

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, Clerk
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James R. Thompson Center
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Chicago, IL 60601

Marie Tipsord, Hearing Officer
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Persons included on the attached
SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board MIDWEST GENERATION'S MOTION FOR EXTENSION OF TIME TO FILE PRE-FILED TESTIMONY OF GREG SEEGER AND DR. ALLEN BURTON, a copy of which is herewith served upon you.

MIDWEST GENERATION, L.L.C.



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Date: July 25, 2008

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 25th day of July, 2008, I have served electronically the attached MIDWEST GENERATION'S MOTION FOR EXTENSION OF TIME TO FILE PRE-FILED TESTIMONY OF GREG SEEGERT AND DR. ALLEN BURTON, and NOTICE OF FILING upon the following person:

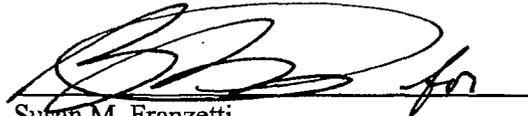
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and by U.S. Mail, first class postage prepaid, to the following persons:

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WATER QUALITY STANDARDS AND)
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MIDWEST GENERATION'S MOTION FOR EXTENSION OF TIME TO FILE PRE-FILED TESTIMONY OF GREG SEEGERT AND DR. ALLEN BURTON

Pursuant to 35 Ill. Adm. Code 101.522, Midwest Generation, L.L.C. ("Midwest Generation" or "MWGen"), respectfully submits this Motion for Extension of Time to File Pre-Filed Testimony of Mr. Greg Seegert and Dr. Allen Burton. In support of this motion, Midwest Generation states as follows:

I. Pre-Filing Deadlines.

On April 23, 2008, during a pre-hearing conference with the Hearing Officer, prior to the start of hearing that same day, discussions were had regarding possible dates for pre-filing deadlines and the deadline was tentatively set for August 4, 2008. During the pre-hearing conference, counsel for Midwest Generation expressed concern regarding the company's ability to meet the August 4 deadline, based on ongoing efforts by MWGen to collect additional field data and sampling in the Des Plaines River to address issues raised by the testimony and exhibits filed by the Illinois Environmental Protection Agency ("IEPA") in support of this rule-making proposal.

Since the April 23 pre-hearing conference, Midwest Generation has moved diligently to try to complete these additional data-gathering activities. However, some of the field work was dependent upon seasonal conditions and could be conducted no sooner than field conditions allowed. Midwest Generation has now determined that the August 4, 2008 deadline for pre-filed testimony does not provide sufficient time to physically collect and analyze the data and to finalize witness reports and pre-filed testimony. The Hearing Officer during the April 23 pre-hearing conference acknowledged MWGen's concern and stated that, if additional time was needed, a request for an extension of time should be sought describing the need for the additional time and the amount of additional time being requested.

The Hearing Officer issued orders on May 2 and May 19, giving notice of a pre-filing deadline "tentatively set" for August 4, 2008. Both Orders mention the fact that pre-filing deadlines were discussed the morning of April 23 and reflect the concern expressed by Midwest Generation of meeting the August 4 deadline. To accommodate these concerns, the Hearing Officer, in the May 19 Order, directed that, in the event more time was needed, a motion be filed with the Hearing Officer prior to the filing deadlines, explaining why and how long an extension would be sought. Pursuant to the May 19 Order, MWGen respectfully requests an extension of time to September 8, 2008 to file certain of its pre-filed witness testimony for the reasons set forth below. MWGen's request for this extension is limited in both time and scope. The extension is only being sought with respect to the pre-filed testimony of two of the witnesses to be presented on behalf of MWGen, Dr. Allen Burton and Mr. Greg Seegert. Additional time is needed to validate and analyze new, recently collected sediment and QHEI data for the Upper Dresden Pool and to final the pre-filed testimony of these two witnesses whose testimony will

address issues related to sediment and habitat conditions in the Upper Dresden Pool. MWGen is not seeking an extension of time to file pre-filed testimony of any other witnesses.

II. MWGen-Sponsored Sediment Sampling Study For Upper Dresden Pool.

During the IEPA hearing testimony, IEPA witnesses explained that because adequate sediment data was lacking, it did not consider whether the presence of contaminated sediments affected the process of identifying the attainable use for the Upper Dresden Pool, as well as other parts of the UAA. *See January 28 Hearing Transcript at p. 98; March 10 Hearing Transcript at pp. 9, 23, and 92-93; and February 1 Hearing Transcript at p. 182.* IEPA also speculated that, if anything, sediment quality may have improved due to reduced instances of CSO's and improved effluent quality and steps taken to reduce non-point source pollution. *See January 28 Hearing Transcript at pp. 161-162.* MWGen believes that sediment quality is an important and relevant factor to be considered regarding the identification of the appropriate aquatic life attainable use for the Upper Dresden Island Pool (UDP). While sediment data is available concerning the subject waterway from other sources, MWGen's review of available data noted that recent sediment quality data was not available for the UDP to show that the results of extensive sediment sampling in the 1990's which documented significant contaminated sediments are still representative of sediment conditions today. To that end, earlier this year, MWGen retained the services of EA Engineering to perform a sediment study in the UDP. The scope of the study was developed and 35 sampling sites in the UDP were identified to be included in the field work. During the period of May 5-9, 2008, sediment samples were collected from the 35 sampling sites included in the study's scope of work. These samples were sent for analysis and the data package was received in early July. Quality assurance/quality control review of the laboratory

analytical results is now being completed (expected to be completed week of July 21) to confirm the reliability of the results. A review of the data and the preparation of a summary report to present the results to the IPCB still need to be completed. Further, the data report also needs to be reviewed by MWGen's expert witness, Dr. Allen Burton, and as appropriate, incorporated into his pre-filed testimony which will address the issue of sediments in the UDP. Dr. Burton will be out of the country for a previously scheduled trip abroad during the period of July 24 to August 8. As the data report will not be completed prior to Dr. Burton's departure, a few additional weeks of time upon his return is needed to allow Dr. Burton to review the results and to incorporate them into his pre-filed testimony.

III. MWGen-Sponsored QHEI Study Of The Upper Dresden Island Pool.

The IEPA has testified that it relied on a weight of evidence approach that was weighted towards habitat conditions, to determine the appropriate use designation for the UAA waterways. *See, e.g., April 24 Hearing Transcript at pp. 12-13.* As part of its filings and testimony before the IPCB, the IEPA has cited to and relied upon QHEI data collected and presented by the Midwest Biodiversity Institute (MBI) in 2006 for three sampling sites in the UDP. *See Attachment S: Aquatic Life and Habitat Data Collected in 2006 on the Illinois and Des Plaines Rivers. Midwest Biodiversity Institute, prepared for U.S. EPA Region 5 (2006) to IEPA's Statement of Reasons; see also January 31 Hearing Transcript at pp. 246-249.* This data had not been disclosed by the IEPA prior to this rule-making because it was received just months before the Agency filed its Petition with the Board. *Id.* MWGen submits that this QHEI data is not sufficiently complete nor statistically representative of habitat conditions in the UDP. Nevertheless, these three samples are being relied upon by the IEPA to support its proposed Aquatic Life Use designation

for the UDP. As indicated by its questioning of the IEPA witness, Mr. Christopher Yoder, who was in charge of the 2006 MBI QHEI data collection, MWGen questions the representativeness and accuracy of certain of the data included in the 2006 MBI QHEI data and believes that such data need to be evaluated through further field survey work.

The IEPA also has presented data collected previously in the UDP at two locations by Mr. Edward Rankin of the Center for Applied Bioassessment and Biocriteria ("CABB") in 2004, which data generally showed lower QHEI values than the 2006 MBI QHEI data. *See Attachment R: Analysis of Physical Habitat Quality and Limitations to Waterways in the Chicago Area. Center for Applied Bioassessment and Biocriteria, prepared for U.S. EPA Region 5 (2004) to the IEPA's Statement of Reasons.* However, because this prior QHEI data was collected in the month of March, it has been noted in IEPA witness testimony that it was collected outside of the standard mid-June to mid-October seasonal index period for conducting QHEI field survey work. The mid-June to mid-October time period is when normal summer flow conditions and certain habitat features, which are measured by the QHEI procedures, are expected to be present. For example, habitat conditions constituting "cover" (e.g., overhanging vegetation and rooted aquatic macrophytes) within the meaning of the QHEI scoring approach do not reach their optimal seasonal condition until the summer months. *See February 1 Hearing Transcript at pp. 142-3.*

To address both the lack of recent, comprehensive QHEI data for the UDP, and any issues raised with regard to the timing of the March 2004 CABB QHEI field work, MWGen subsequently authorized EA Engineering to develop a comprehensive QHEI scope of work to be performed in the UDP during the accepted mid-June to mid-October seasonal index period to avoid any potential issue that the QHEI work was performed when habitat conditions would

perhaps bias the QHEI scores. EA developed a study scope that included 50 stream survey locations in the UDP. EA conducted the 50-sites QHEI stream survey work on July 10 and 11, 2008, which was the earliest scheduled time that would ensure the presence of acceptable habitat conditions, such as cover, to be included in the survey work. This July 2008 QHEI field data is currently under QA/QC review. Upon completion of the QA/QC review, a report will be prepared to present the QHEI survey results in this proceeding. As a final step, MWGen's expert Greg Seegert of EA will need to review the QHEI report to incorporate this information as appropriate into his pre-filed testimony. Each QHEI field data sheet contains over 100 boxes that can be checked and scored. Therefore, after the EA data have been verified, Mr. Seegert will need time to compare the scores EA calculated with the scores MBI and CABB developed for each category and subcategory to determine the cause of any differences.

IV. Recently Filed Additional Sediment Data Reports And Additional Information Requested For Exhibits 40 through 43 by IEPA.

On June 30, 2008, the IEPA filed, in relevant part, an additional "30 different reports which address sediment data" and other information. *See Requests Made to the Illinois EPA at the Hearings Held April 23rd and 24th, 2008, dated June 27, 2008.* MWGen counsel received this information *via* U.S. mail on or about July 15, 2008. This recently received information is being reviewed to determine the extent of its relevance to the preparation of the witness testimony of Messrs. Burton and Seegert that MWGen intends to present to the Board. However, the receipt of this data less than four weeks prior to the August 4, 2008 filing deadline does not allow sufficient time to complete our review and to determine whether and to what extent this new data is relevant to and should be incorporated into the witness testimony of Messrs. Burton and Seegert to be filed on behalf of MWGen. The requested extension to

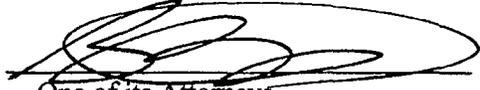
September 8, 2008 will allow sufficient time to complete this additional and potentially important review of the 30 additional sediment reports produced by the Agency in July 2008.

WHEREFORE, for the forgoing reasons, Midwest Generation respectfully requests that the Board grant an extension to September 8, 2008 for the filing of the pre-filed testimony of Messrs. Allen Burton and Greg Seegert.

Respectfully submitted,

MIDWEST GENERATION, L.L.C.

By:


One of its Attorneys

Date: July 25, 2008

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