

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

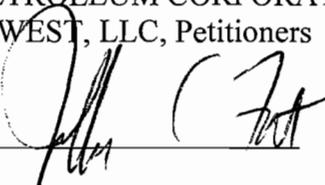
Marie Tipsord, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph, Suite 11-500
 Chicago, IL 60601-3218

Deborah J. Williams, Assistant Counsel
 Stefanie N. Diers, Assistant Counsel
 Illinois Environmental Protection Agency
 1021 N. Grand Ave. East
 P.O. Box 19276
 Springfield, IL 62794

Persons included on the attached
 SERVICE LIST

Please take notice that on March 19, 2012, we filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached Response to the Final Pre-First Notice Comments on Subdocket C, a copy of which is served upon you.

CITGO PETROLEUM CORPORATION, and
 PDV MIDWEST, LLC, Petitioners

By: 

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

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RESPONSE TO THE FINAL PRE-FIRST NOTICE
COMMENTS ON SUBDOCKET C

CITGO PETROLEUM CORPORATION, and PDV MIDWEST, LLC, (collectively, the “Lemont Refinery”) submit the following response to the “final pre-first notice comments” filed on March 5, 2012 in the above-captioned Subdocket C by other parties.

The Lemont Refinery urges the Board to take note not only of the Record, but the significant events that are ongoing outside of this proceeding. Those events would fundamentally change the Chicago Area Water System (CAWS), and indeed the entire hydrology of the Chicago Sanitary and Ship Canal, and the downstream waters. In other words, all of the CAWS and the LDR will be affected by these events which will either be decided by a federal court, or by Congress. When the Agency filed this matter, the electric fish barrier was a one sentence mention, and a much smaller version of what is now present was operating immediately downstream of the Lemont Refinery. The Corps of Engineers and the Coast Guard have since that time expanded the electric fish barrier and established both a Safety Zone (a/k/a “Black Zone”) and a Regulated Navigation Area. The latter was just finalized in November 2011. Now, the international body charged with developing policy for the protection of the Great Lakes for Canada and the United States has issued a report recommending a “**physical**

separation” of Lake Michigan from the Illinois River System in the CAWS.¹ Not only is it the prestigious Great Lakes Commission who authored the Report (Appendix 5), but both Governor Quinn and Mayor Emmanuel endorsed it. Thus, just over a hundred years after Chicago took the bold step to divert the Chicago River and the sanitary wastewater away from Lake Michigan, the City and the State are now seeking to cut the CAWS into at least two distinct drainage areas.

These are interesting times.

We are disappointed that the Agency did not even mention the report, and has even tried to exclude evidence relating to Aquatic Invasive Species (“AIS”). In their comments, the environmental groups mention the report in the context of how the increased presence of Lake Michigan water in the South Branch of the Chicago River would improve water quality in that segment.² Clearly the Environmental Groups expect that a physical separation measure, other than the “Near Lake” physical separation, will be chosen. They also anticipate the Report will have an effect on the CAWS. Midwest Generation did lay out for the Board the allegations of harm to aquatic life that is being asserted by the State of Michigan and other parties who are attacking the present configuration of the CAWS, including stark language from the Seventh Circuit Court of Appeals about the threat posed by Asian Carp.³ Those assertions are a driver for the City and the State to do something with the CAWS beyond the electric fish barrier, and perhaps change the water flow and hydrology of the CAWS. The only point the Lemont Refinery would make now here is that the Board cannot ignore these existing, and potential, uses of the CAWS to inhibit or halt the spread of AIS between Lake Michigan and the Illinois River

¹ See Appendix 5 to Final Pre-First Notice Comments on Subdocket C by the Lemont Refinery (hereafter “Lemont Refinery Comments”) (PC# 1278).

² See Environmental Groups’ Post Hearing Comments Regarding Aquatic Life use Designations for the Chicago Area Waterways System and Lower Des Plaines River, p. 24 at fn 9 (hereafter “Environmental Groups”).

³ Midwest Generation’s Final Comments, at 53, hereafter “Midwest Generation”.

System. The electric fish barrier is already in place; and over the next decade or two, there may also be a physical separation implemented.⁴ In that period of time the CAWS, could be transformed and the assumptions made at the beginning of this rulemaking—that all stormwater and diverted lake water, will flow down the CSSC and into the LDR and the Illinois River System—may be a relic of another era.

I. THE CLEAN WATER ACT REQUIRES RECOGNITION OF EXISTING USES: ONE USE OF THE LOWER CSSC IS TO EMPLOY THE ELECTRIC FISH BARRIER TO PREVENT AQUATIC INVASIVE SPECIES FROM INVADING LAKE MICHIGAN. IN TIME, A PHYSICAL BARRIER MAY BE DEPLOYED.

The law governing the designation of water quality standards and uses requires the designation of uses before water quality standards are put into place. “Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the *water quality criteria for such waters based upon such uses.*”⁵ As a result, the purpose of this Subdocket C is solely to assess what uses apply to the navigable waters under consideration. The Lemont Refinery respectfully submits that one such use is the electric fish barrier and associated Regulated Navigation Area (RNA), as set out by the United States Army Corps of Engineers and the Coast Guard, to prevent the spread of AIS. The Great Lakes Commission proposes a physical barrier be installed at some point in the Lower CSSC.⁶

A. The Agency’s Arguments Against the Electric Fish Barrier as an Existing Use Ignore the Evidence and the Law.

⁴ This will not occur in only a few years. We would tend to agree with the Environmental Groups’ argument that the Board should be looking at a 10-20 year horizon. *See* Environmental Groups, at *Id.*

⁵ Sec. §303(c) of the CWA, 33 U.S.C. § 1313(c) (emphasis added).

⁶ *See* Lemont Refinery Comments, Attachment 5, at page 16.

The Agency improperly asserts that the Lemont Refinery “does not provide sufficient evidence that the aquatic-life use proposed by the Illinois EPA for the entire CSSC (Use B) cannot be attained in the 1.7 mile section [of the RNA].”⁷ While this admits that the RNA has a separate and distinct use, the Agency’s statement is also erroneous for a number of reasons.

First, the Agency neglects to recognize an established use for this 1.7 mile stretch of the Lower Ship Canal: the waters are used for an electric barrier that repels and kills fish – and other living things who may come into contact with it. This barrier is intended to keep fish from swimming through it. A human being will die in a manner of minutes of one were to fall into the waters in the RNA. It is incredible that the Agency insists there is no evidence that the barrier is harmful to aquatic life.⁸ At this stage in the hearings, as described above, the Board must only designate uses, not the standards that would attach. The Board should recognize this use.

Second, the ultimate burden is not on the Lemont Refinery but on the Agency. The Clean Water Act merely provides a rebuttable presumption, but the Agency “retains the burden to demonstrate that the waterbody is capable of attaining” the aquatic life uses it sets out.⁹ The Agency has not presented any evidence or information that the aquatic life uses it proposes could be met in the area of the electric barrier, nor could it present such an argument. The electric barrier is designed to repel fish from swimming through it. Other measures, such as the use of rotenone, actually kill fish, and other aquatic life. Millions of federal and state dollars have been spent to achieve this. The fish barrier and other measures regarding AIS are specifically non-supportive of aquatic life.

⁷ See PC# 1275, Post Hearing Comments of the Illinois EPA for Subdocket C, at 51.

⁸ See Attachment 7 hereto, which is Attachment 2 to Exhibit 285, Testimony of James Huff submitted March 25, 2009.

⁹ See e.g. PC#1277, Midwest Generation’s Final Comments, at 13-14, filed in R08-9(C) on March 5, 2012.

Third, the Agency strangely asserts that the Lemont Refinery has not provided “direct evidence that the presence of such highly localized electrified zones would prevent a much larger stream length from being able to support a fish community ...” At most, this is an argument as to the rest of the CSSC. Moreover, the direct evidence presented by the Lemont Refinery, in the form of written testimony, oral testimony, government reports, citations to the Federal Register, and citations to the Code of Federal Regulations, all establish that the RNA does not support aquatic life. This stretch of waters is 1.7 miles long, as determined by the federal regulations; the Lemont Refinery is unable to understand how much more “highly localized” the Use C waters should be.

The Agency wants this unique, lethal stretch of water to be ignored because it “clearly took into account the uniqueness of the Lower Ship canal [sic] when it proposed CAWS and Brandon Pool Aquatic Life Use B for this section of the waterway, therefore; [sic] there is no need to establish a Use C for this segment of the CAWS.” The Lemont Refinery respectfully disagrees, noting that the Agency did *not* take into account the uniqueness of the electric barrier, whose scale and electric output has been increased substantially since the Agency’s 2002 report.¹⁰ The Agency went so far as to strongly oppose the presentation of testimony and evidence concerning Asian Carp and AIS, lest the Board consider such evidence in setting the uses and standards in this proceeding.¹¹

¹⁰ The Agency’s 2002 petition has one sentence hinting at the existence of the barrier, as it existed at that time. In that petition and in every filing since then, the Agency has neglected to discuss the barrier, its impact on aquatic life in the narrow stretch of waters surrounding that barrier, or how that barrier should be addressed in this rulemaking.

¹¹ The Lemont Refinery further notes the Environmental Groups’ Final Comment, in which they argue that the mere “presence of invasive species in a system is no reason to adopt use designation goals that allow weaker water quality criteria.” Whether that argument stands or not, it is not the argument put forward here. The Lemont Refinery argues that the presence of an

It is undisputed that one use of the Lower CSSC is to create an inhospitable body of water by which AIS would be prevented from traveling across it. This existing barrier is located in a stretch of the Lower CSSC designated and managed by the United States Coast Guard as a Regulated Navigation Zone.¹² This segment has a critical use in the fight against AIS; the Board is obligated to recognize this use.¹³

B. The Great Lakes Commission Report Recognizes and Supports the use of the Ship Canal as a Barrier (either as the electric barrier or as a physical barrier) Preventing the Passage of Aquatic Invasive Species through the CAWS.

In its Final Comments, the Lemont Refinery submitted a recent report issued by the Great Lakes Commission for the Board's Attention.¹⁴ The Great Lakes Commission is an interstate compact established in 1955 whose members are the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, along with associate members consisting of the Canadian Provinces of Ontario and Québec. The United States Congress granted consent to the compact in 1968, whose purpose is to "carry out the terms and

electric barrier (and other measures to deter AIS) is a use of the water that is directly at odds with any designated use or water quality standards that are designed to promote the lives of those same fish. The record clearly shows that Asian carp displace indigenous species and are rapidly approaching Lake Michigan. In the words of the Seventh Circuit Court of Appeals: "It is especially chilling to recall that in just 40 years the fish have migrated all the way from the lower Mississippi River to within striking distance of the lakes and have come to dominate the ecosystem in the process." *State of Michigan v United States Army Corps of Engineers*, 667 F.3d 765 at 17 (7th Cir. 2011); Attachment 3 to Lemont Refinery Comments.

¹² See 76 Fed Reg 77121-77125 (December 12, 2011), adopting 33 CFR 165.923, (included as Attachment 2 to Lemont Refinery Comments).

¹³ We note and support the arguments advanced by Corn Products International, Inc., that the entire CSSC should be designated a Use C. (See PC# 1281 at 11-14.) The focus of the Lemont Refinery here extends beyond all those reasons and with a particular focus on AIS and the RNA. Of course, although the District has "settled" with the Environmental Groups, the information it has submitted on the appropriate uses of the CSSC are still part of the Record here.

¹⁴ See Attachment 5 to the Lemont Refinery Comments.

requirements of the Great lakes Basin Compact.”¹⁵ The Commission has set policy for the Great Lakes for decades; for example its recommendations have led to significant regulatory changes, such as the Great Lakes Initiative to reduce toxins in the Great Lakes.

The executive committee that issued the Commission Report was made up of Illinois Governor Pat Quinn, Chicago Mayor Rahm Emanuel, and Grand Rapids, and Michigan Mayor George Heartwell. These three elected representatives, along with the greater membership of the Commission, strongly recommend physical separation to prevent current and future aquatic invasive species (AIS) from traveling between the Great Lakes and the Mississippi River basins.¹⁶ The Report strongly endorses the idea that a primary use of the waters between Lake Michigan and the Illinois River is to serve as a barrier preventing the passage of Aquatic Invasive Species. One of the potential locations for that physical barrier is at a place in the Lower CSSC.

This recommendation for a physical barrier is a fundamental shift in how Chicago and Illinois approach the CAWS. Instead of a system of water to carry urban and sanitary wastewater away from the Lake Michigan, now some, if not all of this stormwater, sanitary wastewater and even industrial wastewater, may be diverted back into the Lake. While the Report raises staggering questions relating to engineering, social and cost issues, the Board should recognize that one of the uses of the Lower CSSC, and not just of the electric fish barrier, is to provide a barrier against the movement of AIS between the Lake and the Illinois River system.¹⁷ The Report acknowledges that the electric fish barrier is a key element to battle the

¹⁵ See <http://www.glc.org/about/> (last visited March 15, 2012).

¹⁶ See Commission Report at 4.

¹⁷ The Lemont Refinery, does not know if the barrier would be upgradient, or down gradient of it. Will the flow in the Lower CSSC at the Refinery still be 70% wastewater at the Refinery? Or

spread of AIS; it also asserts that a physical structure, perhaps located somewhere on the Lower CSSC, will be needed.

II. THE AGENCY'S PROPOSED "USE B" IS VAGUE AND DOES NOT CONFORM TO THE EVIDENCE AS TO THE USES OF THE LOWER CSSC

In this section, the Lemont Refinery responds to regulatory language submitted by the Agency, and by others in their Final Comments. As noted in our Final Comments, the Agency's "Use B" is an upgrade in uses. The witnesses called by the Refinery testified to that effect.¹⁸ That is not surprising, given the fact that the Agency has proposed the **very same water quality standards for each of the "Uses"** which it has proposed.

"The standards presented ...are designed to protect aquatic life from acute and chronic toxicity resulting... In each case, the water quality standards being proposed are the same for the three aquatic life uses applicable to the waterways being addressed in this proposal."¹⁹

The Agency is clearly intending an "upgrade" of the uses of the Lower CSSC, but has not described what has changed in those prior uses.

In its "Post Hearing Comments on Docket C," the Agency asks the Board to make two "editorial" changes to 303.204, "Chicago Area Waterway System and Lower Des Plaines River".²⁰ The Lemont Refinery objects to the second "edit": the insertion of the phrase "*and the highest quality aquatic life and wildlife that is attainable*". That phrase is meaningless as a definition and it does not describe the uses of this water system. It applies to both "Use A" and

will it be higher due to the shut down of the Fisk and Crawford generation stations? What natural flow will there be? These will be issues that will likely arise in Docket D.

¹⁸ See Lemont Refinery Comments at 17-22; e.g. Exhibit 437 at 4-6; Transcript of March 9, 2011, hearing at 35-36; Exhibit 420 at 9-10.

¹⁹ See Statement of Reasons, page 63.

²⁰ See Agency Comments at 6.

“Use B” waters. But the record is clear as to the great diversity even among even the “Use B” waters. What does this phrase mean when even the stream segments denominated as “Use B waters” are so broad as to encompass the Regulated Navigation Area of the Lower CSSC, as well as the Brandon Pool, the UDIP, and the Cal-Sag channel. We urge the Board to be precise in these definitions and not insert language as to which one must guess what it means.

We would like to make a final comment, to anticipate what others may say in their replies. The Lemont Refinery selected the terminology “Use C” simply to demarcate that the Lower CSSC (or the RNA) is not like any of the other water body segments in this proceeding. There is ample justification NOT to change the regulations applicable to the Lower CSSC, including its uses. Our point is simply that there is no justification in the record for an “upgrade” to the aquatic life uses for the Lower CSSC and particularly the RNA. In reality, not making a change in the regulations, as they apply to the Lower CSSC, including keeping the existing language in 303.204, is quite justified. The Board could then establish the new “Use A” and “Use B” for aquatic life for those segments for which an upgrade has been justified, and leave the Lower CSSC to another day—perhaps sometime after the physical barrier for AIS has been set and to be implemented.

For each of these reasons, the evidence does not support the “Use B” for the Lower CSSC as that regulatory language is proposed by the Agency.

III. CONCLUSION

The Lemont Refinery reiterates its proposal that at least the area of the RNA (and preferably the entire Lower CSSC) be set aside as a separate use category, or set aside under a separate subdocket. The Agency does not oppose this approach when dealing with Bubbly

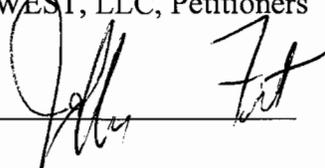
Creek, and it even filed a separate Response noting its non-opposition.²¹ As explained in the Lemont Refinery's Final Comments, the Lower CSSC in general, and the RNA area in particular, are "less natural than most (if not all) of the other segments of the CAWS and Lower Des Plaines River," to quote the language the Agency used in justifying a separate subdocket to address the South Fork of the South Branch Chicago River (also known as "Bubbly Creek").²²

WHEREFORE, the Lemont Refinery respectfully requests that the Board designate a Use C for the Lower CSSC. In the alternative, the Board should designate the RNA and the Black Zone, defined as the area of the Chicago Sanitary and Ship Canal from River Mile 295.5 to River Mile 297.2, as a separate aquatic use area. Such a designation would recognize the existing use of this stretch of the Lower CSSC and prevent any actions that might negatively impact the efficacy of the electric barrier.

Dated: March 19, 2012

Respectfully submitted,

CITGO PETROLEUM CORPORATION, and
PDV MIDWEST, LLC, Petitioners

By: 

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

²¹ See Response of the IEPA, in R08-9(C), filed on March 12, 2012.

²² See Reply of the Illinois Environmental Protection Agency, ¶11, Filed in R08-09(C) on Jan. 30, 2012.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 19th day of March, 2012, I have served electronically the attached Response to the Final Pre-First Notice Comments on Subdocket C and Notice of Filing upon the following person:

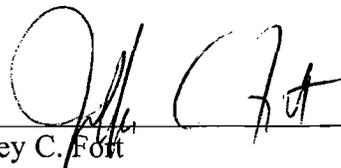
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James R. Thompson Center
100 West Randolph Street - Suite 11-500
Chicago, IL 60601

and by U.S. Mail, first class postage prepaid, to the following persons:

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

Deborah J. Williams, Assistant Counsel
Stefanie N. Diers, Assistant Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

The participants listed on the attached
SERVICE LIST



Jeffrey C. Fort

SERVICE LIST

Frederick M. Feldman, Esq.
Louis Kollias
Margaret T. Conway
Ronald M. Hill
Metropolitan Water Reclamation District
100 East Erie Street
Chicago, IL 60611

Roy M. Harsch
Drinker Biddle & Reath
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606-1698

Claire Manning
Brown Hay & Stephens LLP
700 First Mercantile Bank Blvd.
205 S. Fifth St., P.O. Box 2459
Springfield, IL 62705-2459

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

James L. Daugherty-District Manager
Thorn Creek Basin Sanitary District
700 West End Avenue
Chicago Heights, IL 60411

Jessica Dexter
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601

Robert VanGyseghem
City of Geneva
1800 South St.
Geneva, IL 60134-2203

Andrew Armstrong
Matthew J. Dunn-Chief
Susan Hedman
Office of the Attorney General
Environmental Bureau North
69 West Washington Street, Suite 1800
Chicago, IL 60602

Bernard Sawyer
Thomas Grant
Metropolitan Water Reclamation District
6001 W. Pershing Road
Cicero, IL 60650-4112

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

Alec M. Davis
Katherine D. Hodge
Matthew C. Read
Monica T. Rios
N. LaDonna Driver
Hodge Dwyer & Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705-5776

Tracy Elzemeyer
American Water Company
727 Craig Road
St. Louis, MO 63141

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

Frederick D. Keady, P.E.-President
Vermillion Coal Company
1979 Johns Drive
Glenview, IL 60025

Cindy Skrukud
Jerry Paulsen
McHenry County Defenders
110 S. Johnson Street, Suite 106
Woodstock, IL 60098

Mark Schultz
Navy Facilities and Engineering Command
201 Decatur Avenue Building 1A
Great Lakes, IL 60088-2801

W.C. Blanton
Husch Blackwell LLP
4801 Main St., Suite 1000
Kansas City, MO 64112

Irwin Polls
Ecological Monitoring and Assessment
3206 Maple Leaf Drive
Glenview, IL 60025

Dr. Thomas J. Murphy
2325 N. Clifton St.
Chicago, IL 60614

James E. Eggen
City of Joliet,
Director of Public Works & Utilities
921 E. Washington St.
Joliet, IL 60431

Cathy Hudzik
City of Chicago
Mayor's Office of Intergovernmental Affairs
121 N. LaSalle St., Room 406
Chicago, IL 60602

Kay Anderson
American Bottoms RWTF
One American Bottoms Road
Sauget, IL 62201

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

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

Beth Steinhorn
2021 Timberbrook
Springfield, IL 62702

Bob Carter
Bloomington Normal Water Reclamation
P.O. Box 3307
Bloomington, IL 61711

Lyman Welch
Alliance for the Great Lakes
17 N. State Street, Suite 390
Chicago, IL 60602

Tom Muth
Fox Metro Water Reclamation District
682 State Route 31
Oswego, IL 60543

James Huff-President
Huff & Huff, Inc.
915 Harger Road, Suite 330
Oak Brook, IL 60523

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

Kenneth W. Liss
Andrews Environmental Engineering
3300 Ginger Creek Drive
Springfield, IL 62711

Albert Ettinger
Environmental Law & Policy Center
53 W. Jackson, Suite 1664
Chicago, IL 60604

Kristy A.N. Bulleit
Hunton & Williams LLC
1900 K Street, NW
Washington, DC 20006

Susan M. Franzetti
Nijman Franzetti LLP
10 South LaSalle St.
Suite 3600
Chicago, IL 60603

Vicky McKinley
Evanston Environment Board
223 Grey Avenue
Evanston, IL 60202

Olivia Dorothy
Office of Lt. Governor
Room 414 State House
Springfield, IL 62706

Ann Alexander, Senior Attorney
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606

ATTACHMENT 7

(Exhibit 285, Attachment 2)

ATTACHMENT 2

FISH BARRIER HAZARDS



**U.S. ARMY CORPS OF ENGINEERS
ELECTRIC FISH BARRIER
HAZARDOUS VOLTAGES
PRESENT IN CANAL WATERWAY**

BOATERS ARE ADVISED TO EXERCISE EXTREME CAUTION WHILE NAVIGATING THE CHICAGO SANITARY & SHIP CANAL BETWEEN THE POWER PLANT TO THE PIPELINE ARCH(MILE MARKER 296.1 to 296.7)

HIGH RISK OF SERIOUS INJURY OR DEATH

PRECAUTIONS

DO NOT - Enter the water or place hands or feet in the water in the restricted area for any reason.

PLEASE - Closely supervise children and pets or send them below deck while in the restricted area.

DO NOT - Linger or attempt to moor in the restricted area.

MAN OVERBOARD PROCEDURES

DO NOT - Enter the water to attempt a rescue.

USE - A non-metallic oar or similar item to pull the victim onto your boat as quickly as possible.

NOTIFY - Authorities by calling 9-1-1 or by broadcasting a distress call on VHF Channel 16.



NEWS RELEASE



U.S. Army
Corps of Engineers
Chicago District

Contact: Lynne Whelan
Telephone: (312) 846-5330
E-Mail: lynne.e.whelan@usace.army.mil

Lt. Corey Gardner-Meeks
(630) 986-2155
corey.a.gardner-meeks@uscg.mil

Army Corps and Coast Guard Kick Off Barrier Safety Campaign

March 27, 2008 – The U.S. Army Corps of Engineers and U.S. Coast Guard will begin a campaign April 1st to advise boaters how to safely transit over the electric fish barrier in the Chicago Sanitary and Ship Canal near Romeoville, IL. A portion of the canal near the barrier system has been a Regulated Navigation Area for passage of vessels since 2005.

The Corps of Engineers and Coast Guard have expanded their safety information campaign following the findings of a draft report that indicates the effect of the barrier's electric field on a person immersed in the electrified water could result in serious injury or death. The Corps commissioned the report to determine the potential effects of the barrier's electric field should a person fall into the water.

"Public safety is our highest priority. Although the draft report indicates a wide array of possible impacts, it does show that serious injury or death is possible in worst case scenarios. Therefore, we feel that it is critically important to make sure that people know how to pass through the area safely. The safest thing is to keep people out of the water entirely," said Col. Jack Drolet, commander of the U.S. Army Corps of Engineers, Chicago District, the office responsible for building and operating the electric barrier system.

The final report will not be available until later this Spring, but the Corps of Engineers and Coast Guard have decided to begin an expanded education and information campaign now in order to reach people before the start of the Chicago area boating season.

“Reaching out to commercial and recreational users we initiated a workgroup to address the hazard of a person falling in the water within the fish barrier,” said CDR Paul Mehler III, Commanding Officer of the U.S. Coast Guard, Marine Safety Unit Chicago. This partnership has resulted in a campaign involving distributing informational flyers at area locks, boat launches, bait shops, and fuel docks, and working with local and national boating groups to pass the information to as many boaters as possible. The key message is to inform boaters to use extreme caution while traveling in the Sanitary and Ship Canal between River Miles 296.1 to 296.7. This area is bounded approximately by the power plant near the Romeo Road bridge and an aerial pipeline arch.

While traveling through the area, boaters are advised to take the following precautions:

- Do not enter the water or place hands or feet in the water for any reason.
- Be sure to closely supervise children and pets or send them below deck if possible.
- Do not linger or attempt to moor in the area.

The Corps of Engineers and Coast Guard are working with representatives from commercial navigation and recreational boating groups and others to find ways to enhance safety features in the barrier area.

An electric barrier has been operating in the Sanitary and Ship Canal since 2002. The purpose of the barrier system is to stop the movement of invasive species of fish, such as the Asian carp, between the Great Lakes and Mississippi River basins.

For additional information pertaining to the fish barrier please visit www.lrc.usace.army.mil/safety.

-30-

For additional information pertaining to the fish barrier operation, please contact Lynne Whelan with the U.S. Army Corps of Engineers, Chicago District. For information regarding vessel safety, please contact Lt. Corey Gardner-Meeks with the U.S. Coast Guard Marine Safety Unit Chicago. Point of contact information is provided on the first page of this press release.



Chicago Sanitary & Ship Canal Electrical Hazard Area

