The IDEM Office of Water Quality has issued the following VARIANCE in accordance with IC 13-14-8-8.

BP PRODUCTS NORTH AMERICA INC. – WHITING REFINERY, Permit No. IN0000108, LAKE COUNTY, 2815 Indianapolis Boulevard, Whiting, IN. This industrial facility is a petroleum refinery which withdraws its water from Lake Michigan. On May 6, 2020, BP submitted a request for a variance from 327 IAC 5-2-12, pursuant to Indiana Code 13-14-8-8, and a permit modification. The variance requested pertains to the 36-month schedule of compliance related to the 1911 Intake, included in NPDES Permit No. IN0000108, which became effective on April 1, 2019. BP proposed a 54-month schedule of compliance. IDEM has determined that compliance with the 36-month schedule of compliance would impose an undue hardship or burden upon BP. IDEM therefore is granting the requested variance and the 54-month schedule of compliance. Permit Manager: Taylor Wissel, 317/234-4260, twissel@idem.in.gov.

Notice of Right to Administrative Review

If you wish to challenge this action, you must file a Petition for Administrative Review with the Office of Environmental Adjudication (OEA), and serve a copy of the petition upon IDEM. The requirements for filing a Petition for Administrative Review are found in IC 4-21.5-3-7, IC 13-14-8-11, and 315 IAC 1-3-2. A summary of the requirements of these laws is provided below.

A Petition for Administrative Review must be filed with the OEA within fifteen (15) days of the issuance this notice (eighteen (18) days if you received this notice by U.S. Mail), and a copy must be served upon IDEM and all persons to whom the action is directed. Addresses for OEA and IDEM are:

Director
Office of Environmental Adjudication
Indiana Government Center North
Room N103
100 North Senate Avenue
Indianapolis, Indiana 46204

Commissioner
Indiana Department of Environmental Management
Indiana Government Center North
Room 1301
100 North Senate Avenue
Indianapolis, Indiana 46204

The petition must contain the following information:

1. The name, address and telephone number of each petitioner.
2. An identification of each petitioner’s interest in the subject of the petition.
3. A statement of facts demonstrating that each petitioner is:
   a. a person to whom the order is directed;
   b. aggrieved or adversely affected by the determination; or
   c. entitled to administrative review under any law.
4. The reasons for the request for administrative review.
5. The particular legal issues proposed for review.
6. The facts, terms or conditions of the action for which the petitioner requests review.
7. The identity of any persons represented by the petitioner.
8. The identity of the person against whom administrative review is sought.
9. A copy of the action that is the basis of the petition.
10. A statement identifying petitioner’s attorney or other representative, if any.

Failure to meet the requirements of the law with respect to a Petition for Administrative Review may result in a waiver of your right to seek administrative review. Examples are:

1. Failure to file a Petition by the applicable deadline;
2. Failure to serve a copy of the Petition upon IDEM when it is filed; or
3. Failure to include the information required by law.

Pursuant to IC 13-14-8-11(b), IDEM’s decision to grant a variance does not take effect until available administrative remedies are exhausted.

Pursuant to IC 4-21.5-3-17, OEA will provide all parties with notice of any pre-hearing conferences, preliminary hearings, hearings, stays, or orders disposing of the review of this action. If you are entitled to notice under IC 4-21.5-3-5(b) and would like to obtain notices of any pre-hearing conferences, preliminary hearings, hearings, stays, or orders disposing of the review of this action without intervening in the proceeding you must submit a written request to OEA at the address above.

May 14, 2021

Mr. Don Porter, Refinery Manager
BP Products North America Inc. – Whiting Refinery
2815 Indianapolis Boulevard
Whiting, IN 46394

Dear Mr. Porter:

Re: Variance Request
NPDES Permit No. IN0000108
BP Products North America Inc.
Whiting, IN – Lake County

Barnes and Thornburg, LLP, on behalf of BP Products North America Inc. (BP), submitted a letter dated May 6, 2020 to the Indiana Department of Environmental Management (IDEM) requesting a variance from Title 327 of Indiana Administrative Code (IAC), Article 5, Rule 2, Section 12 (327 IAC 5-2-12). BP is seeking a variance from the 36-month schedule of compliance included in NPDES Permit No. IN0000108, which became effective on April 1, 2019, pursuant to Indiana Code 13-14-8-8. BP has proposed a 54-month schedule of compliance.

BP owns and operates a petroleum refinery in Whiting, Indiana (Whiting Refinery) under NPDES Permit No. IN0000108 (the Permit). The Whiting Refinery sits on the southern shore of Lake Michigan and the facility withdraws water from Lake Michigan via two intake structures, referred to as the 1911 Intake and the 1942 Intake, located approximately 1330 feet and 1440 feet offshore, respectively. Approximately 91% of the intake water is used for cooling water. The Permit requires BP to complete modifications of the 1911 Intake to comply with Clean Water Act Section 316(b) regulations regarding impingement mortality at the Whiting Refinery.

Regulatory Background

The EPA promulgated a CWA section 316(b) regulation on August 15, 2014, which became effective on October 14, 2014. 79 Fed. Reg. 48300-439 (August 15, 2014). This regulation established application requirements and standards for cooling water intake structures (CWIS). The regulation is applicable to point sources with a cumulative design intake flow (DIF) greater than 2 MGD where 25% or more of the water withdrawn (using the actual intake flow (AIF)) is used exclusively for cooling purposes. The regulation establishes best technology available (BTA) standards to reduce impingement and entrainment of aquatic organisms at existing power generation and manufacturing facilities.
Under 40 CFR 125.94(c) existing facilities subject to the rule must comply with one of the following seven BTA Standards for Impingement Mortality:

1. Operate a closed-cycle recirculating system as defined at 40 CFR 125.92;
2. Operate a CWIS that has a maximum design through-screen design intake velocity of 0.5 fps;
3. Operate a CWIS that has a maximum actual through-screen intake velocity of 0.5 fps;
4. Operate an offshore velocity cap that is a minimum of 800 feet offshore;
5. Operate a modified traveling screen that the Director (IDEM) determines meets the definition of the rule (at 40 CFR 125.92(s)) and that the Director (IDEM) determines is BTA for impingement reduction;
6. Operate any other combination of technologies, management practices, and operational measures that the Director (IDEM) determines is BTA for impingement reduction; or
7. Achieve the specified impingement mortality performance standard of less than 24 percent.

BP chose to comply with alternative 3, operate a CWIS that has a maximum actual through-screen intake velocity of 0.5 fps for both the 1942 Intake and the 1911 Intake. IDEM determined that the 1942 Intake meets BTA for this alternative. In the Permit IDEM required BP to complete a velocity verification study for the 1911 Intake or modify the 1911 Intake structure such that the actual intake velocity will be less than 0.5 fps. IDEM specified that these modifications should be completed no later than 36 months from the effective date of the Permit pursuant to 327 IAC 5-2-12(a)(3).

BP is requesting a variance from the 36-month schedule of compliance imposed by 327 IAC 5-2-12(a)(3) to meet BTA at the 1911 Intake and is proposing a 54-month schedule of compliance to complete modifications at the 1911 Intake for the reasons identified below.

**Rationale & Conclusions Regarding the Variance Request**

Pursuant to IC 13-14-8-8, if the Commissioner determines that immediate compliance with a rule would impose an undue hardship or burden upon an applicant for a variance, the Commissioner may grant a variance from the rule. The following statements from BP’s May 6, 2020 variance request are particularly relevant to IDEM’s determination:

1. “BP anticipates that the [1911 modification] project will require coverage under the Army Corps Nationwide Permit for Outfall Structures and Associated Intake Structures (NWP7), an individual CWA Section 401 Water Quality Certification from IDEM, and a Navigable Waterways Act permit and possibly a Lakes Preservation Act permit from IDNR. These permits could take up to a year to obtain before actual construction could begin.”
2. “BP believes that the spawning season imposed by IDNR’s permitting authority [for the project] likely will last from April 1 through June 30. In addition, construction on Lake Michigan is complicated by weather, with construction not being feasible during the winter months (generally November 1 through March 31). Coupling these spawning and weather limitations means that BP may have only four months of the year for construction to implement modifications of the 1911 Intake (July 1 through October 31).”

3. “Based on an expedited engineering schedule and consideration of the time needed to obtain permits, BP would only have the summer of 2021 to complete the installation of the modifications to the 1911 Intake … That would provide BP with only four available months for construction to build the cap or equivalent structure needed for compliance. BP understands that installation of a velocity cap or equivalent structure cannot be completed in such a short period of time.”

4. “In spite of the rigid deadline imposed by 327 IAC 5-2-12(a)(3), consideration of these planning factors is wholly appropriate in determining a realistic compliance schedule for BP’s implementation of BTA on its intake structures. The U.S. Environmental Protection Agency specifically recognized the many factors that may go into implementing BTA … Imposing an impossible compliance schedule that subjects BP to possible enforcement without consideration of these factors results in an undue hardship and burden on BP.”

5. “IDEM’s suggestion in its response to BP’s comment on the draft permit—to extend the compliance schedule through an agreed order—recognizes the undue hardship and burden 327 IAC 5-2-12 imposes on BP. Because IDEM already knows that BP is unable to comply with the three-year compliance schedule, inclusion of an impossible permit condition exposes BP to both government enforcement and potential third-party suits for its inability to comply with requirements of Part IV.B.5 of the Permit.”

In light of the information presented in BP’s variance request, including but not limited to the foregoing, IDEM has determined that compliance with the 36 month schedule of compliance included in the Permit for modifications to the 1911 Intake to meet BTA for impingement mortality would impose an undue hardship or burden upon BP. IDEM therefore grants the requested variance in accordance with the Compliance Schedule set forth below. This is a variance from state law only.
Compliance Schedule

Under IC 13-14-8-8(b), if the variance for which a person applies would be in effect for more than one (1) year, the person’s application must include a demonstration of how the person would come into compliance with the rule within the period for which the variance would be in effect. In accordance with that provision, BP’s application proposes the following compliance schedule, which is approved as a condition of this variance pursuant to IC 13-14-8-8(e):

a. As soon as practicable but no later than October 31, 2020, complete detailed design of the modifications to the 1911 Intake structure and submit the detailed design to IDEM for review and approval.

b. As soon as practicable but no later than July 31, 2022, initiate construction of the modifications to the 1911 Intake.

c. As soon as practicable but no later than October 31, 2023, complete construction of the modifications to the 1911 Intake.

The above compliance schedule is intended to replace the requirements in Part IV.B.5.a-c. of the Permit. BP is required to comply with all other terms and conditions of the Permit. This variance may be revoked under IC 13-14-8-8(f) if BP does not meet the requirements of this compliance schedule.

Compliance Schedule Under 40 CFR 125 – Subpart J

Pursuant to 40 CFR 125.94(b)(1), the permittee is required to comply with the impingement mortality standard in 40 CFR 125.94(c) as soon as practicable, and the Director may establish interim compliance milestones in the permit.

40 CFR 125.98(c) states that, “When the Director establishes a schedule of requirements under §125.94(b), the schedule must provide for compliance with §125.94(c) and (d) as soon as practicable … The Director may determine that extenuating circumstances (e.g., lengthy scheduled outages, future production schedules) warrant establishing a different compliance date for any manufacturing facility.”

IDEM concludes that BP’s variance request for a 54-month schedule of compliance is in line with the above federal regulations. In reaching this conclusion, IDEM considered BP’s statements quoted above in the “Rationale & Conclusions Regarding the Variance Request” section of this letter as well as portions of the Clean Water Act Section 316(b) regulation (79 FR 48360).

Because IDEM concludes that BP’s variance request is in accordance with the schedule of compliance requirements under 40 CFR 125 – Subpart J, IDEM considers the compliance schedule set forth above to be an approved and enforceable “schedule for compliance” for purposes of those federal-law provisions.
Appeal

This decision may be appealed pursuant to IC 13-14-8-11 by filing a petition for review within (15) days of the emailing of an electronic copy of this letter. A petition for review must be submitted to the Office of Environmental Adjudication at the following address:

Director
Office of Environmental Adjudication
Indiana Government Center North
Room N103
100 North Senate Avenue
Indianapolis, Indiana 46204

The petition must include facts demonstrating that you are either the variance applicant, a person aggrieved or adversely affected by this decision, or otherwise entitled to review by law. Pursuant to IC 4-21.5-3-5(d), if you submit a written request to the OEA at the above address, the OEA will provide you with notice of prehearing conferences, preliminary hearings, hearings, stays, or orders disposing of all proceedings. In accordance with IC 13-14-8-11(b), this variance will not take effect until available administrative remedies are exhausted. If you have questions regarding the appeals process you may contact the OEA at (317) 232-8591.

If you have any questions regarding this variance, please contact Taylor Wissel at 317/234-4260.

Sincerely,

Bruno Pigott
Bruno L. Pigott
Commissioner
Indiana Department of Environmental Management

cc: Chief, Permits Section, USEPA Region 5
Cheryl Gonzalez, Barnes & Thornburg, LLP
May 6, 2020

Via Email (MClark@idem.IN.gov) and U.S. Mail

Ms. Martha Clark Mettler
Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46204

RE: Request for Variance from 327 IAC 5-2-12 for BP Whiting and Permit Modification Request for NPDES Permit No. IN0000108

Dear Assistant Commissioner:

On behalf of our client, BP Products North America Inc. (BP), this letter requests that the Indiana Department of Environmental Management (IDEM) Office of Water Quality issue BP a variance from the requirements of 327 IAC Article 5, Rule 2-12 (327 IAC 5-2-12) Schedules of Compliance and a corresponding modification of National Pollutant Discharge Elimination System (NPDES) Permit No. IN0000108 (the Permit), which became effective on April 1, 2019. BP requests this variance in accordance with the requirements of Ind. Code § 13-14-8-8.

BP owns and operates a petroleum refinery in Whiting, Indiana (the Refinery). The Refinery sits on the southern shore of Lake Michigan. Water for the Refinery is withdrawn from Lake Michigan from two intake structures, referred to as the 1911 Intake and the 1942 Intake, located approximately 1330 feet and 1440 feet offshore, respectively. As noted in the Permit, approximately 91% of the withdrawn water is used for cooling water (cooling tower makeup plus once-through cooling water). Permit, Fact Sheet, p. 50.

The Permit includes conditions related to BP’s compliance with Clean Water Act (CWA) § 316(b) requirements that establish standards for cooling water intake structures to reduce impingement and entrainment of aquatic organisms at existing facilities. See Permit Part IV.B; 33 U.S.C. § 1326(b); 40 C.F.R. § 125, Subpart J. Specifically, the Permit at Part IV.B.5 contains a compliance schedule providing the permittee three years to meet the CWA § 316(b) standard for impingement mortality. IDEM included the three-year timeframe in the Permit based on the agency’s application of 327 IAC 5-2-12. Permit, Fact Sheet, p. 96; see also Permit, Part IV.B.
BP requests a variance from 327 IAC 5-2-12 because compliance with the rule results in an undue hardship and burden to BP. Pursuant to the Ind. Code § 13-14-8-8, BP proposes a four-and-a-half-year compliance schedule instead of the three-year compliance schedule described by 327 IAC 5-2-12(a)(3).

REGULATORY BACKGROUND

In federal rulemakings promulgated pursuant to CWA § 316(b), implementation of the best technology available (BTA) for impingement and entrainment can—and in the case of BP, may—require modifications to existing intake structures. See 40 C.F.R. § 125, Subpart J. Recognizing that immediate compliance may not be feasible, federal rules allow permittees a compliance schedule to meet the standards. 40 C.F.R. § 125.94(b). Compliance under the federal rules must be achieved “as soon as practicable,” but no maximum time period is specified. 40 C.F.R. § 125.94(b)(1).

With its most recent NPDES permit renewal application, BP submitted its CWA § 316(b) application and requested a longer compliance schedule to satisfy the planning, permitting, and modification requirements associated with its selected BTA for impingement and entrainment. BP repeated this request during the public comment period for the draft Permit. Permit, Fact Sheet, pp. 92-96 (requesting the Permit be revised to require completion of construction “[a]s soon as practicable but no later than December 31, 2023.”) IDEM denied the request, stating that 327 IAC 5-2-12 limited BP to a three-year compliance schedule for implementing BTA. Id. 327 IAC 5-2-12 provides in relevant part:

(a) A schedule of compliance shall require compliance as soon as reasonably possible, but not later than the earlier of the following:

(1) An applicable statutory deadline.

(2) A deadline specified in a rule establishing applicable limitations, standards, or other requirements.

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1 40 C.F.R. § 125.94(b) states:

Compliance with BTA standards. (1) Aligning compliance deadlines for impingement mortality and entrainment requirements. After issuance of a final permit that establishes the entrainment requirements under § 125.94(d), the owner or operator of an existing facility must comply with the impingement mortality standard in § 125.94(c) as soon as practicable. The director may establish interim compliance milestones in the permit.

(2) After issuance of a final permit establishing the entrainment requirements under § 125.94(d), the owner or operator of an existing facility must comply with the entrainment standard as soon as practicable, based on a schedule of requirements established by the Director.

(3) The owner or operator of a new unit at an existing facility must comply with the BTA standards at § 125.94(e) with respect to the new unit upon commencement of the new unit’s operation.
(3) If no statutory or regulatory deadline is expressly applicable, three years from the date applicable standards, limitations, or other requirements are incorporated into the permit.

IDEM’s determination that there is no “expressly applicable” deadline in 40 C.F.R. § 124.94(b) resulted in the agency’s application of 327 IAC 5-2-12(a)(3) to BP’s Permit. This determination requires BP’s compliance with its CWA § 316(b) obligations “within a maximum of three (3) years.” Permit, Fact Sheet, p. 96. As BP has documented throughout the permitting process, it cannot comply with the CWA § 316(b) obligations within this time frame. IDEM has further stated that, if BP requires more time than provided in the three-year compliance schedule included in the Permit, “then it may be possible to address in another manner such as through an Agreed Order.” Id. As discussed below, however, a variance from 327 IAC 5-2-12 is appropriate and justified under state rules without the need for an agreed order, and a longer compliance schedule is consistent with applicable federal rules. Therefore, BP requests that IDEM grant a variance from the three-year requirement contained in 327 IAC 5-2-12(a)(3) and modify the Permit to allow a four-and-a-half-year compliance schedule.

**VARIANCE JUSTIFICATION**

*Providing only three years to achieve compliance with CWA § 316(b) when IDEM knows BP cannot realistically complete the necessary construction within three years imposes an undue hardship and burden.*

Pursuant to Ind. Code § 13-14-8-8, a variance may be granted if an adopted Indiana rule imposes an undue hardship or burden on a person affected by such rule. IDEM’s reliance on 327 IAC 5-2-12(a) to impose a three-year compliance schedule constitutes an undue hardship or burden because BP cannot comply with the resulting three-year compliance schedule. The Office of Environmental Adjudication has affirmed that an undue hardship or burden exists sufficient to justify a variance where a permit imposes a condition or requirement with which the Agency knows the permittee cannot comply. *See In Re: 327 IAC 3-6-4(A), (B) & (C), 327 IAC 3-6-7(1), (2), (3) & (4) Variance Request for Sanitary Sewer Construction Permit, LaFollette Station Towne Centre, US 150 and Lawrence Banet Road, 2004 OEA 67, 03-W-J-3263 (August 11, 2004)* (finding that the City had demonstrated undue burden where its permit imposed certification requirements with which the City could not comply).

Given the significant planning and permitting required and the limited timeframe available for actual construction in Lake Michigan, discussed in more detail below, meeting the three-year compliance schedule contained in BP’s Permit is infeasible and subjects BP to permit conditions that it cannot meet.

BP has demonstrated that it is not feasible to complete this project in a three-year timeframe, having evaluated a realistic potential schedule for installing in Lake Michigan a velocity cap or equivalent type of structure on the 1911 intake. As BP has previously stated, in order to construct such a cap or equivalent structure in Lake Michigan, BP must conduct substantial planning and engineering and obtain construction permits from U.S. Army Corps of Engineers, the Indiana Department of Natural Resources (IDNR), and IDEM. For example, BP anticipates
that the project will require coverage under the Army Corps Nationwide Permit for Outfall Structures and Associated Intake Structures (NWP7), an individual CWA § 401 Water Quality Certification from IDEM, and a Navigable Waterways Act permit and possibly a Lakes Preservation Act permit from IDNR. These permits could take up to a year to obtain before actual construction could begin.

Additionally, pursuant to IDNR permits issued under Ind. Code § 14-29-1-8 regarding the permanent placement of structures in Lake Michigan, construction is not allowed if it could cause significant harm to the environment. Ind. Code § 14-29-1-8(8)(c)(2). This prohibition has been interpreted by the IDNR to require restrictions on construction activities during times that would interfere with fish spawning activities. E.g., 312 IAC 6-8-3(a). As explained by IDNR in a recent email:

Permits issued for work on … waterbodies typically contain a date restriction that is intended to limit activities in the water when fish and other species are most active completing spawning activities. This includes moving to and from spawning areas, laying eggs, and the movement of young after hatching. … Salmonid streams have a different date restriction (March 15 through June 15 and from July 15 through November 30) as trout and salmon have spring and fall runs. The date restriction for lake permits other than Lake Michigan varies based on the proposed work and what species are near the site. In Lake Michigan, we do have trout and salmon so we do use that date range at times. Other times it is closer to the April 1 – June 30 restriction. It depends on the project.

Our biologists review all the stream and lake permit applications (including Lake Michigan) submitted to the Division of Water. They evaluate applications in terms of impacts to fish, wildlife, and botanical resources, and submit recommended permit conditions to the Division of Water. The permit conditions address impacts to ensure projects do not result in unreasonably detrimental impacts upon fish, wildlife, and botanical resources. The date restriction is one of those typical permit conditions.2

Based on previous construction projects in Lake Michigan, BP believes that the spawning season imposed by IDNR’s permitting authority likely will last from April 1 through June 30. In addition, construction in Lake Michigan is complicated by weather, with construction not being feasible during the winter months (generally, November 1 through March 31). Coupling these spawning and weather limitations means that BP may have only four months of the year for construction to implement modifications to the 1911 Intake (July 1 through October 31). See also Permit, Fact Sheet, p. 93. Based on an expedited engineering schedule and consideration of the time needed to obtain permits, BP would only have the summer of 2021 to complete the installation of the modifications to the 1911 intake structure in order to meet the Permit’s completion deadline of April 1, 2022. That would provide BP with only four available months for construction to build...

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2 Email from Matt Buffington, Division of Fish and Wildlife IDNR, Environmental Supervisor, to Lauren Hill, Ramboll, Senior Consultant 2 (May 2, 2019).
the cap or equivalent structure needed for compliance. BP understands that installation of a velocity cap or equivalent structure cannot be completed in such a short period of time. Underwater construction poses many risks and must be well-engineered and carefully executed. Because continuous construction in Lake Michigan will be impossible due to seasonal temperature and spawning restrictions, multiple mobilization efforts, including installation and removal of construction equipment in the lake, may result in longer total construction time.

In spite of the rigid deadline imposed by 327 IAC 5-2-12(a)(3), consideration of these planning factors is wholly appropriate in determining a realistic compliance schedule for BP’s implementation of BTA on its intake structures. The U.S. Environmental Protection Agency (EPA) specifically recognized the many factors that may go into implementing BTA, including design, construction, and upgrading or installing new technologies, when it promulgated the CWA § 316(b) BTA regulations. 79 Fed. Reg. 48,359–60 (Aug. 15, 2014). Imposing an impossible compliance schedule that subjects BP to possible enforcement without consideration of these factors results in an undue hardship and burden.

Additionally, IDEM’s application of a three-year compliance schedule unnecessarily accelerates the schedule imposed by the federal regulations IDEM followed in evaluating BP’s CWA § 316(b) BTA obligations. Pursuant to 40 C.F.R. § 125.94(b), permittees must complete the installation of control technologies “as soon as practicable,” and the state (as the “Director”) may establish compliance milestones and schedules that could take up to 8 years or, in some circumstances, even longer. Applying 327 IAC 5-2-12(a) to limit a permittee’s compliance schedule to only three years, where the permittee has demonstrated that four and a half years is “as soon as practicable” results in obligations more stringent than those required by federal regulations. A variance from 327 IAC 5-2-12(a) is consistent with the relevant federal rule and avoids imposition of an undue hardship and burden.

Finally, IDEM’s suggestion in its response to BP’s comment on the draft permit—to extend the compliance schedule through an agreed order—recognizes the undue hardship and burden 327 IAC 5-2-12 imposes on BP. Because IDEM already knows that BP is unable to comply with the three-year compliance schedule, inclusion of an impossible permit condition exposes BP to both government enforcement and potential third-party suits for its inability to comply with requirements of Part IV.B.5 of the Permit.

3 In its initial proposal of § 316(b)’s implementing regulations, the federal EPA stated: “The owner or operator of a facility subject to this subpart must comply with the applicable BTA standards for impingent mortality. . . as soon as possible based on the schedule of requirements set by the Director, but in no event later than [date 8 years after the effective date of the final rule].” 76 Fed. Reg. 22,282 (Apr. 20, 2011) (bracketed portion in original). And, in explaining the final § 316(b) implementing regulations, EPA concluded that “[i]n contrast to the proposed rule, today’s final rule does not include a requirement for compliance. . . within eight years. EPA expects, however, that the final rule will generally result in compliance within a similar period of time. . . All facilities will be required to follow their [compliance] schedule as determined by the Director.” Id. at 48,560 (emphasis added). EPA expressed this deadline in the rule by stating compliance was required “as soon as practicable,” authorizing the “Director” (in this case, IDEM) to establish what was practicable and any necessary milestones. 40 C.F.R. § 125.94(b).
**PROPOSED VARIANCE LANGUAGE & DEMONSTRATION**

In addition to demonstrating that a rule imposes an undue hardship or burden, qualifying for a variance that lasts more than one year requires that a variance application “include a demonstration of how the person would come into compliance with the rule within the period for which the variance would be in effect” and that the variance itself “include a schedule requiring the person to come into compliance with the rule within the period for which the variance will be in effect.” Ind. Code § 13-14-8-8(b), (e). A variance may be granted for a period of not more than five (5) years. Ind. Code § 13-14-8-8(d).

The requested variance from the three-year compliance schedule imposed by 327 IAC 5-2-12 requires establishing a revised compliance schedule for satisfying BP’s CWA § 316(b) obligations. BP has determined that a compliance schedule of no more than four and a half years is needed to meet the CWA § 316(b) obligations, which is consistent with Indiana’s maximum allotted time for a variance. At the conclusion of the variance, by complying with the longer compliance schedule, BP will have satisfied the CWA § 316(b) obligations.

Furthermore, BP’s proposed compliance schedule revises the Refinery’s CWA § 316(b) obligations in a manner consistent with the 40 C.F.R. § 125.94(b) requirement that a permittee come into compliance with the BTA standards “as soon as practicable.” The revised compliance schedule also ensures compliance with BP’s CWA § 316(b) obligations within the current term the Permit, which expires March 31, 2024.

The dates proposed above constitute completion “as soon as practicable” based on the extensive nature of the project required to comply with CWA § 316(b) and the limited windows available for construction in Lake Michigan, discussed above. BP intends to meet the 0.5 fps actual through-screen velocity threshold alternative provided by 40 C.F.R. § 125.94(c)(3) through installation of a velocity cap or equivalent structure on the 1911 Intake Structure. A project of this magnitude is governed by BP’s capital value process, which includes risk reviews; project health, safety, security, and environmental reviews; and constructability reviews, which provide valuable input into the detailed design. BP estimates that the project approval and design process can be completed and submitted to IDEM by October 31, 2020. Based on the detailed design, BP will develop a construction schedule that will include initiation of construction by July 31, 2022, and completion of construction by October 31, 2023.

BP requests that the following revised compliance schedule be included as part of IDEM’s grant of the requested variance, and that the Permit be modified to incorporate this compliance schedule. The requested revisions are based on Part IV.B.5 of the Permit:

If the actual Intake velocity at Intake 1911 is determined to be above 0.5 fps, or if BP decides not to proceed with the study to verify intake velocity (Item 3 above), BP shall physically modify the 1911 Intake structure such that the

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4 The offshore velocity cap alternative offered by 40 CFR § 125.94(c)(4) is not available to BP, because it is limited to intake structures with existing velocity caps installed on or before October 14, 2014.
actual intake velocity will be less than 0.5 fps. The modifications to the 1911 Intake will be completed as soon as practicable but no later than the dates developed in accordance with the following schedule:

a. As soon as practicable but no later than **October 31, 2020** 18 months after the effective date of the permit, complete detailed design of the modifications to the 1911 Intake structure and submit the detailed design to IDEM for review and approval. **Following IDEM approval or 60 days after submittal, whichever is sooner, the permittee may proceed with permitting and construction.**

b. As soon as practicable but no later than **July 31, 2022** 30 months after the effective date of the permit, initiate construction of the modifications to the 1911 Intake.

c. As soon as practicable but no later than **October 31, 2023** 36 months after the effective date of the permit, complete construction of the modifications to the 1911 Intake.

* * *

As demonstrated above, a variance from 327 IAC 5-2-12(a) to complete construction of the 1911 Intake in accordance with CWA § 316(b) is both necessary and appropriate. As IDEM is aware, compliance with the current Permit condition based upon this rule is infeasible for BP and, consequently, the application of 327 IAC 5-2-12(a) to the Refinery poses an undue hardship and burden.

If you have any questions about the information presented in this letter, please do not hesitate to call me at (317) 231-7557. In accordance with IDEM’s Written Correspondence and Electronic Signatures Guidance related to the coronavirus pandemic, a paper copy will follow the electronic submission of this variance request.

Sincerely,

Cheryl Gonzalez

cc  Paul Higginbotham, email only (phigginb@idem.in.gov)
Sierra Alberts, email only (salberts@idem.in.gov)