

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9(C) and (D)
CHICAGO AREA WATERWAY SYSTEM) (Rulemaking – Water)
AND THE LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 Ill.)
Adm. Code Parts 301, 302, 303 and 304)

NOTICE OF FILING

TO: 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
Chicago, Illinois 60601	Chicago, Illinois 60601
(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 OIL CORPORATION'S MOTION TO POSTPONE HEARINGS IN SUBDOCKET D**, a copy of which is herewith served upon you.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: June 14, 2011

By: /s/ Monica T. Rios
Monica T. Rios

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WATER QUALITY STANDARDS AND)
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**EXXONMOBIL OIL CORPORATION'S
MOTION TO POSTPONE HEARINGS IN SUBDOCKET D**

NOW COMES EXXONMOBIL OIL CORPORATION (“ExxonMobil”), by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the Hearing Officer Order, dated June 1, 2011, states in support of this Motion to Postpone Hearings in Subdocket D, as follows:

I. BACKGROUND

1. On March 18, 2010, the Illinois Pollution Control Board (“Board”) issued an order severing the R08-9 Rulemaking into Subdockets A, B, C, and D. Board Order, *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 (Ill.Pol.Control.Bd. Mar. 18, 2010) (rulemaking hereafter cited as “R08-9”). Subdocket C was “created to address the issues involving proposed aquatic life uses,” and Subdocket D was “created to address the issues dealing with water quality standards and criteria which are necessary to meet the aquatic life use designations.” *Id.* at 1.

2. Since November 2010, at hearings in this matter, the Board has predominantly heard testimony on issues related to aquatic life use designations in Subdocket C.

3. On June 1, 2010, the Hearing Officer in this proceeding tentatively scheduled hearings in October 2011 for Subdocket D. The Hearing Officer also set deadlines for prefiled testimony and prefiled questions for September 9, 2011 and October 3, 2011, respectively. Hearing Officer Order, R08-9(C) and (D) at 1-2 (Ill.Pol.Control.Bd. June 1, 2010).

4. The Hearing Officer also acknowledged the concern of participants regarding “moving forward with Subdocket D hearings before the Board proceeds to first notice in Subdocket C.” *Id.* at 1. The Hearing Officer established a schedule for motions, responses, and replies on this issue. *Id.*

5. ExxonMobil has been an active participant in this rulemaking proceeding. *See* First Notice Comments on Proposed Recreational Use Designation for the Lower Des Plaines River, R08-9(A) at 1 (Ill.Pol.Control.Bd. Oct. 12, 2010) (citing comments and testimony filed by ExxonMobil and the transcript for the hearing at which ExxonMobil testified). On March 9, 2011, ExxonMobil commented that it intends to provide testimony in Subdocket D. Hearing Transcript, R08-9(C) at 135-137 (Ill.Pol.Control.Bd. Mar. 9, 2011); *see also* Hearing Transcript (afternoon), R08-9 (Ill.Pol.Control.Bd. Mar. 10, 2008). ExxonMobil, however, is concerned that holding hearings in October 2011 to hear testimony on water quality standards for the Lower Des Plaines River (“LDPR”) is premature.

6. As more fully explained below, ExxonMobil requests that the Board postpone hearings in Subdocket D until the Board has adopted aquatic life use designations in Subdocket C. At minimum ExxonMobil requests that the Board issue a Second Notice Opinion and Order in Subdocket C before proceeding to hearing in Subdocket D.

II. THE BOARD SHOULD POSTPONE HEARINGS IN SUBDOCKET D UNTIL IT TAKES ACTION IN SUBDOCKET C.

7. As noted above, since November 2010, the Board has been hearing testimony primarily on the appropriate aquatic life use designations for the waterways that are the subject of this rulemaking. The Board now wants to proceed with hearing testimony in Subdocket D before taking action in Subdocket C. Proceeding to Subdocket D, however, is premature.

8. The Clean Water Act ("CWA") 33 U.S.C. § 1251 *et seq.*, requires the States to adopt water quality standards and implementation plans. *See* 33 U.S.C. § 1313. Section 303(c)(2)(A) states, in relevant part:

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.

33 U.S.C. § 1313(c)(2)(A). (Emphasis added.) USEPA has also promulgated regulations establishing certain requirements that State water quality standards must meet. USEPA requires that at minimum, a State include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act" and "water quality criteria sufficient to protect the designated uses." 40 C.F.R. § 131.6(a) and (c).

9. Illinois EPA further summarized in the Statement of Reasons for this rulemaking that “[a]fter designating uses, States are obligated to look to the requirements of 40 C.F.R. § 131.11 to establish criteria sufficient to protect those uses.” Statement of Reasons, R08-9 at 6 (Ill.Pol.Control.Bd. Oct. 26, 2007).

10. As stated above, the CWA and its regulations require States to adopt use designations and then water quality standards based on such use designations. Without the adoption of designated uses, a “water quality criteria sufficient to protect the designated uses” can not be adopted because there are no uses on which to base a determination of the sufficiency of a water quality standard. The Board’s decision on the appropriate aquatic life use designations for the LDPR and Chicago Area Waterways (“CAWS”) will drive the determination of what water quality standards are protective of the designated use adopted for each segment of the LDPR and CAWS. It is unreasonable to require participants to proceed with preparing testimony on the appropriateness of the proposed water quality standards and their impact on facilities until such time as participants know the aquatic life use designations that apply to each segment of the affected waterways.

11. Also, proceeding to Subdocket D, at this time, without first providing some indication to participants on the Board’s direction in regards to aquatic life use designations will further strain the Board’s resources. Without knowing the use designations in Subdocket C, participants will need to provide testimony on all possible alternative water quality standards for each possible aquatic life use that a segment could be designated. Not only will compiling the information and preparing testimony on each alternative scenario be burdensome on participants, but it will likely require the Board to

hold more hearings than initially anticipated because testimony will undoubtedly be lengthy and more complicated since it will cover all alternative scenarios.

III. RECREATIONAL USE DESIGNATIONS IN SUBDOCKET A AS AN EXAMPLE

12. On June 2, 2011, the Board issued a Proposed Second Notice in Subdocket A, which was established for recreational use designations, and explained that the Board was proposing a second notice to solicit comments from participants and in response to Illinois EPA's Motion to stay Subdocket A so Illinois EPA "can amend the proposal to reflect the USEPA's determination." Board Order, R08-9(A) at 1 (Ill.Pol.Control.Bd. June 2, 2011) (hereafter cited as "Board Order"). USEPA recently issued a determination on May 11, 2011 that new or revised recreational use designations are necessary for certain segments of the CAWS. Public Comment No. 584, R08-9(A) at 1 (Ill.Pol.Control.Bd. May 16, 2011) (hereafter cited as "PC No. 584"). USEPA concluded:

EPA, therefore, hereby determines in accordance with section 303(c)(4)(B) of the CWA that new or revised designated uses that provide for recreation in and on the water, and the criteria necessary to protect such uses, are necessary to meet the requirements of the CWA for the relevant segments of the CAWS. In accordance with 40 C.F.R. § 131.11(a), "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use."

Id. at 9.

13. The recent developments in Subdocket A are relevant to the current procedural issues in Subdockets C and D in that they serve as an example of why it is premature to proceed with Subdocket D until there is finality in Subdocket C. First, as discussed in more detail above, the use designations should be determined prior to the

establishment of water quality standards because the water quality standards are established to protect the designated uses. In its May 2011 determination, USEPA's conclusion supports the designation of uses as a first step, which is then followed by the second step – establishment of water quality standards.

14. Secondly, it is possible that Subdocket C may eventually be in a similar situation as Subdocket A. The Board's First Notice in Subdocket A was published in the *Illinois Register* on August 27, 2010, almost one year ago. In May 2011, USEPA issued a determination concluding that certain segments of the CAWS should be designated to provide for recreation. See PC No. 584. In the Board's proposed Second Notice, the Board proposes to revise the use designations, as proposed at First Notice, for those segments referenced in USEPA's determination from incidental contact recreation to primary contact recreation. Board Order at 29. Although USEPA has made two comments on designated uses, it does not appear that these comments have been addressed, which could prompt USEPA to make a determination on aquatic life use designations, as it has regarding proposed recreational use designations in Subdocket A. Public Comment No. 286, R08-9 (Ill.Pol.Control.Bd. Mar. 26, 2010). It would be an inefficient use of not only the Board's resources, but also participants' resources, to move forward with Subdocket D, when it is likely that future comments by USEPA could prompt the Board, Illinois EPA, or participants to propose different aquatic life use designations than those that Illinois EPA originally proposed or the Board itself proposes at First Notice in Subdocket C.

15. If the Board postpones Subdocket D hearings until after Subdocket C is final or close to being final, testimony in Subdocket D can be focused on the

appropriateness of the proposed water quality standards for the adopted aquatic life use designations as opposed to testimony offering several different water quality standard scenarios for each possible use designation.

16. Based on the foregoing, ExxonMobil respectfully requests that the Board postpone the hearings tentatively scheduled in Subdocket D until such time the Board issues its Final Opinion and Order in Subdocket C, or at minimum until a Second Notice Opinion and Order is issued in Subdocket C.

WHEREFORE, EXXONMOBIL OIL CORPORATION respectfully requests that the Board postpone hearings in Subdocket D until the Board takes action in Subdocket C.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

By: /s/ Monica T. Rios
Monica T. Rios

Dated: June 9, 2011

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MOBO:041/Fil/Motion to Postpone Subdocket D Hearings

CERTIFICATE OF SERVICE

I, Monica T. Rios, the undersigned, hereby certify that I have served the attached
EXXONMOBIL OIL CORPORATION'S MOTION TO POSTPONE HEARINGS IN
SUBDOCKET D upon:

Mr. John T. Therriault
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Illinois Pollution Control Board
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via electronic mail on June 14, 2011; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on June 14, 2011.

/s/ Monica T. Rios

Monica T. Rios

MOBO:041Fil/NOF-COS - Motion to Postpone Subdocket D Hearings