

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

NOTICE OF FILING

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

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Midwest Generation L.L.C.'s Motion for Leave to Reply and Reply to the Comments of the Illinois Environmental Protection Agency on the Proposed Residential Use Designation Rules, copy of which is herewith served upon you.

Dated: May 17, 2010

MIDWEST GENERATION, L.L.C.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PROPOSED AMENDMENTS TO 35 ILL.	)	
ADM. CODE 301, 302, 303, and 304	)	

**MIDWEST GENERATION’S MOTION FOR LEAVE TO REPLY TO  
THE COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY  
ON THE PROPOSED RECREATIONAL USE DESIGNATION RULES**

Midwest Generation, L.L.C. (“MWGen”) hereby moves for leave to file instant a reply to the April 15, 2010 “Post-Hearing Comments of the Illinois Environmental Protection Agency” (the “Agency Post-Hearing Comments”) regarding the proposed recreational use designation rules. In support of this motion, MWGen states:

1. Pursuant to the Illinois Pollution Control Board’s (the “Board”) March 18, 2010 Opinion and Order in this rule-making proceeding, the Board divided this rule-making into four subdockets. The Board stated that one of those subdockets, Subdocket A, will “deal with the issues related to recreational use designations.” (March 18, 2010 Board Opinion at p. 18). The Board also created a subdocket, Subdocket C, to deal with issues related to aquatic life use designations. (*Id.* at p. 18) The Board established a deadline of April 15, 2010 for the filing of any final comments in Subdocket A concerning the proposed recreational use designations. The Board did not establish any schedule for the filing of responses to the final comments.

2. MWGen seeks to file a brief reply to the Agency Post-Hearing Comments because those comments include a request that the Board also include in Subdocket A what the Agency terms certain “miscellaneous provisions” of the proposed rules. MWGen submits that

the Agency's request includes provisions of the proposed rules that go beyond the scope of Subdocket A established by the Board in its March 18, 2010 Opinion and Order. The Agency's request includes provisions of rules that are instead properly a part of the Subdocket C aquatic life use designations. The Subdocket C aquatic life use designations are not yet ripe for the Board's decision pursuant to the terms of the Board's March 18, 2010 Opinion and Order. Accordingly, MWGen seeks to file a reply to the Agency's Post-Hearing Comments to inform the Board of the nature of and reasons for its objections to the Agency's request. A reply is necessary in order to address the issue that the Agency is seeking to include in Subdocket A certain rules that are beyond its scope.

3. MWGen's proposed reply is attached to this motion and leave to file it instanter is hereby requested.

Wherefore, Midwest Generation, L.L.C. respectfully moves for leave to file the attached reply to the Agency Post-Hearing Comments.

Dated: May 17, 2010

MIDWEST GENERATION, L.L.C.

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

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**MIDWEST GENERATION’S REPLY TO  
THE COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY  
ON THE PROPOSED RECREATIONAL USE DESIGNATION RULES**

Pursuant to the Illinois Pollution Control Board’s (the “Board”) March 18, 2010 Opinion and Order in this rule-making proceeding, the Board divided this rule-making into four subdockets. As the Board stated, Subdocket A will “deal with the issues related to recreational use designations.” (March 18, 2010 Board Opinion at p. 18). In its April 15, 2010 comments filed in Subdocket A, entitled “Post-Hearing Comments of the Illinois Environmental Protection Agency” (the “Agency Post-Hearing Comments”), the Illinois Environmental Protection Agency suggests that the Board include in Subdocket A certain of its proposed rules, specifically its proposed amendments to 35 Ill.Adm.Code 302.402 (Purpose) and 35 Ill.Adm.Code 303.204 (Secondary Contact and Indigenous Aquatic Life Use Waters). (Agency Post-Hearing Comments at p. 17) These proposed rules include language addressing the subject matter of aquatic life use designations. The proposed aquatic life use designations are not part of Subdocket A. The aquatic life use designations are instead part of Subdocket C, which the Board has not yet determined are ripe for decision and for which it has ordered the scheduling of additional hearings. (March 18, 2010 Board Opinion at p. 20) Accordingly, MWGen objects to the Agency’s suggestion that “it seems appropriate to address the amended language in these Sections in [Subdocket A].” (Agency Post-Hearing Comments at p. 17) It is neither necessary

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nor appropriate to address proposed amendments that deal with aquatic life use designations in this Subdocket A. The Agency's suggestion is improper because it includes proposed amendments to the rules that are beyond the scope of this Subdocket A, which was established by the Board for the sole purpose of addressing the recreational use designations. Further, if accepted, the Agency's suggestion would adversely prejudice MWGen's interests in the aquatic life use designations that are the subject of Subdocket C. Therefore, MWGen objects to the Agency's suggestion and respectfully submits that it should not be accepted by the Board.

The proposed amendments to 35 Ill. Adm. Code 302.402 (Purpose) and 303.204 (Secondary Contact and Indigenous Aquatic Life Use Waters) are set forth in the Agency Post-Hearing Comments. (Agency Post-Hearing Comments at p.18) For ease of reference, a copy of the page of the Agency Post-Hearing Comments containing the proposed amendments at issue here is attached as Exhibit A.

The proposed amendments to sections 302.402 and 303.204 of the rules do much more than address the proposed recreational use designations for the waters included in this rule-making. The proposed amendments include language setting forth the criteria that the Board will use to determine the aquatic life use designations. They also propose to eliminate the existing aquatic life use designation, described as "Secondary Contact and Indigenous Aquatic Life," from the rules.

The proposed amendments include the addition of the following language to section 302.204: "The Chicago Area Waterway System and Lower Des Plaines River standards shall protect...the highest quality aquatic life and wildlife that is attainable, limited only by the physical condition of these waters and hydrologic modifications to these waters." Almost the identical language is also included in the Agency's proposed amendments to section 303.204.

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Clearly, this proposed language addresses the aquatic life use designations in the proposed rules and would establish the criteria that the aquatic life use designations may be “limited only by the physical condition of these waters and hydrologic modifications to these waters.” These are issues that the Board has reserved for decision in another subdocket, Subdocket C. The Agency’s proposed language regarding what “limitations” are properly considered to determine the aquatic life use designations raises issues that go to the heart of the matters to be addressed in Subdocket C. The proposed amendments are indisputably beyond the scope of Subdocket A.

Similarly, the proposed amendments seek to delete from sections 302.402 and 303.204 all language regarding the existing Secondary Contact and Indigenous Aquatic Life use designation. This existing use designation addresses both recreational use and aquatic life use designations. To delete this existing aquatic life use designation from the rules as part of Subdocket A would be premature and beyond the scope of Subdocket A’s expressed scope of solely the proposed recreational use designations for these waters. The Board has established Subdocket C as the proper proceeding in which to receive comment on whether or not the Indigenous Aquatic Life use designation should or should not continue to be retained in the rules for one or more of the waters included in this rule-making. The Agency’s proposed amendments to section 302.402, if adopted in Subdocket A, improperly prejudice an aquatic life use designation issue that has been reserved for Subdocket C.

MWGen recognizes that if the Board decides in Subdocket A that the Secondary Contact portion of this existing use designation is to be replaced or otherwise amended, the subject language of 302.402 may ultimately need to be amended to be consistent with the Board’s decision. However, it is not necessary nor is it prudent to do so now as part of Subdocket A before the Board has ruled on these matters. Section 303.402 established the existence of an

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aquatic life use designation that is not limited to the CAWS or the Lower Des Plaines River waterbody segments included in this rule-making. Whatever the Board decides in the future regarding the aquatic life use designations for the CAWS and the Lower Des Plaines River water segments that are the only ones at issue in this rule-making, the Board may still elect to retain the Indigenous Aquatic Life Use designation in the rules for its potential applicability to other waters of the state. The Agency's proposal to eliminate this aquatic life use designation from the rules should properly be deferred for decision in Subdocket C. The Board may proceed in this Subdocket A to adopt new recreational use designation rules without simultaneously amending sections 302.402 and 303.204.

MWGen also has substantive objections to the proposed amendments, which it has been given the right to submit to the Board in accordance with a schedule to be established by the Board for Subdocket C. For example, with respect to the limiting factors to be considered in establishing aquatic life use designations that the Agency proposes for inclusion in both sections 302.402 and 303.204, MWGen submits that the Agency's proposed language is not an accurate or complete statement of the matters that may be properly considered by the Board in determining the appropriate aquatic life use designations. The Board's March 18, 2010 Opinion and Order granted MWGen, and other interested parties, the opportunity to proceed with further hearings regarding aquatic life use designations and to submit its objections to the Agency's proposed amendments relating to aquatic life use designations in accordance with a schedule for filing comments that will be established by the Board in Subdocket C. The Agency's suggestion that amendments to sections 302.402 and 303.204 be addressed here in Subdocket A is contrary to the terms of the Board's March 18, 2010 Opinion and Order. Therefore, MWGen objects to

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the Agency's suggestion because it addresses matters that the Board has ruled will be addressed in Subdocket C.

The Subdocket C aquatic life use designations are not yet ripe for the Board's decision pursuant to the terms of the Board's March 18, 2010 Opinion and Order. Accordingly, the Agency's suggested amendments to sections 302.402 and 303.404 are not yet ripe for the Board's decision and should be deferred for consideration in Subdocket C. These proposed amendments are beyond the scope of Subdocket A, and their consideration here will adversely prejudice issues to be decided in Subdocket C. Accordingly, MWGen respectfully requests that the Board reject the suggestion of the Agency that its proposed amendments to sections 302.402 and 303.404 be considered for decision by the Board in Subdocket A.

Dated: May 17, 2010

MIDWEST GENERATION, L.L.C.

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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, L.L.C.'s Motion for Leave to Reply and Reply to the Comments of the Illinois Environmental Protection Agency on the Proposed Residential Use Designation Rules were filed electronically on May 17, 2010 with the following:

John Therriault, Assistant Clerk  
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James R. Thompson Center  
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Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on May 17, 2010 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti