

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9 Subdocket C
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: John Therriault, Assistant Clerk Attached Service List
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board MIDWEST GENERATION'S RESPONSE TO UPDATED JOINT STATUS REPORT OF ILLINOIS EPA, METROPOLITAN WATER RECLAMATION DISTRICT, AND ENVIRONMENTAL GROUPS CONCERNING PROPOSED AQUATIC LIFE USE DESIGNATIONS, a copy of which is herewith served upon you.

Dated: January 17, 2012

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti
One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation's Response to Updated Joint Status Report of Illinois EPA, Metropolitan Water Reclamation District, and Environmental Groups Concerning Proposed Aquatic Life Use Designations was filed electronically on January 17, 2012 with the following:

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

and that true copies were mailed by First Class Mail, postage prepaid, on January 17, 2012 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) **R08-9 (Subdocket C)**
EFFLUENT LIMITATIONS FOR THE) **(Rulemaking – Water)**
CHICAGO AREA WATERWAY SYSTEM)
AND LOWER DES PLAINES RIVER)
PROPOSED AMENDMENTS TO 35 ILL.)
ADM. CODE 301, 302, 303, and 304)

**MIDWEST GENERATION’S RESPONSE TO THE JOINT STATUS REPORT OF
ILLINOIS EPA, METROPOLITAN WATER RECLAMATION DISTRICT, AND
ENVIRONMENTAL GROUPS CONCERNING PROPOSED AQUATIC LIFE USE
DESIGNATIONS**

Midwest Generation, L.L.C. (“MWGen”), by its counsel, Nijman Franzetti, L.L.P., hereby submits this response to the “Updated Joint Status Report of Illinois EPA, Metropolitan Water Reclamation District, and Environmental Groups Concerning Proposed Aquatic Life Use Designations” (“Status Report”). Due to MWGen’s significant stake and interest in the proposed rules for this Use Attainability Analysis (“UAA”) rulemaking, MWGen respectfully requests that the Hearing Officer order the Illinois Environmental Protection Agency (“Illinois EPA”), Metropolitan Waste Reclamation District of Greater Chicago (“MWRD”), and the Environmental Groups (collectively “Negotiation Participants”) to submit a more detailed report on the terms of their agreements prior to scheduling any deadlines for the filing of final Subdocket C comments. MWGen further requests that the Hearing Officer afford all participants the opportunity to file responses to final comments, as previously ordered.

This rulemaking has been suspended since the fall of 2011. In September, 2011, only a few weeks before the final comments deadline in Subdocket C, the Negotiating Parties successfully moved, on an emergency basis, to suspend the filing of Subdocket C final comments

because they were negotiating to “resolve a substantial portion of the issues presented in Subdockets C and D.” Joint Emergency Motion to Vacate Deadlines in Subdocket C and Set Date for Filing of Joint Status Report, ¶3 (Sept. 22, 2011). They represented that if their negotiations were successful, it would result in “significantly reducing the number of issues the Board would need to address in those Subdockets.” (*Id.*) By Hearing Officer Order dated September 23, 2011, the Joint Emergency Motion was granted in part and the previous deadlines for final comments on Subdocket C were suspended.

Pursuant to the requirements of the September 23, 2011 Hearing Officer Order, the Negotiation Parties submitted a joint report on November 21, 2011 stating that although their negotiations were progressing, they needed more time to determine if any agreement could be reached. “Joint Status Report of Illinois EPA, Metropolitan Water Reclamation District, and Environmental Groups Concerning Resolution of Aquatic Life Use Issues” (Nov. 21, 2011). The Hearing Officer again granted their request to continue the suspended final comments briefing schedule and ordered them to submit another status report by not later than January 3, 2012.

In their January 3, 2012 Status Report, the Negotiation Participants reported that they had made significant progress towards agreements on portions of both Subdockets C and D, that they had “reached tentative agreements regarding habitat restoration, variances and permit terms that will be needed to make workable and effective the agreements regarding designations and criteria”, and that they would be able to present their agreements “as to the proper designations of many of the segments of the CAWS as well as DO criteria for those segments” by mid-February. Updated Joint Status Report of Illinois EPA, Metropolitan Water Reclamation District, and Environmental Groups Concerning Proposed Aquatic Life Use Designations, (Jan. 3, 2012) at pp. 1-2. The Negotiation Participants requested that the Board set a deadline of

February 17, 2012 for the filing of Subdocket C final comments, without any provision for the filing of responses to those comments. Beyond these general descriptions, the Status Report does not provide any details of the tentative agreements between the Negotiation Participants, let alone which segments of the CAWS their agreements address.

Because of the lack of information provided by the Negotiation Participants in their Status Report, MWGen does not know to what extent their tentative agreements, if finalized, would affect MWGen's interests in this rulemaking. As shown by MWGen's presentation of evidence in this rulemaking, its interests in Subdocket C are substantial and include several segments of the CAWS. Accordingly, there are reasonable grounds for MWGen to be concerned that any agreements reached by the Negotiation Participants may adversely and significantly affect its interests. It is unreasonable and substantially prejudicial for the Negotiating Participants to request that the Hearing Officer allow them to withhold any disclosure of the terms of their agreements until the time when all other parties must file their final comments in Subdocket C. Moreover, the Negotiation Participants do not even propose to allow any parties to file a response to the substance of whatever agreements they may file.

But more importantly, whether or not the MWRD and the Environmental Groups may be able to strike a bargain with each other that involves supporting their respective positions on various issues in this proceeding, it is a different matter when the Illinois EPA, the Petitioner in this rulemaking, is also a party to that bargain. It originally filed the Subdocket C proposed aquatic life use designation rules on October 26, 2007, over four years ago. Since filing its rulemaking petition, it has not submitted any revisions to its proposed Subdocket C rules, either in any filing with the Board or during any of the 53 days of hearings. If the Illinois EPA is now going to agree to or otherwise support changes to the substance of the Subdocket C rules,

Midwest Generation and the other participants in this rulemaking should not be learning of such changes for the first time at the final comments stage, without any opportunity to evaluate their impact upon Midwest Generation's interests and to address them fully before the Board. This proposed conduct by the Agency would violate the spirit, if not the clear meaning of, the requirements of the Board's rulemaking regulations. *See* 35 Ill. Adm. Code §102.202(a)-(c). As the petitioner here, pursuant to the requirements of § 102.202(a)-(c), the Agency is required to set forth the language of its proposed rules, show how that language differs from any existing rules, provide reasons for and testimony in support of the proposed rules. The Illinois EPA should not be allowed to avoid these regulatory rulemaking requirements by participating in negotiations to reach agreements that will seek to amend its long-pending rulemaking petition and then simply to present and/or lend support to them in the Agency's final Subdocket D comments. In parlance borrowed from all the recent college football bowl games, such conduct would effectively constitute an "end run" around the rulemaking procedures established in the regulations.

Not only is the Negotiation Participants' request contrary to regulatory rulemaking requirements, its effect is plain and simply unfair, unreasonable and unduly burdensome given the long history of this rulemaking and the substantial effort devoted to it by the Board and all of the participants. As proposed in the Negotiation Participants' Status Report, all other participants here will have to complete their Subdocket C final comments based on the pending, proposed language of the rules when that language, as to "many segments of the CAWS," may no longer either be proposed or supported by the Illinois EPA. But Midwest Generation and others will not know this until after receipt and review of the Negotiation Participants' simultaneously filed final comments. The Negotiation Participants' request serves only to create

an unknown “moving target” of proposed rules that threatens to cause any other participant to waste the effort involved in preparing final comments on proposed rules that have now changed, and more significantly, threatens to waste the Board’s resources in reviewing Subdocket C final comments that are no longer applicable or relevant.

For all of the above reasons, MWGen respectfully requests that the Hearing Officer order the Negotiation Participants to file another status report no later than February 17, 2012 that discloses whether or not they have reached any agreements, and if so, details the terms thereof. If the next status report contains any agreements involving proposed rule changes, the remaining UAA rule-making participants should then be given the requisite fourteen (14) days to respond to the Status Report in order to inform the Hearing Officer whether they believe the proposed Subdocket C rule changes warrant any further hearings to present relevant responsive testimony or to instead advise the Hearing Officer on proposed reasonable deadlines for proceeding with the filing of Subdocket C final comments based on the nature and extent of the proposed changes.

Finally, the Negotiation Participants’ Status Report requests a proposed deadline for the filing of final comments, but ignores the fact that the Hearing Officer had previously ordered that the filing of responses to final comments would be allowed. *See* Hearing Officer Order dated August 16, 2011, Subdocket C. MWGen submits that the Hearing Officer should continue to allow for the filing of responses to the Subdocket C final comments, as previously ordered.

WHEREFORE, for the foregoing reasons, Midwest Generation, L.L.C. respectfully requests that the Hearing Officer order the Illinois EPA, MWRD, and the Environmental Groups to submit a status report on whether any agreements have been reached and disclosing the terms of any such agreements by no later than February 17, 2012 and grant the remaining UAA

participants fourteen (14) days to respond. Further, Midwest Generation, L.L.C. requests that the Hearing Officer provide for the filing of both final Subdocket C comments and responses to those comments, as previously ordered, in any future filing schedules issued in this rulemaking.

Respectfully submitted,

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti

Dated: January 17, 2012

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