

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9 (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: Mr. John T. Therriault	Ms. Marie E. Tipsord
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
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(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **EXXONMOBIL'S FIRST NOTICE COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: November 21, 2014

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CERTIFICATE OF SERVICE

I, Matthew C. Read, the undersigned, hereby certify that I have served the attached **EXXONMOBIL'S FIRST NOTICE COMMENTS** upon:

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/s/ Matthew C. Read
Matthew C. Read

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

WATER QUALITY STANDARDS AND)	
EFFLUENT LIMITATIONS FOR THE)	R08-9 (Subdocket D)
CHICAGO AREA WATERWAY SYSTEM)	(Rulemaking – Water)
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ADM. CODE PARTS 301, 302, 303 and 304)	

EXXONMOBIL'S FIRST NOTICE COMMENTS

NOW COMES EXXONMOBIL OIL CORPORATION (“ExxonMobil”), by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the October 3, 2014 Hearing Officer Order, submits the following comments to the Illinois Pollution Control Board’s (“Board”) First Notice Proposed Rule.

I. INTRODUCTION

On September 18, 2014, the Board issued First Notice of the Proposed Rule containing the water quality standards (“WQS”) for the Chicago Area Waterways System (“CAWS”) and Lower Des Plaines River (“LDPR”).¹ Subdocket D was established to address WQS and criteria.² WQS are driven in part by aquatic life uses (“ALU”), which were adopted by the Board in Subdocket C. *See id.* In Subdocket C, the Board signaled to participants that the Upper Dresden Island Pool (“UDIP”), the stretch of water into which ExxonMobil discharges, is unique, and justifies its own unique WQS. This finding, in addition to others related to the UDIP, offers the Board flexibility when adopting WQS and rules implementing WQS for the UDIP.

¹ First Notice Proposed Rule, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code Parts 301, 302, 303 and 304*, R08-9(D) (Ill.Pol.Control.Bd., Sep. 18, 2014) (hereafter referenced and cited as “First Notice”) (rulemaking hereinafter cited as “R08-9()”).

² Board Order, R08-9 (Ill.Pol.Control.Bd. Mar. 18, 2010).

At hearing, in written testimony, and in Pre-First Notice Comments, ExxonMobil documented conditions in the UDIP that warrant consideration when adopting WQS and regulatory relief mechanisms in Subdocket D. These conditions, in addition to technical feasibility issues and Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”) implementation practices, highlight the need to scrutinize certain standards proposed by Illinois EPA and, where appropriate, adopt alternative proposed standards. In addition, these circumstances highlight the need for regulatory relief mechanisms so dischargers are not unnecessarily impacted. ExxonMobil appreciates the Board’s acknowledgement of these unique conditions in its First Notice proposal. The Board recognized and attempted to address many of the challenges impacting dischargers to these waterways. However, ExxonMobil stresses the need for revisions to the Board’s proposal. ExxonMobil describes its concerns and requested revisions to the Board’s First Notice proposal in more detail below.

To summarize, ExxonMobil begins by addressing the Board’s proposed chloride standards for the CAWS and LDPR.³ The record contains information that indicates that the chloride standard proposed by Illinois EPA will be exceeded during winter months due to the use of calcium chloride to deice roads in the area. Industrial sources and point source discharges are not the primary source of elevated chloride levels, and there is no immediate deicing replacement for calcium chloride. The Board is proposing a winter chloride standard for the Chicago Sanitary and Ship Canal (“CSSC”) that recognizes the use of the waterway and is still protective of its ALU. It has not proposed a corresponding chloride standard for the UDIP, even though the record is clear that the UDIP is affected by elevated winter chloride concentrations that intermittently exceed the

³ The UDIP is the most downstream segment of the LDPR in the Illinois WQS.

proposed WQS. The Board has proposed to adopt an appropriate tool (best management practices for point source dischargers), which ExxonMobil supports, that will allow time for Illinois EPA to address nonpoint source discharges, the actual cause of elevated chloride levels. However, ExxonMobil continues to believe that the chloride standards for the UDIP should explicitly acknowledge and account for the existing ALU of the waterway as defined by the Board, and the source of elevated winter chloride concentrations, i.e., deicing activities that cause winter chloride concentrations in the river to exceed the proposed numeric standard.

Next, ExxonMobil addresses the feasibility and implementation of Illinois EPA's proposed mercury standard for the LDPR, including the UDIP. Similar to chloride, nonpoint source discharges are the overwhelming source of mercury in surface water, as acknowledged by Illinois EPA.⁴ Specifically, atmospheric deposition is widely viewed as the primary driver. Nevertheless, Illinois EPA currently lists the UDIP as impaired for mercury.⁵ This impairment status is based on fish tissue data and not water column data. Further complicating the situation for dischargers such as ExxonMobil, there is no known commercially available treatment process for mercury dischargers to achieve the proposed mercury standard. Other states have acknowledged the ubiquitous nature of mercury in surface water and lack of treatment options and have provided dischargers with streamlined approaches for obtaining regulatory relief. ExxonMobil urges the Board to adopt a similar streamlined approach here.

⁴ Pre-Filed Testimony of Lial F. Tischler on Behalf of ExxonMobil Oil Corporation, R08-9(D) at 23 (Ill.Pol.Control.Bd. Nov. 22, 2013) (citing Testimony of Marcia Willhite, *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)*, R06-25 (Apr. 27, 2006) (hereinafter cited as "Tischler PF Test.")).

⁵ July 29, 2013 Hearing Transcript, R08-09(D) at 50 (Ill.Pol.Control.Bd. July 29, 2013) (hereafter Jul. 29, 2013 Tr.); Illinois Integrated Water Quality Report and Section 303(d) List – 2014, available at <http://www.epa.state.il.us/water/tmdl/303d-list.html> (last accessed November 6, 2014).

Moreover, ExxonMobil supports the Board's adoption of the General Use temperature standards for the UDIP. However, the Board's proposal to establish the General Use temperature standards for the UDIP will allow upstream dischargers to jeopardize ExxonMobil's ability to obtain a mixing zone for its relatively modest thermal discharge before such dischargers comply with the temperature standard. Illinois EPA has not proposed a reliable procedure for addressing larger upstream thermal dischargers before imposing the temperature standards on downstream dischargers. As such, ExxonMobil respectfully requests that the Board adopt a regulatory relief mechanism for permitting large upstream thermal dischargers and requiring them to achieve compliance with the temperature standards before requiring compliance from downstream dischargers.

Finally, ExxonMobil supports the Board's conclusion that Illinois EPA has the authority to include conditions in National Pollutant Discharge Elimination System ("NPDES") permits to implement the best management practices ("BMP") provisions of the Federal regulations at 40 C.F.R. § 122.44(k). This is an important principle that can be utilized by Illinois EPA to assure that NPDES permits will show continuing progress toward meeting all designated uses of receiving waters while not placing unachievable limits on point sources when the vast majority of the loads of pollutants originate from nonpoint sources in a watershed. This concept, which is explicitly added to the NPDES regulations to address the chloride standards that are proposed for Subdocket D (CAWS and LDPR), is equally applicable to other pollutants including mercury and nutrients. To facilitate the use of this provision to its full potential, ExxonMobil urges the Board to

adopt the NPDES permitting standards at 40 C.F.R. § 122.44(k) in the Illinois NPDES rule.

II. THE PROPOSED STANDARDS FOR CHLORIDE

The Board is proposing to apply a chloride standard of 500 mg/L to the CAWS and LDPR (including the UDIP) at Proposed 35 Ill. Admin. Code § 302.407. First Notice at 192-194. In addition, for the CSSC only, the Board is proposing separate winter (defined as December 1 through April 30) chloride criteria of 620 mg/L to protect aquatic life from chronic toxicity and 990 mg/L to protect aquatic life from acute toxicity at Proposed Section 303.449. *Id.* ExxonMobil supports this proposal and believes it should also be adopted for the LDPR, including the UDIP, as well as for CAWS waters. Alternatively, ExxonMobil requests the delay of a winter chloride standard to allow for the creation of an additional subdocket to address an appropriate winter chloride standard and waterbody variance. Regardless of the Board's path moving forward with a chloride standard, ExxonMobil supports the addition of the Board's BMP provision to its NPDES regulations.

A. Setting an Appropriate Chloride Standard for the UDIP

There is ample evidence in the rulemaking record that the UDIP is subject to the same winter chloride concentration peaks that are observed in the CSSC due to the use of calcium chloride for deicing. The Board acknowledges testimony to this effect in the First Notice. First Notice at 185. And the Board has proposed adopting site-specific winter chloride standards based on the use of the United States Environmental Protection Agency's ("USEPA") 2013 standards recalculation procedures followed by Huff & Huff. *Id.* at 192-194. Although the data on the aquatic species used in the Huff & Huff

recalculation of the winter chloride criteria are not available for the LDPR, the fact that the source of the vast majority of the flow in the LDPR is from the CAWS, and particularly the CSSC, and that the LDPR is, therefore, subject to the same intermittent peaks in chloride concentration during the winter months, supports adoption of the currently proposed CSSC winter chloride criteria for all waterways immediately downstream of the CSSC. Because the winter intermittent chloride concentration spikes are a historic fact that have been occurring for many years, the existing aquatic biota in the LDPR have necessarily adapted to such variations in concentration and the concentration standards proposed for the CSSC will be protective of the aquatic life that currently inhabits the LDPR. The Board has the authority and the database in the record (as provided by CITGO Petroleum Corporation and PDV Midwest, LLC ("CITGO/PDV")) to justify adopting winter chloride criteria for the UDIP.

As an alternative, ExxonMobil continues to urge the Board to create a new subdocket for the development of a chloride standard. Illinois EPA noted that it expects violations of the proposed chloride standard during winter months and, thus, continues to work with USEPA on an approvable chloride water quality standard and approvable waterbody-specific variance that would meet the requirements of USEPA's proposed Clarifications Rule.⁶ Development of such a water quality standard and a waterbody variance require additional time and resources and, thus, should occur in a separate subdocket.

⁶ Pre-First Notice Comments of the Illinois Environmental Protection Agency for Subdocket D at 29-31, R08-9(D) (Ill.Pol.Control.Bd. Apr. 30, 2014).

B. Best Management Practices for Chloride

The Board is proposing a new rule at Section 309.141(i) that would authorize the use of BMPs for chloride management in NPDES permits in lieu of numeric water quality-based effluent limits ("WQBELs"). First Notice at 204. ExxonMobil strongly supports this proposed rule as a practical and lawful approach for assuring continued progress toward achieving compliance with the chloride criterion of 500 mg/L without requiring unachievable numeric WQBELs for point source dischargers, which the record clearly shows are not the cause of the winter exceedances of the chloride criterion. As the Board points out in the First Notice, USEPA regulations at 40 C.F.R. § 122.44(k) authorize the use of BMPs in NPDES permits when authorized under Section 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. § 1342(p), for the control of storm water discharges, when numeric limits are infeasible, or when such practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA. First Notice at 202-203.

WQBELs applied to point source NPDES permits are infeasible as a means for assuring compliance with the chloride criterion in the winter months because point sources are not the cause of the intermittent exceedances of the 500 mg/L criterion in the waterway. Numeric WQBELs set at the 500 mg/L standard (i.e., at the WQS with no mixing zone) would be economically unreasonable and would have no measurable effect on the winter instream exceedances of the chloride standard. Furthermore, by requiring point sources to implement BMPs to control their contributions of chloride to the CAWS and LDPR during the winter months to the extent practicable, the purposes and intent of

the CWA are carried out because the BMPs will reduce point source contributions of chloride.

III. THE BOARD'S PROPOSED MERCURY CRITERION

The Board proposes to adopt a human health-based criterion for total mercury of 12 ng/L at Proposed Section 302.407(f). First Notice at 183. ExxonMobil could support adoption of this criterion if the Board also adopts a streamlined relief mechanism.

ExxonMobil supports the revision to a 12-month rolling average.

A. Compliance Determination for Human Health-Based Criteria

The Board has proposed to adopt Illinois EPA's revised method for determining compliance with the human health-based water quality criteria at Section 302.407(d). The Board proposes to adopt Section 302.407(c), which would determine compliance with the numeric criteria that are to protect human health using a 12-month rolling average of no fewer than eight samples collected in a manner that is representative of the sampling period. First Notice at 183. Notably, this proposal recognizes concerns of participants about Illinois EPA's initial proposal, which determined compliance based on when the stream flow "is at or above the harmonic mean flow." First Notice at 182-183. In particular, the Board recognized the claim by CITGO/PDV that re-suspension of sediment may be occurring during high flow periods, leading to the potential for uncontrollable exceedances in the water column. *Id.* ExxonMobil supports the proposed method for determining compliance with the human health-based criteria and removal of the flow provision. These criteria are calculated based on allowable long-term average dosages of the regulated constituents and, therefore, the use of a 12-month rolling

average of multiple representative samples is scientifically justified to determine compliance with the criteria.

B. Relief Mechanisms for Mercury

The Board declined to adopt regulatory relief from the human health-based mercury criteria as advocated by ExxonMobil. First Notice at 183. The Board explained that the record did not contain “sufficient information on the water quality for mercury in the UDIP” to conclude that relief is necessary. *Id.* ExxonMobil agrees that there is no water column data in the rulemaking record for the UDIP showing exceedance of the proposed 12 ng/L standard on an annual average basis. Nevertheless, ExxonMobil remains concerned that Illinois EPA will use fish tissue data to make permitting decisions that should be based on water column data. As the rulemaking record clearly documents, the mercury sources to the UDIP are virtually 100% due to nonpoint sources, and WQBELs for point sources would have virtually no effect on the receiving water mercury loadings but could be very burdensome. Tischler PF Test. at 23-24.

Notwithstanding the existence of water column data, ExxonMobil continues to stress that regulatory relief is appropriate, in the form of streamlined adjusted standard procedures, or multi-discharger or waterbody variance procedures for mercury similar to those implemented by most Great Lakes states. *See* Tischler PF Test. at 24, Exhibit E. If the Board believes that it is inappropriate to adopt such variance procedures in these proceedings, ExxonMobil urges the Board to consider a separate rulemaking, preferably on a statewide basis, to adopt such procedures for mercury given that point sources are not the sources of the majority of mercury discharges and that the total maximum daily load (“TMDL”) process has proven to be too slow and cumbersome to provide the

necessary nonpoint source controls to reduce mercury concentrations in fish tissue in any reasonable amount of time. All of the other Great Lakes states have recognized this problem and have addressed it through either variance procedures (e.g. Indiana, Ohio, Wisconsin, and Michigan) or TMDL-based permitting methods (i.e. Minnesota and New York). Tischler PF Test. at Exhibit E.

IV. TEMPERATURE CRITERIA

The Board proposes to adopt the General Use thermal standards for the UDIP at Proposed Section 302.408(e). First Notice at 212. ExxonMobil understands and supports the Board's decision to propose adoption of this temperature standard for the UDIP as opposed to the Illinois EPA's proposal. ExxonMobil agrees with the Board's conclusion that Illinois EPA should not adopt segment-specific criteria that are more restrictive than the General Use standards that meet the CWA goals, particularly since General Use Standards are applicable downstream of the UDIP. ExxonMobil also agrees with the Board's decision to delay implementation of the standards. Nevertheless, large upstream dischargers still necessitate a regulatory relief mechanism for smaller dischargers.

ExxonMobil also supports the inclusion of excursion hours in the proposed rule that recognize that short-term variations in temperature may occur without causing permanent harm to the aquatic life because avoidance is a natural response of fish to short-term temperature increases. First Notice at 212. The General Use thermal standards at Section 302.211 authorize excursion hours, and there is no scientific or regulatory basis in the record to eliminate the applicability of this provision to the UDIP.

A. Temperature Criteria Implementation

ExxonMobil supports the proposed thermal standards for the UDIP. But the concerns expressed in our earlier comments and testimony remain. Specifically, the temperatures in the UDIP upstream of the ExxonMobil discharge are impacted by upstream thermal discharges that have historically resulted in elevated temperatures in the UDIP. These upstream thermal impacts could preclude ExxonMobil from obtaining a mixing zone, as allowed by the Board's rules, until such time as the upstream dischargers are fully compliant with the water quality standard.

The Board is proposing to delay the effective date of the General Use temperature standards for the UDIP for eighteen months following adoption of the final rule. ExxonMobil supports providing this additional time for Illinois EPA to work with the major thermal effluent dischargers and develop schedules for compliance with the proposed standards. First Notice at 214. However, given the likely need for some upstream dischargers to install control equipment to comply with the proposed thermal standard, we do not believe that an 18-month delay is sufficient to assure that the UDIP will comply with the proposed temperature standards.

Prior to upstream compliance, thermal dischargers on the UDIP will be in jeopardy of receiving temperature limitations in NPDES permits in the next permit cycle that cannot be met immediately. In the case of downstream thermal dischargers, such as ExxonMobil, if temperature limits incorporating General Use temperature standards (or stricter) were placed in their renewed permits, assuming that they could not be granted mixing zones because the river would not meet the WQS, they would be forced to install sufficient cooling, at great expense, to achieve the WQS at end-of-pipe. Illinois EPA

acknowledges that a small downstream discharger may not be granted a mixing zone if upstream waters are not meeting WQSs due to a larger upstream discharger.⁷

Illinois EPA's witness, Mr. Twait, has acknowledged in testimony that it would be unfair or unwise to implement revised thermal standards in permits for downstream facilities with a thermal discharge before addressing larger upstream dischargers. Sept. 23 Tr. at 41. To address this concern, the Agency has considered a type of cascading implementation of the temperature standards that would address the major upstream thermal sources first. *Id.* at 40-41. However, Mr. Twait acknowledges that this approach raises some concerns. For example, different dischargers have different renewal application deadlines. *Id.* at 41. And it is not clear how an NPDES permit modification of a downstream discharger would further disrupt this process. *Id.* at 40-42, 48.

In addition, current regulatory relief extended to Midwest Generation will not relieve its generating stations from the newly adopted standards in the UDIP. Once the Agency modifies the Midwest Generation NPDES permit, the WQS would have to be met at the edge of the mixing zone unless further relief is granted. Jul. 29 Tr. at 36-37. Adjusted Standard 96-10 applies to discharges from three Midwest Generation operating stations – Will County, Joliet 9, and Joliet 29. *Id.* at 38. The Will County station would have to meet the Use B temperatures outside of its mixing zones. *Id.* at 39. Similarly, the Joliet 9 and Joliet 29 stations would similarly have to meet UDIP thermal standards at the edge of the mixing zone.

Therefore, ExxonMobil is concerned that the existing regulatory authority to cascade implementation is unclear and imperfect. Although compliance schedules are

⁷ September 23, 2013 Hearing Transcript, R08-09(D) at 40-46 (Ill.Pol.Control.Bd. Sept. 23, 2013) (hereafter "Sept. 23 Tr.").

available for such WQBELs, these would be inadequate if the major upstream sources could not comply within the typical 3 to 5 year schedule allowed, which is probable in the case of the two Joliet power stations.

Because of this, if the Board adopts the proposed UDIP ALU temperature standards that are equal to the General Use standards, then it should also build in regulatory relief for downstream dischargers. This could take the form of a demonstration such as that required by Section 302.211(f) *and* a clarification that until such a demonstration is made and implemented, other thermal dischargers that are impacted by such a discharger need only comply with previously permitted limits. Single discharger variances are another alternative, but they would be cumbersome. These would require an individual hardship showing and, according to USEPA, a showing that it is not feasible to attain the designated use for one of the reasons specified at 40 C.F.R. § 131.10(g).⁸ Given the interrelationship between thermal dischargers and multiple dischargers that can potentially be impacted, a waterbody-wide regulatory mechanism in the WQS itself is most appropriate.

B. Cold Shock

The Board is declining to adopt Illinois EPA's cold shock provisions for the CAWS and LDPR, including the UDIP. First Notice at 213. ExxonMobil supports this decision because, as Mr. Twait has stated in the record, Illinois EPA has never identified cold shock as occurring in the UDIP or, for that matter, any of the surface waters that will be subject to the Subdocket D rule. *Id.* The cold shock provision that was included in

⁸ December 17, 2013 Hearing Transcript, R08-09(D) at 33 (Ill.Pol.Control.Bd. Dec. 17, 2013); Letter from Susan Hedman, USEPA Region 5 to John Kim, Illinois EPA (Mar. 19, 2013).

Illinois EPA's Pre-First Notice proposal was not scientifically justified, and the Board's deletion of this provision from the Proposed Rule is appropriate.

V. BEST MANAGEMENT PRACTICES

The Board has discussed how the Federal BMP regulations at 40 C.F.R. § 122.44(k) are applicable to control point source discharges of pollutants in NPDES permits in cases where point sources contribute minor quantities of such pollutants to waterways in which nonpoint sources are the dominant source of such pollutants. First Notice at 201-203. The Board's proposed rule contains a specific provision to encourage the use of BMPs for chloride at Proposed Section 309.141(i). ExxonMobil supports this provision.

The Board has proposed a specific BMP provision for chloride, but it has not explicitly incorporated the 40 C.F.R. § 122.44(k) provision elsewhere in Section 309, although it clearly states that it believes that Illinois EPA can use BMPs to control other pollutants. First Notice at 203. ExxonMobil requests that the Board revise Section 309 to include the Federal BMP rule as a provision applicable to all pollutants regulated in NPDES permits. As stated earlier in these comments, BMPs are particularly useful in the regulation of mercury and nutrients in point source discharges, both of which may cause impairments of designated uses in Illinois' surface waters and both of which are primarily caused by nonpoint sources.

VI. CONCLUSION

The record demonstrates that conditions in the UDIP warrant specific consideration by the Board when adopting WQS and regulatory relief mechanisms in Subdocket D. ExxonMobil appreciates the Board's acknowledgement of this in its First

Notice Proposed Rule but asks for additional revisions. In certain cases, there are impacts from nonpoint sources and upstream thermal sources that significantly affect compliance with the proposed WQS. Since there is no immediate remedy for these upstream impacts, ExxonMobil again urges the Board to adopt regulatory relief mechanisms that recognize these impacts. In addition, ExxonMobil presented concerns related to technical feasibility and Illinois EPA implementation practices that also require further consideration before adopting the new UDIP WQS and may require special regulatory relief. ExxonMobil urges the Board to utilize the flexibility provided in its Subdocket C ALU determination for the UDIP and adopt appropriate WQS and the necessary regulatory relief mechanisms.

ExxonMobil appreciates the opportunity to provide these comments, and it respectfully requests that the Board consider these comments moving forward with the adoption of WQS for the UDIP.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: November 21, 2014

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