

ILLINOIS POLLUTION CONTROL BOARD

August 4, 2011

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9 (Subdocket C & 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)

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

In response to a hearing officer decision to set hearings in Subdocket D in October, several participants asked that the Board postpone hearings in Subdocket D until at least a first notice decision has been issued by the Board in Subdocket C. The written motions and replies of Midwest Generation, LLC (Midwest Gen), Corn Products International, Inc (Corn Products), ExxonMobil Oil Corporation (ExxonMobil), and Citgo Petroleum Corporation and PDV Midwest, LLC (Citgo/PDV) support postponement of hearings in Subdocket D. The responses filed by the Illinois Environmental Protection Agency (IEPA) and Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council and Openlands (Environmental Groups) argue against postponement. Based on the arguments of the parties, the Board finds that delaying the hearings in Subdocket D until the Board goes to first notice in Subdocket C is appropriate. Also as the Board will proceed to first notice in Subdocket C before hearings begin in Subdocket D, the Board will not create an additional subdocket as requested by Citgo/PDV.

The Board will begin by providing a brief background and then summarize the motions of the participants. The Board will then summarize the responses and replies. The Board will then discuss the decision to delay hearings.

BACKGROUND

On May 31, 2011, the hearing officer held a prehearing conference and on June 1, 2011, entered a hearing officer order. In that order, the hearing officer set dates for hearing to begin in Subdocket D on October 25-27, 2011. Some of the participants expressed concern about proceeding with Subdocket D hearings before the Board proceeds to first notice in Subdocket C. The hearing officer directed participants to file motions with the Board on this issue.

On June 14, 2011, Midwest Gen (MW Mot.), Citgo/PDV (Citgo Mot.), ExxonMobil (EM Mot.), and Corn Products (CP Mot.) all filed motions asking the Board to postpone hearings in Subdocket D until at least such time as proceeding to first notice in Subdocket C. On June 29, 2011, the IEPA filed responses to each motion (IEPA Resp. MW, IEPA Resp. Citgo, IEPA Resp. EM, and IEPA Resp. CP). The Environmental Groups (EG Resp.) also responded to the

motions. On July 8, 2011, Midwest Gen (MW Reply), Citgo/PDV (Citgo Reply), ExxonMobil (EM Reply), and Corn Products (CP Reply) all filed replies.

MOTIONS

The Board will first summarize the arguments made in the motions filed by Midwest Gen and Citgo/PDV. Next the Board will summarize the arguments by Corn Products (CP Mot.) and ExxonMobil (EM Mot.).

Midwest Generation's Motion

Midwest Gen requests that the Board temporarily suspend the start of Subdocket D hearings until after the Board issues a first notice on the proposed Aquatic Life Use Designations in Subdocket C. MW Mot. at 1. Midwest Gen argues that proceeding with Subdocket D hearings before reaching first notice in Subdocket C will force Midwest Gen and other participants to expend "far more resources" than they would in Midwest Gen's proposed timeline. MW Mot. at 2.

Midwest Gen claims that the Board's determination of aquatic life use designations sets the necessary boundaries for any discussions on water quality standards, which are the focus of Subdocket D. MW Mot. at 2. Thus, Midwest Gen and similar participants "should not be compelled to address and present testimony on the issues dealing with the water quality standards" until they know what type of aquatic life these standards will need to protect. *Id.* Without a suspension of the Subdocket D hearings, Midwest Gen claims the Board is putting the "cart before the horse." *Id.*

Midwest Gen also draws a distinction between Subdockets C and D and Subdockets A and B. MW Mot. at 3. Midwest Gen states that the issue of adopting a bacteria effluent standard, the topic of Subdocket B, was "unavoidably intertwined" with the recreation use designation in Subdocket A. *Id.* In contrast, "the interrelationship between the issues in Subdockets C and D is far more complex," and how many aquatic life uses will be presented for the Board's consideration remains unknown. *Id.* at 3-4. Thus, the remaining uncertainty surrounding aquatic life uses supports a temporary suspension of Subdocket D hearings. *Id.* at 4.

Midwest Gen further argues that Midwest Gen would be "severely prejudiced" if "forced" to proceed with testimony when Midwest Gen does not know which aquatic life use designation will apply to Midwest Gen's five electrical generating stations that are affected by the rule. MW Mot. at 4. Having to consider every possible alternative will require "considerable extra effort and cost" in the number of witnesses presented and the scope of their testimonies. *Id.*

The "complete state of uncertainty" with respect to aquatic life designations is "particularly prejudicial" to Midwest Gen on the issue of presenting appropriate thermal water quality standards. MW Mot. at 4. As the IEPA's thermal water quality standards are based on the representative aquatic species (RAS) associated with the designed aquatic life use, Midwest

Gen states multiple RAS lists for each possible scenario will need to be developed. *Id.* This “may cause the record to become much more difficult, if not impossible” to follow. *Id.* at 5. However, if Subdocket D hearings were postponed until after first notice in Subdocket C, Midwest Gen would be able to substantially limit the scope of testimony. *Id.* at 4.

Midwest Gen claims a “substantial interest” in these proceedings because of the “potentially significant” costs associated with the creation of thermal water quality standards. MW Mot. at 5. Midwest Gen argues that these costs, which could reach \$1 billion, justify the Board’s protection of Midwest Gen’s interests in the rulemaking. *Id.* at 5. Midwest Gen also observes that Midwest Gen has actively participated in the rulemaking since the process began, and has never before requested an extension of time. *Id.*

Midwest Gen expresses concern that Public Comment 286, which contains comments by USEPA regarding thermal water quality standards in Subdocket D, could result in significant changes to the first notice in Subdocket D. MW Mot. at 7. These comments include requests for additional information from the IEPA about thermal water quality issues. *Id.* The IEPA’s response to the USEPA’s comments could lead to further revisions in the proposed water quality standards. *Id.* at 8. Midwest Gen fears that proceeding with Subdocket D hearings before this information is compiled this could prejudice Midwest Gen and other participants. *Id.* at 7. Midwest Gen also suggests that delaying the proceedings would “minimize the risk” that significant changes would be made in any second notice in Subdocket D, which Midwest Gen states occurred in Subdocket A. *Id.* at 8. For these reasons, Midwest Gen argues that Illinois EPA should file its response to the issues raised in Public Comment 286 before the participants in the rulemaking are required to begin filing and presenting testimony on Subdocket D issues. *Id.*

Finally Midwest Gen argues that delaying the hearings for Subdocket D until the issuance of first notice in Subdocket C will not lead to an unduly lengthy delay because the Subdocket C hearings are scheduled to end in August 2011. Thus, the Board can “move towards first notice in Subdocket C in a matter of months.” MW Mot. at 10.

In sum, Midwest Gen states that delaying the hearings in Subdocket D until first notice is issued in Subdocket C will “avoid significant prejudice, reduce the risk of expending significant, additional and unnecessary resources,” and “narrow the scope of the effort” needed to address the water quality issues in Subdocket D. MW Mot. at 10.

Citgo/PDV’s Motion

Citgo/PDV own and operate a refinery in Lemont, Illinois (Lemont Refinery) and request that the Board open an expedited subdocket to address “the simplified issues of aquatic life at the Regulation Navigation Area surrounding the electric fish barrier.” Citgo Mot. at 1. Citgo/PDV is referring to River Miles 295.5 to 297.2 along the Chicago Sanitary and Ship Canal (CSSC), which is designated as a Regulation Navigation Area (RNA). *Id.* This stretch of the canal contains an electric fish barrier designed to prevent the passage of invasive aquatic species. *Id.*

Citgo/PDV cites the testimony of James E. Huff, P.E., who said the fish barrier in the RNA is designed to create “*non-support* conditions for aquatic life.” Citgo Mot. at 2, *citing* Exh. 437 at 5-6. Moreover, Citgo/PDV claims that “there is no doubt or contravention in the record that the RNA itself is, by design, a fish-free zone.” *Id.* at 3. The absence of fish passage makes this portion of the canal “totally unique from all other portions of the Chicago area waterway system. *Id.*, *citing* 3/ 9/11Tr. at 17. Because of the unique nature of this section of the canal, Citgo/PDV argues that a separate use category for the RNA is appropriate. Citgo Mot. at 2.

Next, Citgo/PDV states that the water quality standards for the RNA can be set more easily than those concerning the CAWS and the LDPR because the presence of the electric fish barrier in the RNA presents “narrow and discrete issues.” Citgo Mot. at 4. Citgo/PDV also reminds the Board that the Board granted the refinery’s request for relief from rules regarding total dissolved solids (TDS) in 2007. *Id.*, *citing* Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards, R07-9. Citgo/PDV expects the Board to eventually remove the refinery’s TDS requirements in their entirety. *Id.*

Citgo/PDV argues that creating a separate subdocket to expedite the Board’s ruling on the water quality standards in the RNA will “conserve scarce regulatory resources and achieve a tangible result more efficiently than an alternative approach which would require the filing of new variance petitions under an uncertain CAWS/LDPR regulatory framework and the continued inclusion of the RNA issue within Subdockets C and D.” Citgo Mot. at 5.

Thus, Citgo/PDV asks the Board to designate the RNA “as Use C for the purposes of aquatic life and proceed to a new expedited subdocket to determine the appropriate aquatic life standards applicable to such a Use C.” Citgo Mot. at 5.

Corn Products’ Motion

Corn Products contends that proceeding with hearing testimony in Subdocket D before taking action in Subdocket C is premature. CP Mot. at 3. Corn Products urges the Board to postpone hearings in Subdocket D until it takes action in Subdocket C or at minimum, until the Board issues a second notice Opinion and Order in Subdocket C. *Id.* at 3. Corn Products indicates that the Clean Water Act (CWA) and the regulations implementing the CWA require States to adopt use designations and water quality standards based on these designations. *Id.* at 4. Specifically, Corn Products argues that “water quality criteria sufficient to protect designated uses” cannot be adopted without the adoption of designated uses because there would be “no such uses on which to base a determination of the sufficiency of a water quality standard.” *Id.* at 4.

Additionally, Corn Products argues that requiring participants to prepare testimony on the appropriateness of proposed water quality standards and the impact on facilities without knowing the aquatic life designations applicable to each segment of the affected waterways is unreasonable. CP Mot. at 4. Corn Products also argues that proceeding with Subdocket D without knowing the use designations in Subdocket C would further strain the Board’s resources. *Id.* at 5. In particular, Corn Products explains that participants would have to give testimony on

“all possible alternative water quality standards for each possible aquatic life use that a segment could be designated,” which would be burdensome to participants and would likely lead to more hearings than the Board expected. *Id.*

Corn Products also argues that Subdocket A serves as “an example of why it is premature to proceed with Subdocket D until there is finality in Subdocket C.” CP Mot. at 6. First, Corn Products states that the use designations should be determined before water quality standards are established because these standards are established to protect the use designations. *Id.* Corn Products indicates that the USEPA’s May 2011 determination concerning recreational use designations also supports this conclusion, as USEPA may decide to comment on aquatic life uses. *Id.* Second, Corn Products contends that there is a possibility that Subdocket C may become similarly situated to Subdocket A. *Id.* Specifically, Corn Products indicates that, as in Subdocket A, moving forward with Subdocket D would be an inefficient use of the Board and participants’ resources. Corn Products opines that there is a chance that the USEPA’s future comments would cause the Board, the IEPA, or participants to propose different aquatic life use designations than those that were either originally proposed by the IEPA or than those the Board proposes at first notice in Subdocket C. *Id.* at 7.

Corn Products concludes by requesting that the Board postpone Subdocket D hearings until the Board issues a final opinion and order in Subdocket C, or at a minimum, until a second notice opinion and order is issued in Subdocket C. CP Mot. at 7.

ExxonMobil’s Motion

ExxonMobil restates the claims and arguments Corn Products raised in support of Corn Products motion to postpone hearings in Subdocket D. EM Mot. at 3-7. On the basis of these claims and arguments, ExxonMobil contends that proceeding with hearing testimony in Subdocket D before taking action in Subdocket C is premature. *Id.* at 3. ExxonMobil requests that the Board postpone Subdocket D hearings until the issues a final opinion and order in Subdocket C, or at a minimum, until a second notice opinion and order is issued in Subdocket C. *Id.* at 7.

RESPONSES

The Board will begin by summarizing each of the IEPA’s responses and then the Environmental Groups response will be summarized.

IEPA’s Response to Midwest Generation

IEPA states that IEPA “does not object to Midwest Generation’s request to wait until a first notice Opinion and Order is issued in Subdocket C before proceeding with hearings in Subdocket D.” IEPA Resp. MW at 1. The IEPA opines that observing aquatic life uses proposed by the Board before presenting testimony in Subdocket D about water quality standards needed to protect those uses is reasonable. *Id.* However, the IEPA states that requiring a response to Public Comment 286 before scheduling hearings in Subdocket D “would not be

beneficial to the Board and the participants at this time and would cause unnecessary delay.” IEPA Resp. MW at 2. The IEPA will continue to work on these issues “internally and with USEPA to discuss the issues” raised in the Public Comment 286. *Id.* The IEPA offers to provide the Board and participants a status report about how these discussions are proceeding and also observes that the hearing process in Subdocket D may help the IEPA resolve the issues raised in Public Comment 286. *Id.*

IEPA’s Response to Citgo/PDV

IEPA “strongly disagrees” with the Citgo/PDV’s request for a subdocket to be created to address aquatic life uses in the river near the Lemont Refinery. IEPA Resp. Citgo at 2. The IEPA observes that Citgo/PDV “has applied for, and received, two variances allowing relief from the TDS standard.” *Id.* The IEPA states that the second variance was granted in 2008, and lasts for five years, which allows relief from the standard until 2013. *Id.*, citing Citgo Petroleum Corporation and PDV Midwest Refining, L.L.C. v. IEPA, PCB 08-33 (May 15, 2008). Thus, “[w]ith time remaining on the variance, it would be unnecessary to grant an expedited subdocket.” *Id.*

The IEPA next states that Lemont Refinery’s request for an expedited subdocket is “highly dependent” on the uniqueness of the RNA, but “the testimony shows that only a few features are unique only to these 1.7 miles of the CSSC.” IEPA Resp. Citgo at 2. According to information provided in James Huff’s testimony, the IEPA claims these unique features include economic viability, effluent load from combined sewer overflows, and storm water run-off, “with the final two features occurring due to the presence of the Stickney facility.” *Id.*, citing 5/6/09A Tr. at 106-09.

In addition, the IEPA challenges Citgo/PDV’s claim that the absence of fish passage makes the RNA even more unique. IEPA Resp. Citgo at 2. The IEPA again cites James Huff’s testimony, in which Huff agreed that the waters in the “upper CSSC, upstream of the fish barrier, constitutes a water link between the Chicago and Calumet systems.” *Id.*, citing 5/6/09A Tr. at 91. The IEPA further states that this link allows for aquatic life movement between the two systems, and that “the fish barrier would not interfere with fish migration between the two systems.” *Id.* at 3.

Thus, the IEPA requests that the Board deny Citgo/PDV’s request for an expedited subdocket addressing aquatic life use. IEPA Resp. Citgo at 3.

IEPA’s Response to Corn Products

The IEPA disagrees with Corn Products’ request. IEPA Resp. CP at 1. The IEPA argues that waiting until an adoption of aquatic life uses in Subdocket C is unreasonable and would unnecessarily delay the proceedings. *Id.* Instead, the IEPA states that the better approach would be to wait until a first notice opinion and order is issued in Subdocket C. *Id.* The IEPA maintains that by waiting for the first notice opinion and order, parties would be able to know what use designations are being proposed for aquatic life uses and to present testimony on water

quality standards and criteria required to protect the use designations in Subdocket D hearings. *Id.* at 1-2. The IEPA asserts that “[t]his approach would address the confusion that would be caused if the parties were to move forward before seeing the first notice Opinion and Order in Subdocket C as well as timing and expense issues that may burden the parties by not knowing what aquatic life uses the Board intends to go forward with.” *Id.* at 2.

In addition, the IEPA addresses Corn Products’ comparison of Subdocket C to Subdocket A by indicating that Corn Products “is only able to speculate whether USEPA would issue a determination in Subdocket C.” IEPA Resp. CP at 2. Instead, the IEPA asserts that they are working internally and with the USEPA to discuss the issues raised in the January 2010 letter. *Id.* The IEPA states that they are willing to provide the Board and participants with a status report regarding these issues. *Id.* Also, the IEPA states that it strongly opposes postponement of the Subdocket D hearings because it feels that seeing the information that will be presented during the hearing proceeding would be beneficial and could potentially help the IEPA resolve issues raised by the USEPA in the January 2010 letter. *Id.*

The IEPA concludes by requesting that Corn Products’ motion to postpone hearings in Subdocket D be denied. IEPA Resp. CP at 3.

IEPA’s Response to ExxonMobil

The IEPA restates the claims and arguments raised in IEPA’s response to Corn Products’ motion. IEPA Resp. EM at 1-3. On the basis of these claims and arguments, the IEPA contends that waiting until an adoption of aquatic life uses in Subdocket C is unreasonable and would unnecessarily delay the proceedings. *Id.* at 1. It requests that ExxonMobil’s motion to postpone hearings in Subdocket D be denied. *Id.* at 3.

Environmental Groups’ Response

In their response, the Environmental Groups first argue that granting the requests to delay hearings in Subdocket D until Subdocket C is closed would likely delay resolution of this rulemaking for “years” . EG Resp. at 1-2. The Environmental Groups opine that the Board may not reach second notice in Subdocket C until “well into 2013.” *Id.* at 3. The Environmental Groups further argue that interested parties would take several months before presenting testimony in Subdocket D, potentially pushing the start date for Subdocket D hearings until “sometime in 2014.” *Id.* Thus, accepting “in any form” the idea that Subdocket D cannot start until Subdocket C is finalized “risks very major delays in this proceeding.” *Id.*

The Environmental Groups also argue that a final Board decision in Subdocket C is “unlikely to provide the information necessary to lessen the costs of proceedings in Subdocket C.” EG Resp. at 4. The Environmental Groups also suggest that “the odds of real time savings as to the presentations by other parties are very slim.” *Id.* The Environmental Groups state that the Illinois EPA “has already presented its testimony as to both use designation and criteria.” *Id.*

In addition, the Environmental Groups state that the final regulatory language of Subdocket C “is unlikely to actually provide substantive guidance” given the history of use designations that are “usually framed in very general language.” EG Resp. at 4. Due to the broad terms already proposed in this rulemaking such as “tolerant” and “indigenous” species, the Environmental Groups opine that it is “very unlikely that the Board will provide the parties with a list of fish species and other specific aquatic life that needs to be protected in each of the relevant segments.” *Id.* at 4-5. The Environmental Groups observe that Subdocket D hearings will inevitably involve debates over what kinds of aquatic life must be protected, regardless of the final status of Subdocket C use designations. *Id.* at 5.

The Environmental Groups also caution other participants against treating the procedural split of Subdockets C and D as a substantive divide, as well. EG Resp. at 5. The Environmental Groups state that the Board’s creation of subdockets helped “bring some order to a colossally complicated proceeding,” but that this separation does not change the reality that “use designations and criteria determinants are inextricably intertwined, and cannot be artificially separated in substance.” *Id.* The Environmental Groups also express concern that “overemphasizing the division between the subdockets will result in repetitive testimony rather than increased efficiency.” *Id.*

Thus, the Environmental Groups request that the Board deny Midwest Generation, Exxon and Corn Products’ proposal to delay Subdocket D hearings. EG Resp. at 6. The Environmental Groups also ask that the Board proceed immediately to a decision in Subdocket C and hearings in Subdocket D, or, alternatively, should delay decision in Subdocket C “so as to issue combined ruling in both subdockets.” *Id.*

Replies

The Board will first summarize the reply from Midwest Gen and then the reply from Citgo/PDV. Next the Board will summarize Corn Products’ reply and then ExxonMobil.

Midwest Generation’s Reply

Midwest Gen states that the request to delay the hearings in Subdocket D until first notice is issued in Subdocket C, is consistent with USEPA guidance on the “process by which states should adopt use designations and water quality standards.” MW Reply at 1. Midwest Gen observes that the USEPA Handbook “clearly recommends,” when issuing water quality standards, “that the use should be known before the criteria are or can be developed.” *Id.* at 2.

Midwest Gen argues that the Environmental Groups’ suggestion that the Board should issue simultaneous Subdocket C and D first notice decisions is “directly contrary to USEPA guidance,” and “will only serve to further delay, complicate, and confuse this rule-making.” MW Reply at 3. Midwest Gen states that the proposal to delay Subdocket D hearings until the Subdocket C first notice is released is “consistent with USEPA guidance,” and will minimize confusion, effort, and delay. *Id.* at 4.

Midwest Gen next claims that a Subdocket C first notice decision will provide “helpful and necessary information to lessen the scope and cost of Subdocket D.” MW Reply at 4. Midwest Gen disagrees with the Environmental Groups’ assertion that use designations provide little substantive guidance. *Id.* On the contrary, Midwest Gen claims that designated uses “clearly ‘inform’ the process of developing water quality criteria to protect those uses.” *Id.* at 5. Midwest Gen recognizes that past use designations have been somewhat broad, but Midwest Gen states that the Subdocket C hearings are aimed at lending greater “clarity and specificity to the designated uses,” which reflects “current thinking on the development of aquatic life uses.” *Id.*

Midwest Gen challenges the Environmental Groups’ argument that water quality criteria are inextricably intertwined with use designations. Rather, Midwest argues that “[o]ne cannot develop the criteria until one knows what use is to be protected.” MW Reply at 6. With regard to the Environmental Groups’ concern about repeated testimony in Subdocket C and D hearings, Midwest Gen states that Midwest Gen has “no intention” of repeating, in particular, the economic impact testimony. *Id.* at 7. Midwest Gen claims that the Environmental Groups’ concern about repeated testimony is merely a “red herring.” *Id.* at 8.

Midwest Gen also argues that delaying Subdocket D hearings will not delay resolution of this proceeding for years, as suggested by the Environmental Groups. *Id.* Midwest Gen claims the Environmental Groups had no basis for assuming, among other things, that the Board would take months to issue first notice in Subdocket C and that the other participants would require several more months to prepare testimony for hearings in Subdocket D. MW Reply at 8-9. Midwest Gen also expresses skepticism that significant changes will be made between first notice and second notice in Subdocket C, as the Environmental Groups feared might cause considerable delay by forcing the reopening Subdocket D hearings. *Id.* at 9.

Next, Midwest Gen states that temporarily delaying Subdocket D hearings will “serve to reduce the risk of extended, additional Subdocket D hearings.” MW Reply at 10. Midwest Gen states that giving the IEPA time to sort out issues relating to Public Comment 286 will provide a “greater degree of certainty” to other participants, allowing Midwest Gen and others to narrow the scope of their testimony in Subdocket D. *Id.* at 11. Midwest Gen also has concerns that having to present Subdocket D testimony before the IEPA has finalized the proposed Subdocket D rules could unfairly prejudice Midwest Gen’s interests. *Id.*

Again, Midwest Gen requests that IEPA complete the “inter-agency discussions” before Subdocket D hearings occur. MW Reply at 11. Midwest also states that, if Subdocket D hearings are suspended, IEPA should provide status reports about additional information it has disclosed to the USEPA in response to the USEPA’s Subdocket D comments. *Id.* at 13.

Citgo / PDV’s Reply

Citgo/PDV focuses on IEPA’s response, which claimed that an existing variance for Lemont Refinery established by PCB 08-33 provides “complete regulatory relief” until May 2013. Citgo Reply at 1. Citgo/PDV claims this is misleading, as the PCB 08-33 variance has “concrete action requirements that begin to come due on February 15, 2012.” *Id.* at 2.

Citgo/PDV says that its pre-2013 regulatory obligations support creating an expedited Use C Subdocket. *Id.*

Citgo/PDV also challenges the IEPA's suggestion that a separate Use C Subdocket, if it occurred, should occur at the end of the other subdockets. Citgo Reply at 2. Citgo/PDV argues that such a timeline would defeat the purposes of an expedited Use C Subdocket, which includes the efforts by several stakeholders to "maximize the effectiveness of the electric barrier" and efforts by Citgo/PDV to have the Board revise water quality standards on the Ship Canal, which the refinery claims it has sought since 2004. *Id.*

Citgo/PDV does not take a position on Midwest Gen's proposal to delay Subdocket D hearings, but Lemont Refinery observes that such an action would "create more time and opportunity for the pursuit of the expedited Use C Subdocket." Citgo Reply at 3.

Citgo/PDV also challenges the IEPA's assertion that the waters surrounding the electric fish barrier in the RNA are not unique. Citgo Reply at 3. Citgo/PDV says the IEPA's citations of James Huff allegedly supporting this proposition are in error, and that the transcript page cited by the IEPA "does not support this characterization in any fashion." *Id.*

In addition, Citgo/PDV states that the existence of a link for fish passage between the Chicago and Calumet systems in "some other portion" of the Chicago Area Waterway System "does not affect the question of whether the waters of the RNA surrounding the three electric fish barriers ... are capable of supporting aquatic life." Citgo Reply at 4. Citgo/PDV "further hopes that the IEPA is not attempting to suggest that the RNA and electric fish barriers do not help prevent invasive species from accessing Lake Michigan." *Id.*

Citgo/PDV reiterates its position that the RNA is a unique waterway and renews its request that the Board "designate the RNA and the Black Zone ... as Use C for the purposes of aquatic life and proceed to a new expedited Subdocket to determine the appropriate aquatic life standards applicable to such a Use C." Citgo Reply at 4.

Corn Products' Reply

Corn Products specifically replies to both the IEPA and the Environmental Groups. The Board will summarize each in turn.

Reply to IEPA's Response

In response to the IEPA's disagreement with Corn Products' request to postpone hearings in Subdocket D until second notice in Subdocket C, Corn Products indicates that the IEPA "neither articulates why Corn Products' request is unreasonable nor explains why it would cause unnecessary delay." CP Reply at 2. Although Corn Products believes that postponing hearings until second notice in Subdocket C would "provide nearly final guidance on the aquatic life use designations that the Board intends to adopt," Corn Products does support the IEPA's alternative

approach of waiting until first notice in Subdocket C before proceeding with Subdocket D hearings. *Id.* at 2-3.

Corn Products agrees with the IEPA's explanation that the issuance of a first notice in Subdocket C would allow the participants "to know what use designations are being proposed for aquatic life uses and would allow the parties to present testimony on water quality standards and criteria that are necessary to protect those use designations in Subdocket D hearings." CP Reply at 3, citing Resp. to CP at 2-3. Corn Products also agrees with the IEPA's recognition of "the confusion that would be caused if the parties were to move forward before seeing the first notice Opinion and Order in Subdocket C as well as timing and expense issues that may burden the parties by not knowing what aquatic life uses the Board intends to go forward with." *Id.* Although Corn Products agrees with the IEPA on these issues, Corn Products requests that the Board wait until second notice in Subdocket C before it proceeds with hearing in Subdocket D. CP Reply at 3. However, Corn Products indicates alternatively that if the Board determines that postponing hearing in Subdocket D until second notice in Subdocket C is inappropriate, Corn Products supports proceeding to hearing in Subdocket D after first notice in Subdocket C. *Id.* Corn Products agrees that waiting after first notice would give participants preparing testimony in Subdocket D insight into the use designations proposed by the Board. *Id.*

Additionally, Corn Products responds to the IEPA's offer to provide a status report of its discussions with the USEPA by requesting that the Board require the IEPA to file a status report explaining its discussions with the USEPA on the issues raised in the January 2010 letter and providing information relating to such discussions, including, but not limited to, how the IEPA plans to address the USEPA's comments in this rulemaking.. CP Reply at 3-4.

Reply to the Environmental Group's Response

The Environmental Groups argue that granting the motions to postpone would delay resolution of the proceeding for years. CP Reply at 4. Specifically, the Environmental Groups present a timeline stating that "it is entirely possible" that if the motions are granted, testimony in Subdocket D would not begin until 2014. *Id.*, citing to EG Resp. at 2-3. In response, Corn Products argues that the Environmental Groups' timeline is "speculative and appears to be based on unknown timeframes for submitting final comments in Subdocket C, the Board's issuance of first notice in Subdocket C, post-first notice comments, the length of time between First and second notices in Subdocket C, and preparation time after first or second notice for Subdocket D testimony." CP Reply at 4. Corn Products adds that "it is 'entirely possible' that should hearings in Subdocket D be postponed until after first or second notice in Subdocket C that Subdocket D could begin well before 2014 depending on varying timeframes." *Id.*

Additionally, the Environmental Groups' assert that, "it is very unlikely in this proceeding that a ruling on designated uses is going to do much to clarify the appropriate criteria." CP Reply at 4, citing EG Resp. at 4. Specifically, they argue that "the use designations adopted by the Board will use 'general language' or 'resemble in scope the broad descriptive language now in the Board definition for General Use,' and parties 'will have to decide for themselves what species they maintain are 'pollution tolerant' or 'indigenous' and what life

stages are covered by the use designations.” CP Reply at 4-5, citing EG Resp. at 4-5. Corn Products replies by arguing that even if the Board adopts aquatic life use designations using broad or general language, “knowing what those uses are either at Second or even at first notice...will provide insight as to the uses the Board deems appropriate for the waterways subject to this rulemaking.” CP Reply at 5.

Corn Products also contends that participants would be able to adjust their testimony to the uses proposed by the Board at first or second notice in Subdocket C rather than present “testimony on every possible water quality standard scenario for each possible use that a segment could be designated.” *Id.* Corn Products concludes by stating that postponing hearings in Subdocket D would be undoubtedly beneficial because participants would have an understanding of the likely aquatic life use designations since testimony can be adjusted to address the proposed uses. Additionally, the Board and participants’ resources could be saved given that less hearing dates would likely be required since testimony will be focused on water quality standards protective of the use designations proposed at first or second notice rather than all possible use designations. *Id.*

Corn Products concludes by requesting that the Board not proceed to hearing in Subdocket D until second notice in Subdocket C, but states that although it would prefer the finality of a second notice in Subdocket C before proceeding to testimony in Subdocket D, it does support the IEPA and Midwest Generation’s approach to postpone hearings in Subdocket D until first notice in Subdocket C. CP Reply at 5.

ExxonMobil’s Reply

ExxonMobil restates the claims and arguments Corn Products raised in support of Corn Products’ reply to the IEPA and Environmental Groups’ responses. EM Reply at 2-6. On the basis of these claims and arguments, ExxonMobil contends that although ExxonMobil believes that postponing hearings until second notice in Subdocket C would “provide nearly final guidance on the aquatic life use designations that the Board intends to adopt,” ExxonMobil does support the IEPA’s alternative approach of waiting until first notice in Subdocket C before proceeding with Subdocket D hearings. *Id.* at 2-3. ExxonMobil requests that the Board not proceed to hearing in Subdocket D until second notice in Subdocket C, but states that although it would prefer the finality of a second notice in Subdocket C before proceeding to testimony in Subdocket D, it does support the IEPA and Midwest Generation’s approach to postpone hearings in Subdocket D until first notice in Subdocket C. *Id.* at 5.

DISCUSSION

In Subdocket D, the hearing officer tentatively scheduled hearings to begin on October 25, 2011, which in all probability will be prior to adoption of a first notice in Subdocket C. Midwest Gen asks that the Board delay Subdocket C hearings at least until the Board proceeds to first notice in Subdocket C. Corn Products and ExxonMobil suggest that the Board wait until Subdocket C is complete. Citgo/PDV asks for the creation of a new and expedited subdocket to address the aquatic life uses of the CSSC near the electric barrier.

IEPA agrees with Midwest Gen that the hearings should be delayed until after the Board proceeds to first notice in Subdocket C, but disagrees with Corn Products and ExxonMobil's request to delay until the adoption of a rule in Subdocket C. IEPA also disagrees with Citgo/PDV's request for a new and expedited subdocket.

The Environmental Groups oppose a delay in hearings and ask that the Board continue as currently scheduled or issue a combined decision in Subdockets C and D. EG Resp. at 2. The Environmental Groups argue that delaying the hearings in Subdocket D could result in a substantial delay in completion of the rule.

This rulemaking docket has been before the Board for nearly four years and the Board is committed to completing the docket as quickly and efficiently as possible. The Board notes that Subdocket A is approaching final adoption (*see* 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, R08-9(A) (June 16, 2011)) and Subdocket B has proceeded to first notice (*see* 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, R08-9(B) (July 7, 2011)). Thus, progress is being made.

The Board understands the hearing officer's decision to schedule hearings in Subdocket D, but the Board is convinced that a delay in the hearings is appropriate. The Board does not agree that such a delay will result in a hindrance to the completion of Subdockets C and D in an expeditious manner. The Board finds that delaying hearings until the Board proceeds to first notice in Subdocket C will allow participants to focus discussion in Subdocket D. However, the Board does not believe delaying Subdocket D until Subdocket C is final is necessary.

As stated above the Board is committed to completing this rulemaking as quickly and as efficiently as possible. After reviewing the filings of the participants, the Board finds that delaying hearings in subdocket D until after the Board adopts a first notice opinion and order in Subdocket C has the potential to focus the hearings in Subdocket D so that fewer hearing days are required. In addition, the Board expects that the hearing days scheduled for August 15-17, 2011 will be sufficient to conclude testimony in Subdocket C and that final comments on that testimony will be filed expeditiously so that a first notice opinion can be issued in Fall 2011. Thus, a slight delay in scheduling hearing days in Subdocket D is balanced by the potential for fewer hearing days in Subdocket D. Therefore, the Board will direct the hearing officer to delay hearings in Subdocket D until the Board adopts a first notice opinion and order in Subdocket C.

Because the Board is committed to completing the aquatic life use designations in Subdocket C as quickly and efficiently as possible, the Board sees no need to introduce a new subdocket for the CSSC. Citgo/PDV's arguments concerning aquatic life uses for that segment should be considered with the rest of the segments and the Board will examine the proposed use when developing a first notice proposal in Subdocket C.

CONCLUSION

The Board finds that delaying the hearings in Subdocket D until the Board goes to first notice in Subdocket C is appropriate. Also, as the Board will proceed to first notice in Subdocket C before hearings begins in Subdocket D, the Board will not create an additional subdocket as requested by Citgo/PDV. Thus, the Board grants Midwest Gen's motion, denies Corn Products and ExxonMobil's motions in part, and denies the motion of Citgo/PDV.

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 August 4, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board