

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9
CHICAGO AREA WATERWAY SYSTEM) (Rulemaking – Water)
AND THE LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 III.)
Adm. Code Parts 301, 302, 303 and 304)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 26th day of June, 2008, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Response in Opposition to Motion to Stay by the People of the State of Illinois, a copy of which is hereby served upon you.

Respectfully submitted,

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RESPONSE IN OPPOSITION TO MOTION TO STAY
BY THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois (“the People”), by and through Illinois Attorney General Lisa Madigan, oppose the motion to stay this proceeding (“Motion”) that was filed by the Metropolitan Water Reclamation District of Greater Chicago (“the District”) on June 12, 2008. Staying this rulemaking would be injurious to the public interest, harmful to the environment, and would result in an extraordinary waste of the resources of the Illinois Pollution Control Board (“the Board”), the Illinois Environmental Protection Agency (“IEPA”), and the many other public and private stakeholders that have spent years preparing for and participating in this proceeding. The People therefore request that the District’s motion be denied.

I. APPLICABLE LAW

“Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed.” 35 Ill. Adm. Code 101.514.

When considering such motions, the Board carefully weighs the extent to which a stay would burden the Board or otherwise result in the waste of time and resources. Vernon and Elaine Zohfeld v. Bob Drake, et al., PCB 05-193 (February 2, 2006) (denying motion to stay to avoid

burdening the Board's ability to manage its cases; convenience to the Board weighs against granting a stay). The Board denies motions to stay when "the Board believes the effect of a stay in its entirety would harm the environment" or "be injurious to public interest." People of the State of Illinois v. ESG Watts, PCB 96-107 (March 19, 1998), *citing* IEPA v. Pielet Brothers Trading, Inc. PCB 80-185 (February 4, 1982) and IEPA v. Incinerator, Inc., PCB 71-69 (October 14, 1971).

II. THERE IS NO FACTUAL BASIS FOR A STAY.

The District's motion to stay this proceeding is premised on: (1) a one-sided (mis)characterization of the record offered by counsel for the District; (2) alleged deficiencies in the record¹ that counsel for the District claims to have identified; and (3) unsupported and self-serving assertions regarding the nature and the expected findings of certain studies that the District might perform during the pendency of a stay. This is not a factual basis for a stay. There are no expert affidavits. Not even a verified filing. Counsel's unsupported and unverified assertions do not provide the Board with "sufficient information" on which to base a decision to stay this rulemaking. 35 Ill. Adm. Code 101.514. For this reason alone, the District's motion should be denied.

III. STAYING THIS PROCEEDING WOULD INTERFERE WITH THE BOARD'S ABILITY TO MANAGE ITS DOCKET AND WOULD WASTE TIME AND RESOURCES.

IEPA has spent the better part of the last decade conducting detailed analyses in preparation for this rulemaking to amend water quality standards and effluent limitations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River. (Statement of Reasons,

¹ Putting aside the merits of these alleged deficiencies, counsel for the District fails to acknowledge that the evidentiary record will not be complete until after the parties file testimony in August and hearings are held in September, in accordance with the schedule set by the Hearing Examiner.

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at 22-23.) IEPA has actively involved stakeholders in this process since at least September 2002, when IEPA convened a Stakeholders Advisory Committee. (Statement of Reasons, Attachment E “Timeline of Lower Des Plaines River and CAWS Stakeholder Advisory Committee Meetings and Outreach Activities.”) IEPA’s efforts culminated with the proposed rule presented to the Board on October 26, 2007.

The Board formally commenced this rulemaking on November 1, 2007 and, since then, 89 interested parties have registered electronically in this docket. The Board has held ten days of hearings to allow stakeholders to cross-examine IEPA witnesses on pre-filed testimony and over 56 exhibits that have been filed in this proceeding. The Board also heard testimony from 44 people at a public hearing on June 16, 2008, and has received written public comments from over 65 parties—virtually all in support of the proposed rules.

The Board has set a deadline of August 4, 2008, for parties to submit additional pre-filed testimony in preparation for another round of hearings to begin in September 2008. (May 19, 2008 Board Order). Many parties, including the People, have retained witnesses and are hard at work to finish testimony by the August 4th deadline. Most parties have already expended significant effort and resources on this testimony, which was originally due on February 19, 2008. (November 20, 2007 Board Order).

All stakeholders have had ample time to conduct studies and prepare testimony for this docket—over the course of at least five years of discussions prior to the rulemaking and during almost a year since this docket was formally commenced. It is therefore surprising that the District has chosen to file a motion to stay rather than file expert testimony. The District claims that experts retained by the District need more time—until at least the end of 2010—to complete their analysis. (Motion at 14.) If true, that is a problem of the District’s own making.

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The District apparently waited until the Summer of 2007 to begin a peer review process to examine the epidemiological, microbiological and other research studies that the District hopes to use in testimony for this proceeding. (Motion, Exhibit A.) The District now claims to have a “final study plan [that] reflects modifications that were advised in the peer review process.” (Motion, Exhibit A, p. 2.) In other words, the District has essentially been told by a panel of experts that testimony based on its existing studies will not withstand cross-examination. Consequently, the District now asks the Board, the many parties to this proceeding and the thousands of people who recreate in the CAWS and Lower Des Plaines to wait for several years until the District does what it should have done a long time ago to prepare for this proceeding. The Board cannot allow a party to stall a proceeding because of its failure to properly prepare.

A stay would result in an enormous waste of the resources that the Board, IEPA and other parties to this rulemaking have already expended. If there were a lengthy stay of this proceeding, all parties would be required to expend additional time and resources to update their analyses and testimony when the proceeding resumes. It would send IEPA back to the drawing board to devise a new proposal that could not be presented until 2011 at the earliest; it would require all of the other private and public stakeholders to prepare anew for a new iteration of the rulemaking; and it would force the Board to write off the substantial investment of time and resources in this proceeding—only to repeat the entire effort in several years’ time.

A stay would waste the Board’s resources, disrupt its docket, waste public monies, and place additional burdens on other parties to this proceeding. These considerations clearly outweigh unsupported representations that the District’s studies will aid the Board in its decision making. If the District’s studies were as critically relevant to this proceeding as the District

claims, they should have been initiated and completed at a much earlier date.

The District's request to stay this proceeding seems calculated to obstruct, rather than aid, the Board's decision making in this docket. This rulemaking should proceed, in accordance with the schedule already set by the Board. The District's motion should be denied on the grounds that it would interfere with the Board's ability to manage its docket and would waste the time and resources of the Board and all parties involved in this proceeding.

IV. A STAY WOULD BE INJURIOUS TO THE PUBLIC INTEREST AND HARMFUL TO THE ENVIRONMENT.

When the Clean Water Act was enacted in 1972, it articulated several national goals, starting with the following:

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

33 U.S.C. § 1251(a)(1) and (2).

The State of Illinois is required to conduct a triennial review of use designations and the applicable water quality standards necessary to protect designated uses for all navigable waterways that have not previously been determined to be fishable and swimmable, in accordance with 33 U.S.C. § 1251(a)(2). 33 U.S.C. § 1311(c)(1); 40 C.F.R. 131.20(a). The State is also required to review and revise, as necessary, effluent limitations at least every five years. 33 U.S.C. § 1311(d). That IEPA has been preparing for this rulemaking since 2002 is but one indication that the State has failed to meet these requirements for the CAWS and the Lower Des Plaines River.

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This rulemaking is designed meet these Clean Water Act requirements. In this proceeding, the Board is on course to make a long overdue determination as to the uses that are attainable for the CAWS and the Lower Des Plaines, and the water quality standards and effluent limitations that are necessary to attain and protect those uses. Failure to make these determinations as expeditiously as possible would not only be harmful to the environment and the public interest, but would also violate clear deadlines established by federal law.

The District appears to have confused certain institutional self-interests with the public interest. Indeed, instead of *servicing* the public's interest and *responding* to widespread public support for the proposed rules, the District appears to be trying to manipulate the public—issuing an “Urgent Call to Action” and providing sample letters for the public to send to the Board in support of the District's request for a stay of this proceeding. *See*, Exhibit A. This is questionable behavior for a public agency—which exists to serve the public, not to enlist the public in a campaign to persuade the Board to grant the District more time to prepare testimony that should have been prepared long ago. A stay would be injurious to the public interest and harmful to the environment and should, therefore, not be permitted in this case.

V. THE DISTRICT'S MOTION TO STAY THIS PROCEEDING IS CONTRARY TO BOARD PRECEDENT.

The District does not cite any previous Board orders in which the Board stayed a rulemaking proceeding upon the motion of a participant. In fact, a search of the Board's on-line document collection indicates that the Board has never before been presented with such a motion, let alone granted one. The District's proposal appears to be truly unprecedented—and should not be granted.

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The four Board orders that the District cites in support of the motion to stay are readily distinguishable from the facts and legal posture of this proceeding. None of the orders cited by the District involve a rulemaking proceeding. See Israel Gerold's v. IEPA, PCB 91-108 (July 11, 1991) (Underground Storage Tank Fund Reimbursement Determination); People of the State of Illinois v. State Oil Co., PCB 97-103 (May 15, 2003) (Enforcement—Water, Land); In the Matter of the Petition of Midwest Generation, LLC, Will County Generating Station for an Adjusted Standard from 35 Ill. Adm. Code 225.230, AS 07-04 (March 15, 2007) (Adjusted Standard—Air); and In the Matter of the Petition of Cabot Corp. for an Adjusted Standard from 35 Ill. Adm. Code Part 738, Subpart B, AS 07-06 (Adjusted Standard—Land) (August 9, 2007). Moreover, in each of those four orders, the Board granted a motion to stay primarily because of a related concurrent proceeding before another body. See Israel Gerold's, PCB 91-108 (July 11, 1991) at 1 (pending proceeding in Illinois circuit court); State Oil Co., PCB 97-103 (May 15, 2003) at 1 (pending proceeding in Illinois appellate court); In re Midwest Generation, L.L.C., AS 07-04 (March 15, 2007) at 1 (pending Board rulemaking proceeding); In re Cabot Corp., AS 07-06 (August 9, 2007) at 1 (pending petition before United States Environmental Protection Agency).² In this rulemaking proceeding, by contrast, there are no concurrent proceedings.

The District cites In re Midwest Generation, L.L.C., AS 07-04 (March 15, 2007) and In re Cabot Corp., AS 07-06 (Aug. 9, 2007) for the proposition that the Board has historically granted motions to stay in order to 1) “avoid wasting time, expenses, or resources”; 2) “avoid practical difficulties”; 3) “avoid duplicative efforts by the Board and other review authorities addressing related issues”; and 4) “assist the Board in making the proper determination.” (District Mtn. to Stay at 4). Given that the Board did not actually address any of these

² These proceedings are also distinguishable for the reason that only in Israel Gerold's did IEPA oppose the motion to stay.

considerations in those two orders, the District's argument fails. Moreover, even by reference to the District's hand-picked criteria, its motion fails. As discussed above, the District's proposal would be wasteful and would not assist the Board, but rather would interfere with the Board's ability to manage its docket. The District's motion is unsupported by Board precedent and should be denied.

VI. CONCLUSION

A motion to stay a rulemaking proceeding is unprecedented. Staying this rulemaking would be injurious to the public interest, harmful to the environment, and would result in an extraordinary waste of the resources of the Board, the IEPA, and the many other public and private stakeholders that have spent years preparing for and participating in this proceeding. For all of the reasons stated herein, the People request that the Board deny the District's motion to stay this proceeding.

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DATE: June 26, 2007

EXHIBIT A

Protecting Our Water Environment

June 26, 2008

BOARD OF COMMISSIONERS

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Metropolitan Water Reclamation District of Greater Chicago

100 EAST ERIE STREET

CHICAGO, ILLINOIS 60611-3154

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**URGENT CALL TO ACTION:
Proposed Water Quality Standards**

Public Hearing Monday, June 16

5:30 p.m. to 8:00 p.m.

Metropolitan Water Reclamation District

100 East Erie - Chicago

The Illinois Pollution Control Board will be holding a public hearing on the *Proposed Waterway Use Classifications and Water Quality Standards* – Docket R08-009.

The Metropolitan Water Reclamation District is conducting studies that will enable a scientific basis to determine whether the proposed standards will benefit the health of people recreating on the waterways. These studies will also determine if aquatic life will be improved.

If the proposed standards are approved, they will have a major economic impact on the area. The costs of meeting these standards will be borne by taxpayers.

Water quality has dramatically improved in past decades thanks to the initiatives undertaken by the Metropolitan Water Reclamation District. The proposed water standards require further deliberation and study to demonstrate the need for new rulemaking.

If you would like to testify at the hearing in person, here is what you must do:

Sign-in on Monday June 16, 2008 prior to 5:30 p.m. –or – contact the Hearing Officer before June 16th by phone or email advising that you wish to testify.

If you would like to submit comments in writing to the Illinois Pollution Control Board:

Send your comments to the IPCB web-site at www.ipcb.state.il.us. A Sample Letter has been provided in your packet.

Also, kindly advise Jill Horist, Manager Public Affairs, if you will be attending the hearing, testifying at the hearing, or sending comments in writing. You may contact her at: 312-751-7909 or jill.horist@mwr.org.

SAMPLE

SAMPLE

John Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Subject: IPCB Docket R08-9

To the members of the Illinois Pollution Control Board:

I believe any decisions in this rulemaking should be delayed until it is certain that promulgation of standards proposed by the Illinois Environmental Protection Agency will result in a significant and meaningful public health or environmental benefit. It is my understanding that the Metropolitan Water Reclamation District of Greater Chicago is conducting studies that will enable you to have a scientific basis to determine whether the proposed standards will benefit the health of people recreating on the waterways and further improve aquatic life in the waterways.

The costs of meeting the proposed standards are high and will be borne by taxpayers. I want to make certain that tax dollars are not diverted for unnecessary projects that may not provide any benefit to the taxpayers and in fact could increase greenhouse gas emissions causing further harm to the environment.

Regardless that the current water quality standards have not changed in decades, water quality has dramatically improved thanks to the initiatives undertaken by the Metropolitan Water Reclamation District. Water quality will continue to improve as it has over the past decades, when the Metropolitan Water Reclamation District completes the deep tunnel project reservoirs in the near future.

It is imperative that prior to issuing a decision, the Board consider all of the on-going studies being conducted by the District. Until such time, it is premature to issue rules that will be extremely costly to taxpayers and may not provide any public health or environmental benefit.

Sincerely,

CERTIFICATE OF SERVICE

I, ANDREW ARMSTRONG, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the foregoing Notice of Filing and Response in Opposition to Motion to Stay by the People of the State of Illinois and caused them to be served this 26th day of June, 2008 upon the persons listed on the attached Service List by depositing true and correct copies of same in an envelope, first class postage prepaid, with the United States Postal Service at 69 West Washington Street, Chicago, Illinois, unless otherwise noted on the Service List.


ANDREW ARMSTRONG

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