

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
)  
WATER QUALITY STANDARDS AND )  
EFFLUENT LIMITATIONS FOR THE ) R08-9  
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: see attached Service List

PLEASE TAKE NOTICE that on the 15<sup>th</sup> Day of March, 2010, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Reply Memorandum in Support of Motion of Environmental Groups to Sever, Open Subdocket, and Proceed to Decision Concerning Recreational Use Issues**, a copy of which is hereby served upon you.



By: \_\_\_\_\_  
Ann Alexander, Natural Resources Defense Council

Dated: March 15, 2010

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**CERTIFICATE OF SERVICE**

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Reply Memorandum in Support of Motion of Environmental Groups to Sever, Open Subdocket, and Proceed to Decision Concerning Recreational Use Issues** on all parties of record (Service List attached), by depositing said documents in the United States Mail, postage prepaid, from 227 W. Monroe, Chicago, IL 60606, before the hour of 5:00 p.m., on this 15<sup>th</sup> Day of March, 2010.



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Ann Alexander, Natural Resources Defense Council

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**REPLY MEMORANDUM IN SUPPORT OF MOTION OF ENVIRONMENTAL GROUPS TO SEVER, OPEN SUBDOCKET, AND PROCEED TO DECISION CONCERNING RECREATIONAL USE ISSUES**

**Preliminary Statement**

The Environmental Groups<sup>1</sup> submit this reply memorandum in support of their motion to sever the recreational use issues in this proceeding into a separate subdocket, and to proceed to decision on those issues. The Groups note, in the first instance, that no party responding to the motion argued specifically against creation of a separate subdocket for the substantively distinct recreational use issues (subpoint A of the initial motion), but rather confined their arguments to reasons why the Board should not proceed immediately to decision on these issues instead of waiting for conclusion of the UIC epidemiological study (subpoints B and C of the initial motion). Creation of a subdocket is clearly beneficial, regardless of when the Board opts to consider and decide the recreational use issues. Since the request for a separate subdocket is uncontested, this reply memorandum addresses solely the question of timing.

In the initial motion, the Environmental Groups explained why the Board ought not delay a decision concerning disinfection pending completion of various studies, including the UIC epidemiological research (or “CHEERS” study). The motion – supported by testimony from the Groups’ two epidemiology experts – made clear that, while the UIC epidemiological study may

<sup>1</sup> Abbreviations in this reply memorandum are defined in the initial motion unless otherwise noted.

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well be useful down the road to IEPA and the Board in establishing instream criteria and determining whether designated uses are being adequately protected, it is inherently insufficient to overcome the well-established understanding that disinfection is fundamentally necessary to protect public health.

Rather than actually addressing this critical distinction, or any of the specific bases presented by the Environmental Groups and their experts as to technical limitations in the design of the study and epidemiological research overall, the District opts for a straw man. The District's argument boils down to (i) snippets of quotation from the Environmental Groups' epidemiologists expressing strong support for the quality of the study and its overall usefulness as a scientific tool, presented in support of (ii) an argument that the UIC study therefore ought not be "ignored" by the Board.

It is clearly true that the Environmental Groups and their experts have consistently, in testimony and in this motion, made clear that the UIC study is excellent science, and that it may well contribute (along with many other sources of information) to an understanding of the CAWS down the road as regulatory protection is enhanced and refined over time. The specific question on this motion, however, is whether there is *any* potential outcome of the UIC study that could legitimately support a decision by the Board not to require disinfection in the first instance. The answer to that question – for reasons laid out in detail in Environmental Groups' initial motion and not addressed by the District – is clearly no. There is therefore no reason not to proceed to decision on that initial question now.

The District also strains to argue that the recreational use issues must be further delayed on account of an unarticulated relationship between Asian carp management and recreation. As the District 1) was well-aware of proposed measures to manage Asian carp yet failed to raise the

issue in hearings on use designation, and 2) has not identified information relevant to recreational use designation (let alone information that would require additional hearings) this argument should not hinder the Board from granting Environmental Groups' motion to sever and proceed to decision on the recreational use issue.

**Argument**

**Point I**

**THE UIC EPIDEMIOLOGICAL STUDY SHOULD NOT DELAY  
A DECISION ON RECREATIONAL USE ISSUES, SINCE A NEGATIVE  
OUTCOME WOULD NOT SUPPORT A DECISION AGAINST DISINFECTION**

In support of its motion to proceed to immediate decision, the Environmental Groups set forth the following basic facts, supported by expert testimony:

1. *IEPA proposed disinfection but deferred instream criteria pending further study.* In formulating the regulatory proposal currently being considered by the Board, IEPA made a decision to postpone setting instream bacterial water quality standards and criteria to support the new designated uses, pending completion of various scientific research studies that may bear on it, including the UIC epidemiological study. However, IEPA decided that existing evidence supports the basic initial measure of requiring disinfection, a public health protection nearly universal in large U.S. cities.
2. *Risks associated with sewage pathogens are well-known.* There is a centuries-old understanding that waterborne pathogens associated with human sewage can be hazardous to human health, hence the widespread and long-standing practice of sewage effluent disinfection.
3. *Negative results in one epidemiological study do not indicate low risk.* Since epidemiology studies are inherently an exercise in searching for a needle in a



haystack, failure to identify that needle on the first attempt has little probative value in determining the presence or absence of significant risk.

4. *The UIC epidemiological study is not designed to assess important aspects of CAWS risk.* While the UIC study is a good overall look at the CAWS, it is not designed to specifically assess the risk to particularly vulnerable sub-populations who use the CAWS, such as children. It is additionally not designed to assess secondary infection (*i.e.*, transmission of illness from an infected but asymptomatic study participant to a non-participant).

Based on these facts, the Environmental Groups' experts concluded in their testimony that, while the UIC study is interesting, soundly designed, and generally useful to inform decisions regarding water quality, a decision by the Board on the first-order question whether to require disinfection should not be delayed on account of it.<sup>2</sup> The Environmental Groups' motion was grounded in that conclusion.

The relevant question on this motion, then, is not whether the UIC study is well-designed and based on sound science (the answer is yes), or whether it may, when completed, play a role in IEPA's and the Board's future decisions regarding water quality and protection of public health (yes, again). Rather, the relevant question is this: is there *any* possible outcome of the UIC epidemiological study that would support rejection of IEPA's pending proposal to require disinfection? In other words, knowing what we know about inherent risks of sewage pathogens and benefits of effluent disinfection, if the UIC study results were to be entirely negative – finding no cognizable risk to CAWS recreators – could that outcome nonetheless reasonably support a decision not to require disinfection? As discussed below, the answer to that question is clearly no, and nothing in the District's opposition brief supports a different answer.

<sup>2</sup> Orris Testimony at 1; Gorelick Testimony at 11 (*see infra*).

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At the heart of the District's opposition memorandum is a series of quotations from the Environmental Groups' experts' testimony at hearing supporting the overall scientific value of the UIC study, and agreeing with the District's counsel that it could appropriately be considered by the Board. What these quotations do not address, however, is *how and for what* the experts testified the UIC study should be used. The epidemiologists (Gorelick and Orris) and microbiologist (Yates) lauded various aspects of the study that may provide more nuanced information than we now have concerning CAWS recreation and the presence of pathogens, all of which may one day factor in to developing protective criteria to support the designated uses. But these experts also made abundantly clear, in both their prefiled and live testimony, that a negative study result should *not* be used either as a basis to reject disinfection or a reason to delay it.

Specifically, Dr. Gorelick praised the potential of the UIC study to identify types of potential illnesses that may affect CAWS users but that have not yet resulted in recognized disease outbreak:

I think that's actually one of the nice strengths of the CHEER study is – that it is another study that is attempting to look at this in a way that identifies prospective diseases that may not occur in outbreaks. Like some of the other surveys that have already been done in other settings that have shown there is an increased risk. None of those reported outbreaks. They were done through prospective surveillance. We need more of that kind of prospective surveillance to add to the existing body that shows that there are risks associated with it and to try to quantify it.<sup>3</sup>

Similarly, Dr. Yates observed (in a passage partially quoted by the District) that the UIC study will provide additional data fine-tuning our understanding of how much water is swallowed during various types of recreational activities, which may at some point factor into Board rulemaking:

<sup>3</sup> April 15 Transcript at 87.

MR. ANDES: . . .Based on what we've spoken about, I gather you don't know how much actual water is swallowed or inhaled and directly exposed by rowers, paddlers, boaters, and fishers in the CAWS?

DR. YATES: I have not done those studies to determine that. However, as you know, in order to do a risk assessment, you have to make some assumption and the people who did the [District's] Risk Assessment study did make assumptions because they had to come up with numbers. So I don't know how much water is swallowed or inhaled, et cetera, but I don't believe the people who did the risk assessment did, either. That's why they had to come up with some assumption.

MR. ANDES: The epidemiological study, the CHEERS study that's going on now will give us a better idea of that answer?

DR. YATES: That's my understanding, yes.

MR. ANDES: So that would also be information that the Board would want to consider in making a decision here?

DR. YATES: I would imagine that the Board would consider that information, yes.

For its part, IEPA also expressly recognized the value of the CHEERS study to the next iteration of the rulemaking process – *i.e.*, establishing instream standards and criteria to protect designated recreational use standards – by intentionally delaying such standard setting until after completion of the study.<sup>4</sup>

By the same token, the overt primary point these experts made in their testimony – and the primary logic of IEPA's decision to move forward with disinfection even while postponing a proposal of instream criteria – is that the UIC study should not delay the Board from taking action as soon as possible to require disinfection. This main point becomes overwhelmingly clear when the experts' testimony is read in its entirety. In all of such testimony, both live and pre-filed, the experts' statements upholding the overall value of the study as a scientific tool are directly juxtaposed with pleas to the Board not to delay disinfection because of it.

Dr. Orris states in the introduction to his prefiled testimony as follows:

<sup>4</sup> Statement of Reasons at 42-45.

I fully support the MWRD's emphasis on increasing our knowledge of the health effects of human usage of the waterways in the Chicago area through the design and implementation of epidemiological studies. These studies may well add to our understanding of human health effects of recreational use of these waterways, and may have implications for other settings as well. Such studies may aid in crafting preventive policies for the safe use of these waterways.

Yet, based on my extensive experience with the science of epidemiology, and my understanding of both its capabilities and limits, *I believe that delaying disinfection at the MWRD facilities pending the outcome of the single study being conducted by my colleagues at the UIC School of Public Health on behalf of MWRD would be seriously misguided.* It has long been established that waterborne pathogens associated with sewage are hazardous to public health. Perhaps no other area of medicine has been as well established for as long. No single epidemiological study – no matter how well designed and executed, and no matter what the ultimate result – is a sufficient basis to refuse to address waterborne pathogens in the CAWS.<sup>5</sup>

Similarly, Dr. Gorelick states in his conclusion:

I am deeply committed to scientific inquiry, particularly epidemiology. I therefore applaud the joint efforts of MWRD and UIC School of Public Health to conduct an epidemiological study of the CAWS to help assess the risks to users. I believe this study, which is ambitious, well-conceived, and generally well-designed, is likely to yield useful information about potential health risks of water recreation. I look forward to the results of the study, as I am personally very interested in the impact of undisinfected sewage on public health, an interest reflected in my own recent research.

*However, I believe it would be a serious mistake to delay disinfection of the CAWS any longer pending the outcome of this study.* Its results, no matter what they are, will be inconclusive the first time around – particularly if those results are negative, given the severe limitations in the significance of negative epidemiological results in a study of this nature.<sup>6</sup>

Dr. Yates likewise opines, “I start with the assumption that the study constitutes sound science,” but prefaces her detailed discussion of the study by stating, “The following are the major reasons why I believe excessive reliance on the results of the UIC CAWS epidemiological study, *or*

<sup>5</sup> Orris Testimony at 1 (emphasis added).

<sup>6</sup> Gorelick Testimony at 11 (emphasis added).

*postponing disinfection of the MWRD WTPs until after its completion, would be inappropriate...<sup>7</sup>*

It is thus abundantly clear that these experts are not, as the District would have it, arguing that the Board should wait for the results of the UIC study, but rather exactly the contrary. It is also clear that neither the Environmental Groups nor their experts are suggesting that the Board should “ignore” the study, as the District characterizes the motion (MWRD opposition brief at 13, 14). Rather, the Groups and their experts are acknowledging that the UIC study has a role to play in enhancing our understanding of the CAWS – just not as an excuse to delay long-overdue disinfection.

By the same token, the District’s assertion that the Environmental Groups’ motion “pre-judges” the study (MWRD opposition brief at 14) is plainly wrong as well. On the contrary, the Groups are assuming, for purposes of this motion, the *most favorable outcome to the District* – *i.e.*, a negative result (finding of no significant risk). As Dr. Gorelick pointed out, there are abundant reasons why epidemiological studies frequently yield negative results even when significant risks are in fact present.<sup>8</sup> Indeed, it is for this very reason that he, along with the other two experts, counseled against allowing a negative result serve as a basis for a decision whether to disinfect:

For these reasons, it would be highly inappropriate to set policy of any kind based upon one negative outcome of an epidemiological study – particularly one concerning waterborne pathogens, whose effects are very difficult to isolate in a study setting. There is no way predict, as of today, what the results of the ongoing CHEERS study of risks to CAWS recreational users will be. However, we have today – even without those results – sufficient information to know that sewage-related pathogens are harmful to human health, and that those pathogens are present at elevated levels in the CAWS. *Simply put, we already know that germs are bad for people, and MWRD WWTPs are putting those germs in the water. That, standing alone, is sufficient information on which to base a*

<sup>7</sup> Yates testimony at 27 (emphasis added).

<sup>8</sup> Gorelick Testimony at 6-7.

*requirement that WWTPs disinfect their effluent – as, indeed, WWTPs do in virtually every other major city in the country and most smaller communities in Illinois as well.*<sup>9</sup>

Dr. Gorelick thus addressed and answered the fundamental question at the heart of this motion, described above: whether there is any possible outcome of the UIC epidemiological study that could plausibly tip the scales against requiring the District to disinfect. That is, given what has been presented to the Board (and has been known, as Dr. Orris pointed out, “from the time antiquity”<sup>10</sup>) regarding the public health risk associated with human pathogens, could a single negative epidemiological study result provide the basis for nonetheless declining to require disinfection? Clearly, according to Drs. Gorelick, Orris, and Yates, it would not.

The District has failed entirely to rebut that conclusion, since it wholly fails to substantively address the experts’ well-defined bases for it. All three experts fully articulated a set of reasons why the UIC study is simply not designed to support a finding – no matter what its outcome – that CAWS recreators are not at risk, even if its results are negative. As explained in the Environmental Groups’ initial motion, the UIC study is not specifically studying at-risk subgroups such as children; and a single negative epidemiological study result has minimal probative value in determining whether risk is present due to the inherent difficulty of isolating risk variables and assessing secondary infections. The District, while doing a fine job of plucking out the experts’ generalized praise for the UIC study, makes no mention at all of these limitations to the study that were discussed by the experts in substantial detail.

Thus, since the Board’s decision whether to require disinfection cannot appropriately turn on the outcome of the epidemiological study, there is no good reason to delay that decision pending completion of the study. In this regard, it bears noting that the additional hearings

<sup>9</sup> *Id.* at 7 (emphasis added).

<sup>10</sup> April 15 Transcript at 113-114.

proposed by the District would very likely last well into late 2011, by the time the parties had the opportunity to develop additional prefiled testimony and questions concerning the study and present all of their witnesses (many from far-flung locations) before the Board. The UIC study, as useful as it may be to the scientific and regulatory community generally, is simply not a good basis to delay this already record-setting hearing by more than a year while the public waits for disinfection.

Finally, the Environmental Groups note the curious interpretation of the Board's earlier ruling on their stay motion as supporting further delay. In that motion, as the District itself acknowledges, it made essentially the same argument it is making now: that the UIC study warrants delaying a decision concerning disinfection. The Board denied the motion. In so doing, the Board noted that hearings will continue "until the Board has heard testimony from all participants who wish to testify."<sup>11</sup> Unlike the District, we are not inclined to interpret that language to mean that any party may hold the hearing open for as long as it can continue coming up with new testimony to present. The hearing officer set a generous schedule for presentation of testimony, and that schedule has drawn to a close for recreational use testimony. The time is ripe for the Board to evaluate that testimony and make a decision.

### **Point II**

**THE FACT THAT ASIAN CARP MANAGEMENT OPTIONS ARE BEING DISCUSSED SHOULD NOT DELAY A DECISION ON RECREATIONAL USE ISSUES, SINCE THE ISSUE IS NOT NEW, NOT CONCRETE AND NOT RELEVANT TO RECREATION**

Asian carp are not a new issue to the CAWS, or to the District. In fact, the District itself participates in the Chicago Sanitary and Ship Canal Aquatic Nuisance Species Dispersal Barrier Advisory Panel that was formed by the Army Corps of Engineers more than ten years before this

<sup>11</sup> MWRD opposition brief Ex. B, at 11.

rulemaking commenced.<sup>12</sup> All of the proposed measures to control Asian carp to which the District now points as reasons to delay designating uses for these waterways have been discussed in that committee for years before this rulemaking began. The District has had more than ample opportunity in the 37 hearing days and 30 or so witnesses it has presented to raise the concerns it now claims are essential to the rulemaking. It is clear that the only purpose of raising the issues now, after testimony on use designations has concluded, is to delay this rulemaking into eternity.

The argument that the Board needs to further delay use designations because old ideas have been recirculating lately is even more preposterous as to recreation than it is as to aquatic life. The District does not provide any explanation of how the preventive measures it listed could possibly preclude recreational uses in the CAWS or even significantly impact recreation, and nor does it hint at any relevant information it would present at a hearing. Even the unlikely and radical scenario of closing the locks and the Chicago River presented by the article attached as Exhibit F to the MWRD Opposition Brief would not stop the multitudes of recreational users who access waterways throughout the CAWS. If anything, the article underscores Environmental Groups' position that recreational uses of the CAWS are pervasive and critical to the region's economy.

There is no UAA factor<sup>13</sup> that would allow the Board to downgrade recreational or aquatic life uses based on abstract speculation about actions that may be taken in the future. The District's argument on this issue is yet another red herring offered to distract the Board from reaching a decision on the disinfection issue.

### **Conclusion**

For the foregoing reasons, the Board should create a subdocket for the recreational use

<sup>12</sup> See <http://www.seagrant.wisc.edu/Exotics/Default.aspx?tabid=453>.

<sup>13</sup> 40 C.F.R. 131.10(g).



portions of IEPA's rule proposal, and proceed to decision on that subdocket.

Dated: March 15, 2010

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL

SOUTHEAST ENVIRONMENTAL TASK  
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