

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: ALL COUNSEL OF RECORD
(Service List Attached)

PLEASE TAKE NOTICE that on the 8th day of March, 2010, I electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, **Metropolitan Water Reclamation District of Greater Chicago's Motion for a Hearing on the CAWS Habitat Reports and the District's Proposed Aquatic Life Use Designations and Standards.**

Dated: March 8, 2010.

**METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO**

By: /s/ Fredric P. Andes
One of Its Attorneys

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**METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S
MOTION FOR A HEARING ON THE CAWS HABITAT REPORTS AND THE
DISTRICT'S PROPOSED AQUATIC LIFE USE DESIGNATIONS AND STANDARDS**

The Metropolitan Water Reclamation District of Greater Chicago ("the District"), by its attorneys Barnes & Thornburg LLP, hereby moves the Board for an Order scheduling a hearing on the Chicago Area Waterway System ("CAWS") Habitat Evaluation and Improvement Reports that were filed by the District on January 6, 2010 (the "Habitat Reports"). In conjunction with setting that hearing, the Board should also schedule deadlines for the submission of written, pre-filed testimony and questions related to the Habitat Reports. As part of its submission of written, pre-filed testimony, the District would submit proposed aquatic life use designations and water quality standards, which would also be addressed at the hearing requested in this Motion. In support of its Motion, the District states as follows:

1. On June 12, 2008, the District filed a Motion to Stay IPCB R08-9, which was generally based on the premise that the District would be receiving numerous studies related to different aspects of this rulemaking, and that the rulemaking should not proceed until those studies were finalized and filed with the Board. The ongoing studies related to both IEPA's proposed recreational use designations and aquatic life use designations for the ("CAWS").

2. As to the aquatic life use issues, the District stated that it was involved with, among others, two studies analyzing the various habitats in the CAWS that were ongoing and not yet completed. Specifically, the District stated:

The District has also undertaken a program of study that will generate more and better data to help in developing and justifying appropriate aquatic life use designations for the CAWS. This program consists of several different studies, including the following:

- an evaluation and improvement study on the various CAWS habitats, to better define the capabilities of the CAWS to support aquatic life, and to resolve issues concerning its potential to support early life states of fish. This study includes identifying the ambient fish populations and life stages in the CAWS, if any, and then developing a habitat metric specifically designed for this highly-modified waterway system. This study should be completed by Summer 2009; . . .

See Motion to Stay IPCB R08-9, at 12 (June 12, 2008).

3. While the Board denied the District's request for a stay, it found that the District, as well as any party, should be allowed to fully present its studies and witnesses related to the studies. Board Order, July 21, 2008, at 11, attached as Exhibit A ("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 decisions regarding the IEPA's proposed rules."). Based on the July 21, 2008 ruling, the District is entitled to present testimony regarding the Habitat Reports before the Board makes a final decision on aquatic life use designation issues.

4. Throughout this rulemaking, the District repeatedly informed the Board and other parties about the status of the Habitat Reports, and of their critical importance to the Board's assessment of the IEPA's proposed aquatic life use designations. For example, the District's expert witness Paul Freedman, an environmental engineer, testified that "But my opinion was

that the [habitat] information [considered by IEPA] was insufficient, and that it would be in the best interest of the state to consider that information and do a more comprehensive and scientifically thorough development of the standards. **And the Habitat and Biological Assessment Study that is now currently underway, provides a lot of that needed information.**” February 17, 2009 Hearing Trans., at 34, attached as Exhibit B (emphasis added).

Freedman also testified as to the Habitat Reports:

So, you know, which is it? And without a comprehensive characterization and comprehensive habitat study, looking at not only the shape but also the sediment conditions, it would be difficult to make the proper scientific classification, which is, again, returning to – I hate to return to my theme, but it’s the – it’s – a major thrust of my testimony is that it would be in the best interest of the state to wait for these other studies and then we’ll have a comprehensive, scientific and thorough assessment of the habitat along the whole length of the Cal Sag, as well as all areas of the CAWS.

Id. at 53-54; *see also* February 17, 2009 Hearing Trans., at 86-87, testimony of Samuel Dennison, attached as Exhibit C (“I suggest that you wait for ongoing studies to be completed. . . . For example, the Habitat Evaluation Study. And I think there are a number of others, but that’s the one that comes to mind as the most important.”); February 17, 2009 Hearing Trans., at 22-23, testimony of Adrienne Nemura, attached as Exhibit D (“You would look at the – as part of the habitat study the District is conducting, they are gaining information on the species of fish that are present in the Chicago area waterways.”).

5. Similarly, Dr. Scudder Mackey testified as to the importance of the Habitat

Reports:

Unfortunately, Illinois EPA has not provided any data, information, or analyses to show that there is sufficient aquatic habitat to support attainment of the appropriate – sorry – attainment of the proposed aquatic life uses in the CAWS.

We will have a better understanding of the habitat condition when the ongoing habitat evaluation and improvement study has been completed. Only after the comprehensive evaluation of habitat can this question be answered properly. In other words, we really don't have enough information on the physical habitat and characteristics in the CAWS to determine whether or not the system – if there is enough habitat there to actually support the proposed aquatic life uses.

December 2, 2008 Hearing Trans., at 19-20, attached as Exhibit E.

6. Moreover, the Environmental Groups' expert David Thomas, who is a former Chief of the Illinois Natural History Survey, further confirmed the importance of the Habitat Reports to the Board's consideration of aquatic life use issues. Specifically, Thomas testified as follows:

Q [MR. ANDES]. So that [the Habitat Reports] would be something you'd believe would be relevant to look at, to assess role habitat versus some of these other factors; an I right?

A [MR. THOMAS]. Well, I am not sure I would phrase is as versus, but I think it would be an important component, yes.

Q. Various factors, including habitat and improving the fish population?

A. Yes.

August 14, 2009 Hearing Trans., at 65, attached as Exhibit F.¹

7. The District filed the Habitat Reports on January 6, 2010.²

8. Now that the Habitat Reports have been filed, the Board should schedule a hearing on the Reports. As part of setting the hearing on the Habitat Reports, the Board should also set dates for the submission of written testimony and pre-filed questions on the Reports. In

¹ In addition, counsel for the District previously informed the Board that the District would be requesting a hearing on the Habitat Reports. March 3, 2009 Hearing Trans., at 72-73, attached as Exhibit G ("If I can help answer that. I think that the reports will be filed with the Board on completion, and I think at that point the District would propose a timeline in terms of providing further testimony. Hard to say until the report is complete.")

² Prior to the filing of the Reports, the Board had inquired about the status of the Habitat Reports during the hearings in this rulemaking. See December 3, 2008 Hearing Trans., at 89, attached as Exhibit H (Hearing officer asking District witness Samuel Dennison about the projected date for the Habitat Reports).

the written testimony regarding the Habitat Reports, the District will submit proposed aquatic life use designations and water quality standards for the CAWS that are based on the information and analyses in the Habitat Reports (and other relevant information that will be described in the testimony). As the testimony above shows, the Habitat Reports and the District's proposed aquatic life use designations and water quality standards are critical to the Board's consideration of the aquatic life issues involved in this rulemaking. As Tom Granato, the District's Assistant Director of Research and Development who manages the Environmental Monitoring and Research Division, has testified:

Related to the aquatic life standards, the District's Habitat Evaluation and Improvement Study will provide extensive data on the physical habitat and the aquatic life potential in the CAWS at many more locations than were assessed in the UAA report. Since 2001, the District has been collecting biological and physical habitat data throughout the CAWS on a 4-year cycle for our Ambient Water Quality Monitoring Program. In other words, all 59 stations (28 of which are in the CAWS) are sampled within four years. As the data were being analyzed from the first two sampling cycles, it became apparent that additional stations in the CAWS should be evaluated to adequately characterize the aquatic environment. This habitat evaluation study will fill in these gaps, determine what physical habitat modifications would be required to achieve a sustainable fish community in the CAWS, and also synthesize and compare District chemical water quality data to tolerance levels of the fish species expected to colonize the CAWS if habitat improvements were implemented. This is necessary to replace the approach that IEPA took, which was based on insufficient habitat and biotic index data, and which was derived from indices that are not appropriate for use in the CAWS and which were calculated incorrectly.

Pre-Filed Testimony of Thomas Granato Aquatic Life Uses and Criteria, filed August 4, 2008, at 2-3, attached as Exhibit I. In fact, Dr. Granato testified during a hearing that the District "would like very much to be able to do that [submit a comprehensive numeric criteria proposal] following the completion of our studies." See March 3, 2009 Hearing Trans., at 72, testimony of Tom Granato, attached as Exhibit J

9. There is still another reason why the Board should schedule hearings on the Habitat Reports and the District's proposed aquatic life use designation and water quality standards: in order to consider the ongoing discussions amongst multiple levels of federal and state government regarding measures to prevent the migration of Asian carp in the Chicago Sanitary and Ship Canal (the "Ship Canal") and other parts of the CAWS. The rapidly developing discussions between numerous governmental agencies regarding the prevention of the migration of the Asian carp directly bear on the aquatic life use designations and standards that will be submitted by the District and considered by the Board. The major preventative measures that are being considered include, but are not limited to, "kill zones", poisons, electrical barriers, lowering of water quality (as proposed by the Army Corp. of Engineers), reducing diversions, and closing navigational locks. See www.asiancarp.org (last visited on March 4, 2010). Any of these measures, if implemented to stop the migration of Asian carp, will directly bear on aquatic life use designation issues, and the Board should consider them as part of its hearings on the Habitat Reports and the District's proposed aquatic life use designations and water quality standards.

10. The District requests that the Board set the following dates for a hearing on the Habitat Reports and the District's proposed aquatic life use designations and water quality standards: (1) 20 days after the Board rules on this Motion - deadline for pre-filed testimony related to the Habitat Reports and the District's proposed aquatic life use designations and standards; (2) 30 days after the filing of pre-filed testimony - deadline for pre-filed questions related to the Habitat Reports and the District's proposed aquatic life use designations and standards; and (3) reasonably soon after the pre-filed questions are filed – hearing related to the Habitat Reports and the District's proposed aquatic life use designations and standards.

WHEREFORE, the Metropolitan Water Reclamation District of Greater Chicago requests that the Board enter an Order scheduling a hearing on the Habitat Reports and the District's proposed aquatic life use designations and quality standards (which would be included in the District's written, pre-filed testimony filed in advance of a hearing), and set deadlines for pre-filed testimony and questions. Specifically, the District requests that the Board set the following schedule: (1) 20 days after the Board rules on this Motion - deadline for pre-filed testimony related to the Habitat Reports and the District's proposed aquatic life use designations and water quality standards; (2) 30 days after the filing of pre-filed testimony - deadline for pre-filed questions related to the Habitat Reports and the District's proposed aquatic life use designations and quality standards; and (3) reasonably soon after the pre-filed questions are filed – hearing related to the Habitat Reports and the District's proposed aquatic life use designations and quality standards.

Dated: March 8, 2010

**METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO**

By: /s/ Fredric P. Andes
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PROOF OF SERVICE

The undersigned, a non-attorney, certifies, under penalties of perjury pursuant to 735 ILCS 5/1-109, that I caused a copy of the forgoing, **Metropolitan Water Reclamation District of Greater Chicago's Motion for a Hearing on the CAWS Habitat Reports and the District's Proposed Aquatic Life Use Designations and Standards**, to be served via First Class Mail, postage prepaid, from One North Wacker Drive, Chicago, Illinois, on the 8th day of March, 2010, upon the attorneys of record on the attached Service List.

/s/ Barbara E. Szynalik

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
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WATER QUALITY STANDARDS AND) R08-9
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CHICAGO AREA WATERWAY SYSTEM)
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PROPOSED AMENDMENTS TO 35 Ill.)
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Exhibit A

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 pre-filing 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

Exhibit B

~~ORIGINAL~~

Page 1

ILLINOIS POLLUTION CONTROL BOARD

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

TRANSCRIPT OF PROCEEDINGS held in the
above-entitled cause at the James R. Thompson
Building, 100 West Randolph Street, Chicago,
Illinois, Room 2-025, on the 17th day of February,
2009, at 9:00 a.m.

BEFORE: MARIA E. TIPSORD, HEARING OFFICER,
ILLINOIS POLLUTION CONTROL BOARD
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
312-814-4925.

1 A. As I understand your question, you're
2 asking me if they considered habitat and considered
3 biologic -- the biologic in the UAA?

4 Q. Yes.

5 A. Yes, I -- they did consider it. But
6 my opinion was that the information was
7 insufficient, and that it would be in the best
8 interest of the state to consider that information
9 and do a more comprehensive and scientifically
10 thorough development of the standards.

11 And the Habitat and Biological
12 Assessment Study that is now currently underway,
13 provides a lot of that needed information.

14 Q. Okay. Prefiled Question 4.

15 "Are you suggesting in your
16 prefiled testimony that the general use daily
17 minimum and seven-day minima for the CAWS is
18 unwarranted? If yes, please explain."

19 A. I guess you'll have to say -- I'll
20 have to ask you what you mean by "unwarranted,"
21 because that was not my terminology. If you mean
22 unjustified, I would agree.

23 Because I said it was unjustified
24 and premature. I expressed in numerous places in my

1 length before the Board.

2 Q. Did the UAA also indicate that the
3 Cal Sag Channel had shallow shoreline areas?

4 A. In some areas. But I think that was a
5 major shortcoming of the IEPA study and something
6 that would be improved on by the current habitat
7 study. That if you're doing a large generalization
8 of a water body, you know, miles and miles of
9 reaches, you need to do a more comprehensive
10 characterization of the system and be able to say
11 that just because you have some areas that might be
12 shallow, you also -- they describe it as steep solid
13 walls.

14 So, you know, which is it? And
15 without a comprehensive characterization and
16 comprehensive habitat study, looking at not only the
17 shape but also the sediment conditions, it would be
18 difficult to make the proper scientific
19 classification, which is, again, returning to -- I
20 hate to return to my theme, but it's the -- it's --
21 a major thrust of my testimony is that it would be
22 in the best interest of the state to wait for these
23 other studies and then we'll have a comprehensive,
24 scientific and thorough assessment of the habitat

1 along the whole length of the Cal Sag, as well as
2 all areas of the CAWS.

3 MR. ANDES: If I can follow up, have
4 you -- did you also review and agree with
5 Dr. Makke's statements indicating that during
6 his testimony that there might be limited
7 areas of refuge but not for spawning?

8 BY THE WITNESS:

9 A. I reviewed his testimony. But, you
10 know, not being, again, a, quote, "biologic expert,"
11 I would concur with his conclusions.

12 But I haven't viewed all the
13 habitat data, as Dr. Mackey did. And so I would
14 rely on his testimony.

15 BY MS. DEXTER:

16 Q. Dr. Mackey is not a biologist;
17 correct?

18 A. He's a habitat specialist. I guess
19 I'm not here to speak through -- to his --

20 MR. ANDES: I don't think he's an
21 expert on Dr. Mackey.

22 BY MS. DIERS:

23 Q. Are you a Biologist?

24 A. No, I'm not.

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF COOK)

4 I, SHARON BERKERY, a Notary Public within
5 and for the County of Cook, State of Illinois, and a
6 Certified Shorthand Reporter of said state, do
7 hereby certify:

8 That previous to the commencement of the
9 examination of the witness herein, the witness was
10 duly sworn to testify the whole truth concerning the
11 matters herein;

12 That the foregoing hearing transcript was
13 reported stenographically by me, was thereafter
14 reduced to typewriting under my personal direction
15 and constitutes a true record of the testimony given
16 and the proceedings had;

17 That the said hearing was taken before me
18 at the time and place specified;

19 That I am not a relative or employee of
20 attorney or counsel, nor a relative or employee of
21 such attorney or counsel for any of the parties
22 hereto, nor interested directly or indirectly in the
23 outcome of this action.

24 IN WITNESS WHEREOF, I do hereunto set

1 my hand and affix my seal of office at Chicago,
2 Illinois, this 23rd day of February, 2009.

3

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Sharon Berling
Notary Public, Cook County,

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Illinois.

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My commission expires 7/22/2010.

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C.S.R. Certificate No. 84-4327

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Exhibit C

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Page 1

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9
EFFLUENT LIMITATIONS FOR THE) (Rulemaking -
CHICAGO AREA WATERWAY SYSTEM) Water)
AND LOWER DES PLAINES RIVER)
PROPOSED AMENDMENTS TO 35 ILL.)
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BEFORE: MARIA E. TIPSORD, HEARING OFFICER,
ILLINOIS POLLUTION CONTROL BOARD
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
312-814-4925.

1 substantially increase the fish population in the
2 CAWS. This was discussed by Drs. Mackey and
3 Melching, and I have also had personal knowledge of
4 habitat limitations, which I mentioned in my
5 testimony on the Cal Sag Channel and on
6 Bubbly Creek.

7 Q. Question 4.

8 "On Pages 3 and 4 of your prefiled
9 testimony, you referenced compliance statistics for
10 the continuous monitoring stations with the lowest
11 compliance rates on proposed dissolved oxygen
12 standards occurring during the years 2005 through
13 2007. Why is compliance with the proposal lower at
14 the identified stations than at the other stations?"

15 A. Well, there are more instances of low
16 dissolved oxygen at those stations. I have not done
17 an analysis as to why this is, there could be many
18 factors throughout the CAWS.

19 I suggest that you wait for
20 ongoing studies to be completed.

21 Q. And what studies are you referring to?

22 A. For example, the Habitat Evaluation
23 Study. And I think there are a number of others,
24 but that's the one that comes to mind as the most

1 important.

2 Q. Question 5.

3 "What would you recommend for CAWS
4 A waters with respect to dissolved oxygen?"

5 A. I agree with the testimonies of
6 Dr. Mackey and Melching and Mr. Freedman.

7 Q. I'm sorry, could you repeat that?

8 A. I agree with the testimonies of
9 Dr. Mackey, Dr. Melching and Mr. Freedman.

10 Q. And did they say they didn't have a
11 recommendation for dissolved oxygen?

12 MR. ANDES: Does he have to
13 characterize their testimony?

14 MS. DIERS: I'm asking a question. I
15 can't remember what we talked about in
16 December.

17 So if he can answer it, fine. If
18 he can't, fine.

19 BY THE WITNESS:

20 A. Yes, I can't be more specific than to
21 say that we should wait for these studies to be
22 completed.

23 BY MS. DIERS:

24 Q. Once these studies are completed, is

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF COOK)

4 I, SHARON BERKERY, a Notary Public within
5 and for the County of Cook, State of Illinois, and a
6 Certified Shorthand Reporter of said state, do
7 hereby certify:

8 That previous to the commencement of the
9 examination of the witness herein, the witness was
10 duly sworn to testify the whole truth concerning the
11 matters herein;

12 That the foregoing hearing transcript was
13 reported stenographically by me, was thereafter
14 reduced to typewriting under my personal direction
15 and constitutes a true record of the testimony given
16 and the proceedings had;

17 That the said hearing was taken before me
18 at the time and place specified;

19 That I am not a relative or employee of
20 attorney or counsel, nor a relative or employee of
21 such attorney or counsel for any of the parties
22 hereto, nor interested directly or indirectly in the
23 outcome of this action.

24 IN WITNESS WHEREOF, I do hereunto set

1 my hand and affix my seal of office at Chicago,
2 Illinois, this 23rd day of February, 2009.

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Sharon Berling
Notary Public, Cook County,

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Illinois.

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My commission expires 7/22/2010.

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C.S.R. Certificate No. 84-4327

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Exhibit D

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ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9
EFFLUENT LIMITATIONS FOR THE) (Rulemaking -
CHICAGO AREA WATERWAY SYSTEM) Water)
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BEFORE: MARIA E. TIPSORD, HEARING OFFICER,
ILLINOIS POLLUTION CONTROL BOARD
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
312-814-4925.

1 tolerate .7 milligrams per liter DO for seven hours
2 or less.

3 BY MS. WILLIAMS:

4 Q. Do we have the entire document in
5 front of us?

6 A. It appears that that is not the entire
7 document. But we can make that available.

8 MR. ANDES: We can certainly provide
9 the entire document if that -- people want to
10 read it.

11 BY THE WITNESS:

12 A. But the gist of this study is you have
13 a dissolved oxygen gradient. And the question was
14 whether the low DO that are present in those
15 gradients could be tolerated by fish.

16 BY MS. WILLIAMS:

17 Q. Would you agree, Ms. Nemura, that once
18 you determine -- well, first of all, how would you
19 determine the list of potential fish species that
20 you'd be looking at under the methodology that you
21 just described?

22 A. How would I determine it?

23 Q. Uh-huh.

24 A. You would look at the -- as part of

1 the habitat study the District is conducting, they
2 are gaining information on the species of fish that
3 are present in the Chicago area waterways. You can
4 also evaluate the habitat that is available to
5 determine whether the habitat is suitable for the
6 propagation of the resident fish species, as well as
7 other species biologists may feel could reside
8 within that habitat.

9 Q. Would you agree that once you've done
10 that analysis, the dissolved oxygen criteria you'd
11 developed would need to protect the most sensitive
12 of the species you're trying to protect?

13 A. You would need to evaluate all of the
14 stressors that affect the fish.

15 Just, for example, let's say we
16 were able to aerate the entire Chicago area
17 waterways and have it be 12 milligrams per liter of
18 DO all the time. Whether or not you would see a
19 change in the fish assemblage is a big question,
20 because there are other stressors that would affect
21 whether fish would actually start appearing in
22 different segments.

23 Q. But I don't think that's -- that
24 wasn't the question; right? I mean, you are

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF COOK)

4 I, SHARON BERKERY, a Notary Public within
5 and for the County of Cook, State of Illinois, and a
6 Certified Shorthand Reporter of said state, do
7 hereby certify:

8 That previous to the commencement of the
9 examination of the witness herein, the witness was
10 duly sworn to testify the whole truth concerning the
11 matters herein;

12 That the foregoing hearing transcript was
13 reported stenographically by me, was thereafter
14 reduced to typewriting under my personal direction
15 and constitutes a true record of the testimony given
16 and the proceedings had;

17 That the said hearing was taken before me
18 at the time and place specified;

19 That I am not a relative or employee of
20 attorney or counsel, nor a relative or employee of
21 such attorney or counsel for any of the parties
22 hereto, nor interested directly or indirectly in the
23 outcome of this action.

24 IN WITNESS WHEREOF, I do hereunto set

1 my hand and affix my seal of office at Chicago,
2 Illinois, this 23rd day of February, 2009.

3

4

5

6

7

Sharon Berling
Notary Public, Cook County,

8

Illinois.

9

My commission expires 7/22/2010.

10

11

C.S.R. Certificate No. 84-4327

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Exhibit E

1 in, in essence, identical to general use
2 dissolved oxygen standards for the Type A
3 waters.

4 And, fourth, the implicit
5 assumption in Illinois EPA's proposal is that
6 improvements in water quality alone are
7 sufficient to attain the aquatic life uses
8 proposed by Illinois EPA and that the CAWS is
9 not habitat limited. I believe that is
10 incumbent upon Illinois EPA to demonstrate
11 that there is sufficient aquatic habitat
12 available in the CAWS to attain the proposed
13 aquatic life uses, and to show that the
14 system is not habitat limited.
15 Unfortunately, Illinois EPA has not provided
16 any data, information, or analyses to show
17 that there is sufficient aquatic habitat to
18 support attainment of the appropriate --
19 sorry -- attainment of the proposed aquatic
20 life uses in the CAWS.

21 We will have a better
22 understanding of the habitat conditions when
23 the ongoing habitat evaluation and
24 improvement study has been completed. Only

1 after comprehensive evaluation of habitat can
2 this question be answered properly. In other
3 words, we really don't have enough
4 information on the physical habitat and
5 characteristics in the CAWS to determine
6 whether or not the system -- if there is
7 enough habitat there to actually support the
8 proposed aquatic life uses.

9 HEARING OFFICER TIPSORD: Miss Dexter?

10 MS. DEXTER: Jessica Dexter. Do you
11 do any fish sampling yourself?

12 DR. MACKEY: No, I do not.

13 MS. DEXTER: Do you know anything
14 about the limitations of the equipment that
15 has been used for sampling?

16 DR. MACKEY: I have some familiarity
17 with the limitations. But, again, I would
18 qualify that statement that I am not a
19 fisheries biologist, and so that any answer I
20 may give will be from basically a lay
21 person's perspective.

22 MS. DEXTER: All right. So you might
23 say that your opinion on the samples is also
24 qualified down as -- You're not a biologist,

1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF COOK)

3

4 I, LAURA MUKAHIRN, being a Certified
5 Shorthand Reporter doing business in the City of
6 Chicago, Illinois, County of Cook, certify that I
7 reported in shorthand the proceedings had at the
8 foregoing hearing of the above-entitled cause. And
9 I certify that the foregoing is a true and correct
10 transcript of all my shorthand notes so taken as
11 aforesaid and contains all the proceedings had at
12 the said meeting of the above-entitled cause.

13

14

15

16

LAURA MUKAHIRN, CSR
CSR NO. 084-003592

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Exhibit F

ORIGINAL

IN THE MATTER OF:)

WATER QUALITY STANDARDS AND)

EFFLUENT LIMITATIONS FOR THE)

CHICAGO AREA WATERWAY SYSTEM)

AND THE LOWER DES PLAINES RIVER;) No. 08-9

PROPOSED AMENDMENTS TO 35 ILL.)

ADM. CODE PARTS 301, 302, 303)

AND 304.)

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AUG 27 2009
STATE OF ILLINOIS
Pollution Control Board

TRANSCRIPT OF PROCEEDINGS held in the
above-entitled cause before Hearing Officer
Marie Tipsord, taken before Sharon L. Berkery,
CSR, at 160 North LaSalle Street, Room 9-031,
Chicago, Illinois, on the 14th day of August, A.D.,
2009 commencing at 1:40 p.m.

1 So that would be something you'd
2 believe would be relevant to look at, to assess role
3 habitat versus some of these other factors; am I
4 right?

5 A. Well, I'm not sure I would phrase is
6 as versus, but I think it would be an important
7 component, yes.

8 Q. Various factors, including habitat and
9 improving the fish population?

10 A. Yes.

11 Q. Okay. Thank you.

12 Let's move to Subquestion R.

13 Do you know what effect the
14 electric field barrier north of the confluence of
15 the Des Plaines and the Illinois Waterway has on
16 fish migration?

17 A. Yeah. Hopefully on this answer I can
18 correct something that's wrong in the record. But
19 it should keep adult fish from moving either
20 upstream or downstream through that barrier.

21 Downstream, still could happen,
22 you could still shock a fish, it could float through
23 and recover potentially. There was some statement,
24 I can't remember whether it was Mackey's testimony

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF COOK)

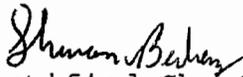
4 I, SHARON BERKERY, a Certified Shorthand
5 Reporter of the State of Illinois, do hereby certify
6 that I reported in shorthand the proceedings had at
7 the hearing aforesaid, and that the foregoing is a
8 true, complete and correct transcript of the
9 proceedings of said hearing as appears from my
10 stenographic notes so taken and transcribed under my
11 personal direction.

12 IN WITNESS WHEREOF, I do hereunto set my
13 hand at Chicago, Illinois, this 25th day of
14 August, 2009.

15

16

17


Certified Shorthand Reporter

18

19 C.S.R. Certificate No. 84-4327.

20

21

22

23

24

Exhibit G

~~ORIGINAL~~

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-09
EFFLUENT LIMITATIONS FOR THE) (Rulemaking-
CHICAGO AREA WATERWAY SYSTEM) Water)
AND THE LOWER DES PLAINES)
RIVER: PROPOSED AMENDMENTS)
TO 35 Ill. Adm. Code Parts)
301, 302, 303 and 304)

REPORT OF PROCEEDINGS held in the
above-entitled cause before Hearing Officer Marie
Tipsord, called by the Illinois Pollution Control
Board, taken before Laura Mukahirn, CSR, a notary
public within and for the County of Cook and State
of Illinois, at 160 North LaSalle Street, Suite 505,
Chicago, Illinois, on the 3rd day of March, 2009,
commencing at the hour of 1:00 p.m.

1 don't support them. The 5.0 standard which
2 is -- seems to be based on protecting early
3 life stages does not have adequately
4 demonstrated basis in terms of presence of
5 early life stages that require protection.
6 And the 3.5 daily minima standard is higher
7 than the national criteria standard of 3.0
8 which is recommended for natural balance warm
9 water systems.

10 MS. WILLIAMS: And I'm assuming,
11 though, that the answer is the same as you
12 just provided to Miss Diers that a
13 comprehensive numeric criteria proposal from
14 the District is forthcoming at some point.

15 DR. GRANATO: We would like very much
16 to be able to do that following the
17 completion of our studies.

18 MS. WILLIAMS: How long following the
19 completion do you think it would take the
20 District to prepare that type of proposal?

21 MR. ANDES: If I can help answer that.
22 I think that the reports will be filed with
23 the Board on completion, and I think at that
24 point the District would propose a timeline

1 in terms of providing further testimony.
2 Hard to say until the report is complete.
3 But --

4 MS. WILLIAMS: So the District will be
5 proposing when additional testimony should
6 come in?

7 MR. ANDES: We'll follow suggestion at
8 that point in terms of the time.

9 MS. WILLIAMS: Question 11: What are
10 the District's plans for removing or capping
11 sediment in the south fork of the south
12 branch Chicago River?

13 DR. GRANATO: The District currently
14 has no plans to cap or remove sediment in the
15 south branch of the south fork -- excuse
16 me -- the south fork of the south branch of
17 the Chicago River.

18 MS. WILLIAMS: Just let me have a
19 second. That wasn't the answer I was
20 expecting.

21 MR. ANDES: I think, if I can help on
22 that. I believe there was a study being
23 conducted currently by the Corps of Engineers
24 with a limited capping project in the turning

1 STATE OF ILLINOIS)
2 COUNTY OF COOK) SS.

3

4 I, LAURA MUKAHIRN, being a Certified
5 Shorthand Reporter doing business in the City of
6 Chicago, Illinois, County of Cook, certify that I
7 reported in shorthand the proceedings had at the
8 foregoing hearing of the above-entitled cause. And
9 I certify that the foregoing is a true and correct
10 transcript of all my shorthand notes so taken as
11 aforesaid and contains all the proceedings had at
12 the said meeting of the above-entitled cause.

13

14

15

16

Laura Mukahirn

LAURA MUKAHIRN, CSR
CSR NO. 084-003592

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Exhibit H

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1 ILLINOIS POLLUTION CONTROL BOARD
2 IN THE MATTER OF:)
3 WATER QUALITY STANDARDS AND) R08-09
EFFLUENT LIMITATIONS FOR THE) (Rulemaking-
4 CHICAGO AREA WATERWAY SYSTEM) Water)
AND THE LOWER DES PLAINES)
5 RIVER: PROPOSED AMENDMENTS)
TO 35 Ill. Adm. Code Parts)
6 301, 302, 303 and 304)

7 REPORT OF PROCEEDINGS held in the
8 above-entitled cause before Hearing Officer Marie
9 Tipsord, called by the Illinois Pollution Control
10 Board, taken before Laura Mukahirn, CSR, a notary
11 public within and for the County of Cook and State
12 of Illinois, at the Thompson Building, 100 West
13 Randolph, Chicago, Illinois, on the 3rd day of
14 December, 2008, commencing at the hour of 9:00 a.m.
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0002

1 A P P E A R A N C E S
2 MS. MARIE TIPSORD, Hearing Officer
MR. THOMAS JOHNSON, Acting Chairman
3 MS. ALISA LIU, Member
MS. ANDREA MOORE, Member
4 DR. SHUNDAR LIN, Member
Appearing on behalf of the Illinois
5 Pollution Control Board
6 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 North Grand Avenue East
7 P.O. Box 19276
Springfield, Illinois 62794-9276
8 (217)782-5544
BY: MS. DEBORAH WILLIAMS
9 MS. STEPHANIE DIERS
MR. ROBERT SULSKI
10 MR. SCOTT TWAIT
MR. HOWARD ESSIG
11 MR. RAY SMOGOR
12 BARNES & THORNBURG
One North Wacker Drive
13 Suite 4400
Chicago, Illinois 6606-2833
14 (312)357-1313
BY: MR. FREDRIC P. ANDES
15 Appearing on behalf of the Metropolitan
Water Reclamation District

0087

1 fish, do you need to protect the benthic
2 organisms?

3 MR. DENNISON: Yes.

4 MS. DIERS: Twelve: On Page 3 of your
5 prefiled testimony you state, "In fact, the
6 waterways are both dominated by
7 pollution-tolerant invertebrates."

8 The question being, how does the
9 current condition of the waterway indicate
10 potential aquatic life conditions?

11 MR. DENNISON: The substrates are such
12 that they would be expected to be dominated
13 by such tolerant invertebrates. Since the
14 substrate quality is what is limiting
15 invertebrates, the communities are not going
16 to change.

17 MS. DIERS: Could you repeat the last
18 sentence of that again, the last phrase.

19 MR. DENNISON: Since the substrate
20 quality is what is limiting invertebrates,
21 the communities are not going to change.

22 MR. ANDES: In other words, even if
23 you improve water quality, that's not going
24 to help the state of the community?

0088

1 MR. DENNISON: Correct.

2 MS. DIERS: I'm going to strike
3 Question 13.

4 Question 14: On Page 3 of your
5 prefiled testimony you state, "Over the years
6 there has been extensive land use
7 development, urbanization, and the
8 Calumet-Sag Channel water shed."

9 Question: How many acres of
10 forest preserve are available in this water
11 shed?

12 MR. DENNISON: I don't know.

13 MS. DIERS: Do you know how many miles
14 of the Calumet-Sag Channel are bordered by
15 forest preserves?

16 MR. DENNISON: I don't know.

17 MR. ANDES: Could that information be
18 available as part of the LimnoTech study?

19 MR. DENNISON: Yes. That's what we're
20 looking forward to for the geographical
21 information system portion of the LimnoTech
22 study.

23 MS. DIERS: And that's the habitat
24 study that's ongoing right now?

0089

1 MR. DENNISON: Yes.

2 HEARING OFFICER TIPSORD: If I may,
3 Dr. Dennison, I believe that we asked
4 Dr. Mackey this and he wasn't able to
5 specify. When is the projected date for the
6 LimnoTech study?

7 MR. DENNISON: Well, we're expecting a
8 report to be available in the summer of 2009.

9 HEARING OFFICER TIPSORD: Thank you.

10 MS. DIERS: And just asking on that
11 line of question, I think I asked Dr. Mackey
12 this yesterday. Does that time frame, is
13 that -- Have you accounted for a peer review
14 in that time frame for a summer of '09?

15 MR. DENNISON: No.

16 MS. DIERS: Is that going to be the
17 final report is what you're expecting?

18 MR. DENNISON: That's why we're going
19 towards the summer of 2009. The contract
20 itself was originally from April to April,
21 mid April to mid April.

22 MS. DIERS: Will you be integrating
23 the biological information by next summer?

24 MR. DENNISON: Yes.

0090

1 MS. DIERS: That takes care of
2 Question 4 and 5. Page 134.

3 HEARING OFFICER TIPSORD: Sorry.

4 MR. ANDES: I'm sorry. Actually, I
5 just want to follow up on No. 4 because I
6 wanted to ask if you could explain a little
7 bit, Dr. Dennison, about what information the
8 consultant is developing in that study.

9 MR. DENNISON: The present Chicago
10 area waterways habitat evaluation and
11 improvement project will formulate a habitat
12 index that is applicable to the deep draft
13 waterways of the CAWS. For development of
14 this habitat index, the District's consultant
15 LimnoTech is using fish, macroinvertebrate
16 and habitat data sampled by the District
17 during the period 2001 through 2007 from the
18 District's 26 sampling stations on the CAWS.
19 During 2008, 25 District sample stations were
20 sampled using expanded habitat procedure plus
21 five additional stations not previously
22 described; three of these additional stations
23 are on the Cal-Sag Channel and two are on the
24 Chicago Sanitary and Ship Canal. Eight CAWS

0091

1 stations were sampled by the District in 2008
2 for fish and macroinvertebrates and LimnoTech
3 collected fish and macroinvertebrates from 14
4 stations, not sampled by the District during
5 2008. LimnoTech is also including the
6 analysis of collected digital video of bank
7 conditions and habitats and high resolution
8 aerial imagery and bathymetry to support the
9 assessment of the habitat conditions and
10 index development.

11 LimnoTech is conducting an
12 examination of the potential of navigational
13 effects to adversely affect habitat

Exhibit I

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 Ill.)
Adm. Code Parts 301, 302, 303 and 304)

PRE-FILED TESTIMONY OF THOMAS GRANATO
AQUATIC LIFE USES AND CRITERIA

My name is Thomas Granato, and I am the Assistant Director of Research and Development managing the Environmental Monitoring and Research Division at the Metropolitan Water Reclamation District of Greater Chicago. I have been employed by the District for over 20 years and have held progressively responsible positions, including head of the Biosolids Utilization and Soil Science Section, and Coordinator of Technical Services. I have been Assistant Director of R&D for the past three and one half years. The EM&R Division houses the District's Wastewater Treatment Process Research Section, the Biosolids Utilization and Soil Science Section, the Analytical Microbiology and Biomonitoring Section, the Aquatic Ecology and Water Quality Section, and the Radiochemistry Section, which collectively house approximately 70 environmental scientists and engineers, soil scientists, biologists, microbiologists, chemists, radiation chemists, biostatisticians and other technical personnel. Over this time period I have been directly involved in the planning, development, management and administration of the many research studies that the District has undertaken to support the Chicago Area Waterways Use Attainability Analysis.

This testimony summarizes and concludes each main topic of the District's testimony with regard to aquatic life use and criteria issues. The District believes that IEPA relied on incorrect assumptions and reached faulty conclusions concerning aquatic life use designations

and associated criteria for the CAWS. Instead of pursuing this rulemaking now, IEPA should wait for necessary studies being conducted by the District to be completed. These studies will provide information necessary to make scientifically supported decisions concerning appropriate water quality standards for the CAWS. However, if the rulemaking does move forward before those studies are complete, the District urges significant revisions to assure that the use designations and criteria for the CAWS are technically and legally supportable.

Aquatic Use Summary and Conclusions

As an active stakeholder, the District has appreciated the opportunity to provide the majority of the environmental data that have been assessed in the CAWS UAA. Research projects and studies regarding the UAA have been initiated by the District either on our own accord or on the request of IEPA. The District is concerned that IEPA has filed its proposal for R08-09 before the results of these crucial studies were available. The IEPA has chosen to formulate use designations and proposed standards for the CAWS, despite being aware that certain studies they have requested have not yet been completed.

We feel strongly that the results of all of the studies conducted for or in association with the UAA must be available and assessed before IEPA can make informed and scientifically supportable decisions about the uses and standards that are applicable to the CAWS. For parameters for which there is little or no science available, it would be counter-productive to set arbitrary standards while we await the results of ongoing research. Related to the aquatic life standards, the District's Habitat Evaluation and Improvement Study will provide extensive data on the physical habitat and the aquatic life potential in the CAWS at many more locations than were assessed in the UAA report. Since 2001, the District has been collecting biological and physical habitat data throughout the CAWS on a 4-year cycle for our Ambient Water Quality Monitoring Program. In other words, all 59 stations (28 of which are in the CAWS) are sampled

within four years. As the data were being analyzed from the first two sampling cycles, it became apparent that additional stations in the CAWS should be evaluated to adequately characterize the aquatic environment. This habitat evaluation study will fill in these gaps, determine what physical habitat modifications would be required to achieve a sustainable fish community in the CAWS, and also synthesize and compare District chemical water quality data to tolerance levels of the fish species expected to colonize the CAWS if habitat improvements were implemented. This is necessary to replace the approach that IEPA took, which was based on insufficient habitat and biotic index data, and which was derived from indices that are not appropriate for use in the CAWS and which were calculated incorrectly.

The definition and basis for the proposed aquatic life use designations was never adequately explained by the IEPA. One of the confusing aspects of the CAWS UAA report is that it contains language that is inconsistent with the proposed standards. For instance, the CAWS UAA report refers to the Aquatic Life Use Designations in categories, including Modified Warm-water Aquatic Life (MWAL) and Limited Warm-water Aquatic Life (LWAL). IEPA's proposed aquatic life use designations, however, do not mention these classifications, nor do they explain how they are related to Aquatic Life Use A and B, terms that are introduced in the UAA proposal for the CAWS.

Between the 2004 CAWS UAA draft report and the 2007 issuance of the final report, no new data were assessed. All of the water quality, sediment quality and biological data described in the UAA report was collected prior to or during 2002. During 2001-2007, the District has collected a wealth of sediment chemistry, sediment toxicity, and benthic invertebrate data in the CAWS as part of the Ambient Water Quality Monitoring Program. However, none of information was considered when IEPA designated Aquatic Life Uses. Essentially, it appears

that only fish Index of Biotic Integrity (IBI) percentile was used to classify waterways into Aquatic Life Use A or B. Given the more extensive database now available for sediment and benthic invertebrates and the soon-to-be completed CAWS Habitat Evaluation and Improvement Study, the IEPA should consider these factors and their implications for the Aquatic Life Use designations in the CAWS.

Furthermore, the Agency did not adequately account for the unique characteristics of the CAWS that significantly differentiate it from other General Use waters. Hydraulic limitations such as flow reversals, slow water velocity and the effects of wet weather present challenges not faced by most natural waterbodies. The ecological community in the CAWS also is substantially impaired by poor habitat, including low quality substrate, little or no sinuosity, poor riffle and pond development and low gradients. The CAWS substrate alone will prevent any further improvements in water quality from translating to a better macroinvertebrate community and will not likely result in improvements in aquatic life use. Without suitable habitat pattern and diversity, sustainable aquatic populations will not be established even with improvements in water quality.

If this rulemaking moves forward despite the data gaps, the Aquatic Life Uses should be revised to more appropriately reflect the nature of the CAWS and the aquatic community to be protected. For example, the Calumet-Sag Channel, which is a deep-draft, steep-walled channel, should be classified with other deep-draft, steep-walled channels in Aquatic Life Use B. Bubbly Creek, which is stagnant during dry weather and inundated with combined sewer overflow from the Racine Avenue Pumping Station during wet weather, does not reasonably fit within either of IEPA's proposed aquatic life uses. Bubbly Creek is unique in that it is a side fork and is therefore not used for fish passage through the Chicago Area Waterway System. To this end, the

District recommends a narrative DO standard for Bubbly Creek that prevents fish kills and maintains aesthetics (*e.g.*, prevents nuisance odors). This would be appropriate until such time as the sediments are capped, removed or remediated and the frequency of discharge at Racine Avenue Pumping Station is diminished sometime after 2024. If a numerical DO standard is deemed imperative, then the IPCB should consider the testimonies of Drs. Paul Freedman and Marcelo Garcia as a basis for such a standard.

Aquatic Criteria Summary and Conclusions

The District is very concerned that the IEPA's proposal establishes standards to protect aquatic life that are inappropriate for the proposed uses in the CAWS, and which would require the expenditure of significant resources to implement flow augmentation and supplemental aeration projects that ultimately could not guarantee achievement of the proposed standards. We therefore urge the Board not to adopt the agency's proposal.

Despite the unique highly-managed, manmade characteristics of the CAWS, and despite IEPA's indication that the aquatic life uses are designed to protect tolerant or intermediately tolerant species, the agency has proposed criteria that are virtually identical to those applicable to General Use waters in the case of dissolved oxygen and are more stringent than General Use waters in Cook County for cyanide. This is not reasonable, because the General Use standards apply to natural waters where intolerant sensitive species must be protected. The Agency proposed that Aquatic Life Use A waters be required to meet standards proposed to protect early life stages of fish, such as smallmouth bass, which cannot succeed in the CAWS due to lack of appropriate habitat. The Agency's proposed cyanide standard was based on protection of cold water species such as rainbow trout, which are not present in the CAWS. Without a clear link between the standards and protection of appropriate organisms, the agency's proposal is not justified.

While the Agency has applied the General Use numerical criteria to the CAWS, it has failed to also apply the narrative dissolved oxygen standard that was recently adopted for General Use waters to the CAWS. The Agency gave no consideration to developing a similar standard for the inherently quiescent reaches of the CAWS. The Agency stated in the recently adopted General Use waters rulemaking that it is not reasonable to expect to attain the dissolved oxygen standard that was set for General Use waters everywhere and that “[t]here are isolated areas where the physical and chemical and biological circumstances are such that you cannot maintain that standard.”¹

As a result, the dissolved oxygen criteria proposed by IEPA would require implementation of flow augmentation and supplemental aeration projects, even in isolated areas of the CAWS that are quiescent due to their physical circumstances. However, even if implementation of these projects could be accomplished in all areas of the CAWS, the Agency has provided no direct evidence that the proposed criteria could be achieved. The Agency particularly failed to consider the prolonged effects of wet weather on dissolved oxygen levels in all parts of the CAWS, particularly in Bubbly Creek. If this rulemaking proceeds, the proposal should be revised to incorporate wet weather standards and eliminate the seven-day average dissolved oxygen criterion. In addition, the chronic cyanide criterion should be revised to reflect protection of species actually present (or intended to be present) in the CAWS. The resulting chronic cyanide standard that is developed for the CAWS should not be more restrictive than the General Use standard currently applicable to Cook County.

Finally, the District has serious concerns about the feasibility and the significant costs of such an uncertain undertaking. It is simply not practicable to install supplemental aeration

¹ R04-25 at Tr. 4, pg 61-62.

stations of the size necessary to achieve 100 percent compliance with the proposed dissolved oxygen criteria and still maintain certain recreational uses in and around some parts of the CAWS . For example, to build a diffused-air instream aeration station that delivers DO to meet the proposed DO standards could require installing diffusers in an area the length of a football field, in which the rising air bubbles in the water could make this area unsafe for passing hand-powered boats. The implementation of flow augmentation for the upper NSC would likely require the construction of a 4.5 mile, 7-foot diameter pipeline along the waterway, which would disrupt transportation and recreation in the surrounding communities including trenching across many streets, CTA railway tracks, a golf course, Ladd Arboretum and miles of walking trails.

Furthermore, the costs associated with implementation of DO enhancement processes are significant: \$525 million in capital costs and \$6.9 million in annual operation and maintenance costs. Based upon the District's limitations and restrictions on generating revenues to fund programs, funding such an expenditure would require legislative action, a voter referendum, or significantly reducing funding of existing District programs.

Installation and operation of technology necessary to comply with proposed aquatic life uses and criteria would result in substantial environmental impacts in the form of energy usage, air emissions (including greenhouse gasses) from power generation and transportation of raw and waste materials, and land usage. For example, the total energy required for operation of dissolved oxygen enhancement technologies is estimated at 74.2 million kWh/yr, which will increase the District's total energy consumption by 13.5 percent. These environmental impacts must be taken into consideration in determining appropriate requirements.

Conclusion

In conclusion, the CAWS was created largely by the District for purposes other than sustaining aquatic life use, long before the Clean Water Act was conceived or passed into law.

Nevertheless, the District has expended considerable resources and has undertaken many ambitious engineering projects, such as building some of the world's largest wastewater treatment plants and developing and implementing TARP to improve water quality in the CAWS. These water quality improvements will no doubt continue as TARP is completed. The District shares the goal of its fellow UAA stakeholders to continuously improve Chicago's aquatic environment, both the CAWS and Lake Michigan. However, the District cannot support the proposal that the IEPA has put before you in this rulemaking. That proposal has focused solely on addressing further improvements in chemical water quality, requires higher dissolved oxygen concentrations and lower concentrations of many chemical constituents than are currently required, and has ignored the many inherent physical limitations the CAWS has, which prior testimony has shown will prevent the chemical water quality improvements that the Agency seeks from supporting improved aquatic life use. With the potential cost of compliance measured in the hundreds of millions of dollars, standards that are based on incomplete, inappropriate and incorrect data are unacceptable.

I appreciate the opportunity to present this testimony today, and encourage the Board to reject IEPA's proposal as premature, without sufficient scientific basis, unattainable, and inappropriate to protect the CAWS.

Respectfully submitted,

A handwritten signature in black ink that reads "Tom Granato". The signature is written in a cursive style with a large, stylized initial "T".

By: Thomas Granato

Exhibit J

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-09
EFFLUENT LIMITATIONS FOR THE) (Rulemaking-
CHICAGO AREA WATERWAY SYSTEM) Water)
AND THE LOWER DES PLAINES)
RIVER: PROPOSED AMENDMENTS)
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REPORT OF PROCEEDINGS held in the
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Board, taken before Laura Mukahirn, CSR, a notary
public within and for the County of Cook and State
of Illinois, at 160 North LaSalle Street, Suite 505,
Chicago, Illinois, on the 3rd day of March, 2009,
commencing at the hour of 1:00 p.m.

1 don't support them. The 5.0 standard which
2 is -- seems to be based on protecting early
3 life stages does not have adequately
4 demonstrated basis in terms of presence of
5 early life stages that require protection.
6 And the 3.5 daily minima standard is higher
7 than the national criteria standard of 3.0
8 which is recommended for natural balance warm
9 water systems.

10 MS. WILLIAMS: And I'm assuming,
11 though, that the answer is the same as you
12 just provided to Miss Diers that a
13 comprehensive numeric criteria proposal from
14 the District is forthcoming at some point.

15 DR. GRANATO: We would like very much
16 to be able to do that following the
17 completion of our studies.

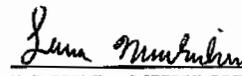
18 MS. WILLIAMS: How long following the
19 completion do you think it would take the
20 District to prepare that type of proposal?

21 MR. ANDES: If I can help answer that.
22 I think that the reports will be filed with
23 the Board on completion, and I think at that
24 point the District would propose a timeline

1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF COOK)
3

4 I, LAURA MUKAHIRN, being a Certified
5 Shorthand Reporter doing business in the City of
6 Chicago, Illinois, County of Cook, certify that I
7 reported in shorthand the proceedings had at the
8 foregoing hearing of the above-entitled cause. And
9 I certify that the foregoing is a true and correct
10 transcript of all my shorthand notes so taken as
11 aforesaid and contains all the proceedings had at
12 the said meeting of the above-entitled cause.

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LAURA MUKAHIRN, CSR
CSR NO. 084-003592