

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9 Subdockets C and D
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)

NOTICE OF FILING

TO: John Therriault, Assistant Clerk Attached Service List
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Midwest Generation's Reply In Support of Its Motion For Temporary Suspension Of Subdocket D Hearings, a copy of which is herewith served upon you.

Dated: July 8, 2011

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti
One of Its Attorneys

Susan M. Franzetti
Kristen Laughridge Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5590

SERVICE LIST R08-09

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

Frederick Feldman
Ronald Hill
Louis Kollias
Margaret Conway
Metropolitan Water Reclamation District
100 East Erie St
Chicago, IL 60611

Katherine Hodge
Monica Rios
Hodge Dwyer Driver
3150 Roland Avenue
Springfield, IL 62705-5776

Fredric Andes
Erika Powers
Barnes & Thornburg LLP
1 North Wacker Dr
Suite 4400
Chicago, IL 60606

Lisa Frede
Chemical Industry Council of Illinois
1400 E. Touhy Avenue, Suite 110
Des Plaines, IL 60018

Jeffrey C. Fort
Ariel J. Teshner
SNR Denton US LLP
233 S. Wacker Drive, Suite 7800
Chicago, IL 60606-6404

Stacy Meyers-Glen
Openlands
25 E. Washington, Suite 1650
Chicago, IL 60602

Deborah J. Williams
Stefanie N. Diers
Illinois EPA
1021 North Grand Avenue
Springfield, IL 62794-9276

Keith Harley
Elizabeth Schenkier
Chicago Legal Clinic, Inc.
211 West Wacker Drive
Suite 750
Chicago, IL 60606

Ann Alexander
Natural Resources Defense Council
Two North Riverside Plaza
Suite 2250
Chicago, IL 60606

Andrew Armstrong
Elizabeth Wallace
Office of Illinois Attorney General
Environmental Bureau
69 West Washington St. Ste 1800
Chicago, IL 60602

Jack Darin
Cindy Skrukud
Sierra Club, Illinois Chapter
70 E. Lake St., Suite 1500
Chicago, IL 60601-7447

Jessica Dexter
Environmental Law & Policy Center
35 E. Wacker
Suite 1300
Chicago, IL 60601

Thomas W. Dimond
Susan Charles
Ice Miller LLP
200 West Madison Street, Suite 3500
Chicago, IL 60606-3417

Electronic Filing - Received, Clerk's Office, 07/08/2011

Lyman C. Welch
Alliance for the Great Lakes
17 N. State St., Suite 1390
Chicago, IL 60602

Cathy Hudzik
City of Chicago
Mayor's Office of Intergovernmental Affairs
121 North LaSalle Street, Room 406
Chicago, IL 60602

Mitchell Cohen
Illinois DNR, Legal
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62705-5776

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
WATER QUALITY STANDARDS AND)	R08-9 (Subdockets C and D)
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)	

**MIDWEST GENERATION'S REPLY IN SUPPORT OF ITS MOTION FOR
TEMPORARY SUSPENSION OF SUBDOCKET D HEARINGS**

Midwest Generation, L.L.C. ("MWGen"), by its counsel, Nijman Franzetti, L.L.P., hereby replies in support of its motion to temporarily suspend the commencement of the Subdocket D Hearings until after the Board issues the First Notice of the Proposed Aquatic Life Use Designations under Subdocket C.

I. Relevant Guidance Supports Granting MWGen's Motion.

The Environmental Groups are the only voice raised in opposition to MWGen's motion to temporarily suspend the Subdocket D hearings until issuance of the Subdocket C First Notice. The Illinois EPA supports the MWGen motion, stating "it is reasonable for the parties to want to see what aquatic life uses are being proposed by the Board before presenting a case in Subdocket D with respect to water quality standards to protect those aquatic life uses."¹ Most importantly, the common position advanced by both MWGen and the Illinois EPA is also consistent with, and supported by, U.S. EPA guidance on the process by which states should adopt use designations and water quality standards. In its 1994 Water Quality Standards Handbook ("U.S.EPA Handbook"), the U.S.EPA provided guidance to the states concerning the development of both

¹ Illinois EPA Response, para. 3, p. 1.

aquatic life use designations and the water quality criteria to protect the designated use(s).² The U.S. EPA succinctly summarized the step-wise process it recommends states follow in a “Simplified Flow Chart of a Typical State Water Quality Standards Review Process,” a copy of which is attached.³ The fifth step in the flow chart is the “Evaluation of Designated Uses,” followed by the next step of “Evaluation of Criteria.”⁴ The U.S.EPA Handbook repeatedly states that if a use designation is removed or changed, then states must consider the need for a change in the water quality criteria to protect the removed or added use.⁵ The U.S. EPA clearly recommends that the use should be known before the criteria are or can be developed. A 2001 National Research Council report similarly states that the “designated use is a description of a desired endpoint for the waterbody, and the criterion is a measureable indicator that is a surrogate for use attainment.”⁶

More recently, the U.S. EPA again explained its support for a sequential approach to use designations and water quality criteria, consistent with its priority of improving clarity in the rule-making process. In a March 13, 2006 memorandum by Director Ephraim S. King of the USEPA Office of Science and Technology, it is stated:

“Our priority is to improve clarity in the WQS process including better communication, understanding, efficiency, and increased public awareness. Making the UAA process operate effectively is an important step towards achieving these priorities. Once states and tribes designate the appropriate uses, the right water quality criteria, permits and targets for Total Maximum Daily Loads (TMDLs) will follow to move us towards improving water quality.”⁷ (emphasis added).

² U.S. EPA Water Quality Standards Handbook: Second Edition, August 1994, Handbook at Chapters 2 and 3.

³ *Id.* at Fig. 6.1.

⁴ *Id.*

⁵ *Id.*

⁶ National Research Council. 2001. *Assessing the TMDL Approach to Water Quality Management*. Water Science and Technology Board, Division on Earth and Life Studies. National Academy Press, Washington, D.C., p. 24.

⁷ USEPA Memorandum, from Ephraim S. King, Director, USEPA Office of Science and Technology, to Regional Water Division Directors, Regions 1-10, “Improving the Effectiveness of the Use Attainability Analysis (UAA) Process,” March 13, 2006, p. 1.

In other words, the U.S.EPA believes the selection of the appropriate water quality criteria comes after the states have designated the appropriate uses. In this rule-making, there are multiple and conflicting proposed uses for several, if not all, of the UAA segments. It is reasonable, if not necessary, to have the Board propose what the endpoint of the waterbody should be before hearing evidence on how to create measurable indicators for the attainment of that proposed use. To begin hearings on determining the right water quality criteria under the various proposed uses for the UAA water segments would be contrary to U.S. EPA guidance, incredibly inefficient and will unnecessarily prolong the Subdocket D hearings.

The Environmental Groups' proffered alternative that the Board should not proceed to First Notice in Subdocket C and instead issue simultaneous Subdocket C and D First Notice decisions is not only directly contrary to U.S. EPA guidance, but will only serve to further delay, complicate and confuse this rule-making. The Environmental Groups provide no explanation or justification for how such an approach will advance this proceeding. Delaying the issuance of Subdocket C First Notice only serves to keep regulated parties like MWGen in the dark about the proposed use designations while they are forced to present evidence concerning appropriate water quality criteria – perhaps why the Environmental Groups' are advocating this approach. Incredibly, the Environmental Groups advise the Board it faces the “daunting task of parsing through and evaluating the voluminous evidence before it to develop its first notice opinion and order” in Subdocket C,⁸ and yet they advocate that the Board make this task even more “daunting” by combining it with a simultaneous review and analysis of all of the testimony, exhibits and comments to be filed in Subdocket D.

MWGen submits that the process it proposes, with the support of the Illinois EPA, to temporarily suspend Subdocket D hearings until the Subdocket C First Notice decision is

⁸ Environmental Groups' Response, p. 2.

consistent with U.S. EPA guidance, minimizes confusion, effort and delay and therefore, should be adopted by the Board. Therefore, MWGen urges the Board to reject the Environmental Group's alternative suggestion that simultaneous First Notice decisions be issued in Subdockets C and D.

II. A Subdocket C First Notice Decision Will Provide Helpful and Necessary Information to Lessen the Scope and Cost of Subdocket D.

The Environmental Groups mischaracterize the role and substance of use designations and their ability to inform decisions on necessary water quality standards. The Environmental Groups claim that use designations do not "actually provide substantive guidance."⁹ In essence, the Environmental Groups contend that the uses are "useless" and everyone involved has been wasting their time and efforts in Subdocket C by making "much ado about nothing" through extensive expert testimony, exhibits and comments regarding the appropriate aquatic life uses.

Not surprisingly, the Environmental Groups' perspective is clearly wrong and unsupported by applicable law and guidance on the role of designated uses under the Clean Water Act ("CWA"). Designating the use(s) is a part of adopting the water quality standards to protect public health and welfare, enhance the quality of water and serve the purposes of the CWA.¹⁰ As stated in section 303(c)(2)(A) of the CWA, any new or revised water quality standard "shall consist of the designated uses of the navigable waters involved..." and be established in consideration of the use and value of the state waters for public water supplies, propagation of fish, recreation, agriculture, and industrial purposes, as well as the use and value

⁹ Environmental Groups' Response, p. 4.

¹⁰ 33 U.S.C.A. §1313(c)(2)(A).

for navigation.¹¹ U.S.EPA believes that “deciding what uses are attainable is critical, and views the UAA process, properly applied and implemented, as a vital tool in making those decisions.”¹²

Designated uses clearly “inform” the process of developing water quality criteria to protect those uses. By necessity, the actual regulatory language used in designating uses is somewhat broad in order to address the various waterbody conditions that they are intended to cover. But the Environmental Groups strain the bounds of logic by suggesting that designated use regulations do not provide any guidance as to the level of protection the water quality criteria are to afford. Moreover, the language of the proposed aquatic life use designations here do attempt to progress from the original and much more general language of Illinois use designations adopted decades ago, such as the “General Use” and “Secondary Use” designations cited as examples by the Environmental Groups.

Creating greater clarity and specificity to the designated uses is exactly what this proceeding is trying to accomplish. Current thinking on the development of aquatic life uses is that they should be as specific as possible.¹³ For instance, according to the NRC report, an aquatic use would “ideally describe whether the waterbody is expected to support a desired fish population and the relative invertebrate or other biological communities necessary to support that population.”¹⁴ There is certainly a fundamental difference between a proposed use that attains the CWA’s “fishable” goals of being capable of supporting a balanced, diverse fish population, and a use that recognizes a waterbody is not capable of doing so because the attainment of that aquatic life use is limited due to channelization, impoundments, and other such limiting factors

¹¹ *Id.*

¹² USEPA Memorandum, from Ephraim S. King, Director, USEPA Office of Science and Technology, to Regional Water Division Directors, Regions 1-10, “Improving the Effectiveness of the Use Attainability Analysis (UAA) Process,” March 13, 2006, p. 1.

¹³ National Research Council. 2001. *Assessing the TMDL Approach to Water Quality Management*. Water Science and Technology Board, Division on Earth and Life Studies. National Academy Press, Washington, D.C., p. 23

¹⁴ *Id.* at pp. 23-24.

recognized by the federal UAA regulation. And further, no one has thus far contended, as the Environmental Groups speculatively postulate, that the Board must go so far as to “provide the parties with a list of fish species and other specific aquatic life that needs to be protected” in order to inform the parties of what the uses are that are to be protected by the water quality standards.¹⁵

Use decisions provide the necessary scope and boundaries on which water quality criteria depend. If, for example, the Board determines that certain habitat limitations in the Lower Des Plaines River prevent it from attaining the CWA’s aquatic life use goal, then it follows that fish that cannot live in its limited habit do not need to be protected by, and their needs are not relevant to, the development of applicable water quality criteria. Rather than being “inextricably intertwined” as the Environmental Groups alone suggest,¹⁶ the water quality criteria are based on the designated use. One simply cannot develop the criteria until one knows what use is to be protected.

The Environmental Groups resort to alleging erroneous premises in order to misrepresent the alleged degree of evidentiary overlap between the Board’s consideration of designated aquatic life uses and the adoption of water quality criteria to protect those uses. Without citation to any supporting authority, the Environmental Groups claim that walleye do not live in the Lower Des Plaines River because they are avoiding the water temperatures there.¹⁷ As the testimony by an expert in the field of aquatic biology has shown in this proceeding, fish like walleye and sauger are not present in the Lower Des Plaines River portion of the UAA waters because the habitat they require is not present. Walleye “habitat requirements are such that ...there’s [not] enough hard substrate rock and cobble that’s going to support them either as

¹⁵ Environmental Groups’ Response, p. 4.

¹⁶ *Id.* at p. 5.

¹⁷ *Id.* at p. 6.

adults but particularly for spawning purposes.”¹⁸ Therefore, even if ambient temperatures were lower, walleye still would not inhabit the Lower Des Plaines River. The Board’s findings on Subdocket C will answer the threshold question regarding whether or not the Lower Des Plaines River is habitat-limited and hence, not capable of supporting a balanced, diverse fish population. While the Environmental Groups may wrongly persist in their misplaced attempt to blame solely thermal temperatures for the absence of certain fish from the Lower Des Plaines River, there properly should be no such “overlap” of testimony between Subdockets C and D. In truth, there has not been any testimony presented on thermal standards in Subdocket C since the creation of the Subdockets, a point which even the Environmental Groups do not dispute.

The Environmental Groups also rely on the fact that economic impact testimony will be presented in both Subdockets C and D. However, the presentation of such testimony is required under the Illinois Environmental Protection Act (“Act”), which requires a public hearing on the economic impact of new rules promulgated under the Act, but allows that the public hearing be held simultaneously or as part of the Board hearings considering the new rules.¹⁹ This provision is repeated in section 102.414 of the Board rules on Regulatory Hearings.²⁰ Moreover, no party has proposed to repeat economic impact testimony presented in Subdocket C. In fact, the record clearly shows that the opposite is true. For example, MWGen stated when presenting its economic impact testimony that it has no intention of repeating the testimony and requested that it also be considered in Subdocket D, to which there was no objection.²¹ Similarly, Exxon Mobil made a statement on the record that it intended to hold off presenting its economic impact

¹⁸ 11/9/10 PM Testimony of Greg Seegert, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, R08-09, p. 28.

¹⁹ 415 ILCS 5/27(b)(2).

²⁰ 35 Ill. Adm. Code 102.414.

²¹ 5/9/11 AM Testimony, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, R08-09, p. 138.

testimony until Subdocket D.²² At the same time, the Environmental Groups' counsel stated that they were "more concerned about being precluded [from presenting economic impact testimony in Subdocket D] than duplicative" testimony.²³ The record in Subdocket C, including statements by the Environmental Groups' themselves, and the ability of the Hearing Officer to exclude duplicative testimony, both serve to directly refute the Environmental Groups' unsubstantiated warnings of repetition and duplication if MWGen's Motion is granted. It is simply another "red herring" argument against a proposed means of moving forward with Subdocket D in a way that is consistent with due process principles of "notice and opportunity to be heard" and which promotes focused and informed presentations that save costs, resources and hearing time.

III. Granting MWGen's Motion Will Not Delay Resolution of this Proceeding for Years.

The Environmental Groups argue that "[i]n the real world" the MWGen request for a temporary suspension of the Subdocket D hearings will be "neither brief nor helpful."²⁴ However, the "world" according to the Environmental Groups is anything but "real." The Environmental Groups concede that the Board's First Notice decision in Subdocket C will be issued in 2012, but they conveniently speculate that it will be "well into 2012."²⁵ In reality, the Board itself can best judge the timing of its issuance of the Subdocket C First Notice. But even using the Environmental Groups' conservative projections, the proposed suspension of the Subdocket D hearings would be months not years. The Environmental Groups also speculate that MWGen "will want some months after" the Board issues the Subdocket C First Notice to prepare testimony without citing any factual basis for this allegation.²⁶ Again, there is no basis

²² *Id.* at pp. 135-137.

²³ 5/9/11 AM Testimony, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, R08-09, p. 140.

²⁴ Environmental Groups' Response, p. 1.

²⁵ *Id.* at p. 3.

²⁶ *Id.* at p. 3.

for that in the record or other facts supporting this contention. Obviously, the Board, through the Hearing Officer, controls the scheduling of when testimony for Subdocket D is to be filed and the parties will follow whatever schedule is ordered. Further, because the Subdocket C First Notice will narrow the scope and focus of the Subdocket D testimony, it will take less time to prepare it and to present it. In fact, MWGen's motion reduces the risk of more delay and minimizes potential prejudice to its interests as well as those of other interested parties.

The Environmental Groups further speculate that if the Board were to make significant changes between the Board's Subdocket C First Notice and Second Notice decisions, there will be "a reopening or repeat of hearing days in Subdocket D."²⁷ This argument ignores the undisputed fact that Subdocket C has been the subject of extensive testimony, exhibits and comment, with additional final comments yet to be filed. It is unreasonable to expect that after such an extensive vetting of the issues by the numerous participants in Subdocket C, the Board is going to make significant changes to its Subdocket C First Notice decision. However, even if this were to occur, this risk of a request for additional hearings exists regardless of whether or not MWGen's Motion is granted. If the Subdocket D hearings proceed in 2011 as currently scheduled and in the subsequent year there is a significant change between the Board's First Notice and Second Notice Subdocket C decisions that has a significant impact on Subdocket D issues, then there may well be a request to hold further Subdocket D hearings to address the changes made by the Board. If anything, the risk of this occurring and the extent of the additional time it necessitates are probably lower if MWGen's motion is granted, because there is a chance that the Subdocket D hearings will not be as far along because of their temporary suspension.

²⁷ *Id.*

Further, unlike the situation in Subdocket A, which did cause a significant change to the Board's First Notice decision, the U.S. EPA already has commented on Subdocket C issues in its January 2010 comment letter and its comments are relatively limited. As the comments were timely filed well in advance of the closing of the Subdocket C comment period, all interested parties had the opportunity to address them in their Subdocket C submissions to the Board, and the Board will be able to incorporate those comments in the Subdocket C First Notice.

IV. Granting MWGen's Motion Will Serve to Reduce the Risk of Extended, Additional Subdocket D Hearings.

Although the U.S. EPA's comments on Subdocket C were limited in scope and length, the same is not true of its Subdocket D comments. The MWGen motion actually seeks to reduce the risk of reopening Subdocket D hearings by requesting that the Illinois EPA first address U.S.EPA's extensive list of questions and comments. The Illinois EPA stated in its Response to MWGen's Motion, "Illinois EPA is continuing to work on these issues internally and with USEPA to discuss the issues raised in the January 2010 letter."²⁸ Based on the Illinois EPA's response to MWGen's Motion, it appears the Agencies are attempting to work through the Subdocket D U.S. EPA comments. Illinois EPA also expressed its willingness to provide a status report on how these discussions are progressing.²⁹ This is all the more reason why MWGen's Motion should be granted. Given the mature status of this proceeding, it is reasonable to request a greater degree of certainty regarding the outcome of these ongoing Agencies discussions before interested parties must present their Subdocket D testimony, particularly where there is a risk of substantive changes to the 2007 version of the Illinois EPA's proposed Subdocket D rules. While MWGen respects the Illinois EPA's desire not to disclose the contents of ongoing discussions between the Agencies, this is another reason why a temporary suspension

²⁸ Illinois EPA Response, para. 5, p. 2.

²⁹ *Id.*

of Subdocket D is warranted. A temporary suspension will allow those discussions to progress to a conclusion and will give the Illinois EPA the necessary opportunity to advise the Board and the participants whether it will be proposing any substantive changes to its proposed rules.

MWGen submits that this is the only reasonable resolution of the current situation to minimize the risk of unfair prejudice caused by substantive changes proposed after interested parties already have presented their Subdocket D testimony. MWGen is entitled to know of any substantive changes to the Agency's proposed Subdocket D rules before it must come forward to present testimony. Notice is adequate if it tells the interested parties of the issues to be addressed in the rulemaking process "with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informative manner."³⁰ By requiring stakeholders like MWGen to proceed to prepare and present Subdocket D testimony now, before the outcome of the discussions between the U.S. EPA and the Illinois EPA is known, there is significant risk that proper notice regarding the substance of the Subdocket D will not have been afforded and Subdocket D testimony will not proceed in a meaningful and informative manner.

The Illinois EPA's proposed rules in this proceeding should not be a "moving target" for interested parties to try to address. To avoid a reopening of Subdocket D hearings, MWGen submits that the prudent course is to use the next few months to allow these pending inter-agency discussions on the Subdocket D proposed rules the opportunity to progress. The Illinois EPA can then inform interested parties whether it is proposing any changes to the Subdocket D proposed rules and, if so, what those changes are, thereby giving all parties both a meaningful and cost-effective opportunity to prepare testimony on them. Otherwise, it is likely MWGen and others will waste resources and the Board's hearing time presenting testimony on contents of the Subdocket D proposed rules that subsequently change as a result of the Agencies' discussions.

³⁰ *American Medical Ass'n v. U.S.*, 887 F.2d 760, 767 (7th Cir. 1989).

Further, should significant changes be made to the proposed rules based on these discussions, and particularly if any such changes are part of the Board's First Notice decision, section 5-40(b)(5) of the Illinois Administrative Procedure Act would support granting additional hearing days to hear testimony on those changes.³¹ If there are material changes to the proposed Subdocket D rules subsequent to the filing of the Subdocket D testimony that threaten to adversely affect MWGen's interests, MWGen will be well within its rights to seek further Subdocket D hearings to present testimony to protect itself against any unfair prejudice and surprise caused by such changes.

The Agency suggests that the outcome of its discussions with the U.S. EPA should not first be known before interested parties proceed to present testimony on the "issues" raised by the U.S. EPA comments because such testimony will be "helpful."³² But due to the nature of many of the U.S. EPA's comments, the ability of any party other than the Agency to provide responsive information is significantly limited. The U.S. EPA comments include many questions addressed to the Illinois EPA to explain how it came to certain findings and the basis on which it crafted certain provisions of its proposed rules.³³ Just taking the U.S. EPA comments on the proposed thermal standards, several examples include questions requesting (i) what information Illinois EPA used to support its choices of Representative Aquatic Species (RAS) as the basis for the maximum and period average thermal criteria for all of the proposed aquatic uses;³⁴ (ii) clarification of which of the six thermal input parameters was the basis for the Agency's proposed summer temperature criteria;³⁵ (iii) what data from the Metropolitan Water

³¹ 5 ILCS 100/5-40(b)(5).

³² Illinois EPA Response, para. 5, p. 2.

³³ U.S.EPA Comments on October 2007 Version of Proposed Water Quality Standards Revisions for the Chicago Area Waterway and Lower Des Plaines River, January 29, 2010, Public Comment to R08-09 #286, p. 1.

³⁴ *Id.*

³⁵ *Id.*

Reclamation District of Greater Chicago (the “District”) was used, why certain District data was used and what statistic was used for criteria derivation,³⁶ (iv) the basis of Illinois EPA’s finding that the CSSC location at Route 83 was not influenced by Lake Michigan or thermal discharges and was a representative “background” location for temperature criteria,³⁷ and (v) clarification of the term “average basis” in Sections 302.408 Parts b through d.³⁸ Neither MWGen nor any other interested party can present helpful testimony on these issues because the U.S. EPA questions seek information that only the Illinois EPA was privy to and hence, only it can identify and explain. Without the answers that only Illinois EPA can provide, MWGen does not know what testimony would help either support or present a better approach to the Illinois EPA’s decision-making process. Any attempt to present testimony that assumes or otherwise tries to guess at what information Illinois EPA has considered or analyzed, or what the basis of its findings were, is not likely to help and may only serve to confuse the hearings further. If before the Subdocket D pre-filed testimony is due, Illinois EPA can at least disclose the answers to the U.S. EPA Subdocket D questions, then MWGen agrees that it and other interested parties can try to provide helpful testimony regarding those answers. Accordingly, MWGen requests that during the suspension of the Subdocket D hearings, Illinois EPA provide status reports that include any additional information it has disclosed or provided to the U.S. EPA in response to its Subdocket D comments.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1 and 3.

WHEREFORE, for the foregoing reasons, Midwest Generation, L.L.C. respectfully requests that the Board grant its Motion to Temporarily Suspend the Subdocket D Hearings, and the associated filing deadlines set forth in the Hearing Officer's June 1, 2011 Order, until after the Board has issued its First Notice on the designated aquatic life uses under Subdocket C of this proceeding.

Respectfully submitted,

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti

Dated: July 8, 2011

Susan M. Franzetti
Kristen Laughridge Gale
NIJMAN FRANZETTI LLP
10 S. LaSalle St., Suite 3600
Chicago, IL 60603
(312) 251-5590 (phone)
(312) 251- 4610 (fax)

ATTACHMENT

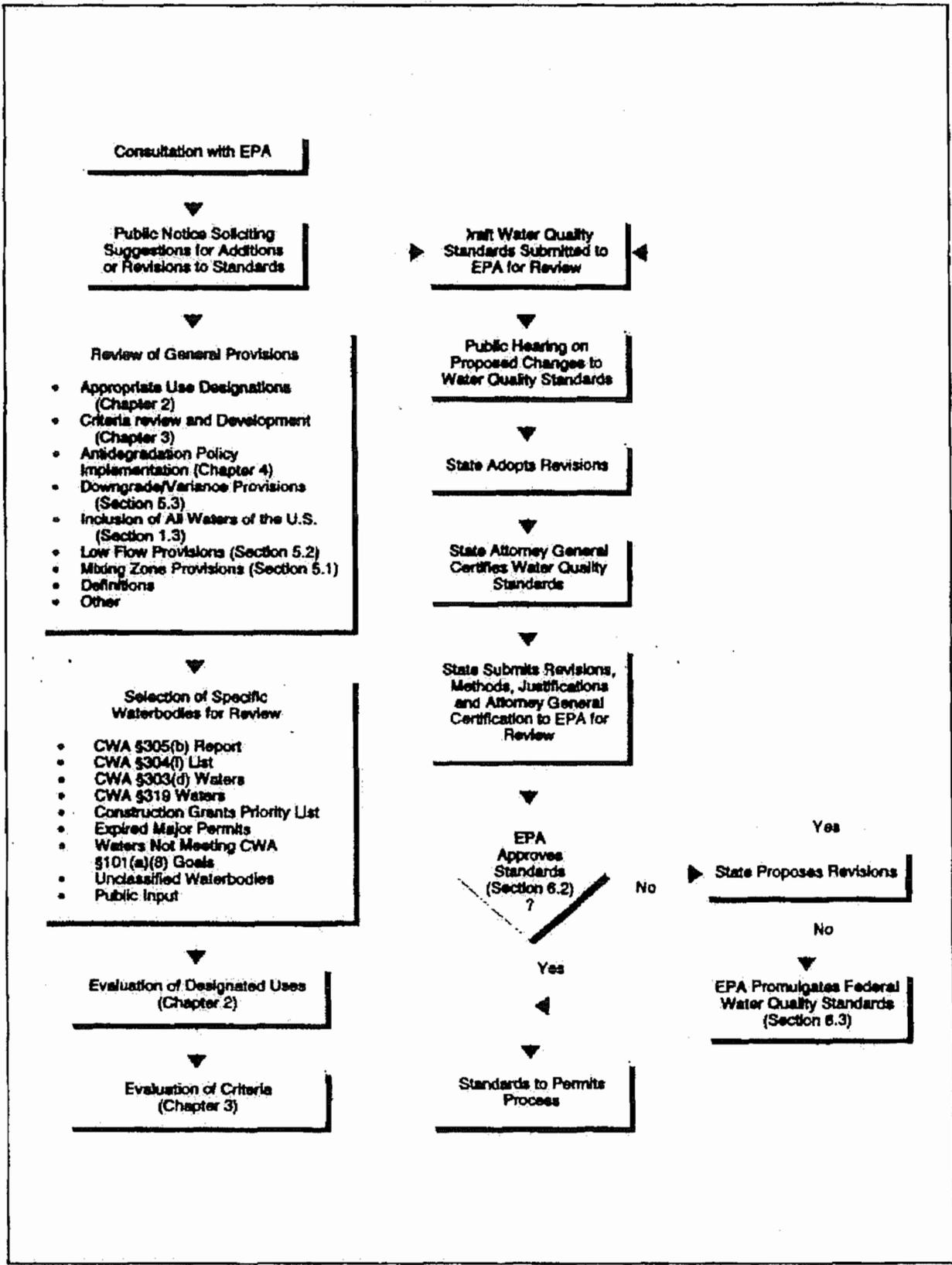


Figure 6-1. Simplified Flow Chart of a Typical State Water Quality Standards Review Process

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation's Reply In Support of Its Motion For Temporary Suspension Of Subdocket D Hearings was filed electronically on July 8, 2011 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on July 8, 2011 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti