

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

NOTICE OF FILING

TO: Mr. John T. Therriault,	Ms. Marie E. Tipsord
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an **ENTRY OF APPEARANCE OF THOMAS G. SAFLEY and PRE-FILED QUESTIONS FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: January 18, 2008

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Thomas G. Safley
Monica T. Rios
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached ENTRY OF THOMAS G. SAFLEY and PRE-FILED QUESTIONS FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on January 18, 2008; and upon:

Ms. Marie E. Tipsord
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Richard J. Kissel, Esq.
Roy M. Harsch, Esq.
Drinker, Biddle, Gardner, Carton
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698

Matthew J. Dunn, Esq.
Chief
Environmental Enforcement Division
Office of the Attorney General
69 West Washington, 18th Floor
Chicago, Illinois 60602

Claire A. Manning, Esq.
Brown, Hay & Stephens, LLP
700 First Mercantile Bank Building
205 South Fifth Street
Post Office Box 2459
Springfield, Illinois 62705-2459

Deborah J. Williams, Esq.
Stefanie N. Diers, Esq.
Illinois EPA
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Kevin G. Desharnais, Esq.
Thomas W. Dimond, Esq.
Thomas V. Skinner, Esq.
Mayer, Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637

Frederick M. Feldman, Esq.
Ronald M. Hill, Esq.
Mr. Louis Kollias
Margaret T. Conway
Metropolitan Water
Reclamation District
100 East Erie Street
Chicago, Illinois 60611

Charles W. Wesselhoft, Esq.
James T. Harrington, Esq.
Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601-7567

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Mr. Robert VanGyseghem
City of Geneva
1800 South Street
Geneva, Illinois 60134-2203

Jerry Paulsen, Esq.
Cindy Skrukud, Esq.
McHenry County Defenders
132 Cass Street
Woodstock, Illinois 60098

Albert Ettinger, Esq.
Freeman, Freeman & Salzman
401 North Michigan Avenue
Chicago, Illinois 60611

Mr. Bernard Sawyer
Mr. Thomas Granto
Metropolitan Water
Reclamation District
6001 West Pershing Road
Cicero, Illinois 60650

Ms. Lisa Frede
Chemical Industry Council of Illinois
2250 East Devon Avenue
Suite 239
Des Plaines, Illinois 60018-4509

Fredric P. Andes, Esq.
Erika K. Powers, Esq.
1 North Wacker Drive
Suite 4400
Chicago, Illinois 60606

Mr. James L. Daugherty
Thorn Creek Basin Sanitary District
700 West End Avenue
Chicago Heights, Illinois 60411

Ms. Sharon Neal
Commonwealth Edison Company
125 South Clark Street
Chicago, Illinois 60603

Tracy Elzemeyer, Esq.
American Water Company
727 Craig Road
St. Louis, Missouri 63141

Margaret P. Howard, Esq.
Hedinger Law Office
2601 South Fifth Street
Springfield, Illinois 62703

Mr. Keith I. Harley
Ms. Elizabeth Schenkler
Chicago Legal Clinic, Inc.
205 West Monroe Street
4th Floor
Chicago, Illinois 60606

Frederick D. Keady, P.E.
Vermillion Coal Company
1979 Johns Drive
Glenview, Illinois 60025

Mr. Fred L. Hubbard
16 West Madison
Post Office Box 12
Danville, Illinois 61834

Ms. Georgia Vlahos
Naval Training Center
2601A Paul Jones Street
Great Lakes, Illinois 60088-2845

W.C. Blanton, Esq.
Blackwell Sanders LLP
4801 Main Street
Suite 1000
Kansas City, Missouri 64112

Mr. Dennis L. Duffield
City of Joliet, Department of Public
Work and Utilities
921 East Washington Street
Joliet, Illinois 60431

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Ms. Kay Anderson
American Bottoms RWTF
One American Bottoms Road
Sauget, Illinois 62201

Mr. Jack Darin
Sierra Club
70 East Lake Street
Suite 1500
Chicago, Illinois 60601-7447

Mr. Bob Carter
Bloomington Normal Water
Reclamation District
Post Office Box 3307
Bloomington, Illinois 61702-3307

Mr. Tom Muth
Fox Metro Water Reclamation District
682 State Route 31
Oswego, Illinois 60543

Mr. Kenneth W. Liss
Andrews Environmental Engineering
3300 Ginger Creek Drive
Springfield, Illinois 62711

Albert Ettinger, Esq.
Jessica Dexter, Esq.
Environmental Law & Policy Center
35 East Wacker
Suite 1300
Chicago, Illinois 60601

Ms. Vicky McKinley
Evanston Environment Board
223 Grey Avenue
Evanston, Illinois 60202

Mr. Marc Miller
Mr. Jamie S. Caston
Office of Lt. Governor Pat Quinn
Room 414 State House
Springfield, Illinois 62706

Susan M. Franzetti, Esq.
Franzetti Law Firm P.C.
10 South LaSalle Street
Suite 3600
Chicago, Illinois 60603

Mr. Irwin Polls
Ecological Monitoring and Assessment
3206 Maple Leaf Drive
Glenview, Illinois 60025

Dr. Thomas J. Murphy
2325 North Clifton Street
Chicago, Illinois 60614

Ms. Cathy Hudzik
City of Chicago – Mayor's Office
of Intergovernmental Affairs
121 North LaSalle Street
City Hall – Room 406
Chicago, Illinois 60602

Ms. Beth Steinhorn
2021 Timberbrook
Springfield, Illinois 62702

Mr. James Huff
Huff & Huff, Inc.
915 Harger Road
Suite 330
Oak Brook, Illinois 60523

Ann Alexander, Esq.
Natural Resources Defense Council
101 North Wacker Drive
Suite 609
Chicago, Illinois 60606

Ms. Traci Barkley
Prairie Rivers Networks
1902 Fox Drive
Suite 6
Champaign, Illinois 61820

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Adm. Code Parts 301, 302, 303 and 304)

ENTRY OF APPEARANCE OF THOMAS G. SAFLEY

NOW COMES Thomas G. Safley, of the law firm HODGE DWYER
ZEMAN, and hereby enters his appearance in this matter on behalf of the Illinois
Environmental Regulatory Group.

Respectfully submitted,

By: /s/ Thomas G. Safley
Thomas G. Safley

Dated: January 18, 2008

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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**PRE-FILED QUESTIONS FOR THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorneys, HODGE DWYER ZEMAN, and submits the following Pre-Filed Questions for the Illinois Environmental Protection Agency (“Agency”) for presentation at the January 28, 2008 hearing scheduled in the above-referenced matter:

1. In its Statement of Reasons (“SOR”), the Agency cites to federal requirements, which the Agency refers to as UAA factors, in 40 C.F.R. § 131.10(g), as requirements with which States must comply when developing use designations. *SOR* at 5. The first factor to be considered is whether “[n]aturally occurring pollutant concentrations prevent the attainment of the use.” *Id.* Can you please discuss how the Agency considered the pollutant concentrations of the Chicago Area Waterway System (“CAWS”) and the Lower Des Plaines River (“LDPR”) in developing the proposed rule? What information did the Agency review to evaluate the naturally occurring pollutant concentrations in the water bodies? Is any of that information not contained in the Agency’s rulemaking proposal? What were the Agency’s conclusions regarding the level

of naturally occurring pollutant concentrations in the water bodies? How did the Agency's conclusions impact the development of the proposed rule? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

2. UAA factor two is the consideration of whether "[n]atural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use." *SOR* at 5. Can you please discuss how the Agency considered the natural, ephemeral, intermittent, or low flow conditions of the water bodies? What information did the Agency review to evaluate the flow conditions of the water bodies? Is any of that information not contained in the Agency's rulemaking proposal? What were the Agency's conclusions regarding the flow conditions of the water bodies? How did the Agency's conclusions impact the development of the proposed rule? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

3. UAA factor three is the consideration of whether "[h]uman caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place." *SOR* at 6. Can you discuss how the Agency considered human caused conditions or sources of pollution and whether such conditions or pollution sources cannot be remedied or would cause more environmental damage to correct than to leave in place? What information did the Agency review to evaluate the human caused conditions or sources of pollution impacting the waterways? Is any of that information not contained in the Agency's rulemaking proposal? Did the Agency determine that any human caused conditions and sources of pollution impacting the water bodies cannot be remedied? If

so, as to which conditions or sources of pollution did the Agency make that determination? What information and/or factors did the Agency rely on or consider in making that determination? Did the Agency determine that any human caused conditions and sources of pollution impacting the water bodies would cause more environmental damage to correct than to leave in place? If so, as to which conditions or sources of pollution did the Agency make that determination? What information and/or factors did the Agency rely on or consider in making that determination? How did the Agency's conclusions on these issues impact the development of the proposed rule? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

4. UAA factor four is the consideration of whether “[d]ams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use.” *SOR* at 6. Can you please discuss how the Agency considered whether dams, diversions or other types of hydrologic modifications to the waterbodies preclude attainment of the uses proposed in the rule? Can you discuss how the Agency considered whether it is feasible to restore these water bodies to their original condition? Can you discuss how the Agency considered whether it is feasible to operate the modifications to these waterbodies in a way that would result in the attainment of the proposed uses of the water bodies? What information did the Agency review to evaluate these issues? Is any of that information not contained in the Agency's rulemaking proposal? What were the Agency's conclusions regarding these issues? How did the Agency's conclusions impact the

development of the proposed rule? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

5. UAA factor five is the consideration of whether “[p]hysical conditions related to natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of the use.” *SOR* at 6. Can you discuss how the Agency considered these characteristics and features of the CAWS and LDPR in developing the proposed rule? What information did the Agency review to evaluate the characteristics and features of the water bodies? Is any of that information not contained in the Agency's rulemaking proposal? What were the Agency's conclusions regarding the impact of the water bodies' characteristics and features on the level of pollutant concentrations in the water bodies? How did the Agency's conclusions impact the development of the proposed rule? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

6. UAA factor six is the consideration of whether “[c]ontrols more stringent than those required by sections 301(b) and 306 of the Act [CWA effluent standards] would result in widespread economic and social impact.” *SOR* at 6. Can you discuss how the Agency considered the economic and social impact of its proposed rule? The Agency states in its *SOR* that it relies on USEPA guidance (“Appendix M”) when considering factor six. *Id.*; *see also* *SOR* Attachment C. Although the Agency references Appendix M, it does not provide details on whether it relied on Appendix M when evaluating factor six. Did the Agency rely on Appendix M to determine the social and

economic impact of the proposed rule? If so, to what extent did the Agency rely on Appendix M? What other information did the Agency use to determine the social and economic impact of the proposed rule? Is any of that information not contained in the Agency's rulemaking proposal? What are the Agency's conclusions regarding whether the proposed rule would have a widespread social and economic impact? Are any of the Agency's conclusions not reflected in the Agency's rulemaking proposal?

7. It is our understanding that significant portions of the CAWS and LDPR currently may not meet the proposed thermal and dissolved oxygen water quality standards. Has the Agency evaluated the water bodies to determine whether they currently meet the proposed standards? If so, what was the Agency's conclusion?

8. Pursuant to the current regulations, if a receiving water does not meet the water quality standards, no mixing zone is allowed for a discharger to the water. *See* 35 Ill. Admin. Code § 302.102(b)(9). Does the Agency agree that, as such, dischargers will not be allowed a mixing zone to aid in complying with many of the proposed standards? If not, why not? What is the Agency's basis for proposing standards that preclude the use of mixing zones?

9. Is it the Agency's intent with this proposal to require facilities to comply with the water quality standards at the "end of pipe"? If so, what are the economic and technological implications of requiring compliance in such a manner?

10. What period of time will affected facilities be given to begin compliance with the proposed rules once they are adopted and become effective?

11. How does the Agency determine if a proposed rule is economically reasonable? What factors are taken into consideration?

12. What is the Agency's justification for the economic reasonableness of this proposal? What economic impact studies or analysis did the Agency perform to determine the economic feasibility of the proposed rule?

13. If no economic impact study was performed, on what does the Agency base its economic justification for the proposed rule? What information has the Agency provided to the Illinois Pollution Control Board ("Board") on which the Board can base its determination that the proposed rule is economically reasonable?

14. How does the Agency determine if a proposed rule is technically feasible? What factors are taken into consideration?

15. What is the Agency's justification for the technical feasibility of this proposal? Did the Agency perform any studies or conduct any research regarding the technical feasibility of the proposed rule? If so, what were the Agency's conclusions?

16. If no studies were performed by the Agency that addressed the technical feasibility of the proposed rule, on what does the Agency base its technical justification of the proposed rule? What information has the Agency provided to the Board on which the Board can base its determination that the proposed rule is technically feasible?

17. Does the technology exist to comply with the proposed standards at a reasonable cost? If yes, what is that technology? What does the Agency consider to be a reasonable cost for this technology? Did the agency consider the cost for each discharger to the CAWS and LDPR to comply with the Agency's proposed regulations?

18. The Agency states in its SOR that “[its] proposed temperature water quality standards were based on the report by Midwest Biodiversity Institute (MBI) and center for Applied Bioassessment and Biocriteria (CABB),” which report is attached to the SOR as Attachment GG. *See* Statement of Reasons, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code Parts 301, 302, 303, and 304*, R08-9 at 80 (Ill.Pol.Control.Bd. Oct. 26, 2007) (hereinafter cited as “SOR”). Attachment S to the Agency’s SOR includes some data on which the MBI/CABB Report was based. However, the data seems to be limited to instances cited in literature from laboratory studies. The raw report data is not available for review. Having access to the raw data is critical when evaluating this type of report. Also, the report lacks discussion relating to data validation, verification and usability. These are also critical areas that need to be documented. How can interested parties obtain copies of the raw data on which Attachment S was based?

19. Does the Agency have field data that it collected, or that was provided to it by dischargers, relating to fish populations and/or water temperature in the CAWS? In the LDPR? If so, did the Agency take these data into account in developing the proposed thermal standard? If the Agency did not take these data into account, would it not be preferable to rely on this actual fish and temperature data from these water bodies in developing thermal standards? If not, why not?

20. If the proposed rule is adopted as drafted, how will the rule impact dischargers that currently have regulatory relief from the current water quality standards for the CAWS and LDPR?

This concludes IERG's questions for the Agency. IERG thanks the Board for the opportunity to present these questions today.

* * *

IERG reserves the right to supplement or modify these pre-filed questions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: January 18, 2008

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Thomas G. Safley
Monica T. Rios
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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