Carolina, finding that fact sheets lacked sufficient justification for approving the alternative standard, public notices were also lacking or insufficient because of failure to send public notices with draft permits, and that due to a lack of data on the BIP, it was unclear whether current thermal standards were actually protecting the BIP because permit renewals were granted based on insufficient documentation of the proposed thermal standards. *See Oversight of North Carolina's Renewals of Thermal Variances*, 11-P-0221 (May 9, 2011). The State of North Carolina and US EPA Region 4 did not follow permit safeguards and requirements in federal regulations, and did not follow the MOU between the two agencies. *Id.* at 4-5. Further, EPA OIG found that the incomplete fact sheets and public notices:

“limit the public’s ability to make informed judgments about, comment on, or dispute these decisions by North Carolina. These facilities will continue discharging heated waters as allowed under their current permits and thermal variances for the next 4 years. Consequently, Region 4 and the public will not know whether these discharges are harming the BIP of the waterbodies until the permits come up again for renewal.”

Id. at 7.

In order to avoid this problem in Illinois, CARE recommends that this Board prescribe in its regulations the specific public notice requirements that must be incorporated as part of the NPDES permitting processes that will include an alternative thermal limitation.

Respectfully Submitted,


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Date: September 5, 2013

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