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STATE OF ILLINOIS
Pollution Control Board

PC#1289

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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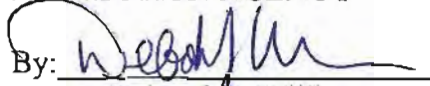
NOTICE OF FILING

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 Illinois Environmental Protection Agency's Response to Post-Hearing Comments in Subdocket C, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Deborah J. Williams
Assistant Counsel

Dated: March 16, 2012
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO POST-HEARING COMMENTS IN SUBDOCKET C

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys, hereby submits its Response to post-hearing comments submitted to the Pollution Control Board ("Board") in the above-captioned rulemaking proceeding.

I. Background and Summary of Illinois EPA's Response to Post-Hearing Comments in Subdocket C

On March 18, 2010, the Board issued an order dividing R08-09 into four separate subdockets. Pursuant to the Board's March 18, 2010 Opinion and Order, Subdocket C was "created to address issues involving proposed aquatic life uses." R08-09 (March 18, 2010) slip op. at 18. On February 3, 2012, the Hearing Officer established a March 5, 2012 deadline for post-hearing comments in Subdocket C and a March 19, 2012 deadline for responses. The Agency submitted detailed post-hearing comments on March 5, 2012 summarizing the outstanding issues in Subdocket C. Post-hearing comments were also submitted by the Board's deadline from the Metropolitan Water Reclamation District of Greater Chicago ("MWRDGC"), the Illinois Environmental Regulatory Group ("IERG"), ExxonMobil Oil Corporation

("ExxonMobil"), Corn Products International Inc. ("Corn Products"), Stepan Company ("Stepan"), Citgo Petroleum Corporation and PDV Midwest LLC ("Citgo"), Midwest Generation and a coalition of Environmental Groups.

This Response will not reiterate the points made in the Agency's Post-Hearing Comments and will not respond to issues raised in the post-hearing comments of other parties that are addressed adequately in those comments. However, the Agency would like to briefly respond to some of the points made in the comments of some of the parties to this proceeding.

II. Alternative Regulatory Language Proposals and Alternative Use Designations

Illinois EPA's Post-Hearing Comments summarized the Agency's aquatic life use regulatory proposal and attempted to respond to competing regulatory proposals that had been submitted by the parties. In the March 5th post-hearing comments, new language proposals or suggestions were submitted by Corn Products, Citgo, Exxon Mobil and Midwest Generation that we will briefly address here. The Agency will also respond to alternative use designations for certain segments suggested by the Environmental Groups.

A. Response to Aquatic Life Use Designation Comments of the Environmental Groups

The Agency's Post-Hearing Comments addressed the agreement reached between MWRDGC and the Environmental Groups regarding placement of various CAWS segments into CAWS Aquatic Life Use A or CAWS and Brandon Pool Aquatic Life Use B categories. This Response does not revisit that discussion. However, the comments of the Environmental Groups did raise for the first time the argument that

Brandon Pool should be designated as a CAWS Aquatic Life Use A water. As discussed in post-hearing comments, Illinois EPA remains confident in its use designation for Brandon Pool and no scientific justification has been presented that would support a different use designation for that segment. The Environmental Groups seem to use data collected from the Chicago Sanitary and Ship Canal (“CSSC”) to argue for a higher use designation for Brandon Pool than the Environmental Groups are supporting for the CSSC. The similarities between Brandon Pool and the CSSC argue compellingly for the two segments to retain the same use designation.

In addition to the discussion of Brandon Pool, the Environmental Groups assert that the record in this proceeding does not support invoking use attainability factors for North Shore Channel, Calumet River and Chicago River. The Agency disagrees with this conclusion and is confident the record in this proceeding provides ample support for the recommendations in the Agency’s proposal. The joint agreement between the Environmental Groups and MWRDGC to designate these segments as CAWS Aquatic Life Use A waters also supports this conclusion.

B. Response to Comments of Exxon Mobil Regarding Intolerant Species

ExxonMobil criticizes the Agency’s Upper Dresden Island Pool aquatic life use designation by saying that “[t]his proposed use designation for the UDIP, which includes intolerant types of aquatic-life populations, is not achievable.” ExxonMobil comments at p. 2. These comments go on to state that “[t]he designated aquatic life use subcategory for the UDIP should represent existing, achievable habitat conditions,

not aspirational uses that are unsupported by the available field data.” Id. at 5. This statement misinterprets the burden placed on states in conducting use attainability analyses. The Clean Water Act and regulations specifically require an analysis of aspirational uses that are attainable in the foreseeable future and prohibits a focus on existing uses alone.

ExxonMobil focuses its comments and alternative proposal on the argument that the data in the records shows that no intolerant species are present in the upper or lower Dresden Island Pools. Id. at pp. 5-6, 11. Even if true, this statement alone would be insufficient to support a use designation lower than the Clean Water Act aquatic life use goal. However, as identified in the Agency’s Post-Hearing Comments, this statement is not accurate. Data from Midwest Generation confirms there are at least 16 species currently found in the Dresden Island Pool that fall into the categories of intolerant or moderately intolerant species.¹ Illinois EPA Post-Hearing Comments at 39. For this reason and the other reasons identified in the Agency’s Post-Hearing Comments, ExxonMobil’s request that the Board remove the term “intolerant” from the Agency’s use designation proposal for Upper Dresden Island Pool should be denied.

C. Response to Midwest Generation Comments Regarding Upper Dresden Island Pool Aquatic Life Use

Illinois EPA's Post-Hearing Comments provided a detailed rebuttal of the arguments Midwest Generation had made that one or more UAA factors was applicable to Upper Dresden Island Pool. The Agency will not repeat those arguments here, but will simply respond to two key points Midwest Generation seems to rely on in

¹ Some of the confusion may result from use of the term “moderately intolerant” which is a sub-category of intolerant species and the term “intermediately tolerant” which is an additional more tolerant category.

their comments that are not supported by the Record: that QHEI scores between 45 and 60 indicate that the Upper Dresden Island Pool cannot attain the Clean Water Act aquatic-life goal and that over 50 percent of the Upper Dresden Island Pool must have high habitat scores to be able to attain that goal.

Midwest Generation's post-hearing comments do not meet the burden of showing that Upper Dresden Island Pool cannot attain the Clean Water Act aquatic-life goal in the foreseeable future. Midwest Generation relies heavily on an unsubstantiated opinion that, to attain the Clean Water Act aquatic-life goal, a stream requires "...in general...something like 50% or more [of its area] to be in good habitat." Hearing transcript, 11/09/2009, p. 147. Midwest Generation's post-hearing comments reiterate this opinion in arguing that too little of the area of Upper Dresden Island Pool is "good habitat" and consequently the waterbody cannot attain the Clean Water Act aquatic-life goal by stating: "In general, there needs to be approximately 50% or more of good habitat to support a balanced aquatic-life population." Midwest Generation comments at p. 66. Midwest Generation provides no evidence to support this benchmark and a closer look reveals its lack of scientific validity. To understand this benchmark first requires knowing how Midwest Generation defines "good". Based on Midwest Generation's post-hearing comments and testimony, "good" means having an Ohio EPA habitat-index score of 60 or above (out of a possible 100 points), presumably attributable to having riffles, fast water, and boulder/cobble substrates. See, Midwest Generation comments at p. 7, 65-66 and Exhibit 366. On page 27 of exhibit 2 of the pre-filed testimony of Greg Seegert for Midwest Generation states:

"To have a fish community consistent with Clean Water Act aquatic life goals, a variety of habitat types must not only be present, but present in amounts sufficient to support viable populations of various fishes. However, in the UDP, riffles and fast water areas are essentially confined to the Brandon tailwater area... Boulder/cobble substrates, though not confined to the tailwater area, occur in appreciable amounts in only a few of the other 48 zones EA evaluated. The small and few areas of good habitat located in the Brandon tailwater area are overwhelmed by the large preponderance of poor to fair habitat that characterizes the UDP."

Exhibit 366. Illinois EPA does not dispute the general observation in the first sentence that "...a variety of habitat types must not only be present, but present in amounts sufficient to support viable populations of various fishes." However, Illinois EPA does dispute Midwest Generation's reliance on a leap from this general statement to the unsupported claim that "...there needs to be approximately 50% or more of good habitat to support a balanced aquatic-life population." Midwest Generation comments at p. 66. The scientific evidence in the Record does not support this opinion. Nowhere in the rulemaking record is there evidence that, unless a stream has more than 50% of its area as riffles, fast water, and cobble/boulder substrate, it cannot attain a fish community of sufficient balance to meet the Clean Water Act aquatic-life goal. Nowhere in the rulemaking record is there evidence that unless a stream has more than 50% of its area scoring 60 or more points on the Ohio EPA habitat index, it cannot attain the Clean Water Act goal. Even Mr. Seegert admits, "I am not aware that anyone has established a precise cutoff" for how much area of a stream needs to be worse-than-good habitat to prevent that stream from attaining the Clean Water Act goal. Hearing Transcript, 11/09/2009 at p. 147.

For rivers as large and as flat as the Lower Des Plaines River, habitat conditions such as riffles, fast water, and coarse substrates are naturally sparse, as

are other localized habitat conditions that are nonetheless important for fish. For example, Stalnaker et al. (1989) state:

"Other specialized microhabitat types, characterized by low current velocities or specific substrate types, may also occur only along the margins of the stream. These areas may compose less than 10% of the surface area, but contain 90% of the fish in a large river. Examples of these specialized habitat features include side channels, around islands, connected sloughs and oxbows, and the mouths of tributaries."²

Unlike the conclusions drawn by Midwest Generation, this passage acknowledges that, in large rivers, the relative ecological importance of a particular habitat type can be much greater than the simple relative amount of that habitat type. Regarding the Clean Water Act aquatic-life goal in a large, low-gradient river such as Upper Dresden Island Pool, the attainability threshold in terms of the amount of "good" versus "not good" habitat remains unknown. Nevertheless, large-river ecology recognizes that relatively small, localized amounts of critical habitat can provide a disproportionately large influence in sustaining the overall fish community. Clearly, the conclusion by Midwest Generation that "to attain the CWA fishable goals, an aquatic habitat must have fast water, riffles, hard substrates, and consistent water levels," over 50% or more of its area has little factual basis when applied to rivers like the Lower Des Plaines. Midwest Generation comments at p. 59.

Counter to the unsupported benchmark relied on by Midwest Generation, the approach used by Illinois EPA to propose an aquatic-life use for Upper Dresden Island Pool represents a reasonable and measured assessment that recognizes the limitations of the available information and the technical burden required by the Clean

² Stalnaker, C. B., R. T. Milhous, and K. D. Bovee. 1989. Hydrology and hydraulics applied to fishery management in large rivers. Pages 13-30 in D. P. Dodge, editor, Proceedings of the international large river symposium (LARS). Canadian Special Publication of Fisheries and Aquatic Sciences 106.

Water Act. Illinois EPA used two established indicators of biological condition and physical-habitat conditions: Ohio EPA's fish index of biological integrity and Ohio EPA's habitat index. Based on the scientifically established relationships between the Ohio EPA fish and physical-habitat indexes, scores of the habitat index indicate a stream's biological potential, including its potential to attain the Clean Water Act interim goal of balanced aquatic-life communities. A habitat-index score below 45 indicates that a stream is likely unable to attain the goal; Ohio EPA categorizes such scores as "Poor" or "Very Poor." See Attachment R to Illinois EPA's Statement of Reasons. A habitat-index score of 60 or more indicates likely ability to attain the goal; Ohio EPA categorizes such scores as "Good" or "Excellent." A habitat-index score between 45 and 60 indicates no overriding inclination to attain or not attain the goal; Ohio EPA categorizes such scores as "Fair".

The conclusions of Midwest Generation over-emphasize the habitat-index threshold of 60 while lacking sufficient consideration that scores as low as 45 may still represent conditions that can attain the Clean Water Act goal. Midwest Generation inappropriately equates inability to attain the Clean Water Act goal with any habitat condition that scores less than "good" (i.e., < 60). In other words, Midwest Generation's conclusions reflect the worst-case perspective that unless more than 50% of the habitat area scores are greater than 60, the Clean Water Act aquatic-life use goal is not attainable. Contrary to this incomplete approach, Illinois EPA recognizes and accounts for the possibility that "Fair" habitat conditions (i.e., Ohio habitat index score of 45-60) can also have the ability to support the Clean Water Act goal. See, Exhibit 32. By recognizing that even under natural conditions larger, low

gradient rivers have little of their overall area occupied by habitat conditions such as riffles, fast water, and coarse substrates, Illinois EPA's proposed use for Upper Dresden Island Pool is both legally and scientifically valid in the face of otherwise incomplete and imperfect knowledge. Illinois EPA judged that it is more reasonable to conclude that the amount of "Fair" to "Good" habitat indicated by over half of the available habitat-index scores represents an ability to support a balanced aquatic-life community in Upper Dresden Island Pool. See, Exhibit 32.

D. Response to Use Designation Proposals from Citgo and Corn Products

During the Subdocket C hearings, Citgo proposed a designation of CAWS Aquatic Life Use C for the Lower CSSC. See, Exhibit 437, Exhibit B. In its post-hearing comments, Citgo suggests three options for the Board to consider with respect to their Use C proposal. Citgo comments at p. 26. These three options were: (1) suspend further consideration of Subdockets C and D as they relate to the Lower CSSC until decisions are made on a physical barrier between the Mississippi River and Lake Michigan basins; (2) recognize the use of the electrical fish barrier at its present location and the possibility of another barrier being constructed at some point in the future; or (3) in conjunction with the foregoing, add a process by which future stream segments could be added to the list of designated uses of the CAWS for the purposes of battling aquatic invasive species. *Id.*

Citgo's option #1 is discussed below. With regard to the other options, Citgo has proposed amended regulatory language for their proposed Use C by adding language concerning non-recreational waters, offering an alternative that would

include the CSSC from its confluence with Cal-Sag Channel to the Lockport Locks and suggesting that other waters in the CAWS may be added to the Use C list through an adjusted standard process. Citgo comments at Attachment 6. As discussed in Illinois EPA's Post-Hearing Comments, Citgo's proposal should not be considered by the Board. Citgo has not demonstrated a need to establish a Use C for the lower CSSC as defined in their original proposal or as re-defined in their amended proposal. The waters proposed by Illinois EPA for CAWS and Brandon Pool Aquatic Life Use B are also deep-draft, straight-walled canals. Citgo has failed to show that the Agency's CAWS and Brandon Pool Aquatic Life Use B proposal is inadequate for this part of the waterway. The Agency proposal considered the fact that this segment is only capable of maintaining aquatic life populations predominated by individuals of tolerant types that are adaptive to the unique physical conditions, flow patterns, and operational controls designed to maintain navigational use, flood control and drainage functions in deep-draft, steep-walled shipping channels. The Agency's proposal recognizes the similarity between the portions of the CSSC into which Citgo discharges and Brandon Pool, the rest of CSSC and South Branch Chicago River.

In its March 5, 2012 filing, Corn Products also submits language for a proposed Use C designation. Corn Products comments at p. 23. As previously stated by Illinois EPA, a Use C designation is not warranted for this part of the waterway. The CAWS and Brandon Pool Use B designation proposed by Illinois EPA properly defines these waters and in proposing this designation the Agency took into account the uniqueness of the CSSC. Therefore, the Board should not consider the regulatory language now being proposed by Corn Products. Furthermore, Corn Products argument is beyond

the scope of Subdocket C. Issues related to problems with meeting the water quality standards proposed by the Agency is better suited for Subdocket D.

III. Response to Comments Related to Technical Feasibility and Economic Reasonableness

The Agency's Post-Hearing comments discussed technical feasibility and economic reasonableness and the analysis the Board should conduct in addressing those factors in Subdocket C. The Agency does not repeat those arguments here, but will briefly respond to the suggestion by some commenters that economic impacts have not been adequately addressed. In each case, the commenters have linked their economic argument to a water quality standard for a particular parameter that will not be ripe for consideration until Subdocket D.

In its post-hearing comments, IERG argues that "without a use attainability analysis for chlorides, the Board has no basis for determining whether proposed aquatic life uses are attainable, as required by the CWA, or the technical feasibility of the proposal, as required under the Illinois Environmental Protection Act." IERG comments at 5-6. These statements confuse the purpose of a UAA and misinterpret the scope of Subdocket C. In Subdocket D, the Board will study what chloride water quality standard is necessary to protect the proposed aquatic life uses. In that proceeding, the parties will be able to address both what standard is appropriate and how much it will cost to achieve that standard.

Similarly, Corn Products makes arguments against the Agency's proposed aquatic life use designations that are beyond the scope of Subdocket C. Corn Products argues that the "impact of the proposed Use B on Argo's existing use of the

Sanitary & Ship Canal is substantial.” Corn Products comments at p. 22. They base this argument on the claim that adoption of the Agency’s proposed CAWS and Brandon Pool Aquatic Life Use B designation will automatically result in adoption of the Agency’s temperature standards proposal. This is clearly not the case. Therefore, Corn Products makes arguments beyond the scope of Subdocket C when it discusses the cost of compliance with temperature water quality standards as costs related to Subdocket C. *Id.* at pp. 18 - 21.

Similarly, Exxon Mobil claims, with no attempt to conduct a UAA Factor 6 analysis, that “...there would be widespread social and economic impacts if an aquatic life use description that approaches the General Use standard is adopted for the UDIP.” ExxonMobil comments at p. 9. This statement seems to be based on assuming the Agency’s use designations would require drastic changes like removal of dams and secession of commercial navigations. “At a minimum, elimination of commercial navigation, restoration of the UDIP channel, including removal of all contaminated sediment, and treatment of all wastewater and urban runoff, would be required to attain an aquatic life use that could be considered as achieving the description in proposed Section 303.237.” *Id.* at 10. As virtually all commercial vessels in the Upper Dresden Island Pool also cross the I-55 Bridge and travel into General Use waters, the basis for this assumption is unclear.

Stepan also makes the argument that “the Board should consider the costs of complying with new proposed criteria in considering whether the designated use should be revised.” Stepan comments at p. 13-14. Midwest Generation seems to make the same argument on pages 92-95 of its comments. Stepan does not explain

how the Board should undertake this analysis; moreover, this request to consider information outside the scope of Subdocket C is inappropriate. Whether it is chlorides, temperature, dissolved oxygen or some other parameter, the Board should not consider, as part of Subdocket C, the cost of compliance with a standard that is yet to be considered by the Board in Subdocket D.

IV. Response to Comments That Suggest to Delay Decision in Subdocket C

In its post-hearing comments, MWRDGC stated:

“If the Board decides to move toward a First Notice on aquatic life designated uses, then the District urges that those issues and concerns be addressed, and that its proposal be considered. However the District suggests that it would be more appropriate for the Board to postpone a decision on this matter while the District and the other parties referenced above continue their discussions, since if a resolution is reached, the issues that will need resolution by the Board will change substantially.”

In addition, MWRDGC suggests that monthly progress reports to the Board may be appropriate. While the Agency acknowledges that some outstanding issues exist that may impact the positions of MWRDGC and the Environmental Groups in Subdocket D, the Agency disagrees that any period of delay is necessary for the Board to move forward with Subdocket C.

On June 14, 2011, Citgo filed a motion entitled “Motion for an Expedited Subdocket Addressing Use C” with the Board. That motion requested that the Board designate Use C for River miles 295.5 to 297.2 of the CSSC and create an expedited subdocket to determine the appropriate water quality standards for that segment. The Board denied Citgo’s motion on August 4, 2011. In its comments, Citgo now suggests that the Board suspend Subdockets C and D with regard to the Lower CSSC. While it is ironic that Citgo now asks for delay after previously asking for an expedited

subdocket, Citgo's request should be denied anyway because Subdocket C is ripe for a decision by the Board. Suspending the docket with respect to the Lower CSSC is not warranted. Citgo's arguments are speculative and it would not be appropriate to suspend Subdocket C or D on mere speculation. Should something change in the future for the CAWS, the parties would have the opportunity to come back to the Board at that time to address those new issues or circumstances.

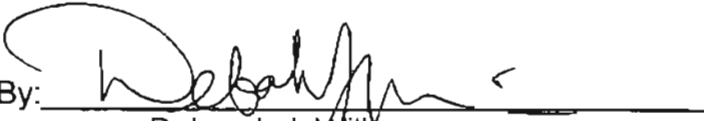
The Agency supported the motions of several dischargers for the Board to first adopt designated uses and then proceed to adoption of water quality standards after a First Notice Opinion is issued in Subdocket C. Any argument at this stage that the Board should not proceed with Subdocket C because there are outstanding issues to be addressed in Subdocket D issues must be rejected.

V. Conclusion

Wherefore, for the reasons and based on the evidence outlined in the Agency's Post-Hearing Comments and this Response, the Illinois EPA asks the Board to proceed to First Notice on R08-09(C) and adopt appropriate aquatic life use designations for the Lower Des Plaines River and all segments of the Chicago Area

Waterway System except for the South Fork of South Branch Chicago River.

Respectfully submitted,

By: 
Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

Date: March 16, 2012

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STATE OF ILLINOIS)
)
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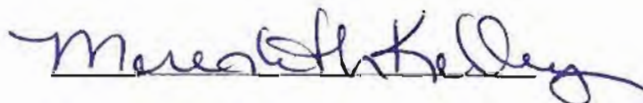
PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Illinois Environmental Protection Agency's Response to Post-Hearing Comments in Subdocket C upon the person to whom it is directed by placing it in 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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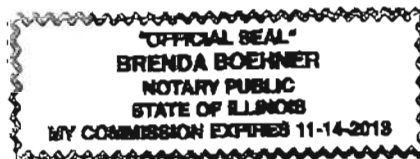
and mailing it by Overnight Mail from Springfield, Illinois on March 16, 2012, with sufficient postage affixed and by mailing it by First Class U.S. Mail from Springfield, Illinois on March 16, 2012 with sufficient postage affixed to the **ATTACHED SERVICE LIST**.



SUBSCRIBED AND SWORN TO BEFORE ME

This 16th day of March, 2012

Brenda Boehner
Notary Public



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