

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)

R08-09(C)
(Rulemaking – Water)

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JAN 30 2012

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: John Therriault, Clerk
Marie Tipsord, Hearing Officer
James R. Thompson Center
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the Reply of the Illinois Environmental Protection Agency to Responses of Midwest Generation, ExxonMobil, Stepan and Illinois Environmental Regulatory Group to Updated Joint Status Report, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Deborah J. Williams
Assistant Counsel

Dated: January 27 2012
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 30 2012

STATE OF ILLINOIS
Pollution Control Board

R08-09 (Sub-Docket C)
(Rulemaking – Water)

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**REPLY OF THE ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY TO RESPONSES OF MIDWEST GENERATION, EXXONMOBIL,
STEPAN AND ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO
UPDATED JOINT STATUS REPORT**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys, hereby submits its Reply to the Responses to the Updated Joint Status Report. In response to the filings submitted to the Pollution Control Board ("Board") by Midwest Generation LLC, Illinois Environmental Regulatory Group, ExxonMobil Oil Corporation and Stepan Company (hereafter referred to jointly as "the Industrial Parties"), the Agency submits the following Reply which includes further explanation of matters addressed in the Updated Joint Status Report and the Agency's position with regard to a tentative agreement reached between additional parties to the above-captioned proceeding.

1. On October 26, 2007, the Agency filed a rulemaking proposal to update the designated uses and accompanying water quality standards and effluent limitations for the waters currently designated for Secondary Contact and Indigenous Aquatic Life

Use which includes most waters in the Chicago Area Waterway System (“CAWS”) and Lower Des Plaines River. The Board docketed this proposal as R08-09.

2. On March 18, 2010, the Board issued an order dividing R08-09 into four separate sub-dockets. Sub-docket C was “created to address issues involving proposed aquatic life uses.” Slip Op. at 18.

3. On September 22, 2011, the Agency joined with the Metropolitan Water Reclamation District of Greater Chicago (“MWRDGC”) and the Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council, Openlands, Prairie Rivers Network, Alliance for the Great Lakes and Southeast Environmental Task Force (“Environmental Groups”) to request that the Hearing Officer vacate the October 3, 2011 comment deadline and the October 17, 2011 response deadline that had been established in Subdocket C. The Joint Emergency Motion to Vacate Deadlines in Subdocket C and Set Date for Filing of Joint Status Report, sought additional time for MWRDGC, the Environmental Groups and the Agency to pursue a possible resolution of some issues in Subdockets C and D.

4. On September 23, 2011, the Hearing Officer granted the Emergency Motion and directed the moving parties to file a joint status report on November 21, 2011. In the November 21, 2011 joint status report, the moving parties requested and were granted additional time to conduct discussions and were ordered to file another status report on January 3, 2012.

5. The Updated Joint Status Report of the Illinois EPA, MWRDGC, and Environmental Groups Concerning Proposed Aquatic Life Use Designations submitted on January 3, 2012 indicated that “[d]ue to the progress that has been made,

participants believe that the Board should take the next step toward resolution of this proceeding by setting a date for filing of post-hearing comments in Subdocket C.”

6. Some of the specific statements in the Updated Joint Status Report caused some confusion and generated concerns on the part of the Industrial Parties. As a result, Responses to the Updated Joint Status Report were filed by the four industrial parties identified above on January 17, 2012. In essence, these Motions requested that the Hearing Officer order filings from MWRDGC, the Environmental Groups and Illinois EPA detailing the substance of any joint agreement and grant additional time for comments and responses in Subdocket C.

7. With this Reply, the Agency tries to clear up any confusion that may have been created about the Agency's position on its rulemaking proposal to the Board and any pending procedural matters. First, while it may appear from the Updated Joint Status filing that the Agency was suggesting that all final comments be submitted to the Board by the proposed comment deadline and that no response pleadings be allowed, that was not Illinois EPA's intended meaning. In the Hearing Officer's initial order establishing comment deadlines for Subdocket C, a two week period for responses to comments was established. The Agency has continued to expect the Hearing Officer will include a similar response time in setting a new comment deadline and certainly has no objection to providing this reasonable period of time for all parties to respond to the comments of all the other parties.

8. The following statement in the Updated Joint Status report caused the most confusion and concern among the other parties: “We have also reached tentative agreements regarding habitat restoration, variances and permit terms that will be

needed to make workable and effective the agreements regarding designations and criteria." The Agency will attempt to clear up any confusion created by this statement. First, the Illinois EPA is not and does not anticipate becoming party to an agreement regarding Subdockets C and D with MWRDGC and the Environmental Groups. These parties allowed Illinois EPA staff to participate in some of their meetings regarding issues of concern to the Agency; and therefore, the Agency is aware of the areas of tentative agreement between them. The Agency has no plans to amend any of the language in its original proposal that is the subject of Subdocket C. To facilitate preparation of this filing, MWRDGC and the Environmental Groups allowed the Agency to review a document summarizing the areas of tentative agreement that will be included in their filing to the Board in this matter. As a result of that review and in order to alleviate the concerns raised by the Industrial Parties, the Agency will provide its position on areas of concurrence, areas of no objection or areas of disagreement at this time.

9. Regarding use designations, MWRDGC and the environmental groups have reached a tentative agreement to support the Agency's proposed designated uses for the Chicago Sanitary and Ship Canal and the CAWS Use A Waters. Illinois EPA supports this tentative agreement. The parties did not address uses proposed by the Illinois EPA for segments defined as the Lower Des Plaines River (i.e., Upper Dresden Island Pool and Brandon Pool).

10. In addition, MWRDGC and the Environmental Groups have reached a tentative agreement to support a use designation of CAWS Use A for several segments of the CAWS for which Illinois EPA proposed a less natural, CAWS Use B designation.

These segments are: North Branch Chicago River from the south end of the North Avenue Turning Basin to its confluence with South Branch Chicago River and Chicago River; Chicago River; South Branch Chicago River; Calumet River from Lake Michigan to Torrence Avenue; and Lake Calumet Connecting Channel. The Agency continues to affirm the scientific basis of its original proposal and the conclusions drawn from the technical analyses performed. But in the interest of narrowing the areas of decision for the Board, the Agency does not object to the upgrading from Use B to Use A of four of these five segments listed above. For South Branch Chicago River, the Agency believes that at least one discharger who has actively participated in these proceedings, Midwest Generation, could potentially be impacted by an upgrade of this segment from CAWS Use B to CAWS Use A. In the absence of new scientific information that would change the conclusions in Illinois EPA's original proposal, the Agency is not willing to concur with a tentative agreement between MWRDGC and the Environmental Groups, with regard to South Branch Chicago River, that has not involved the participation of a major discharger to that segment with an identified interest in the outcome.

11. MWRDGC and the Environmental Groups also have reached a tentative agreement to jointly ask the Board to either open a fifth Subdocket in this proceeding or to open a new Board docket to address the appropriate use designation for the South Fork of South Branch Chicago River (also referred to as Bubbly Creek). While the Agency has not seen information that would alter its conclusion to place this segment in the category of CAWS Use B waters, the Illinois EPA supports the parties request that decisions on this segment be deferred while work is completed on a study by the U.S. Army Corps of Engineers entitled "Bubbly Creek Ecosystem Restoration Feasibility

Study (the Bubbly Creek study).” The Illinois EPA has concluded that the highest attainable aquatic life use for the South Fork of South Branch Chicago River is less natural than that of most (if not all) of the other segments of the CAWS and Lower Des Plaines River. Consequently, Illinois EPA see little disadvantage in delaying a decision on the uses and standards for this segment, if such delay can facilitate the completion of the Board’s determinations that will establish uses and standards for the other segments of the CAWS and Lower Des Plaines River.

12. MWRDGC and the Environmental Groups have also reached a tentative agreement that MWRDGC will withdraw its proposal for a wet-weather aquatic life use designation. The Agency supports this tentative agreement and believes it will simplify, for the Board and the parties, the process of submitting comments and addressing those comments. To address MWRDGC’s concerns about its ability to attain the proposed dissolved oxygen standards during wet weather periods prior to the completion of TARP, the Environmental Groups have tentatively agreed to support a five-year variance from the Board, allowing MWRDGC to work towards compliance with these standards. Illinois EPA also agrees to support an initial five-year variance before the Board. The Agency also recognizes that if the initial five-year variance is granted by the Board, an additional variance may be necessary and appropriate at the conclusion of the initial variance period.

13. The parties included language in their points of tentative agreement regarding the existing SEPA stations in the Calumet System to ensure that if MWRDGC is granted regulatory relief from the Board, MWRDGC will continue to provide the same level of dissolved oxygen treatment they are currently providing. The Agency supports

this concept and would have probably requested similar conditions from the Board in a variance proceeding. In addition to the language presented by MWRDGC and the Environmental Groups, the Agency also believes that MWRDGC should be required to maintain SEPA stations 3, 4 and 5 in such a manner as to minimize downtimes to the maximum extent practicable and comply with applicable NPDES permit requirements. This would include taking such preventative measures as having replacement parts available for immediate use.

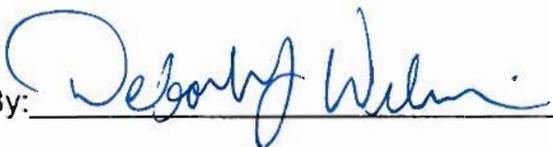
14. MWRDGC previously submitted testimony recommending that the Board conform the water quality standard for zinc in the CAWS and Lower Des Plaines River to the Agency's proposal in R11-18. Although the Board has not yet issued a First Notice Opinion in R11-18, the Agency continues to believe there is a transcription error in the General Use zinc standard and that error was inadvertently carried over to the Illinois EPA's R08-09 zinc proposal. Illinois EPA has no reason to believe that the correction of this error in the zinc formula should be controversial with U.S. EPA or any of the parties to this proceeding. Therefore, the Agency supports this area of tentative agreement between MWRDGC and the Environmental Groups which attempts to narrow the issues of disagreement in Subdocket D.

15. The final area of tentative agreement between MWRDGC and the Environmental Groups addressed in the documents reviewed by the Agency is the fact that these parties have agreed to support the Agency's dissolved oxygen standard proposal as appropriate for the CAWS Use A and CAWS Use B waters. The Agency appreciates the effort of both parties to resolve areas of foreseen dispute in Subdocket D and agrees with the parties on this issue. The Agency would also like to take this

opportunity to update the Board and the parties that during this period in which proceedings before the Board have been on hold, Illinois EPA has successfully worked with U.S. EPA to resolve the concerns, expressed in U.S. EPA's January 29, 2010 letter, about the Agency's proposed dissolved oxygen standards. See, Public Comment # 286.

Wherefore, based on the information outlined above, the Illinois EPA respectfully requests that the Hearing Officer proceed to establish a reasonable and final deadline for post-hearing comments and responses in Sub-docket C.

Respectfully Submitted,

By:  _____

Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

Date: January 27, 2012

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STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)
)

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SS STATE OF ILLINOIS
Pollution Control Board

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Reply of the Illinois Environmental Protection Agency to Responses of Midwest Generation, ExxonMobil, Stepan and Illinois Environmental Regulatory Group to Updated Joint Status Report upon the person to whom it is directed by placing it an envelope addressed to:

John Therriault, Clerk
Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

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and mailing it by Overnight Mail from Springfield, Illinois on January 27, 2012, with sufficient postage affixed and by mailing it by First Class U.S. Mail from Springfield, Illinois on January 27, 2012 with sufficient postage affixed to the **ATTACHED SERVICE LIST**.

SUBSCRIBED AND SWORN TO BEFORE ME

This 27th day of January, 2012

Brenda Boehner
Notary Public

"OFFICIAL SEAL"
BRENDA BOEHNER
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STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-14-2013

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