

ILLINOIS POLLUTION CONTROL BOARD

July 21, 2008

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

ORDER OF THE BOARD (by G.T. Girard):

On June 12, 2008, the Metropolitan Water Reclamation District of Greater Chicago (District) filed a motion to stay the proceedings in this rulemaking (Motion). Between June 26 and June 30, 2008, the Board received seven responses to the Motion. Three of the responses supported the District, while four opposed the Motion. On July 11, 2008, the District filed a motion for leave to file a reply and a reply. The Board is cognizant of the concerns raised by the District and the other participants that support the motion. However, as discussed below, the Board is unconvinced that a stay of the proceeding is appropriate at this time. Therefore, the Board denies the Motion.

The discussion below will begin with a brief procedural history. Next the Board will summarize the motion and the filings that support the Motion. Then the Board will summarize the filings that oppose the motion. The Board will next summarize the reply. The Board will then explain the reasons for the decision.

PROCEDURAL HISTORY

On October 26, 2007, the Illinois Environmental Protection Agency (IEPA) filed a proposal under the general rulemaking provisions of Sections 27 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/27, 28 (2006)). Generally, the proposal will amend the Board's rules for Secondary Contact and Indigenous Aquatic Life Uses to update the designated uses and criteria necessary to protect the existing uses of the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River (LDPR). On November 1, 2007, the Board accepted the proposal for hearing. On November 1, 2007, the Board accepted the proposal for hearing.

Hearings were held in Chicago from January 28, 2008 through February 1, 2008 and on June 16, 2008. Hearings were then held in Joliet from March 10, 2008 through March 12, 2009. The Board also held hearings in Des Plaines on April 23, 2008 and April 24, 2008. There have been 11 days of hearing and additional hearings are scheduled to begin September 8, 2008.

On June 12, 2008, the District filed a motion to stay the rulemaking proceeding. On June 26, 2008, Midwest Generation LLC (Midwest Generation) filed a memorandum in support of the

motion (MGmemo). On June 27, 2008, the Chemical Industry Council (CICI) filed a memorandum in support of the motion (CICImemo). On June 30, 2008, Stepan Company (Stepan) filed a concurrence with the motion (Smemo).

On June 25, 2008, the Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council and Openlands (Environmental Groups) filed a response in opposition to the motion (EGResp.). On June 26, 2008, the Chicago Legal Clinic on behalf of the Southeast Environmental Task Force (SETF) filed a response in opposition to the motion (SETFResp.). On June 26, 2008, the Attorney General of the State of Illinois (People) filed a response in opposition to the motion (PResp.). On June 30, 2008, the IEPA filed a response in opposition to the motion (Resp.).

On June 30, 2008, the IEPA also filed numerous documents requested at the prior hearings along with a motion for leave to file a limited number of copies with the Board. That motion is granted.

On July 11, 2008, the District filed a motion for leave to file a reply along with a reply (Reply). The Board grants that motion and accepts the reply.

MOTION TO STAY

The Board will first summarize the District's arguments made in the motion to stay. Next, the Board will summarize each of the responses that support the motion to stay.

District's Motion to Stay

The District indicates that the obligation to protect public health and the environment is taken very seriously by the District and the District has spent "large amounts of money, time and resources" to improve the water quality of the CAWS. Mot. at 1. Further, the District participated in the rule development stakeholder process until the process ended and the rulemaking was proposed. *Id.* The District believes that the proposal has changed in significant ways and ignores "major studies, which could change the IEPA recommendations" and provide essential information in the rulemaking process. *Id.*

The District has participated in the rulemaking proceedings before the Board on the proposed rule. Mot. at 1. The District argues that the hearings have shown that the proposal has major problems scientifically, legally and from a policy perspective. *Id.* Because of these problems the District asks the Board to stay the proceedings until additional studies are completed and the results can be considered. Mot. at 2.

Legal Standard for Motion to Stay Proceedings

The District claims that the Board has inherent authority to grant stays in Board proceedings and sole discretion to grant or deny motions to stay. Mot. at 4, citing Israel-Gerold's v. IEPA, PCB 91-108 (July 11, 1991) and People v. State Oil Co., PCB 97-103 (May 15, 2003). The District asserts that the Board has historically granted motions to stay:

inter alia, (1) to avoid wasting time, expenses, or resources (In the Matter of: Petition of Midwest Generation, LLC, Will County Generating Station for an Adjusted Standard from 35 Ill. Adm. Code 225.230, AS 07-04 (Mar. 15, 2007)); (2) to avoid practical difficulties (*Id.*); (2) to avoid duplicative efforts by the Board and other review authorities addressing related issues (*Id.*); and (4) to assist the Board in making the appropriate determination (In the Matter of: Petition of Cabot Corporation for and Adjusted Standard from 35 Ill. Adm. Code Part 738, Subpart B, AS 07-06 (Aug. 9, 2007)). Mot. at 4.

The District notes that a motion to stay must provide sufficient information detailing why a stay is needed and include a status report on the progress of the case. Mot. at 4, citing 35 Ill. Adm. Code 101.514.

Reasons For Stay

The District argues that during the hearing process the District and other parties have discovered “a number of substantial deficiencies” in the proposal by IEPA. Mot. at 5. Specifically, the District claims that the IEPA’s responses to questions have indicated that the IEPA: 1) failed to clearly document the methodologies utilized to arrive at findings and recommendations; 2) did not have adequate data and information to assess aquatic life and water quality standards; 3) did not have adequate data to set water quality standards to protect recreational uses; and 4) did not have adequate information to assess the economic impact of the rulemaking. *Id.* The District delineates specific responses to questions on each of the four areas and asserts that those responses establish the inadequacies in the record. Mot. at 5-10.

The District argues that there are forthcoming studies that will assist the IEPA’s analysis for the proposal and some studies have already been completed. Mot. at 10. The District has already performed a fecal coliform distribution study on CAWS waters and an expert panel study on secondary contact criteria feasibility in the CAWS. *Id.* In addition, a quantitative microbial risk assessment for the recreational uses proposed for the CAWS was recently completed and the report has been submitted to the IEPA. *Id.*

The District is also currently engaged in an ongoing epidemiological study of recreational contamination in the CAWS. Mot. at 10. The District states that the intent of the study is to: 1) validate the results of the quantitative microbial risk assessment, 2) provide scientific data necessary to properly evaluate the actual risk of illness, and 3) provide scientific data on the risk of illness in correlation to indicator bacteria concentrations. *Id.* The District indicates that the study has been approved through the peer review process and the study is scheduled for completion in 2010. *Id.*

The District points to another set of studies on recreational use development on the CAWS that focuses on the cost of complying with the proposed standards. Mot. at 11. Those studies include: 1) a “Blue Ribbon Panel” to evaluate and rank the suitability of all available disinfection technologies for the District’s facilities; 2) preliminary design and cost estimate study for installing various disinfection units; 3) overall costs and environmental impacts

resulting from the proposed rule; 4) a comparison of several UV technologies; and 5) a study of end-of-pipe treatment of the combined sewer overflow (CSO) discharges on CAWS. *Id.* The CSO study has been submitted to the IEPA. *Id.*

The District has a study program to generate more and better data to help develop appropriate aquatic life use designations for the CAWS including evaluation and improvement of habitat, sediment quality data, dissolved oxygen monitoring and ambient water quality monitoring. Mot. at 12. The District points to several ongoing or proposed engineering studies including development of an integrated water quality strategy for CAWS, field tests of aeration stations, and assessing control measures. Mot. at 12-13.

The District argues that the IEPA's proposal has substantial deficiencies and that there are studies currently underway that would be helpful in filling those gaps. Mot. at 14. The District asserts that a stay would allow the IEPA to analyze the scheduled studies, collect other information and submit a complete rulemaking proposal to the Board. Mot. 14. Therefore, the District asks that the Board stay these proceedings, including the schedule set for submittal of testimony, until after ruling on the stay.

Midwest Generation's Response

Midwest Generation states that during the years the IEPA held stakeholder meetings, Midwest Generation actively participated in the process. MGmemo at 1. Midwest Generation has also been actively participating in the hearings on the proposed rules. *Id.* Midwest Generation shares the District's concerns that the IEPA proposal is fundamentally flawed and cannot be supported based on the factual gaps and faulty assumptions in the record. *Id.* Midwest Generation claims that the IEPA's testimony establishes that development of the proposed rules was harmed by fundamental problems, including IEPA's failure to consider the stakeholders' meaningful input. *Id.*

In addition to specific deficiencies listed in the response (*see* MGmemo at 4-7), Midwest Generation argues that the IEPA failed to consider the need to obtain and review relevant data relating to constraints limiting the attainable uses of the waterways. MGmemo at 2. Midwest Generation further argues that the IEPA failed to consider the technical feasibility or economic costs of the proposed rules. *Id.* Midwest Generation asserts that the IEPA also failed to consider any alternative approaches to the proposed thermal water quality standards. *Id.*

Midwest Generation notes that the IEPA admitted that a 2007 submission by Midwest Generation regarding alternative thermal standards methodology and proposed numerical standards for Upper Dresden Island Pool¹ was not reviewed by the IEPA. MGmemo at 2. Midwest Generation further notes that the IEPA failed to consider 20 years of fish survey data for the Upper Dresden Island Pool that the IEPA had when preparing this rulemaking. *Id.* Midwest Generation asserts that the testimony revealed a complete absence of review of key data or analysis regarding environmental stressors. *Id.*

¹ The Upper Dresden Island Pool is part of the LDPR.

Midwest Generation maintains that moving ahead with this rulemaking when the IEPA's supporting record "suffers from so many key deficiencies" is not beneficial to the Board, the IEPA, or interested members of the public. MGmemo at 2. Midwest Generation concedes that the burden and expense of presenting Midwest Generation's view in this rulemaking is Midwest Generation's burden. *Id.* However, Midwest Generation asserts that the burden has become unreasonable given the many omissions in the IEPA's record. *Id.* Midwest Generation argues that a pause in the proceedings would result in a more streamlined, cost-effective, and less time consuming rulemaking process before the Board. MGmemo at 3.

Midwest Generation asserts that only at hearing was the IEPA's "selective consideration of limited data related" to Upper Dresden Island Pool evident and Midwest Generation is trying to address the gaps. MGmemo at 3. Midwest Generation is attempting to: 1) gather, review, and analyze data the IEPA ignored; 2) address gaps in the more recently collected data presented by IEPA in this rulemaking; 3) prepare and present a more complete data set and analysis to the Board. *Id.* Some of the data Midwest Generation is collecting cannot be collected until July and that data could have a direct bearing on the IEPA's use designations. *Id.*

Midwest Generation argues that a stay would allow the necessary time to collect and review current data as opposed to the current prefiling deadline for Midwest Generation testimony. MGmemo at 3. Midwest Generation further argues that a stay would allow the data to be presented first to the IEPA and other stakeholders outside the formal constraints of the rulemaking process. *Id.* Such a process could serve to narrow or resolve the many disputed issues currently in this proceeding. *Id.* For all these reasons, Midwest Generation agrees with the District that a stay is appropriate in this proceeding. *Id.*

CICI'S Response

CICI joins the District and Midwest Generation in requesting a stay of these proceedings. CICImemo at 1. CICI notes that, as pointed out by both the District and Midwest Generation, the record developed by IEPA "suffers obvious problems" that should be resolved before proceeding. *Id.* CICI asserts that the record reveals a significant lack of data including information and analysis on economic and social impacts of the proposal. *Id.* CICI claims that there is a deficiency in the collection and analysis of environmental data and given these shortcomings a stay should be granted. CICImemo at 2.

Stepan's Response

Stepan agrees with the District's motion to stay and agrees that a stay would allow IEPA to consider additional information. Smemo at 1. Stepan notes that in addition to those matters that IEPA failed to consider, as determined by the District, IEPA failed to consider potential particulate matter emissions from cooling towers, the cost of retrofitting existing sources, and the thermal quality of industrial dischargers. Smemo at 1-2. Stepan requests that a stay be granted.

RESPONSES IN OPPOSITION TO MOTION TO STAY

The Board received four responses in opposition to the motion to stay. The Board will first summarize the response from the IEPA and then the response from the People. Next the Board will summarize the Environmental Groups response and the response by SETF.

IEPA's Response

The IEPA agrees with the District that a stay may be granted; however, the IEPA emphasizes that the District does not cite to a single case where the Board granted a motion to stay in a regulatory proceeding without the support of the IEPA. Resp. at 2. The IEPA notes that the District states there are four situations where the Board typically grants a stay; but that four-part test is not found in the cases cited in the District's motion. *Id.* The IEPA argues that a stay would not save time, expenses or resources and would cause practical difficulties. *Id.* Further, the IEPA asserts that there are not ongoing proceedings that would duplicate the work of the parties in this proceeding, and a multi-year span between the IEPA's testimony and the regulated community would not assist the Board in a final determination. *Id.*

IEPA states that the IEPA has worked on this proposal since 2000 and the District has been a participant since the beginning. Resp. at 2. The IEPA met all the filing requirements under the Act and the Board's rules. *Id.* In addition, the IEPA has answered questions in hearings over 10 days and filed additional information with respect to the proposal in March and April of 2008. Resp. at 3. Further, the proposal submitted is a very detailed rulemaking package and the IEPA asserts that the submission of the proposal and the answering of questions meet the IEPA's burden. *Id.*

The IEPA argues that instead of delaying these proceedings for two years in the "hopes that more relevant information will be produced" now is the time for the District or any other party who disagrees with the proposal to come forward and present counter arguments. Resp. at 3. The IEPA disagrees that the requested delay would add to the record or produce needed changes to the IEPA's proposal. *Id.* The IEPA also does not feel a delay is necessary for studies currently being undertaken. *Id.* The IEPA states that no delay is needed for review of the studies as the IEPA is prepared to review the studies as the rulemaking moves forward. *Id.*

The IEPA notes that the District "makes much of the need for additional information" regarding bacteria. Resp. at 3. The IEPA points out that the IEPA's Statement of Reasons recognized that the states are waiting on USEPA to update national criteria for bacteria. *Id.*, citing Statement of Reasons at 42-46. The IEPA maintains that this issue was addressed in the proposal by the technology based effluent requirement in 35 Ill. Adm. Code 304 and proposing appropriate designated recreational uses for both the CAWS and the LDPR. Resp. at 3-4.

The IEPA argues that granting a stay at this juncture would cause a delay in the rulemaking that could be detrimental to the waterway that needs improvement now. Resp. at 4. The IEPA maintains that the IEPA and participants have already dedicated a lot of time and resources to this rulemaking and a return to the stakeholder process would not be appropriate. *Id.* As to the District's arguments regarding economic reasonableness, the IEPA states that the IEPA has stated on the record that the proposal is economically reasonable and technically feasible. *Id.*

People's Response

The People oppose the motion to stay arguing that staying the 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. PResp. at 1. The People argue that when considering a motion to stay, the Board “carefully weighs” the extent to which a stay would burden the Board or otherwise waste time and resources. *Id.*, citing Vernon and Elaine Zohfeld v. Bob Drake et. al., PCB 05-193 (Feb. 2, 2006). Further, the Board denies stays when the effect of the stay could harm the environment or be injurious to public interest. *Id.*, citing People v. ESG Watts, PCB 96-107 (Mar. 19, 1998).

The People argue that the motion to stay is premised on:

(1) a one-sided (mis)characterization of the record offered by counsel for the District; (2) alleged deficiencies in the record [footnote omitted] 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. PResp. at 2.

The People assert that these premises are not a factual basis for a stay and no affidavits or verified filings were included. *Id.* The People maintain that “counsel’s unsupported and unverified assertions” are insufficient for the Board to base a decision to stay the proceeding. *Id.*

The People argue that the granting of the stay would interfere with the Board’s ability to manage the Board’s docket and would waste time and resources. PResp. at 2. The People claim that the IEPA has spent nearly a decade “conducting detailed analyses” in preparation for this rulemaking. *Id.* Further IEPA has actively involved stakeholders in the process since at least 2002 and IEPA’s efforts culminated in the proposal. PResp. at 3. Also, with the deadline for pre-filing of testimony for the next hearings scheduled for August 4, many parties including the People, have retained witnesses and are working to finish testimony for the deadline. *Id.*

The People argue that all stakeholders have had “ample time to conduct studies and prepare testimony” for the rulemaking. PResp. at 3. The People maintain that the District’s decision to file a motion to stay rather than testimony is “surprising” and if the District needs more time the problem is of the District’s own making. *Id.*

The People note that under the Clean Water Act (33 U.S.C. §1251), the State is required to conduct a triennial review and to review and revise, as necessary, effluent limitations at least every five years. PResp. at 5, citing 33 U.S.C. §1311(c)(1), 40 C.F.R. 131.20. The People argue that the Board is on course to make a determination on attainable uses in CAWS and the LDPR and the water quality standards and effluent limitations necessary to attain those uses. PResp. at 6. The People assert that failure to make this determination would not only be harmful to the environment and the public interest but would also violate clear deadlines established by federal law. *Id.*

The People argue that the granting of the stay is contrary to Board precedent and the District does not cite any previous Board orders in which the Board granted a motion to stay by a participant. PResp. at 6. The People note that a search of the Board's records indicates that the Board has never been presented with such a motion. *Id.* The People argue that the cases cited by the District are easily distinguishable and that in those cases the Board primarily granted the motion because of a related concurrent proceeding. PResp. at 7.

Environmental Group's Response

The Environmental Groups oppose the District's motion for stay because the need to upgrade the standards protecting recreation and aquatic life in the CAWS is urgent and supported by the evidence. EGResp. at 2. The Environmental Groups argue that the proposed rules are not rushed and may be arguably decades overdue. *Id.* The Environmental Groups note that the IEPA is required to evaluate uses for water-bodies every three years; however most of the CAWS has not been formally reviewed since 1972. *Id.* The Environmental Groups note that IEPA began the review process for CAWS in 2002 and the District cooperated in the studies and other portions of the use attainability analysis (UAA). EGResp. at 3. The Environmental Groups state that IEPA circulated a draft set of rules in January, 2007 and USEPA indicated that the rules did not offer sufficient protection. *Id.* Additional meetings were then held on the draft proposal before the final proposal was made to the Board. *Id.*

In response to the "laundry list of deficiencies" cited by the District, the Environmental Groups argue that the burden is on opponents of the rulemaking to demonstrate that the CAWS cannot sustain uses proposed by the IEPA. EGResp. at 4. The Environmental Groups state that the law is clear that there is a rebuttable presumption that every water body should support fishable and swimmable uses. *Id.*, citing Kansas Natural Resource Council v. Whitman, 255 F.Supp. 2d 1208, 1209 (D. Kan. 2003); Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 197-98 (D. Idaho 2000). The Environmental Groups further state that unless the state demonstrates using the UAA factors that a use cannot be attained in a particular water body, fishable and swimmable uses are assumed. EGResp. at 4-5.

The Environmental Groups maintain that the UAA regulations provide six ways to rebut the presumption of a fishable/swimmable water and five of those reason deal with physical limitations and one allows for consideration of economic factors. EGResp. at 5, citing 40 C.F.R. § 131.10(g). The Environmental Groups argue that without putting on any evidence, the District alludes to the possibility that the proposed standards should not apply because of economic hardship. *Id.* The Environmental Groups assert that the Board's evaluation of technical feasibility and economic reasonableness must be done in conjunction with the federal requirements. EGResp. at 5-6. The Environmental Groups claim that an argument that disinfection is infeasible or economically unreasonable is "preposterous" as disinfection is required almost everywhere across the State. EGResp. at 6, citing 35 Ill. Adm. Code 302.209.

The Environmental Groups maintain that the alleged deficiencies in the record cited by the District are based on a distortion of the record and the Environmental Groups offer responses to many of the listed deficiencies. EGResp. at 8-13. The Environmental Groups argue that the studies cited by the District are not indispensable to this proceeding and that no explanation on

why the studies were not undertaken earlier. EGResp. at 13-14. The Environmental Groups point particularly to the epidemiological study and assert that a colleague of the leading researcher on that study does not believe the study is a reason for delay. EGResp. at 14. As to the other studies, the Environmental Groups claim that the District will need to complete some of those studies regardless of this rulemaking. EGResp. at 16.

SETF's Response

SETF opposes the motion to stay arguing that the motion is premature and incorrect. SETFResp. at 6. The motion is premature because a “major, legally required component of this rulemaking” is not complete and that component is the opportunity of participants other than IEPA to present testimony and comment. *Id.* SETF argues that if a stay is granted the evidence gathering necessary for the Board to evaluate the arguments of the District or any other participant would be prematurely terminated. *Id.* SETF plans to present testimony concerning the recreational uses of the Calumet River system and the parks and recreational areas through which the Calumet River flows. SETFResp. at 6-7. SETF states that this testimony and subsequent comments by SETF will help the Board in evaluating the IEPA's use designations and the disinfection requirements. SETFResp. at 7.

SETF disagrees with the characterization by the District of the law on stays. SETFResp. at 7. SETF argues that the Board is authorized to: 1) control only one source category, 2) control discharges despite collateral environmental impacts, 3) control discharges because of potential threats without finding actual harm, 4) control discharges from sources even if contributions to overall pollution is small, and 5) implement requirements even if regulated entities will bear costs. SETFResp. at 7-8, citing In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury), R06-25.

Further SETF claims that the legal requirements behind this proceeding are very different than the District asserts. SETFResp. at 8. SETF argues that under the Clean Water Act the IEPA is under a non-discretionary duty to assess Illinois waters to ensure that the waters are safe for the people and wildlife using them, “now and in the future, until the waters are fully fishable and swimmable.” *Id.*, citing 33 U.S.C. § 1313(c)(1), 40 CFR 131.10(j)(1). SETF states that to fulfill this duty, IEPA engaged in a process, over several years, involving multiple stakeholders to assess the present attainable uses of the CAWS, and IEPA determined that some decades old classifications should be changed. SETFResp. at 8. SETF notes that new recreational uses trigger Clean Water Act mandates to ensure that the CAWS is safe for these uses. *Id.* SETF points out that the District's wastewater treatment plants are sources of pathogens into waters which are now classified for recreational uses and disinfection is almost uniformly employed by POTWs in Illinois and throughout the United States to control these kinds of pathogens. *Id.* SETF opines that affording “any value” to the District's broad claims that disinfection is technically infeasible and will result in substantial and widespread economic and social impact, is difficult. *Id.*

SETF states that from their perspective, the IEPA proposal designates uses for which CAWS should be maintained and protected, prescribes water quality standards necessary to sustain the designated uses, and establishes effluent standards to limit contaminant discharges to

CAWS. SETFResp. at 8-9. SETF argues that the IEPA's proposal is within IEPA's legal mandate under both federal and state law. SETFResp. at 9, citing 35 Ill. Adm. Code 301.102 and 33 U.S.C. § 1370.

SETF argues that granting the stay would be fundamentally unfair to the participants in this rulemaking as the Board has received over 70 comments on the rule and 44 individuals testified at a June 16, 2008 hearing regarding the proposal. SETFResp. at 9. Further, for the first time in the September hearings environmental organizations will be given an opportunity to present testimony and evidence concerning the proposed rule. *Id.* SETF claims that the stay could be viewed as an attempt to allow the testimony already given to go stale and this is against the public interest. *Id.*

SETF asserts that granting the stay would allow the District to subvert the rulemaking process that dozens of participants have engaged in good faith. SETFResp. at 10. SETF maintains that many of the internal District activities cited in the motion have been underway for years and will take many more years to complete. *Id.* Further, SETF asserts that a stay would "damage the public trust and confidence in the Board" because the rulemaking is generating public interest and participation from numerous entities. SETFResp. at 11. SETF maintains that the stay will be ascribed to the Board and the Board will be regarded as responsible for allowing additional years of human contact with pathogens. SETFResp. at 11-12.

DISTRICT'S REPLY

The District notes that the participants seem to recognize that a stay would be appropriate to avoid wasting time, expenses and resources, and that is the purpose of the District's motion. Reply at 2. The District claims the motion to stay was filed to avoid the needless expense of pushing forward with rulemaking proceedings that may ultimately need to be repeated. *Id.* The District indicates that in the coming months the District will present over 20 witnesses and other participants also intend to present witnesses. *Id.* The District asserts that based on the substantial number of witnesses that will need to be questioned, proceeding with this rulemaking when much of the support needed will be provided in the reports outlined by the District does not make much sense. *Id.* The District also notes that many of the reports, identified in the motion, were specifically requested by IEPA or that current studies are being conducted to address issues raised by the reports requested. *Id.*

The District notes that the responses in opposition to the motion offer several specific challenges to the motion to stay, but the common themes are that the UAA process has been ongoing for six years and the IEPA has adequately supported the proposal or need not support certain aspects. Reply at 3. The District agrees that the IEPA has answered numerous questions and that the rulemaking has been ongoing for six years. Reply at 3-4. The District argues that a great volume of data is not a substitute for complete analysis and much of the IEPA's testimony shows that the IEPA has failed to perform the necessary legal and technical analysis. Reply at 4.

The District disagrees that the burden to justify the changed use designations is not on the IEPA. Reply at 4. The District agrees that if the CAWS designation was fishable/swimmable, then the IEPA would not need to justify the standard, but the streamlined process does not apply

when designating other than fishable/swimmable. *Id.* The District also takes issue with the claim that Illinois specifically requires disinfection for vast stretches of water and that the requirements are simple proximity to parks or residential areas to require disinfection. Reply at 6.

The District argues that discussions about proposed water quality standards have been on going so the push for an urgent resolution is disingenuous. Reply at 22. The hearings that have already taken place will not go to waste unless the rulemaking continues and the significant holes are not resolved and the rule proposal fails to withstand the Board's scrutiny. Reply at 21. The District is not using the motion as a tactical ploy to delay the rulemaking as many of the studies being undertaken are done so at the request of the IEPA. Reply at 23. The IEPA did not wait for the District to complete the studies but proceeded to propose changes and the District argues that the District can hardly be blamed for timing issues associated with particular studies. Reply at 23-24. The District undertook additional studies as soon as the District became aware that IEPA would be proposing new standards without much of the information needed to justify them. Reply at 24.

The District maintains that the District was not obligated to undertake these studies. Reply at 24. The IEPA is attempting to change the designated uses and IEPA has the responsibility to justify UAAs with information supporting the decision. Reply at 24, citing 40 C.F.R. § 131.10(g), (j). The District's desire to supplement the rulemaking with studies to fill gaps is not an obligation to conduct the studies. Reply at 24. Furthermore, the District could not know the full extent of the informational gaps in the IEPA's proposal until the IEPA proposed the rulemaking and the District could not fully appreciate the gaps until the IEPA completed the testimony in April. Reply at 25. Thus, the District timely moved for a stay and Midwest Generation, Stepan, and CICI support that motion. Reply at 26.

DISCUSSION

The Board has reviewed the arguments by the participants concerning the requests to stay the proceedings. The Board notes that there have already been 11 days of hearing beginning in January 2008, including one evening hearing between the April hearings and the hearings scheduled for September. Since the September hearings are devoted to testimony by participants other than the IEPA on use designations only, there will be future hearings on the proposal so participants have the opportunity to testify on the water quality standards proposed by the IEPA. The hearing officer will schedule additional hearings on the water quality standards after conclusion of testimony on the use designations. Finally, the Board has already given participants several months to prepare testimony for the scheduled September hearing.

The Board is not convinced that an additional delay is warranted at this time. The hearing process and information gathering by the Board will continue at least until the Board has heard testimony from all participants who wish to testify on all aspects of the IEPA's proposal. Additional testimony will provide a more complete record and enable the Board to make the best possible decisions regarding the IEPA's proposed rules. The Board finds that this process is proceeding in an appropriate manner and a stay is not necessary at this time. The Board denies

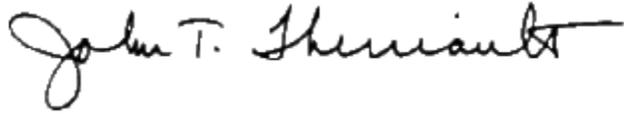
the motion to stay and will not disturb the hearing officer's order on the prefiling of testimony and questions for the September hearings.

CONCLUSION

The Board finds that a stay is not warranted at this time and therefore denies the motion for stay. The hearing schedule, including all prefiling deadlines for the hearings starting September 8, 2008, is unchanged from the hearing officer's May 19, 2008 order. Thus, prefiled testimony is due August 4, 2008, and the mailbox rule does not apply.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2008, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board