

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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JUN 28 2010

STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )

Water Quality Standards and )  
Effluent Limitations for the )  
Chicago Area Waterway System )  
And the Lower Des Plains River: )  
Proposed Amendments to 35 Ill. )  
Adm. Code Parts 301, 302, 303 and 304 )

R08-09 (Sub-Docket B)  
(Rulemaking - Water)

NOTICE

Dorothy Gunn, Clerk  
Pollution Control Board  
James R. Thompson Center  
100 W. Randolph, Ste. 11-500  
Chicago, Illinois 60601

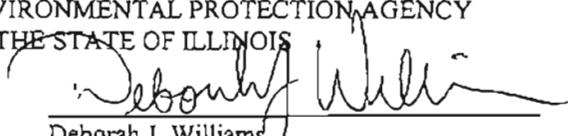
Marie Tipsord, Hearing Officer  
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Chicago, Illinois 60601

See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Response of the Illinois Environmental Protection Agency to MWRDGC's Motion for Leave File and Set a Hearing on the UIC Cheers Report on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY  
OF THE STATE OF ILLINOIS

By:

  
Deborah J. Williams  
Assistant Counsel

DATE: June 24, 2010  
Illinois Environmental  
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THIS FILING IS SUBMITTED ON RECYCLED PAPER



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

JUN 28 2010

STATE OF ILLINOIS  
Pollution Control Board

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

R08-09 (Sub-Docket B)  
(Rulemaking – Water)

**RESPONSE OF THE ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY TO MWRDGC'S MOTION FOR LEAVE FILE AND SET A  
HEARING ON THE UIC CHEERS REPORT**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys, hereby submits its Response to the Metropolitan Water Reclamation District of Greater Chicago's ("MWRDGC") Motion for Leave to File and Set a Hearing on the UIC CHEERS Report with the Pollution Control Board ("Board").

1. On October 26, 2007, the Agency filed a rulemaking proposal to update the designated uses and accompanying water quality standards and effluent limitations for the waters currently designated for Secondary Contact and Indigenous Aquatic Life Use which includes most waters in the Chicago Area Waterway System ("CAWS") and Lower Des Plaines River. The Board docketed this proposal as R08-09.

2. On March 18, 2010, the Board issued an order dividing R08-09 into four separate sub-dockets. Sub-docket B was to "address issues relating to disinfection and whether or not disinfection may or may not be necessary to meet those use

designations.” Slip Op. at 18. The Board also determined to move immediately to decision on recreational uses, but reserved ruling on the disinfection issue. In addition, the Board ordered the “Hearing Officer to schedule a hearing in June on the epidemiological study technical reports being prepared by the District.” Slip Op. at 1, 20.

3. On April 1, 2010, the Hearing Officer issued an Order setting hearings for June 29 and June 30, 2010 on the “epidemiological study technical reports” filed by MWRDGC and setting filing dates for pre-filed testimony and pre-filed questions related to those reports. The April 1, 2010 Hearing Officer Order also stated “Any motions for additional testimony or other hearing issues should also be filed by June 14, 2010 and directed to the Hearing Officer.”

4. On June 14, 2010, MWRDGC filed a Motion with the Board for leave to file the final CHEERS Report with conclusions by August 31, 2010 and to schedule a date for a hearing on that report with additional testimony and pre-filed questions.

5. At the time of the Board's March 18, 2010 Order, the Board was aware that the District was ready to file “technical reports by May 5, 2010 and a final report with conclusions by September 15, 2010.” Slip Op. at page 15. In the same Order the Board also determined that Asian Carp hearings would be scheduled “later this year” and granted MWRDGC’s motion for additional hearings on aquatic life uses. The Board did not specify that additional hearings and testimony would be held on the final CHEERS report.

6. The Agency recognizes MWRDGC's right to submit its final CHEERS report to the Board in the form of a public comment. However, for the reasons

explained below, the Agency opposes MWRDGC's motion to hold additional hearings on this topic. As an alternative, the Illinois EPA requests that the Board issue an order setting a Public Comment deadline for sometime in the Fall of 2010 for the issues in sub-docket B. This schedule will accommodate the District's timeline in finalizing the CHEERS Report.

7. Illinois EPA would like to take this opportunity to discuss the issues to be addressed in sub-docket B. Now that the Board has divided these proceedings into four separate sub-dockets, it is time to take a hard look at what this sub-docket B is about. In order for these hearings to ever reach a conclusion, it will be necessary for the Board to conclude that some of the information being presented by some of the parties is not relevant to this sub-docket. The language in the Board's Order establishing the purpose of sub-docket B is understandably quite broad. However, the Agency believes the time has come for the Board to narrow and focus this purpose. In the March 18, 2010 Order, the Board defined the purpose of sub-docket B as "whether or not disinfection may or may not be *necessary to meet those use designations.*" (emphasis added). This terminology may leave open the opportunity for misunderstandings that the Agency feels obligated to address.

8. From its initial filings in this proceeding, Illinois EPA has consistently taken the position that the current available scientific information is insufficient to determine which indicator organism should be used in setting water quality standards and, as a logical result, what the appropriate allowable levels of bacterial contamination should be to protect the proposed designated uses of these waters. Instead, the approach taken in the rulemaking proposal to the Board was as follows:

“the Agency has proposed appropriate recreational use designations for each reach. In the future, when it is known which indicator organism should be used and what the water quality standards should be, the numeric standards that protect each of the recreational uses can easily be inserted by initiating another rulemaking.”

Statement of Reasons at page 45.

9. In the absence of proposed water quality standards to protect recreational uses, the Agency proposed a technology-based effluent limit in 35 Ill. Adm. Code Part 304. The explanation of the proposed effluent limit was the following:

“This language establishes an effluent bacteria standard for certain dischargers impacted by this proposal of 400 fecal coliforms per 100 milliliters. This standard mirrors the existing standard for dischargers to General Use waters that have not been granted a disinfection exemption found in 35 Ill. Adm. Code 304.121(a). The numerical limitation in this proposal and the existing requirement is a technology-based value designed to assure that disinfection technologies are functioning properly.”

Statement of Reasons at 92-93. It would not be accurate to state that Illinois EPA proposed this disinfection effluent limitation to protect the proposed recreational use designations, because only ambient water quality standards can be adopted to “meet use designations” or to protect designated uses.

10. Throughout the course of the numerous days of recreational use hearings, there is possibly only one point on which all the Recreational Use expert witnesses presented by MWRDGC and the Environmental Groups agreed. None of the nationally recognized experts in epidemiology, microbiology and public health were able to tell the Board which indicator organism would be the most reliable surrogate to determine when a given body of water was safe for recreational activity. Not only could none of the witnesses tell the Board what level of bacteria would be protective, they couldn't even

tell the Board which organism to measure for to establish a safe level for recreational activities. Because of this lack of information, all of the competing risk-based testimony from both the MWRDGC experts and the environmental experts has not succeeded in revealing information relevant to the decision the Board is faced with in sub-docket B.

11. After all of these witnesses and hearings, the Board must draw the same conclusion the Agency came to three years ago. Illinois EPA has been quite consistent and clear about a weakness of its proposal – the fact that needed scientific information is lacking to develop protective numeric water quality standards for these waters. While it may be possible to propose a narrative water quality standard, all the experts agree that currently we do not have sufficient information on which to base a numeric water quality standard. Therefore, it is not accurate at this stage in the proceeding to suggest the Board is faced with the decision of what water quality standard is necessary to meet recreational use designations. The decision on whether to require disinfection in some of the affected waters should not be equated with a decision on what level of ambient bacterial contamination is safe.

12. By questioning the relevance of some of the testimony by some of the parties, the Agency is not trying to suggest that its proposal is the only option. Other stakeholders are free to argue that a scientifically defensible water quality standard can be determined for these waters and to propose one to the Board for its consideration. MWRDGC and other stakeholders are certainly free to argue that the technology-based effluent limit proposed by the Agency is too expensive or not achievable. However, what MWRDGC is doing with the CHEERS study and this motion to the Board is something very different. MWRDGC has taken a valid and laudable study – one that

may ultimately further the scientific knowledge on what bacteriological water quality standards for secondary contact recreational activities could look like -- not to support an actual water quality standard to protect recreational uses, but to oppose a technology-based effluent requirement. All the evidence presented to date indicates MWRDGC's intention to use this study to explain why disinfection of its effluent is not necessary and to use epidemiological evidence to argue against a technology-based effluent proposal. It is misleading for MWRDGC to suggest that the results of the CHEERS study will shed light on the only proposal that is currently pending before the Board in sub-docket B.

13. If MWRDGC intended to amend the Agency's proposal to include numeric bacteria water quality standards for these waters, the results of this study might become meaningful and relevant. No matter the outcome of the CHEERS study on the relative risk of recreating in these waters, to be relevant it would have to conclude that the appropriate water quality standard would be a specific numeric value for a given indicator organism or organisms. The number could be very high, but it could not be infinite. In order for MWRDGC to argue that the results of the CHEERS study indicate that disinfection is not necessary, they must first identify what the water quality standard should be in order for the Board or the permitting authority to determine that the established water quality standard can be met without imposing a disinfection requirement on the discharger.

14. Under Section 13(a) of the Act, the Board has authority to

"adopt regulations to promote the purposes and provisions of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe: ... (2) Effluent standards specifying the maximum amounts or concentrations, and

the physical, chemical, thermal, biological and radioactive nature of contaminants that may be discharged into the waters of the State, as defined herein, including, but not limited to, waters to any sewage works, or into any well, or from any source within the State...”

415 ILCS 5/13(a). In adopting effluent standards under this authority, the Board must also consider the technical feasibility and economic reasonableness of such limitations. There has been a technology-based disinfection requirement in the Board’s rules since 1972 for dischargers to General Use waters. Applying a similar requirement to two of the three proposed use designations for the CAWS and Lower Des Plaines River is the focus of the Board’s inquiry in sub-docket B.

15. The Board recently dealt with a very similar issue in a manner that is informative to its consideration of MWRDGC’s motion. In R04-26, In the Matter of: Interim Phosphorus Effluent Standard, Proposed 35 Ill. Adm. Code 304.123(g-k), the Illinois Association of Wastewater Agencies opposed adoption of the Illinois EPA’s proposal in part on the grounds that the Board should wait for the results of ongoing nutrient studies to determine what levels of phosphorus should be allowed in Illinois streams. In response to IAWA and the objection of the Joint Committee on Administrative Rules the Board explained that

“while the findings of the nutrient control work group referenced by JCAR will help the Agency in developing scientifically justifiable nutrient water quality standards, effluent standards are somewhat different. An effluent standard is mainly intended to limit significant loading of a pollutant to a receiving stream giving consideration to availability of appropriate treatment technology and associated costs. While there is currently a water quality standard for phosphorus that applies to some waters of the State, the impact of the new effluent standard for phosphorus is designed to limit the phosphorus loading on the State waters.”

R04-26, Slip Op. at 3-4 (see *also*, First Notice Opinion and Order at 17 and Second Notice Opinion and Order at 6).

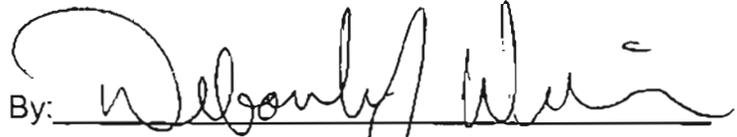
16. The Agency is confident that its proposal to disinfect the effluent from three of the four MWRDGC plants in the CAWS and Lower Des Plaines River is going to help protect recreational users from harmful bacteria. However, the essence of the Board's decision in this matter is not whether or not it will do so sufficiently. The question in sub-docket B is whether the Agency's proposal of a technology-based disinfection requirement for some of these waters is technically feasible and economically reasonable.

17. In the event the Board determines the CHEERS study to be relevant with respect to the issues present in sub-docket B, hearings are still not warranted on the final CHEERS study. Dr. Dorevitch will have testified twice now before the Board. The Board and participants have had the opportunity to extensively question Dr. Dorevitch on this study. The Board is capable of reading the final study and making a determination on its weight and relevance to these proceedings without having additional hearings on the CHEERS study.

Wherefore, for the reasons outlined above, the Illinois EPA respectfully requests the Board deny MWRDGC's Motion to Set a Hearing on the Final UIC CHEERS Report and Grant Illinois EPA's request to set a Public Comment deadline for R08-09(B) for a

date in the Fall of 2010.

Respectfully Submitted,

By: 

Deborah J. Williams  
Assistant Counsel  
Division of Legal Counsel

Date: June 24, 2010

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
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Springfield, Illinois 62794-9276



STATE OF ILLINOIS            )  
  )  
COUNTY OF SANGAMON        )

**PROOF OF SERVICE**

I, the undersigned, on oath state that I have served the attached Response of the Illinois Environmental Protection Agency to MWRDGC'S Motion for Leave File and Set a Hearing on the UIC Cheers Report of the Illinois Environmental Protection Agency of Attorney, to whom they are directed, by placing a copy of each in an envelope addressed to:

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Marie Tipsord, Hearing Officer  
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See Attached Service List

and mailing them (First Class Mail) from Springfield, Illinois on June 24th 2010, with sufficient postage affixed as indicated above.

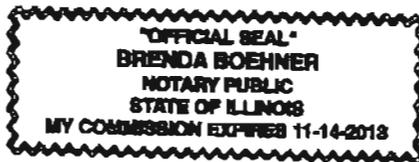
*Naomi Simpson Gordon*

SUBSCRIBED AND SWORN TO BEFORE ME

This 24th day of June, 2010

Brenda Boehner

Notary Public





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