

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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|--|---|-----------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| WATER QUALITY STANDARDS AND |) | |
| EFFLUENT LIMITATIONS FOR THE |) | R08-09 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

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|--|-----------------------|
| 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 Comments on the Illinois Pollution Control Board’s First Notice and Opinion in Subdocket C of R08-09, a copy of which is herewith served upon you.

Dated: July 1, 2013

MIDWEST GENERATION, L.L.C.

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ILLINOIS POLLUTION CONTROL BOARD

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| 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 COMMENTS ON THE ILLINOIS POLLUTION CONTROL BOARD'S FIRST NOTICE AND OPINION IN SUBDOCKET C OF R08-09

I. Introduction

Midwest Generation, L.L.C. ("Midwest Generation") has been an active participant in this rule-making since its inception because the proposed use designations will directly affect its electric-generating stations operating along the Chicago Sanitary & Ship Canal (CSSC) in the Chicago Area Waterway System ("CAWS") and in the Upper Dresden Island Pool ("UDIP"). In its First Notice Opinion and Order in Subdocket C (the "First Notice Opinion"), the Illinois Pollution Control Board (the "Board") rejected both the Illinois Environmental Protection Agency's (the "Agency" or "Illinois EPA") and Midwest Generation's proposed UDIP aquatic life use designations. Instead, the Board proposes that the UDIP should be classified as a General Use water under the existing Illinois use classification system, an approach that was not proposed either by the Illinois EPA, or any other party, or in any expert testimony presented in Subdocket C. Because the Board's proposed General Use designation for the UDIP will significantly impact the two Midwest Generation stations located in the UDIP, known as Joliet Stations 9 and 29, respectively, Midwest Generation submits this Comment on the Board's First Notice Opinion and Order in Subdocket C ("First Notice Opinion").

In the First Notice Opinion, the Board found that because none of the six UAA Factors applied to the UDIP, there was no justification for an aquatic life use which does not attain the CWA goal.¹ The Board's First Notice Opinion provides little explanation for how it reached this conclusion. It does not address why none of the extensive expert testimony and data presented by Midwest Generation and others showing that at least one of the six UAA Factors applied to the UDIP was legally inadequate to rebut the CWA's initial presumption that the UDIP could attain the CWA goal. That presumption was rebutted by evidence showing that the impounded nature of the effluent-dominated UDIP, its habitat constraints, widespread sedimentation, commercial navigation, urban impacts, continuing control for invasive Asian carp and other equally irreversible conditions prevents the UDIP from attaining the CWA's "fishable" goal.

The First Notice Opinion does not appear to recognize the "rebuttable presumption" legal standard by which all UAAs must be evaluated. The Subdocket C evidence was sufficient to rebut the presumption that the UDIP can attain the CWA fishable goal. The First Notice Opinion does not explain how the Board concluded otherwise nor does it provide adequate support for the finding that the UDIP is capable of attaining the CWA's goal.

The Board's proposed designation of the UDIP as a General Use water for aquatic life uses also conflicts with the Board's prior Subdocket A findings that at least one or more of the UAA Factors applied to the UDIP. In Subdocket A, the Board held that the UDIP cannot attain the General Use standards because the overwhelming evidence supported the finding that UAA Factor 3, Human Caused Conditions, precluded the attainment of the CWA recreational goals. The same combination of channelization, barge traffic, effluent domination, and effects of CSOs, the "human caused conditions" the Board found were present in the UDIP to satisfy

¹ Opinion and Order, First Notice in Subdocket C, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09 at p. 221 ("First Notice Opinion").

UAA Factor 3, directly correlate to negative impacts to aquatic life in the UDIP. Therefore, it is arbitrary for the Board to conclude that UAA Factor 3 does not apply to the UDIP aquatic use designation as it did to its recreational use designation.

Similarly, in its First Notice Opinion, the Board finds that the UDIP is capable of attaining the General Use designation, while simultaneously stating that it will “examine water quality standards for UDIP in Subdocket D to ensure the UDIP can meet the water quality standards applicable under the General Use standard.”² The Board’s expressed doubts about the whether the UDIP “can meet” the General Use water quality standards also conflicts with its proposed General Use designation for the UDIP.

Because of the numerous questions and apparent inconsistencies presented by the Board’s First Notice Opinion in Subdocket C, Midwest Generation respectfully suggests that the Board reconsider its proposed adoption of a General Use designation for the UDIP and instead adopt the following UDIP Aquatic Life Use as previously proposed by Midwest Generation:³

302.237 Upper Dresden Island Pool Aquatic Life Use Waters

Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 Bridge shall be designated for the Upper Dresden Island Pool Aquatic Life Use. These effluent-dominated, urban-impacted waters are capable of maintaining warm water aquatic-life populations consisting primarily of lentic species of tolerant and intermediately tolerant types that are adaptive to the impounded, channelized and artificially-controlled flow and widespread siltation conditions created by the operation of the locks and dams that are necessary to maintain the existing navigational use and upstream flood control functions of the waterway system.

This UDIP proposed use designation language accurately describes the UDIP’s modified, urbanized and effluent-dominated nature and its highly impounded and widespread siltation conditions that limit the aquatic life population of the UDIP. The Board’s proposed General Use designation does not account for the fact that aquatic-life populations in the UDIP must be able

² First Notice Opinion at p. 221.

³ Midwest Generation Final Comments, PC #1277, p. 101.

to adapt to these constraints and that they are irreversible due to the need to protect the existing navigational use and flood control functions of the UDIP. Therefore, the aquatic life use that the UDIP can attain is lower than the proposed General Use designation. Midwest Generation submits that upon further consideration of the relevant evidence in this rulemaking, the Board should properly conclude that this proposed language best reflects the applicable aquatic life use designation for the UDIP.

If the Board does not adopt Midwest Generation's proposed UDIP use designation, then it at least must prevent the immediate application of the General Use water quality standards to the UDIP. The Board has clearly stated that an immediate application of these standards was not intended by its First Notice Opinion. Midwest Generation suggests that the Board avoid this unintended result by either postponing the adoption of the General Use designation for the UDIP by temporarily maintaining the Secondary Use designation until it adopts a different use classification as part of its decisions in Subdocket D or that it expressly provides in its Subdocket C decision that the effective date of its adoption of the General Use classification for the UDIP is postponed until the conclusion of the Subdocket D rulemaking proceeding.

Finally, Midwest Generation supports the Board's proposed Aquatic Life Use B designation for the CSSC and the Brandon Pool waters. However, the recently filed First Notice Opinion comments of the United States Environmental Protection Agency ("U.S. EPA") raise several questions and significant issues concerning this portion of the Board's First Notice Opinion. These issues merit further review and comment because they question the adequacy of the justification for the Board's proposed decision to apply both the Aquatic Life Use A and B use designations to certain segments of the CAWS. In part, the U.S. EPA's comments appear to require that the Board provide more detailed references to the Subdocket C record evidence in support of its findings that UAA Factors 3, 4 and 5 apply to these waters. It also requests an

explanation as to why the Board's proposed selection of the Use B designation is more appropriate than a Use A designation. Because the U.S. EPA comments have the potential to significantly affect Midwest Generation's interests, particularly its Will County Station, Midwest Generation requests an additional thirty (30) days to provide a summary of, including relevant citations to, the Subdocket C record evidence that shows the Board's proposed decisions regarding the Use B designations are supported and justified. The recent filing of the U.S. EPA's comments did not allow sufficient time to present such a review of the Subdocket C record evidence in time to include it in this submission. Because this requested additional comment period is limited both in time and in scope, it should not cause any delay and should instead help expedite the Board's completion of Subdocket C in a manner that will satisfy the U.S. EPA.

II. Response to the Board's Requests for Suggestions and Comments Regarding the Proposed General Use Designation for the UDIP.

Following the Board's First Notice Opinion, the Illinois Environmental Regulatory Group ("IERG") filed a motion seeking clarification of the Board's Subdocket C order. IERG asked the Board several questions to clarify its decision designating the UDIP as a General Use Water. IERG's questions primarily related to how the Board intended the Subpart B General Use water quality standards to apply to the UDIP, including the intended regulatory effect of the Board's proposed General Use designation upon both the Subdocket D rulemaking and the previously adopted incidental contact recreational use designation for the UDIP.⁴

⁴ Illinois Environmental Regulatory Group's Motion for Clarification Regarding the First Notice Opinion and Order For Subdocket C, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09(C), p. 3, April 5, 2013.

On April 15, 2013, in light of IERG's motion, the Hearing Officer rescinded her April 29, 2013 deadline for submission of First Notice comments and ordered that a new deadline would be set after the Board ruled on IERG's motion.

On April 19, 2013, the Illinois EPA filed a response to IERG's motion and presented additional questions for the Board's consideration on the applicability of the General Use Designation to the UDIP. Specifically, the Illinois EPA indicated that the goal of its proposed UDIP aquatic life use designation was to recognize the UDIP's inability to meet the Clean Water Act goal for recreational use, and questioned whether all existing General Use water quality standards will be applicable in the UDIP upon adoption of the Board's proposal.⁵ Also on April 19, 2013, the Environmental Groups filed an opposition to the motion stating that the questions presented by IERG are better suited for the comments on the First Notice by the participants in the rulemaking.⁶

On May 16, 2013, the Board granted IERG'S motion in part and denied the motion in part.⁷ The Board stated that it did not intend for the General Use water quality standards to apply to the UDIP until the conclusion of Subdocket D. The Board further stated that by designating the UDIP as a General Use Water, the Board did not intend to change or alter the Recreational Use designations and standards decided in Subdockets A and B. The Board invited the participants to provide clarification to the rule to alleviate any confusion on both of these

⁵ The Illinois EPA also questioned how the Board would implement the General Use designation for the Chicago River as it is designated as a Primary Contact Water and questioned the Board's decision to move Bubbly Creek to a Subdocket E. Illinois Environmental Protection Agency's Response to Illinois Environmental Regulatory Group's Motion for Clarification Regarding the First Notice Opinion and Order For Subdocket C, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09(C), April 19, 2013.

⁶ Opposition of Certain Environmental Organizations to the Illinois Environmental Regulatory Group's Motion for Clarification Regarding the First Notice Opinion and Order For Subdocket C, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09(C), April 19, 2013.

⁷ Order of the Board, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09(C), May 16, 2013.

issues. As to the remaining questions presented by IERG and Illinois EPA, the Board stated that the clarifications and questions can be answered as a part of the First Notice process and invited all participants to provide suggestions, comments and to propose alternative language where appropriate.

Although Midwest Generation maintains its objection to the application of the General Use designation for the UDIP, it submits the following comments on these issues in response to the Board's request. Initially, it would appear that the simplest method to clarify that the General Use water quality standards do not apply until the conclusion of Subdocket D would be to wait to adopt the UDIP aquatic life use designation until the proposed Subdocket D rules are also adopted. In addition to the considerable evidence and testimony in Subdocket C which showed that the UDIP is incapable of attaining the Clean Water Act goals, Midwest Generation believes that additional evidence and testimony to be presented in the Subdocket D hearings will show how challenging it will be for the UDIP to achieve certain of the General Use Subpart B water quality standards based on existing UDIP conditions and water quality. Thus, deferring the adoption of the proposed General Use designation would benefit the Board by providing it the opportunity to consider the totality of the evidence and testimony in both of the Subdockets. Midwest Generation submits that such consideration of the totality of the evidence presented in Subdockets C and D may persuade the Board that its *sua sponte* decision to designate the UDIP as a General Use water should be reconsidered. By waiting to adopt the UDIP aquatic life use designation until Subdocket D is adopted, the Board would gain the ability to modify its Subdocket C decision, as appropriate, before it becomes final.

However, this suggested postponement of the adoption of an aquatic life use designation for the UDIP creates a procedural issue under the Illinois Administrative Procedure Act (the "APA"). The APA states that no rule may be adopted more than one year after the date the first

notice was published in the Illinois Register.⁸ Pursuant to that section, the deadline to adopt the rule in Subdocket C is March 15, 2014. Based upon the proceedings in the other Subdockets in this matter, it is uncertain whether Subdocket D will conclude by that deadline. Thus, waiting to adopt the proposed UDIP aquatic life use designation until the conclusion of Subdocket D may not be possible without running afoul of the one-year deadline under the APA for adopting the UDIP aquatic life use designation rules.

Because of the risk that the one-year deadline under the APA may not be achievable, the Board should consider other alternatives that are achievable within this regulatory time frame. The Board could decide to maintain the Secondary Contact use designation for aquatic life uses for the UDIP temporarily until it has further considered the use designation issue in Subdocket D. The Board would render its decision on the appropriate “final” aquatic life use designation for the UDIP in Subdocket D, as well as determining the accompanying water quality standards to protect the selected use. This approach allows the Board additional time to consider, with the benefit of additional evidence presented in Subdocket D, how best to address those specific UDIP parameters which are not currently attaining the General Use standards.

Alternatively, the Board could proceed to adopt the General Use aquatic life designation for the UDIP but delay the effective date of the rules containing this designation. Adopting the General Use aquatic life use designation rules, but delaying their effective date would allow Midwest Generation and other UDIP dischargers to participate in the Subdocket D rulemaking proceedings without simultaneously having to pursue other relief, such as the immediate filing of variance petitions, to prevent their UDIP discharges from being subject to General Use water quality standards while the Board proceeds with its intended consideration of appropriate UDIP water quality standards in Subdocket D. This approach is also consistent with the Board’s

⁸ 5 ILCS 100/40(e).

statement in response to the IERG Motion for Clarification that it did not intend for the General Use water quality standards to apply to the UDIP until the conclusion of Subdocket D. The Board should also expressly state in the UDIP aquatic life designation rules that until the rules are effective, the Secondary Contact water quality standards shall remain in effect. Otherwise, there may be the unintended consequence that because the Secondary Contact use designation has been removed, but the UDIP water quality standards have not yet been adopted, no water quality standards apply to the UDIP until the Subdocket D rulemaking is completed.

The delayed effective date approach for the General Use aquatic life designation for the UDIP addresses the issue of reserving the opportunity to review the appropriate water quality standards for the UDIP in Subdocket D. It does not, however, address the remaining problem that the proposed General Use designation for the UDIP is in direct conflict with the Board's prior findings and decision in Subdocket A that the UDIP recreational use designation is "Incidental Contact," and not the "primary contact" recreational use that is an inherent part of a General Use designation under the existing Illinois use classification regulations. The Board has requested suggestions for clarifying language to eliminate this unintended conflict by reconciling the Board's decisions on the recreational use designations with its decision to designate the UDIP as a General Use water for aquatic life purposes.

Midwest Generation believes that the Board's decisions in Subdocket A and its First Notice Opinion cannot be clarified or reconciled. The General Use designation in Section 303.201 is an exclusionary rule in that it states "[e]xcept as otherwise specifically provided, all waters of the State must meet the general use standards...." 35 Ill. Adm. 303.201. The section 303.201 General Use rule is a default category, which by its nature is generic in order to apply to a broad number of waters of the State. The General Use designation includes both recreational and aquatic life uses. In the case of recreational uses, a General Use designation carries with it a

primary contact recreational use designation. Section 303.201's General Use designation is simply not sufficiently descriptive such that it could be "clarified" as suggested by the Board. It seems that any such clarification could only be pursued through the "as otherwise specifically provided" language contained in Section 303.201. In other words, any "clarification" would need to be set forth in a new rule that excludes the UDIP from the recreational use portion of Section 303.201's General Use designation. This proposed new rule may have to be further amended at the conclusion of Subdocket D to include any and all of the other exceptions to the General Use aquatic life water quality standards that are adopted in Subdocket D. However, as the Board has yet to determine what the General Use aquatic life water quality standards for the UDIP will be, it cannot presently craft these provisions of the new rule that "otherwise specifically provides" the UDIP is an "Incidental Contact Residential Use" water, consistent with the language of Section 303.201.

The Board also states that it will examine the water quality standards for the UDIP in Subdocket D to ensure that the UDIP can meet the General Use water quality standards.⁹ This statement is at odds with the Board's conclusion that the UDIP is capable of attaining the General Use water quality standards. The Board does not explain or propose a mechanism by which it will ensure that the UDIP can meet the General Use standards. Moreover, the Board's uncertainty regarding whether the UDIP can meet the General Use water quality standards is also at odds with the approach to use classifications identified in the federal rules.

The federal Use Attainability Analysis ("UAA") rules, in 40 CFR § 131.10(c), allow a State to create a sub-category of a designated use and thereby create different water quality standards for each sub-category. However, the federal UAA rules do not articulate a mechanism for applying different water quality standards for a particular water once a State designates that

⁹ First Notice Opinion at p. 221.

water as attaining the CWA goals. In other words, the regulations do not appear to allow a State to designate a water as capable of attaining a particular use classification, such as the Illinois General Use classification, and then to set standards below the levels of existing water quality standards that apply to that use classification and which are intended to ensure the protection of that use.

If the federal regulations describing the procedures by which States can designate uses do not specifically allow for a water quality standard below the levels required to maintain the use, it is questionable whether the Board has the legal authority to modify the Part 302, Subpart B General Use Water Quality Standards while still designating the UDIP as a General Use Water. In its First Notice Opinion, the Board recognized six parameters that do not consistently meet the General Use Water Quality standards in the UDIP: copper, mercury, fecal coliform, DO, zinc, and thermal. The Board specifically stated that the water quality standards for temperature may need to be adapted for the UDIP.¹⁰ The UAA LDPR Report authors appear to have anticipated this issue in suggesting a subclass of the Illinois General Use designation, called either “General (Modified) Use” or “General Use (Impounded),” for the UDIP, in recognition of the lack of attainment of certain General Use numeric water quality standards that was apparent to them based on even the more limited information that existed at the time of the report’s preparation in 2003.¹¹ Such an alternative approach may also confer the added benefit of moving the Illinois use classification system away from its out-dated approach of a single use designation for waters that are deemed capable of attaining the Clean Water Act’s goals, but which differ by varying degrees in their ability to attain the generic General Use standards. Perhaps, alternatively, the Board could also achieve its intended goal by considering in Subdocket D the incorporation into the UDIP water quality standards of a general variance applicable to those parameters that do not

¹⁰ First Notice Opinion at p. 221.

¹¹ LDPR UAA Report, Attachment A to Illinois EPA’s Statement of Reasons, Chapter 8, pps. 8-16 to 8-17.

consistently meet the General Use Water Quality standards and the adoption of alternative interim standards until the UDIP is capable of consistently meeting the General Use Water Quality Standards.

Although Midwest Generation has attempted here to provide the Board with helpful comments in response to its requests, it still maintains that upon a further review of the Subdocket C evidence, the Board should properly conclude that the problem it is encountering in dealing with the UDIP is that it is a “square peg” that does not fit within the “General Use hole.” The UDIP, while perhaps somewhat better in potential than certain of the proposed Aquatic Life Use B waters, is still not capable of attaining the use that was contemplated by the General Use generic designation under Illinois’ use classification system. Clearly, with its channelization, extensive habitat constraints and limitations, barge traffic, continuing CSOs, toxic sediments, the UDIP is still a challenged waterbody. As further discussed below, Midwest Generation requests that the Board re-consider its proposed designation of the UDIP as a General Use water and instead adopt the Midwest Generation proposed UDIP aquatic life use.

III. ARGUMENT

A. The Board’s First Notice Opinion Fails to Recognize that the UDIP’s Ability to Attain the CWA’s “Fishable” Goal is a “Rebuttable Presumption.”

The Clean Water Act’s goal is for all waters to be able to propagate fish, shellfish, and wildlife and provide for recreation in and on the water. 33 U.S.C. §1251(a)(2). While the Clean Water Act generally presumes that all waters can attain this goal, this is clearly a rebuttable presumption.¹² Once contrary evidence is presented, the presumption disappears and the finder of fact must evaluate all evidence equally.¹³ In the Subdocket C rulemaking, a significant amount of evidence was presented challenging the presumption that the UDIP is capable of

¹² *Idaho Mining Assoc., Inc. v. Browner*, 90 F.Supp. 2d 1078, 1092 (D.Idaho, 2000).

¹³ *Legille v. Dann*, 544 F.2d 1, 5-6 (D.C. Cir., 1976).

attaining the CWA's fishable goal. Yet, the First Notice Opinion's discussion of that evidence does not indicate it was evaluated equally. While the First Notice Opinion outlines the procedures States must use to designate uses and to conduct a UAA, it does not appear to apply the "rebuttable presumption" legal standard by which all UAAs must be evaluated.¹⁴

A use other than the CWA aquatic life and recreational goals may be applied to the UDIP if any one of the six UAA Factors applies.¹⁵ Midwest Generation presented extensive evidence showing that conditions in the UDIP satisfied at least one of the six UAA Factors, thus rebutting the presumption that the UDIP was capable of attaining the CWA goals. The evidence included extensive expert testimony, studies and analytical data showing the actual and anticipated future conditions of the UDIP.¹⁶ The Board summarily rejected this overwhelming body of evidence by referencing the Illinois EPA's general contention that Midwest Generation failed to present adequate proof that one of the UAA Factors applies to the UDIP and by adding, without explanation, that the Board was unpersuaded as well.¹⁷

The First Notice Opinion correctly recognizes that the UDIP is not a naturally flowing or free flowing river system, but rather a heavily and permanently modified system due to the presence of locks and dams, with reduced habitat diversity, widespread sedimentation, and an unlikelihood of any improvement due to its primary purpose as a commercial waterway. It further acknowledges that almost the entire LDPR is impounded and that the LDPR UAA concluded that the habitat is degraded due to impoundments and channelization.¹⁸ But while acknowledging the causes and existence of the degraded habitat in the UDIP, the First Notice

¹⁴ First Notice Opinion at p. 11-13.

¹⁵ First Notice Opinion at p. 12.

¹⁶ See Generally: Exhibits 364, Pre-filed Testimony of Julia Wozniak, the attached exhibits, and her testimony on 11/9/09; Exhibit 366, Pre-filed Testimony of Greg Seegert, the attached exhibits and his testimony on 11/10/09 and 11/8/10; Exhibit 369, Pre-filed Testimony of Dr. G. Allen Burton, the attached exhibits; Midwest Generation's Final Comments, PC #1277 and its Reply to Pre-First Notice Final Comments, PC #1286.

¹⁷ First Notice Opinion at p. 221.

¹⁸ *Id.* at p. 211.

Opinion then proceeds to ignore their effect upon the UDIP's ability to support aquatic life at a level that attains the CWA's fishable goals.¹⁹

The undisputed evidence showed that 93% of the UDIP is impounded, while the Brandon Pool is 100% impounded, a difference of only 7%.²⁰ The Board found that UAA Factor 4 applied to the Brandon Pool preventing attainment, yet made the opposite finding for the UDIP.²¹ However, the First Notice Opinion provides no explanation regarding why such a slight difference in the degree of impoundment supports the conclusion that UAA Factor 4 does not also apply to the UDIP.

The Board also wrongly assumed that impacts upon aquatic life caused by the presence of the dams were insignificant -- a finding not supported by the relevant facts, expert opinions or applicable regulations. The Board's consideration of the comparisons made in the LDPR UAA of the Fox River, which also has impounded segments, to the UDIP in evaluating the habitat quality in the UDIP was incomplete.²² The Board appears to have assumed that because the LDPR UAA found that the IBI scores for the UDIP "were comparable to the impounded segments of the Fox River, which is designated a General Use water", the UDIP must therefore qualify as a General Use water too.²³ The Board apparently believes that this finding was consistent with testimony by Dr. Thomas "that many of our large rivers are now impounded, but they can still support diverse fish communities."²⁴

The Board's reliance upon the General Use status of the Fox River and Dr. Thomas' testimony to conclude that the impounded nature of the UDIP does not satisfy UAA Factor 4 is misplaced for several reasons. As discussed above, the General Use Waters designation is the

¹⁹ *Id.* at p. 218.

²⁰ Ex. 2 of Ex. 366 at 14; Midwest Generation Final Comments PC #1277, p. 31.

²¹ *Id.* at p. 214.

²² *Id.* at p. 217.

²³ *Id.*

²⁴ *Id.*

default category for all Illinois waterbodies. Unless expressly excluded, all waters of the State must meet the general use standards of Subpart B of Part 302. 35 Ill. Adm. Code 303.201. The Board failed to take into account that a UAA has not been performed on the impounded segments of the Fox River. The entire Fox River, both its impounded and free-flowing segments, did not earn their “General Use status” based on any UAA assessment of their ability to attain the CWA’s fishable goal; instead, the entire Fox River is classified as a General Use waterway merely by default. Hence, in the absence of a UAA analysis on the impounded segments of the Fox River, their default General Use status does not support the conclusion that any other Illinois water body, including the UDIP, that has similarly poor IBI scores as the impounded segments of the Fox River is also capable of attaining the CWA’s fishable goals. The UAA of the UDIP is supposed to be a scientific evaluation. Its outcome should not be significantly influenced by general comparison to another waterbody classified as a General Use water merely by default.

The Board’s reliance on the LDPR UAA Report’s review of the Fox River is also misplaced because the Board completely ignored the findings of the more recent and extensive 2005 Fox River Study, which is part of the Subdocket C record along with expert testimony from Greg Seegert explaining how its findings support the conclusion that the UDIP is not capable of attaining the CWA’s goal. The 2005 Fox River Study was not available to the authors of the LDPR UAA and hence was not addressed in that UAA report.²⁵ The 2005 Fox River study definitively showed numerous adverse impacts of its dams on habitat, fish populations, and macroinvertebrates.²⁶ When the 2005 Fox River study results are considered, it shows that the

²⁵ Attachment 3 of Ex. 2 of Ex. 366, Santucci, V.J., S.R. Gephart, and S.M. Pescitelli. 2005. Effects of multiple low-head dams on fish, macroinvertebrates, habitat, and water quality in the Fox River, Illinois. *North American Journal of Fisheries Management* 25:975-992.

²⁶*Id.*; See also Midwest Generation Final Comments PC #1277, pp. 29-32 and Midwest Generation Reply to Pre-Notice Comments.

similarity between the UDIP and the Fox River IBI scores clearly supports the finding that UAA Factor 4 applies and that the Board's contrary conclusion is unsupported by the scientific evidence presented in Subdocket C.

Also of significant importance is that the IBI scores for both the UDIP and Fox River impounded segments are poor. Because of the purely default nature of the General Use classification of the impounded segments of the Fox River, using their IBI scores as a "bell weather" standard for determining that UAA Factor 4 does not apply is an arbitrary exercise. Instead, what is significant and determinative is the clear difference in IBI scores between the impounded and free-flowing segments of the Fox River. The impounded segments of the Fox River have much lower IBI scores than the free-flowing segments. This significant difference in IBI scores clearly demonstrates that the highly impounded condition caused by dams like those on both the UDIP and the Fox River results in major declines in biotic integrity.²⁷

In its most recent, December 20, 2012 303(d) List, the Illinois EPA itself has determined that these impounded segments of the Fox River are impaired for aquatic life, with causes including dissolved oxygen and sedimentation/siltation.²⁸ Significant evidence was presented in Subdocket C showing how sedimentation and siltation also negatively impacts aquatic life, particularly in the UDIP. Clearly, the fact that the Fox River is designated as a General Use Water does not mean it is a benchmark by which other waterbodies should be compared to determine whether they are capable of attaining the CWA's fishable goals. The similarities in the documented adverse effects caused to habitat and aquatic life between the impounded Fox River segments and the UDIP instead provides a rational, scientific basis for finding that UAA Factor 4 applies here.

²⁷ LDPR UAA Report, Attachment A to Illinois EPA Statement of Reasons, at p. 6-17.

²⁸ *Illinois Integrated Water Quality Report and Section 303(d) List, Clean Water Act Sections 303(d), 305(b), and 314*, Illinois EPA Bureau of Water, December 20, 2012.

Dr. Thomas' testimony also does not support the Board's finding that UAA Factor 4 does not apply to the UDIP. Contrary to the Environmental Groups' characterization of his comments, as cited in the Board's First Notice Opinion, Dr. Thomas never testified that many impounded large rivers can support diverse fish communities, as is stated in the Board's First Notice Opinion.²⁹ Dr. Thomas' actual testimony was that other – unidentified - large rivers should not be downgraded just because they do not have the equivalent balanced, indigenous population of a flowing river.³⁰ Moreover, even when Dr. Thomas' testimony is accurately stated, it has little or no relevance to the UDIP. The LDPR is not accurately characterized as a "large river" and any comparison of the UDIP to other, larger rivers is simply not accurate or reliable.³¹ Moreover, Dr. Thomas expressly confirmed that testimony by others in this rulemaking on the adverse effects caused by impoundment on rivers is true and he was not going to argue against it.³²

The evidence presented by Midwest Generation, through its expert aquatic biologist, Greg Seegert, coupled with the LDPR UAA and the 2005 Fox River Study, showed that the locks and dams create a deep pool environment that is lacking in coarse substrate, channel diversity, riffle habitat, and gradient."³³ In particular, the LDPR UAA concluded that the physical habitat formed by the navigation system falls under both UAA Factors 4 and 5, and conditions in both the Brandon Road Pool and the UDIP do not reflect a system that meets the optimum criteria for warm water use.³⁴ The LDPR UAA's conclusions were further supported by the additional EA Engineering studies conducted in 2003 and 2008. The EA Engineering

²⁹ The First Notice Opinion cites to the Environmental Groups' comment interpreting Dr. Thomas' testimony "PC1293 at 4, citing 8/14/09ATr. At 78-79", not to the testimony itself. (First Notice Opinion at p. 217).

³⁰ 8/14/09 Tr. at p. 79.

³¹ Midwest Generation Reply to Pre-First Notice Comments, PC #1286 p. 11.

³² 8/14/09 Tr. at pp. 78-79.

³³ LDPR UAA Report, Attachment A to Illinois EPA Statement of Reasons, at p. 4-32; See also Ex. 366, p. 7, and Midwest Generation Final Comments, PC #1277 pp. 58-80.

³⁴ LDPR UAA Report, Attachment A to Illinois EPA Statement of Reasons, at 4-32 – 4-33.

studies showed that the QHEI scores for the entire UDIP were well below a level that could support a diverse and health fish community, and the locations with higher scores were limited to a small portion of the UDIP.³⁵ The average QHEI score for the UDIP is only 47, showing that on average the habitat is much closer to poor than good.³⁶ The First Notice opinion correctly states that the main channel and main channel border provide marginal habitat and that the only reason the UDIP scored higher than the Brandon Road Pool was because of the Brandon tailwater which is only a small fraction of the UDIP (only 7%).³⁷ The testimony on QHEI scores by Dr. Thomas, referenced in the First Notice Opinion (at p. 51), does not rebut these findings, particularly in light of his admission that he had no experience using the QHEI in the UDIP or anywhere else.³⁸ The First Notice Opinion generally acknowledges that fish may move between good pockets of habitat, perhaps indicating why the Board disregarded the generally poor habitat conditions in the UDIP. However, while it may be true that fish do not need a continuous stretch of good habitat, they do need more than the one, very small pocket of good habitat provided by the Brandon Tailwater, particularly given its isolation from the rest of the UDIP. The Board's First Notice Opinion does not explain how this small pocket of good habitat is sufficient to support a healthy and diverse fish community in the UDIP. There is no data in the record showing that such a fish community exists today or that it can exist in the future. As the LDPR UAA found, consistent with the expert testimony presented in Subdocket C, the UDIP habitat could "not be improved without removal or major modifications to the navigation system"³⁹

³⁵ Ex. 2 of Ex. 366 at 27; Even Mr. Smogor of the Illinois EPA testified "that the [UDIP] has a lower biological potential than general use waters." 4/23/08 Tr. at 37.

³⁶ Midwest Generation's Final Comments, PC #1277, p. 65. A QHEI score of 45 or below signifies that a waterway cannot support a balanced fish community.

³⁷ First Notice Opinion at p. 219. The Board also looked to Illinois EPA's reliance on Ohio habitat index and fish index of biological integrity. However, the IBI and QHEI scores relied upon by Illinois EPA were exceptionally flawed and not as thorough as the EA Engineering studies. Midwest Generation's Final Comments, PC #1277, at pp. 70-76.

³⁸ 8/14/09 Tr.AM, p. 8; see also Midwest Generation's Reply Comments, at p. 43.

³⁹ LDPR UAA Report, Attachment A to Illinois EPA Statement of Reasons, at p. 4-32.

Yet, unexplainably and selectively, the First Notice Opinion emphasizes instead the opinion of Dr. Thomas, who has no actual experience in stream restoration, that the physical habitat in the UDIP can be improved by adding structures to the waterway.⁴⁰

The Subdocket C evidence rebuts the presumption that the UDIP can attain the CWA fishable goals. The First Notice Opinion does not explain how the Board concluded otherwise nor does it provide adequate support for the finding that the UDIP is capable of attaining the CWA goal. The Board should reconsider its conclusion that the UDIP should be designated a General Use water and instead adopt the proposed use designation submitted by Midwest Generation.

B. The First Notice Opinion Conflicts with the Board's Prior Holding that the UDIP Cannot Attain the CWA Recreational Goal

The Board's proposed General Use designation for the UDIP is inconsistent with the Board's findings and decisions in Subdockets A and B of this rulemaking. "General Use Waters" are able to attain the Clean Water Act fishable and swimmable goals.⁴¹ Yet, in Subdocket A, the Board held that the UDIP cannot attain the General Use Standards because the overwhelming evidence supported the finding that UAA Factor 3, Human Caused Conditions, precluded the attainment of the CWA recreational goals.⁴² The Board concluded in Subdocket A that the proper designation for the UDIP would be Incidental Contact Recreational, a use that does not attain the CWA swimmable goal.⁴³ Moreover, certain Board findings in Subdocket A applicable to the UDIP show that it is unable to attain the CWA goals. The Board found in Subdocket A that the UDIP was "completely channelized to a minimum depth of 9 feet and is

⁴⁰ First Notice Opinion at p. 51. See Midwest Generation Reply Comments at pps. 49-50. Dr. Thomas has never executed a restoration project from design to completion and he did not know what the effect on aquatic life was. 8/14/09AM Tr. at pp. 42-46.

⁴¹ First Notice Opinion at p. 14.

⁴² First Notice Opinion at p. 50.

⁴³ Opinion and Order, Second Notice in Subdocket A, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09 at p. 50 ("Second Notice Opinion in Subdocket A").

used primarily for commercial transport of bulk commodities such as grain, coal, petroleum products, chemicals and raw materials.”⁴⁴ Also, the Board found that the bacterial quality of the UDIP is significantly affected by the Joliet WRP effluent and the waste water treatment plants and CSOs significantly increase the bacterial densities in UDIP to three to four times higher than the general standards.⁴⁵ The LDPR UAA went further and concluded that the General Use maximum standard of 10% or less samples allowed to exceed 400 fecal coliforms cfu/100 mL was not attainable.⁴⁶ Evidently the Board agreed, because it found that the UDIP was significantly impacted by human caused conditions in accordance with UAA Factor 3, including the significant commercial transport of bulk commodities.⁴⁷ Therefore, the Board concluded that the UDIP should be Incidental Contact Recreational Water.

The conditions identified in Subdocket A that satisfied one or more of the UAA Factors and prevented the UDIP from achieving the CWA’s recreational goal remain the same when considering the aquatic use potential of the UDIP. The UDIP is still completely channelized to a minimum depth of 9 feet and is still primarily used for commercial transport of bulk commodities. Its flow is still primarily effluent from the wastewater treatment plants upstream. It already has been established in this rulemaking that barge traffic limits the quality of aquatic life attainable by physically injuring, killing or stranding fish, disrupting or disturbing spawning habitat, uprooting vegetation, increasing turbidity, and enhancing toxicity of the water by re-suspending and dispersing fine grained sediments with toxic compounds.⁴⁸ In fact, Illinois EPA linked the barge traffic to the low DO levels in the UDIP because the organic material released

⁴⁴ Second Notice Opinion in Subdocket A at p. 49.

⁴⁵ Second Notice Opinion in Subdocket A at p. 7-44.

⁴⁶ LDPR UAA Report, Attachment A to Illinois EPA Statement of Reasons, at p. 7-44.

⁴⁷ Second Notice Opinion in Subdocket A at p. 50.

⁴⁸ Ex. 369, Pre-filed testimony of Dr. G. Allen Burton at 4; Ex. 2 of Ex. 366, EA Engineering, Science, and Technology’s Report on the Aquatic Life Use Attainability Analysis for the South Branch of the Chicago River, the Chicago Sanitary and Ship Canal, and the Upper Dresden Island Pool, September 2008, at p. 8-9. See also Midwest Generation Final Comments, PC #1277, p. 51-52.

during CSO events is churned up by the barge traffic and begins to decompose causing low to zero DO levels.⁴⁹ The combined barge traffic and CSOs' effects, which are both "human caused conditions" under UAA Factor 3, directly correlate to negative impacts to aquatic life in the UDIP. Therefore, it is arbitrary to conclude that UAA Factor 3 does not equally apply to the UDIP aquatic use designation as it does to its recreational use designation.

The applicability of UAA Factor 3 is particularly evident in the data Midwest Generation presented documenting the predominance of sedimentation in the UDIP and how that sedimentation negatively impacts aquatic life in the UDIP.⁵⁰ Sedimentation pervades the entire UDIP and is moderate to severe in over two thirds of the UDIP.⁵¹ Such heavy sedimentation negatively impacts the aquatic species by filling rearing pools, filling interstitial spaces of spawning gravels, impairing fish food sources, and reducing beneficial habitat structure in stream channels.⁵² This is coupled with the fact that the sediments are extensively contaminated and are having a toxic effect on the aquatic life.⁵³ Sediments from a majority of the sampling locations in the UDIP smelled of petroleum and released oily sheens into the overlying water⁵⁴ – a point underscored by the Hearing Officer's remark, "Oh, yeah, it smells like gasoline. I'm not tasting it," when sediment samples collected by EA during its 2008 Study were opened during the hearings.⁵⁵

⁴⁹ 3/12/09 Tr. at p. 100. The negative effects of zero to low DO on aquatic life are not in dispute, and can be seen numerous exhibits in this rulemaking, including Exhibit 47, Metropolitan Water Reclamation District Letters to Illinois EPA on reported fish kills.

⁵⁰ Midwest Generation Final Comments, PC #1277, pp 36-58, Midwest Generation Reply to Pre-Notice Comments, PC #1286, pp 16-23.

⁵¹ Midwest Generation Final Comments, PC #1277, Ex. 366 at 5, Ex. 2 of Ex. 366 at 10.

⁵² Midwest Generation Final Comments, PC #1277, p. 38; Ex. 366 at 4; Ex. 2 of Ex. 366 at 9; 5/16/11 Tr. at 13; 12/3/08 Tr. at 9; see also Ex. 455, Kohler and Hubert, *Inland Fisheries Management in North America* (1999) at 273 ("Various smaller fishes take refuge from predators and water currents in the interstices of wood debris or under streambed rock.").

⁵³ Midwest Generation Final Comments, PC #1277, p. 42, Attachment 1 of Ex. 369 at 7-10; 1/13/10 PM Tr. at 87.

⁵⁴ 1/13/10 PM Tr. at 87.

⁵⁵ 1/13/10 PM Tr. at 89.

Yet, in the First Notice Opinion, the Board's discussion of biologic conditions notes that the benthic data from *artificial substrates* showed that the UDIP provided water quality sufficient to support a General Use classification.⁵⁶ But what the Board overlooked is that the benthic fauna in the natural substrates in the UDIP is poor because the natural substrates are covered in sediment and contaminated sediments.⁵⁷

Finally, as Illinois EPA repeatedly stressed, the UDIP has unique flow conditions necessary to maintain navigational uses and upstream flood-control functions.⁵⁸ These unique conditions are essentially due to the urbanized nature of the waterway. As Midwest Generation showed, there is a strong inverse relationship between the amount of urbanization and the various biological measures regardless of the biological metric used in the analysis.⁵⁹ Thus, as the urbanization around a waterway increases, the biological diversity decreases.⁶⁰

The Board already has found that UAA Factor 3 applies to the UDIP. Midwest Generation has provided ample evidence to strengthen that finding as it relates to the aquatic uses in the UDIP. At the very least, the Board's First Notice Opinion is in conflict with the findings in its Subdocket A opinion supporting its conclusion that the UDIP cannot attain the CWA recreational goal. Midwest Generation suggests that the Board reconsider its decision in rejecting an alternative aquatic life use designation for the UDIP.

⁵⁶ First Notice Opinion at p. 218 (emphasis added).

⁵⁷ Midwest Generation Final Comments, PC #1277, pp. 62.

⁵⁸ IEPA Statement of Reasons, p. 48.

⁵⁹ Ex. 2 of Ex. 366 at 30.

⁶⁰ Studies have shown that biological measures significantly decline when the percent impervious area reaches 10-20% or the percent urban area is 8-50%. Ex. 2 of Ex. 366 at 30-31.

C. In Applying Federal Law, the Board Should “Articulate a Satisfactory Explanation of Its Action”

In Illinois, a quasi-legislative decision is reviewed pursuant to the arbitrary and capricious standard.⁶¹ “An Agency action is arbitrary and capricious if the agency: (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁶² In its opinion in *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, (1983), the U.S. Supreme Court stated that even though the scope of review of an agency action is limited to the “arbitrary and capricious” standard, the agency must examine the “relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁶³ An Agency’s explanation of its action may not be superficial or perfunctory, but must be cogently explained such that a reviewing court can be sure that the decision was the product of reasoned decision-making.⁶⁴

While the Board may not be obligated to give a quantum of evidence,⁶⁵ some explanation of its reasoning should be provided. This is particularly true when a state administrative body like the Board is interpreting federal environmental statutes.⁶⁶ The Board is following and

⁶¹ *Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Bd.*, 155 Ill.2d 149, 180, 613 N.E.2d 719, 733 (1993).

⁶² *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 506, 524 N.E.2d 561 (1988) (citing *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67 (1983)).

⁶³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 42-43, 103 S.Ct. at 2866-2867.

⁶⁴ *Owner-Operator Independent Drivers Ass’n, Inc. v. Federal Motor Carrier Safety Admin.* 656 F.3d 580, 588 -589 (7th Cir. 2011) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29).

⁶⁵ *Granite City Div. of Nat. Steel. Co.*, 155 Ill.2d at 180.

⁶⁶ Bender, Josh, Farmer, Miles, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, Legal Workshop, (Yale L. J., December 24, 2012) (Deferring to state agency interpretations of federal statutes could cause unacceptable differences in the meaning of a law that requires nationwide uniformity, such as environmental statutes meant to create uniform rules across a national marketplace).

applying the Clean Water Act, a federal law.⁶⁷ Thus, it should be held to administrative requirements to sufficiently explain its rational in coming to its decision. According to the Seventh Circuit Court of Appeals, in rulemakings by the United States Environmental Protection Agency interpreting federal environmental laws, the U.S.EPA is required to identify the reasons for its decision and the reasons had to be plausible.⁶⁸ The Seventh Circuit so held because to rule otherwise would leave the reviewing court unable to assess the reasonableness of the agency's choice.⁶⁹ It follows that the Board should be held to the same standard when it is following and applying the same federal law. Moreover, without an explanation of the reasons for its decision, it is impossible to determine whether the explanation runs counter to the evidence before the Board, which is another key element in evaluating whether an agency's decision is arbitrary and capricious.⁷⁰

The Board's lack of explanation of its reasoning is particularly evident in its response to the substantial evidence that Midwest Generation presented in this rulemaking. The Board responded, without explanation, that it was "unconvinced."⁷¹ Midwest Generation presented significant data, reports, and expert and fact witness testimony on how three of the six UAA Factors apply to the UDIP and prevent it from attaining the CWA's fishable goal. Yet, the First Notice Opinion does not address why it concluded that all of the evidence presented on each of these three UAA Factors was "unconvincing." For example, the First Notice Opinion does not address what was lacking in the abundant evidence presented regarding the adverse effects of sedimentation on the UDIP (UAA Factor 3), or the evidence showing the highly impounded condition of the UDIP satisfies UAA Factor 4. Finally, the Board's analysis of the four large and

⁶⁷ First Notice Opinion at p. 11.

⁶⁸ *Madison Gas & Elec. Co. v. U.S. E.P.A.* 25 F.3d 526, 529 (7th Cir. 1994).

⁶⁹ *Madison Gas & Elec. Co. v. U.S. E.P.A.* 25 F.3d 526, 529 (7th Cir. 1994).

⁷⁰ *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 506, 524 N.E.2d 561 (1988) (citing *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67 (1983)).

⁷¹ First Notice Opinion at p. 221.

extensive habitat studies of the UDIP that were introduced into evidence in this rule-making is limited to one page of discussion that fails to explain how, with only 7% of “good” habitat area, the UDIP is capable of attaining the Clean Water Act’s fishable goal.

Without an explanation of the reasons why none of the six UAA Factors apply to the UDIP, the First Notice Opinion impedes, if not prevents, any analysis of the reasonableness of the Board’s proposal to instead apply the General Use designation to the UDIP. Without a clear explanation of the reasons underlying the Board’s proposal, an evaluation of whether the decision runs counter to the evidence presented, and thus, whether the decision is arbitrary and capricious, is also particularly difficult. As the Seventh Circuit held when considering a U.S.EPA rulemaking decision, while the U.S. EPA is free to reasonably interpret the statutes it administers, it must exhibit the reasons for its choice and articulate a satisfactory explanation for its action.⁷² Otherwise, its actions appear to be arbitrary and capricious.⁷³ By giving little or no explanation of its action in designating the UDIP as a General Use water, the Board’s opinion also appears to be arbitrary and capricious. Midwest Generation respectfully requests that the Board identify the reasons for its conclusion that none of the six UAA Factors applies to the UDIP in the Second Notice Opinion in Subdocket C.

IV. The Board’s Proposed Language for the Use B Designation and the U.S. EPA’s June 26, 2013 Comments Thereon

The Board requested comment on its proposed language describing the categories of, and examples of specific fish species contained in, the definitions of the Chicago Area Waterway System Aquatic Life Uses A and B.⁷⁴ The Board is proposing to use the terms "tolerant" and "moderately tolerant" with regard to fish species and to list certain fish species in the definitions

⁷² *Madison Gas & Elec. Co. v. U.S. E.P.A.* 25 F.3d 526, 529 (7th Cir. 1994).

⁷³ *Illinois State Chamber of Commerce v. U.S. E.P.A.* 775 F.2d 1141, 1147 (7th Cir. 1985).

⁷⁴ Opinion and Order, First Notice in Subdocket C, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304*, R08-09 at p. 175-176.

of CAWS Aquatic Life Use A Waters ("Use A Waters") and CAWS Aquatic Life Use B Waters ("Use B Waters"). Because Midwest Generation does not discharge to any of the ALU A Waters, its comments here are limited to the proposed ALU B Waters use designation language.

Recently, the U.S. EPA provided comments, dated June 26, 2013 (PC# 1372), which raise additional questions concerning the Board's proposed use designation language and recommends that the Board "revert to the designated use language proposed by the [Illinois EPA] in its Statement of Reasons." Midwest Generation has not had sufficient time to consider the U.S. EPA's comments, but requests the opportunity to do so as part of its request for an additional thirty (30) days to file comments in response to them. Accordingly, Midwest Generation does not express any opinion on whether the Board's or the Illinois EPA's proposed Use B language is preferable, but notes that the Board must have believed it was improving upon the Agency's proposed language in crafting its proposed revision. Hence, careful review is warranted before simply reverting to the Agency's alternative use language instead of crafting additional revisions as necessary to make the Board's proposed language consistent with requirements of federal law.

For ALU B Waters, the First Notice Opinion presents the following proposed language for further comment:

"These waters are capable of supporting primarily tolerant fish species, which may include but are not limited to central mudminnow, golden shiner, bluntnose minnow, yellow bullhead and green sunfish."⁷⁵

Midwest Generation agrees that the examples of fish species included in this proposed language represent fish that have been found to be present in Use B Waters. If the Board decides to retain the specific fish species references in the rule, the Board should consider also including in this

⁷⁵ First Notice Opinion at p. 228.

list the “common carp,” because it one of the most abundant fish species found in Use B Waters and is particularly representative of a “tolerant” fish species found in these waters.

The Board’s proposed Use B Waters language appears to be an attempt to clarify the meaning of the phrase “tolerant fish species,” because the Board does not believe the Subdocket C record adequately addressed what this term, as well as other similar terms such as “intolerant” or “moderately tolerant,” means.⁷⁶ It is questionable whether the First Notice comment period is aptly suited to or provides enough time to satisfactorily address this important issue, particularly as the record indicates there were differing views expressed by witnesses during the Subdocket C hearings regarding the correct meaning and interpretation of these terms. As the Board did not raise these questions during the Subdocket C hearings, there was not an opportunity to bring forward expert witness testimony and other relevant information to fully address them. The Board may wish to consider deferring the effective date of the proposed use designations until the completion of Subdocket D along with the invitation to Subdocket D participants to bring forth witness testimony and other information to address these issues further. The Board could then consider this additional evidence and determine whether further amendment to the language of its proposed Use A and B designations is appropriate.

There is one initial comment Midwest Generation can offer regarding the U.S. EPA’s comments on the Aquatic Life Use A and B descriptions. U.S. EPA emphasizes that designated uses reflect the uses already attained.⁷⁷ It recommends that the Board expand the language of the proposed use designations to address those macroinvertebrate, plant, algae and wildlife uses maintained in these waters. While a review of other states approved aquatic life use designations makes Midwest Generation question the U.S. EPA’s position that every attained use has to be expressly and specifically listed in the regulatory language of a use designation, a key “use” of

⁷⁶ First Notice Opinion at p. 175.

⁷⁷ June 26, 2013 U.S. EPA Letter to IPCB, PC#1372, at p. 3.

the CSSC which has now been attained and which is overlooked in the U.S. EPA's comments is its use to prevent the migration of invasive species to and from Lake Michigan. In addition, existing uses that are to be protected include navigation and industrial uses – both of which are protected uses under the Clean Water Act and its implementing regulations. Midwest Generation suggests that the presence of the electric barrier in the CSSC, navigation and industrial uses all should be mentioned in the Aquatic Life Use B designation language in recognition that these are also “protected uses.” In particular, the presence of the electric barrier has an impact on the quality of aquatic life in the CSSC and supports its proposed designation as an Aquatic Life Use B water.

V. Conclusion

The Board, by its own motion, decided in its First Notice Opinion that the UDIP was capable of meeting the CWA fishable goals and could be designated as a General Use Water pursuant to 35 Ill. Adm. 303.201. The First Notice Opinion, albeit substantial in pages, did not explain how the Board came to its conclusion. By not sufficiently articulating its reasoning in concluding that the UDIP should be designated a General Use Water, it is difficult, if not impossible, to evaluate fully whether there is a rational connection between the facts found and the choices the Board made. As a result, the opinion appears to be arbitrary and capricious because it cannot be reconciled with the totality of the testimony and evidence in the Subdocket C rulemaking which clearly rebuts the presumption that the UDIP could attain the CWA's “fishable” goal.

Midwest Generation presented expert testimony, reports and data which showed that the locks and dams, the human-caused conditions and the physical conditions of the UDIP prevent it from attaining the CWA's “fishable” goal. In fact, the Board has already held that UAA Factor 3 human-caused conditions on the UDIP prevent its attainment of the swimmable goal and

designated the UDIP accordingly for recreational uses. Moreover, the Board's proposal to designate the UDIP as a General Use water presents inconsistencies related to the Board's previous opinions in Subdocket A. And it raises critical questions, such as how will the Board adapt the General Water Quality Standards in Subdocket D if the current General Use Water Quality Standards were promulgated to maintain the General Use Designation? Does the Board intend to create a separate water quality standard from the General Use Standards for the UDIP? Midwest Generation respectfully requests that the Board consider these questions in its Second Notice Opinion.

In its May 15, 2013 order on IERG's motion for clarification, the Board clarified that it did not intend for the General Use water quality standards to apply to the UDIP until the conclusion of Subdocket D nor to change or alter the Recreational Use designations and standards decided in Subdockets A and B. The Board requested participants suggest clarifying language. Midwest Generation suggests that the Board reconsider its decision to designate the UDIP as a General use water. The General Use designation should not be adopted because it does not accurately describe the current or potential future conditions and aquatic uses of the UDIP. Further, the General Use designation cannot be "clarified." It is, and was intended to be, a generic, default use designation.

For all of the above reasons, Midwest Generation recommends that the Board instead adopt the Midwest Generation proposed UDIP use designation rule language:

302.237 Upper Dresden Island Pool Aquatic Life Use Waters

Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 Bridge shall be designated for the Upper Dresden Island Pool Aquatic Life Use. These effluent-dominated, urban-impacted waters are capable of maintaining warm water aquatic-life populations consisting primarily of lentic species of tolerant and intermediately tolerant types that are adaptive to the impounded, channelized and artificially-controlled flow and widespread siltation conditions created by the operation of the locks and dams that are necessary to maintain the existing navigational use and upstream flood control functions of the waterway system.

Further, the proposed UDIP use designation accurately describes the UDIP as a modified and completely channelized waterbody, impounded by locks and dams, and constantly impacted by human-caused conditions, which leaves it unable to attain the CWA's fishable goals.

If the Board, however, proceeds with its General Use approach for the UDIP, then at a minimum, it should either temporarily retain the existing Secondary Contact aquatic life use designation or defer the effect of its General Use classification decision until the end of Subdocket D to allow it the necessary additional time to determine to what extent there are water quality standards specific to the UDIP, but different from the generic General Use standards, which need to be adopted based on the record presented in Subdocket D. If such changes to the General Use water quality standards need to be made, as is expected to be the case for one or more parameters, the Board may find that creating a new "subclassification" of General Use waters is the clearer and more appropriate regulatory path to follow, while still being consistent with federal law and guidance.

Midwest Generation is also significantly concerned about certain of the recently filed U.S. EPA comments (PC# 1372) which apply to the Board's proposed Aquatic Life Use B waters where Midwest Generation's Will County Station is located. While it appears that the U.S. EPA is merely requesting that the Board expand upon the description of the evidence and justifications for its proposed Use B designations, and is not rejecting them, the fact remains that the Subdocket C record evidence gathered by the Board over the past almost six years is so extensive that finding all or substantially all of the evidence that the U.S. EPA claims must be specifically identified to support each of the UAA Factor 3, 4 and 5 findings by the Board is no small undertaking. Accordingly, Midwest Generation has a strong desire to assist the Board in that effort and requests an additional thirty (30) days to conduct a review of the CSSC and Brandon Pool evidence in the record and to provide to the Board the information contained in the

Subdocket C record for its consideration in addressing the U.S. EPA's Use B comments.

Midwest Generation also will include in its submission comments responding to the alternatives which the U.S. EPA comments present concerning the specific use designation rule language.

Midwest Generation appreciates the substantial effort the Board faced in reviewing the extensive record in Subdocket C. While Midwest Generation believes that the Board's proposed General Use designation of the UDIP is contrary to the record evidence and applicable UAA regulations, it has carefully considered the questions raised by the Board concerning the proposed UDIP designation and offers its responses here to assist the Board in its further consideration of these issues. By doing so, Midwest Generation nevertheless reserves its right to challenge a General Use designation for the UDIP if that designation is adopted by the Board.

Respectfully submitted,

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti
Susan M. Franzetti

Date: July 1, 2013

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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 Comments on the Illinois Pollution Control Board's First Notice and Opinion in Subdocket C of R08-09 were filed electronically on July 1, 2013 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 July 1, 2013 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti