

Electronic Filing - Received, Clerk's Office, June 26, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9
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)

NOTICE OF FILING

TO:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
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Chicago, IL 60601

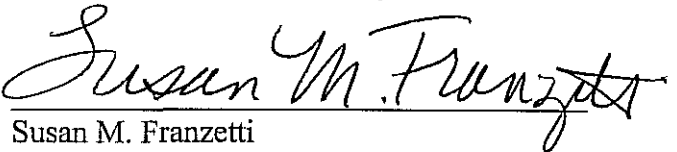
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SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the
Pollution Control Board MIDWEST GENERATION'S MEMORANDUM IN SUPPORT OF
MWRDGC'S MOTION TO STAY, a copy of which is herewith served upon you.

MIDWEST GENERATION, L.L.C.


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Date: June 26, 2008

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 26th day of June, 2008, I have served electronically the attached MIDWEST GENERATION'S MEMORANDUM IN SUPPORT OF MWRDGC'S MOTION TO STAY, and NOTICE OF FILING upon the following person:

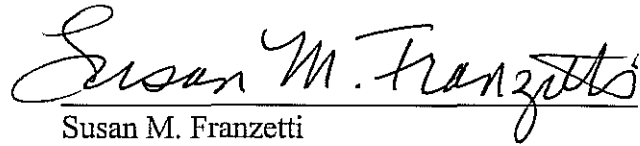
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and by U.S. Mail, first class postage prepaid, to the following persons:

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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)

**MIDWEST GENERATION'S MEMORANDUM IN SUPPORT OF MWRDGC'S
MOTION TO STAY**

Pursuant to 35 Ill. Adm. Code 101.514, Midwest Generation, L.L.C. ("Midwest Generation" or "MWGen"), respectfully submits this Memorandum in Support of the Metropolitan Water Reclamation District of Greater Chicago's ("MWRDGC" or "District") Motion to Stay. Midwest Generation states as follows:

I. INTRODUCTION

Midwest Generation actively participated during the years that the Agency held stakeholder meetings concerning the Use Attainability Analyses ("UAA") for the Chicago Area Waterways Systems ("CAWS") and the Lower Des Plaines River ("LDP"), particularly on use designation and thermal issues. After a gap of a few years after the stakeholder meeting process ended, Midwest Generation also is now actively participating in the hearings on the proposed UAA rules. Based on its extensive participation in this UAA process, Midwest Generation shares the District's concern that Illinois EPA's proposal is fundamentally flawed and cannot be supported based on the many factual gaps and faulty assumptions that make up the administrative record. As evidenced by the testimony of the Agency's witnesses, the Illinois EPA's development of the proposed rules was impaired by certain fundamental problems, including the Agency's failure to meaningfully consider the stakeholders' input regarding, *inter*

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alia, the need to obtain and review relevant data relating to major constraints limiting the attainable uses for the subject waterways, the Agency's failure to consider the technical feasibility and economic costs of the proposed rules it ultimately filed with the Board, and its failure to consider any alternative approaches to its proposed thermal water quality standards. For example, despite Midwest Generation's August 2007 submission of a detailed, statistically-sound alternative thermal standards methodology and proposed numerical standards for the Upper Dresden Island Pool ("UDP"), the Agency admitted during the hearings that it did not review Midwest Generation's submission. Moreover, the Agency failed to consider 20 years of fish survey data collected from the UDP and within its possession, data which the Illinois EPA and its thermal consultant Chris Yoder agree are important in assessing use attainment.

The testimony also has revealed the complete absence of review of key data or analysis regarding environmental stressors, such as extensive fish survey data, QHEI data, as well as available sediment chemistry and quality data, that is fundamental to the Agency's decisions on use designations and ultimately whether the Agency's proposal is reasonable and defensible. For example, despite the lack of sediment data, IEPA speculated during the hearings that sediment quality is improving, and is using such speculation as a basis for the Agency's core belief that the UDP can attain the Clean Water Act's goal of "fishable and swimmable."

Midwest Generation submits that setting a precedent of moving ahead with this significant rule-making when the Agency's supporting record suffers from so many key deficiencies is not beneficial to the Board, to the Agency or to the interested members of the public. Midwest Generation recognizes and accepts that it bears the burden and expense of presenting its views on this rule-making to the Board. However, due to the many omissions in the Agency's development of the underlying record here, that burden has become unreasonable. A stay would allow the Agency an opportunity to complete the work, including hopefully re-

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initiating the long ago terminated stakeholder process that should have been performed before these rules were filed with the Board. A pause in the proceedings we believe would result in a more stream-lined, cost-effective and less time-consuming rule-making process before the Board.

Because the Agency's selective consideration of limited data related to the UDP did not become evident until its testimony before the Board in these proceedings, Midwest Generation is trying to address those gaps. Midwest Generation is working to: gather, review and analyze data that the Agency has ignored; address gaps in the more recently collected but limited data that the Agency has presented here; and prepare to present a more complete data set and analysis to the Board. Due to the weather conditions this year, field work to collect additional field data to provide a more complete picture of current conditions in the UDP has been delayed and some of this work also must await summer seasonal conditions that will not be present until July. This new field data will have a direct bearing on the Agency's use designation decisions.

A stay would allow the necessary time to collect and carefully review current data as opposed to the press of the August 4, 2008 deadline for pre-filed testimony on use designation issues. It also would allow this data to first be presented and discussed with the Agency and other stakeholders outside of the formal constraints of a rule-making proceeding in the hope that it may lead to resolving, or at least narrowing, the many disputed UAA issues currently before the Board. Midwest Generation believes it would be beneficial to the Agency and the integrity of the Agency's decision-making process to provide the Agency adequate time to consider and discuss the additional data outside of the context of the rule-making proceeding.

Consequently, Midwest Generation concurs with the District's position that IEPA's rulemaking efforts are filled with significant gaps and receiving additional data from the stakeholders would be important for the Agency to consider in its decision-making process.

II. DEFICIENCIES IN IEPA'S PROPOSAL

The hearing testimony has revealed a significant lack of data, information and analysis regarding the assessment of the economic and social impacts that will result from Illinois EPA's proposed thermal water quality standards, including the following:

- Illinois EPA failed to conduct any economic analysis of its proposed thermal standards on all effected parties within the CAWS (January 28 Hearing, transcript at p. 53);
- Illinois EPA failed to consider the costs to industrial dischargers along the UDP to comply with the proposed thermal standards (March 10 Hearing, transcript at pp. 24-26);
- Illinois EPA's only basis to conclude that cooling towers are economically reasonable was premised on the fact that such technologies are available and have been used elsewhere, despite the fact that no facilities within Illinois have ever been retrofitted with cooling towers (January 28 Hearing, transcript at pp. 53-54, 86; March 10 Hearing, transcript at p. 38);
- Illinois EPA failed to discuss the economic impacts to dischargers to the CAWS in the Lower Des Plaines and how long it would take for those dischargers to obtain, install, and test control equipment necessary to comply with IEPA's proposal (March 10 Hearing, transcript at p. 79);
- Illinois EPA admitted to not knowing whether its proposal would result in "substantial and widespread economic and social impact" under the 40 C.F.R. Section 131.10 of the federal regulations (*i.e.*, UAA Factor 6), because it did not have the data to do so (March 10 Hearing, transcript at p. 39);
- Illinois EPA admitted to not knowing whether or not UAA Factor 6 would apply to the UDP (January 28 Hearing, transcript at p. 100); and

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- Illinois EPA did not request any data from the dischargers regarding the potential costs of cooling towers, despite the fact that the Agency agreed that such information would have been valuable to its decision-making process (January 29 Hearing, transcript at pp. 123-124).

The testimony further reveals significant deficiencies in the collection of environmental data and information that, if collected and analyzed, would contribute significantly to the decision-making process, including the following:

- Illinois EPA admitted to having huge gaps in sediment data to determine whether contaminated sediments would have a limiting effect on attainment of water quality standards (January 28 Hearing, transcript at p. 98; March 10 Hearing, transcript at pp. 9, 23, and 92-93);
- Illinois EPA conceded that sediment chemistry data would be necessary to do a complete evaluation of the habitat issues for aquatic life in the CAWS, but admitted that it did not consider sediment chemistry data in making its habitat evaluation (February 1 Hearing, transcript at p. 182);
- Illinois EPA conceded that it cannot make a definite distinction between legacy sediment and recent sediment (January 29 Hearing, transcript at p. 183);
- Illinois EPA has failed to explain why habitat impacts from extensive channelization and barge traffic – which the Board in the AS 96-10 proceedings concluded overrode the effect of temperature below I-55 – do not override the effects of temperature for the UDP (January 28 Hearing, transcript at pp. 127-134);
- Illinois EPA failed to consider any non-water quality environmental impacts from its proposal, including air emissions and impact to air quality that would result from the construction of cooling towers (March 10 Hearing, transcript at pp. 26-28, 34); and

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- Illinois EPA admitted it did not assess other significant environmental stressors, including the number of combined sewer overflows (“CSO”) bacteria sources, or municipal separate storm sewer system (“MS4”) sources to the CAWS, even though they may be significant contributing sources (April 23 Hearing, transcript at pp. 76-77, 79).

The testimony has also revealed Illinois EPA’s approach is deficient in many other material respects, including its failure or unwillingness to consider other data and alternative approaches:

- Illinois EPA’s consultant, Mr. Yoder, stated that, although he was aware of the 20 years of stream survey data related to fish studies for the UDP, he was not provided the data and, therefore, did not factor it into his analysis (January 30 Hearing, transcript at pp. 83-84);
- Illinois EPA’s consultant, Mr. Yoder, was aware of the August 2007 EA report submitted to the Agency by Midwest Generation, but admitted to not reviewing the several years of fish studies data, because it was “outside the scope of [his] task”, (January 30 Hearing, transcript at pp. 86-87), despite agreeing to the importance of field data in assessing thermal conditions (Id. at 92 and 97);
- Illinois EPA’s consultant, Mr. Yoder, conceded that his fish temperature ranking approach to establish thermal water quality standards had not been used outside of Ohio, and that there were other methodologies available to be used; however, neither Mr. Yoder nor IEPA considered any other alternative methodologies (January 30 Hearing, transcript at p. 76);
- Illinois EPA admitted to being aware of how other states developed thermal water quality standards, such as Colorado, yet failed to meaningfully consider these alternative approaches (March 10 Hearing, transcript at pp. 121-123);

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- Illinois EPA's consultant, Mr. Yoder, acknowledged that his fish temperature model does not account for other biotic factors such as population, community, and/or food-web interactions, although he agreed such factors are important (January 30 Hearing, transcript at p. 188);
- Illinois EPA did not provide stakeholders an opportunity for input into the Agency's list of representative fish species, despite the fact that Illinois EPA's consultant, Mr. Yoder, concluded that giving the public such an opportunity would have been important (January 31 Hearing, transcript at pp. 201-202);
- Illinois EPA's consultant, Mr. Yoder, conceded that he was not sufficiently versed with U.S. EPA's guidance on the development of water quality standards to say whether his approach satisfied U.S. EPA's quality assurance protocols (January 31 Hearing, transcript at pp. 60-62);
- Illinois EPA's consultant, Mr. Yoder, agreed that his methodology had not been embraced or endorsed by U.S. EPA in any national publication or criteria document (January 31 Hearing, transcript at p. 214);
- Illinois EPA failed to consider the requirements of section 303(g) of the Clean Water Act pertaining to federal water quality standards for thermal discharges (January 28 Hearing, transcript at p. 112); and
- Illinois EPA admits that its approach to establishing designated uses is not based on tiered-aquatic life uses, which is an approach recommended by the U.S. EPA, especially to address modified water bodies such as CAWS (March 10 Hearing, transcript at p. 121).

III. A STAY WOULD ALLOW FOR ILLINOIS EPA'S CONSIDERATION OF FORTHCOMING RELEVANT STUDIES AND STAKEHOLDER INPUT

It is certainly not uncommon in rule-making proceedings to identify areas where additional data and information would be helpful to the Board and the participating parties. In

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that regard, the mere existence of any "information gaps" is not in and of itself grounds for a stay. However, as detailed above, the extent and magnitude of the informational gaps and deficiencies here is far greater than is typically the case in a petition for significant new rules presented to the Board by the Agency.

The inadequacy of the record here is also contrary to the intent of the UAA regulation. The UAA regulation sets forth six factors to be considered by the Agency, any one of which if satisfied supports a finding that the appropriate use designation is not a fishable standard under the Clean Water Act. The UAA regulations do not contemplate or encourage a regulatory approach that fails to conduct an adequate review of the UAA factors in order to reach an unsubstantiated conclusion that none have been satisfied. That approach undermines principles of fundamental fairness in governance. The Agency should not have failed to collect and review data that could have shown that one or more of the six UAA factors is satisfied for the Upper Dresden Island Pool. To shift this governmental obligation to the regulated community and to the Board, as is the current state of this rule-making record, is neither reasonable nor consistent with the intent of the Clean Water Act. However, as past history cannot be undone, the current situation can at least be ameliorated going forward by the entry of a stay. Entering a stay to allow the necessary time for interested parties to collect and present at least some of the missing and critical information to fill the gaps in the current administrative record is an appropriate and fair response to the incomplete administrative record currently before the Board.

In addition, as the extensive questioning of Agency witnesses has shown, there was limited opportunity for the Agency and stakeholders to engage on key issues and questions after the Agency presented its UAA rules proposal to the public in March 2007. By the Agency's own testimony, any alternative approaches, such as the Midwest Generation alternative approach to thermal standards submitted in August 2007, were not considered because they were deemed to

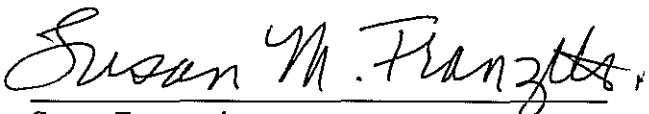
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be too late. For this reason, Midwest Generation suggests that the Board in granting a stay, should also direct the Agency to re-initiate the stakeholder process so that an attempt can be made to reduce the amount of time and resources devoted to this rule-making upon its resumption.

WHEREFORE, Midwest Generation respectfully supports the Motion for Stay filed by the District. Midwest Generation also submits that the Board should mandate that during any stay granted by the Board, the Illinois EPA re-initiate the stakeholder process that was terminated prior to the Agency's presentation to the stakeholders of its UAA decisions and followed subsequently by the initiation of this rulemaking.

Respectfully submitted,

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