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..	)	(Subdockets C and D)
ADM. CODE PARTS 301, 302, 303 and 304	)	

NOTICE OF FILING

To:

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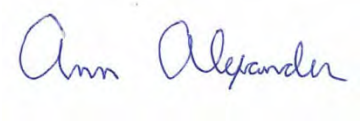
Please take notice that on the 29th Day of June, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Response of Environmental Groups to the Motions of Midwest Generation, Exxon, and Corn Products to Delay Hearings in Subdocket D until Subdocket C is Resolved**, a copy of which is hereby served upon you.



By: _____
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Dated: June 29th, 2011

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CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Response of Environmental Groups to the Motions of Midwest Generation, Exxon, and Corn Products to Delay Hearings in Subdocket D until Subdocket C is Resolved** 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 29th Day of June, 2011.

_____

Ann Alexander, Natural Resources Defense Council

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS FOR THE CHICAGO AREA WATERWAYS SYSTEM AND THE LOWER DES PLAINES RIVER: PROPOSED AMENDMENTS TO 35 Ill. Adm. Code Parts 301, 302, 303 and 304	)	R08-09 (Rulemaking- Water) Subdockets C and D

RESPONSE OF ENVIRONMENTAL GROUPS TO THE MOTIONS OF MIDWEST GENERATION, EXXON, AND CORN PRODUCTS TO DELAY HEARINGS IN SUBDOCKET D UNTIL SUBDOCKET C IS RESOLVED

Environmental Law & Policy Center, Natural Resources Defense Council, Friends of the Chicago River, Openlands, Prairie Rivers Network, Southeast Environmental Task Force, Alliance for the Great Lakes, and Sierra Club-Illinois Chapter ("Environmental Groups") submit this response in opposition to the motions of Midwest Generation, Exxon, and Corn Products to delay hearings in Subdocket D until Subdocket C is resolved.

Until one thinks about their actual consequences, the motions make superficial sense. In a world in which granting a short delay to allow the Board to rule in Subdocket C would actually give the parties guidance that would allow a major saving in time and expense in preparing for Subdocket D, a brief delay would be justifiable – even despite the fact that this proceeding has already set a record for duration. In the real world, however, the requested delay would be neither brief nor helpful. Granting any of the motions to delay Subdocket D would:

- Almost certainly delay for years resolution of this now already old proceeding, and

- Almost certainly not actually provide the desired guidance, or result in substantial savings of time or effort.

Rather than saving time, it is likely that delaying Subdocket D would, if anything, add expense, require duplicative presentation of evidence and require the Board to rule on similar issues multiple times. In this regard, delaying Subdocket D only until First Notice in Subdocket C as Midwest Generation advocates could make the delay even worse, since any significant changes made to the First Notice could result in the need for yet more Subdocket D proceedings to address the results of those changes. For the reasons discussed below, the most efficient approach would be for the Board to either continue as currently scheduled, or to issue a combined decision for Subdockets C and D.

I. Granting Any of The Motions Will Likely Delay Resolution of This Proceeding for Years

The history of this proceedings cautions against overconfidence in making any prediction as to when anything will finish, but it now appears that testimony in Subdocket C will conclude on August 16, 2011. However, there will probably be additional time left for public comment, and naturally the major parties to this proceeding will want some time to organize final presentations to the Board. Putting these final presentations together will be a major undertaking in that interested parties will need to analyze testimony over the course of the last four years, as well as dozens of related exhibits, attachments and comment letters. It is unlikely, then, that Subdocket C will even be briefed fully for the Board before well into fall.

The Board will then have the daunting task of parsing through and evaluating the voluminous evidence before it to develop its first notice opinion and order. It goes almost without saying that this will be a big job coming at a time when the Board has numerous other regulatory proceedings and cases on its docket. While we are confident that the Board will move

as quickly as it can on this matter, it would be unreasonable to expect that the Board could render a First Notice decision on Subdocket C until well into 2012. The Board's Second Notice decision must come somewhere within a year of the First Notice decision, but presumably there will be extensive comments on the First Notice decision. It is thus entirely possible that the Second Notice decision would not come until sometime well into 2013.

Midwest Generation would have the Board delay presentation of testimony in Subdocket D until after issuance of the First Notice decision. Exxon and Corn Products ask that Subdocket D be sidetracked until at least the Second Notice decision. These parties do not explicitly say so, but presumably they will want some months after the rendering of the relevant Board decision to prepare testimony. These parties will likely argue that their experts need to digest the Subdocket C decision in order to formulate their Subdocket D testimony, in order to realize the purported efficiencies. So, it is entirely possible that if the motions are granted, testimony in Subdocket D will not begin until sometime in 2014.

As a practical matter, it is hard to say whether the Board granting the Midwest Generation motion or the Corn Products/Exxon motion would be worse. Midwest Generation's proposal looks more modest on the surface, but it might actually result in more delay. Unless the Board's Second Notice decision in Subdocket C is identical or nearly identical to its First Notice decision -- which is by no means certain and should not be assumed -- parties claiming that they relied on the Board's initial decision in fashioning their testimony will claim that they need yet more time and a reopening or repeat of hearing days in Subdocket D to address any changes to the Subdocket C decision on Second Notice. Clearly, accepting in any form the theory that Subdocket D must wait on any portion of Subdocket C risks very major delays in this proceeding.

II. A Board Decision in Subdocket C is Unlikely to Provide the Information Necessary to Lessen the Cost of Proceedings in Subdocket D

The premise of the Midwest Generation, Exxon and Corn Products motions is that their presentations concerning water quality criteria in Subdocket D must be decided in relation to designated uses that have already been determined. This sounds logical in theory. In fact, however, it is very unlikely in this proceeding that a ruling on designated uses is going to do much to clarify the appropriate criteria.

At the outset, we note that there can be no potential savings from delaying Subdocket D as to the presentation of the Illinois Environmental Protection Agency. IEPA has already presented its testimony as to both use designation and criteria. The parties and some experts have already spent much time analyzing jointly the IEPA use designations with the criteria designed to protect them. There have been days of testimony that proceeded on that basis.

The odds of real time savings as to the presentations by other parties are very slim. Although we do not know what the Board's final regulatory language will look like, if the approach is at all consistent with similar use designations, it is unlikely to actually provide substantive guidance. Use designations usually are framed in very general language – *e.g.*, "general use," "secondary contact," "modified warm water habitat," *etc*. The pending proposals and counter-proposals in this proceeding are no exception in that they include language that is only slightly less vague, referencing "tolerant" and "indigenous" species, "early life stages," and the like. Unless the Board deviates substantially from current regulatory practice, as well as the language of the pending proposals, and drafts language that is much more specific than the use designations that have been presented to it so far, it is very unlikely that the Board will provide the parties with a list of fish species and other specific aquatic life that needs to be protected in

each of the relevant segments. It is doubtful that the present record would allow the Board to do this even if it wanted to do so.

It is more reasonable to expect that the Board will adopt use designations on First Notice that resemble in scope the broad descriptive language now in the Board definition for General Use, supplemented by language that looks in general like what IEPA proposed in 2007. Thus, in developing Subdocket D testimony concerning criteria, all of the parties and their experts will have to decide for themselves what species they maintain are "pollution tolerant" or "indigenous" and what life stages are covered by the use designations. As IEPA has already done, every other party's expert is going to have to make a judgment as to what species and life stages are or could be present in a water body segment and then suggest criteria necessary to protect them. It can be predicted with almost moral certainty that Subdocket D will involve debates over what kinds of aquatic life must be protected in each of the various use designation categories as well as what criteria are needed to protect them regardless of what use categories are adopted.

As an overall matter, given the typical structure of setting water quality standards in Illinois, it appears that the moving parties are making too much of the Board's procedural decision to separate out use determinations from supporting criteria into separate subdockets. These divisions made a lot of sense as a way to segment testimony and bring some order to a colossally complicated proceeding, involving multiple disparate issues and stretches of waterways. That procedural decision, however, does not change the fact that use designations and criteria determinations are inextricably intertwined, and cannot be artificially separated in substance. Whether it is satisfying as a matter of theory or not, Illinois use designations to protect aquatic life are, as practical matter, defined largely by the criteria that stand behind them.

"General use" and "secondary contact" and "CAWS Aquatic Life Use A" are phrases that mean little without reference to the specific criteria necessary to protect them.

Thus, for purposes of finding an efficient procedural path in this matter, it is essential to recognize that the evidence as to the relevant criteria largely overlaps with that for designated uses. If, as we know, certain fish avoid temperatures that are now often present in the Lower Des Plaines, that fact is highly relevant to analyzing data that those fish are only rarely present there. For example, the fact that walleye are not now present in large numbers in Lower Des Plaines really tells us nothing of whether they should be there given the currently prevailing temperatures in the system. The data as to habitat cannot properly be considered in isolation from water quality and water quality cannot be analyzed without looking at the factors that go into deciding on criteria.

Indeed, the inherent and unavoidable overlap between the Subdocket C use designation issues and the Subdocket D criteria issues is already becoming evident in the Subdocket C testimony. Some parties, based on assumptions regarding the criteria that they fear may be adopted to protect a particular use designation, have already suggested that they will suffer economically if the uses are designated. (*See, e.g.*, Testimony of Ray E. Henry and David R. Zenz). Of course, these economic arguments are not relevant in either subdocket under 40 CFR 131.10(g). However, the fact that they are being presented in Subdocket C, when they actually pertain to the cost of pollution control measures that may be determined necessary in subdocket D, illustrates the likelihood that overemphasizing the division between the subdockets will result in repetitive testimony rather than increased efficiency. Waiting for a decision in Subdocket C before starting in Subdocket D would only facilitate parties concerned about costs of compliance

to argue, first in Subdocket C based on their assumptions of the criteria that will follow the uses and then again when the issue of the criteria is actually presented in Subdocket D.

Thus, the Board should continue to treat the separate subdockets as merely a procedural convenience as originally intended, and not as an artificial bright-line distinction between subject matter. This can be achieved by proceeding as currently scheduled, *i.e.*, by proceeding with Subdocket D proceedings while the Board prepares a ruling in Subdocket C. A second option, which may make even more procedural sense given the structure of the standard setting process, would be for the Board to hold off ruling on Subdocket C until Subdocket D proceedings are complete, and then issue a decision concerning both subdockets together.

Conclusion

Delaying Subdocket D as requested by Midwest Generation, Corn Products and Exxon would certainly delay these proceedings but is unlikely to benefit anyone except those benefitted from any delay. The motions to delay Subdocket D should be denied; and the Board should either proceed immediately to a decision in Subdocket C and hearings in Subdocket D, or else should delay decision in Subdocket C so as to issue combined ruling in both subdockets.

Dated: June 29, 2011

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL

SIERRA CLUB-ILLINOIS CHAPTER

OPENLANDS

SOUTHEAST ENVIRONMENTAL TASK FORCE

PRAIRIE RIVERS NETWORK

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Authorized to represent the parties listed above for purposes of this motion