

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9(C)
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: Mr. John T. Therriault Ms. Marie E. Tipsord
Assistant Clerk of the Board Hearing Officer
Illinois Pollution Control Board Illinois Pollution Control Board
100 West Randolph Street 100 West Randolph Street
Suite 11-500 Suite 11-500
Chicago, Illinois 60601 Chicago, Illinois 60601
(VIA ELECTRONIC MAIL) (VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **EXXONMOBIL OIL CORPORATION'S FIRST NOTICE COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: July 1, 2013

By: /s/ Monica T. Rios
Monica T. Rios

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Monica T. Rios, the undersigned, hereby certify that I have served the attached

EXXONMOBIL OIL CORPORATION'S FIRST NOTICE COMMENTS upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on July 1, 2013; and upon:

Ms. Marie E. Tipsord
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Deborah J. Williams, Esq.
Stefanie N. Diers, Esq.
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Matthew J. Dunn, Esq.
Thomas H. Shepherd, Esq.
Environmental Enforcement Division
Office of the Attorney General
State of Illinois
69 West Washington, 18th Floor
Chicago, Illinois 60602

Frederick M. Feldman, Esq.
Ronald M. Hill, Esq.
Margaret T. Conway
Metropolitan Water Reclamation District
100 East Erie Street
Chicago, Illinois 60611

Jeffrey C. Fort, Esq.
SNR Denton US LLP
233 South Wacker Drive, Suite 7800
Chicago, Illinois 60606-6404

Susan Charles, Esq.
Thomas W. Dimond, Esq.
Ice Miller LLP
200 West Madison, Suite 3500
Chicago, Illinois 60606

Claire A. Manning, Esq.
Brown, Hay & Stephens, LLP
700 First Mercantile Bank Building
205 South Fifth Street
Post Office Box 2459
Springfield, Illinois 62705-2459

Mr. Bernard Sawyer
Mr. Thomas Granato
Metropolitan Water Reclamation District
6001 West Pershing Road
Cicero, Illinois 60650-4112

Mr. Robert VanGyseghem
City of Geneva
1800 South Street
Geneva, Illinois 60134-2203

Ms. Lisa Frede
Chemical Industry Council of Illinois
1400 East Touhy Avenue, Suite 110
Des Plaines, Illinois 60019-3338

Jerry Paulsen, Esq.
Cindy Skrukud
Environmental Defenders of
McHenry County
110 S. Johnson Street, Suite 106
Woodstock, Illinois 60098

Mr. James L. Daugherty
Thorn Creek Basin Sanitary District
700 West End Avenue
Chicago Heights, Illinois 60411

Mr. Keith I. Harley, Esq.
Ms. Elizabeth Schenkler
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, Illinois 60606

Frederick D. Keady, P.E.
Vermilion Coal Company
1979 Johns Drive
Glenview, Illinois 60025

W.C. Blanton, Esq.
Husch Blackwell LLP
4801 Main Street
Suite 1000
Kansas City, Missouri 64112

Mr. James E. Eggen
City of Joliet, Department of Public
Work and Utilities
150 W. Jefferson Street
Joliet, Illinois 60432

Mr. Jack Darin
Sierra Club
70 East Lake Street, Suite 1500
Chicago, Illinois 60601-7447

Mr. Bob Carter
Bloomington Normal Water
Reclamation District
Post Office Box 3307
Bloomington, Illinois 61702-3307

Fredric P. Andes, Esq.
Erika K. Powers, Esq.
Barnes & Thornburg
1 North Wacker Drive, Suite 4400
Chicago, Illinois 60606

John J. Reichart, Esq.
American Water Company
727 Craig Road
St. Louis, Missouri 63141

Mr. Mark Schultz
Navy Facilities and
Engineering Command
201 Decatur Avenue, Bldg. 1A
Great Lakes, Illinois 60088-2801

Ms. Kay Anderson
American Bottoms RWTF
One American Bottoms Road
Sauget, Illinois 62201

Jessica Dexter, Esq.
Environmental Law & Policy Center
35 East Wacker, Suite 1600
Chicago, Illinois 60601

Ms. Cathy Hudzik
City of Chicago – Mayor's Office
of Intergovernmental Affairs
121 North LaSalle Street
City Hall – Room 406
Chicago, Illinois 60602

Dr. Thomas J. Murphy
2325 North Clifton Street
Chicago, Illinois 60614

Ms. Olivia Dorothy
Office of Lt. Governor
Room 414 State House
Springfield, Illinois 62706

Mr. Kenneth W. Liss
Andrews Environmental Engineering
3300 Ginger Creek Drive
Springfield, Illinois 62711

Ms. Vicky McKinley
Evanston Environment Board
223 Grey Avenue
Evanston, Illinois 60202

Susan M. Franzetti, Esq.
Kristen Laughridge Gale, Esq.
Nijman Franzetti LLP
10 South LaSalle Street, Suite 3600
Chicago, Illinois 60603

Mr. Irwin Polls
Ecological Monitoring and Assessment
3206 Maple Leaf Drive
Glenview, Illinois 60025

Stacy Meyers-Glen, Esq.
Openlands
25 East Washington Street, Suite 1650
Chicago, Illinois 60602

Mr. Lyman C. Welch
Alliance for the Great Lakes
17 N. State Street, Suite 1390
Chicago, Illinois 60602

Mr. James Huff
Huff & Huff, Inc.
915 Harger Road, Suite 330
Oak Brook, Illinois 60523

Ann Alexander, Esq.
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

Roy M. Harsch, Esq.
Drinker Biddle & Reath
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698

Albert Ettinger, Esq.
53 West Jackson
Suite 1664
Chicago, Illinois 60604

Alec M. Davis, Esq.
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701

Jared Policicchio, Esq.
Chicago Department of Law
30 N. LaSalle Street
Suite 900
Chicago, Illinois 60602

by depositing said documents in the United States Mail, postage prepaid, in Springfield,
Illinois on July 1, 2013.

/s/ Monica T. Rios
Monica T. Rios

MOBO:041/Fil/ NOF-COS - Subdocket C Comments

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9(C)
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)

EXXONMOBIL OIL CORPORATION'S FIRST NOTICE COMMENTS

NOW COMES EXXONMOBIL OIL CORPORATION ("ExxonMobil"), by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the May 16, 2013 Hearing Officer Order, submits the following First Notice Comments in Subdocket C.

I. INTRODUCTION

On March 5, 2012, ExxonMobil filed Pre-First Notice Comments articulating the reasons why the record before the Illinois Pollution Control Board ("Board") demonstrates that the Upper Dresden Island Pool ("UDIP") does not meet Clean Water Act ("CWA") goals for aquatic life.¹ On March 19, 2013, ExxonMobil filed a Response to Pre-First Notice Comments, and again argued that the UDIP does not meet the CWA goals and should be designated accordingly.²

¹ See Pre-First Notice Comments of ExxonMobil Oil Corporation on the Proposed Aquatic Life Use Designation of the Lower Des Plaines River, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, R08-9 (Ill.Pol.Control.Bd. Mar. 5, 2012) (hereafter rulemaking is cited as "R08-9" and comments cited as "Pre-First Notice Comments").

² See Response to Pre-First Notice Comments, R08-9 (Ill.Pol.Control.Bd. Mar. 19, 2012) (hereafter "Response to Comments").

On February 21, 2013, the Board issued its First Notice Opinion and Order (“First Notice”)³ in Subdocket C and determined that the UDIP should be designated General Use for aquatic life. The Board concluded:

The Board has examined the record and agrees with IEPA that no UAA factors apply to the UDIP. Because the UAA factors do not justify an aquatic life use less than the CWA goal, the Board finds that identifying UDIP as General Use is appropriate.

. . . [T]his analysis supported the Board’s determination that the UDIP should be designated as General Use because the proposed standards were nearly identical except for more stringent standards for April to November temperatures and mercury and a less stringent temperature standard for December to March. The Board will examine water quality standards applicable under the General Use standard. The Board is mindful that, particularly in the area of temperature, water quality standards may need to be adapted for the UDIP.

First Notice at 221.

ExxonMobil objects to the classification of the UDIP as a General Use water for aquatic life purposes. As discussed in its Pre-First Notice Comments, and reiterated here, the record in this rulemaking provides more than sufficient evidence to demonstrate that the UDIP cannot meet CWA goals. These comments first highlight the reasons why the UDIP should not be classified General Use and then discusses the complexities associated with the applicability of General Use water quality standards (“WQSs”) to the UDIP. Finally, these comments provide a brief discussion on several issues raised by the First Notice.

³ First Notice Opinions and Order, R08-9(C) at 221 (Ill.Pol.Control.Bd. Feb. 21, 2013) (hereafter referenced and cited as “First Notice”).

II. THE RECORD DOES NOT DOCUMENT WHICH "INTOLERANT" SPECIES HAVE SUSTAINABLE POPULATIONS IN THE UDIP THAT WOULD BE CONSISTENT WITH AN AQUATIC LIFE GENERAL USE DESIGNATION.

The Board concludes in its First Notice that the General Use standard should apply for aquatic life protection in the UDIP and proposes not to use the Illinois Environmental Protection Agency's ("Illinois EPA") originally proposed "Upper Dresden Island Pool Aquatic Life Use" designation, which attempted to distinguish between achievable aquatic life populations in the UDIP and those in surface waters with General Use classifications that do not have the habitat limitations characteristic of the UDIP. First Notice at 221. The Board states in its First Notice that in the absence of a determination that any of the 40 C.F.R § 131.10(g) Use Attainability Analysis ("UAA") factors apply, it has no choice but to apply the General Use classification to the UDIP. As discussed elsewhere in these comments, ExxonMobil disputes the conclusions of both Illinois EPA and the Board that none of the UAA factors should apply to the UDIP, given that the record clearly documents that Factors 3, 4, 5 and 6 are applicable to these waters.

Specifically, the Board should note that, 40 C.F.R § 131.10(c) allows states to adopt subcategories of uses to reflect varying needs of such subcategories, and the use of subcategories is not limited to situations where one or more of the UAA factors must be demonstrated. Recognition of habitat factors that limit aquatic uses to intermediately tolerant and tolerant species is a subcategory of use that is acceptable under the CWA regulations and does not require any of the UAA factors to be present, although the Subdocket C record clearly shows that such factors do exist in the Lower Des Plaines River ("LDPR"), including the UDIP.

At least two states offer noteworthy examples of using subcategories of aquatic life use to recognize limitations in habitat factors — Ohio and Texas. Ohio has seven designated aquatic life use categories that are based on habitat including warmwater, limited warmwater, and exceptional warmwater. Ohio Admin. Code 3745-1-07(B). In the limited warmwater habitat category, for example, numeric water quality criteria are varied on a case-by-case basis to represent habitat limitations and the potential aquatic communities that they can sustain.

Texas has adopted five aquatic life use categories: exceptional, high, intermediate, limited, and minimal. 30 Tex. Admin. Code § 307.7(b)(3). These categories each have different dissolved oxygen standards (minimum, average). Texas also adopted temperature, total dissolved solids, chloride, and sulfate standards for each classified segment to represent achievable criteria that are based on monitoring data from each segment. For example, Texas has chloride criteria ranging from 50 mg/L to over 1,000 mg/L for bodies of water that are classified as high aquatic life protection.

These are only two examples of states that have approved WQS that use the flexibility provided at 40 C.F.R § 131.10(c) to adopt subcategories of aquatic life uses to properly acknowledge habitat limitations.⁴ These subcategories have been adopted, in most cases, without any finding by the state that one or more of the UAA factors apply. USEPA has allowed, and even encouraged, such subcategorization of aquatic life uses in state WQSs within Region 5 and elsewhere.

In its Pre-First Notice Comments on Illinois EPA's Subdocket C proposed UDIP aquatic life use, ExxonMobil questioned the inclusion of "intolerant" species in the use

⁴ Other examples of states with long-standing USEPA-approved aquatic life use subcategories include Iowa, Indiana, Missouri, New York, and Wisconsin.

designation (see originally proposed Sections 303.237,⁵ 303.230 and 303.235) and requested identification of such species that the habitat of the UDIP could support. Whether intolerant species can be supported by the habitat in the UDIP is important because the General Use aquatic life definition assumes, *a priori*, that a balanced, indigenous population of aquatic life is achievable which would include intolerant aquatic species, *both in the water column and the benthos*.

Illinois EPA, in its comments on the pre-notice proposal, provided examples of moderately tolerant and tolerant species in its definition of the Chicago Area Waterways System (“CAWS”) Aquatic Life Use A Waters at Section 303.230 and for tolerant species at proposed Section 303.235. First Notice at 227-228. However, Illinois EPA did not offer any examples of the intolerant species that can be expected in the LDPR, including the UDIP, perhaps because there are not any sustainable populations of such species identified in the UAA⁶ or any of the other fishery surveys incorporated in the Subdocket C record. As ExxonMobil noted in its Pre-First Notice Comments, not only were no intolerant species found in the UDIP in the UAA study, but there were no intolerant species found in the Lower Dresden Island Pool (“LDIP”) either, clearly indicating that the physical habitat is limiting in the entire LDPR. Pre-First Notice Comments at 2-6.

At First Notice, the Board stated that it shares the concerns of commenters that Illinois EPA does not define “terms such as tolerant, intermediately tolerant, and

⁵ At First Notice, the Board proposed to designate the UDIP as General Use, and consequently, removed Illinois EPA’s originally proposed Section 303.237 (Upper Dresden Island Pool Aquatic Life Use Waters) from the proposed revisions to Part 303.

⁶ Statement of Reasons, Attachment A – Lower Des Plaines River Use Attainability Analysis Final Report (Dec. 2003), R08-09 (Ill.Pol.Control.Bd. Oct. 26, 2007) (Statement of Reasons hereafter cited as “SOR” and Attachment A hereafter cited as “UAA”).

intolerant species in the aquatic life use definitions.” First Notice at 175. The Board further stated:

The record lacks a clear definition of these terms to understand what species might exist or be lacking in a stream segment in order to determine which aquatic life use designation should be applied. There is also no discussion of how the classifications relate to native species or how a fish is defined as “tolerant, intermediately tolerant, and intolerant.” In addition, a species may be tolerant of certain parameters and not others. For example, one fish species might be tolerant of low DO levels but intolerant of higher temperatures. It is not clear from the record whether this species would be classified as tolerant or intolerant, or even intermediately tolerant, and how this classification would aid in determining an appropriate aquatic life use designation.

Id.

The proposed classification of the UDIP as a General Use surface water is unsupportable because the UAA and other available data in the record do not justify the conclusion that the habitat of the UDIP supports (or can support) intolerant species in sustainable populations, which is an underlying assumption of the General Use classification. Pre-First Notice Comments at 3-5. This is especially true if both water column (e.g. fish populations) and benthic animal populations are considered necessary components of a balanced, indigenous, aquatic ecosystem.

In addition, the UAA section on the metrics for the Index of Biotic Integrity for the LDPR, including the UDIP, states that intolerant fish species were “very rare or absent in all samples,” including in the LDIP. UAA at 6-13. The UAA attributes the lack of intolerant species of fish to poor habitat and possibly thermal and/or dissolved oxygen stresses. *Id.* However, because no intolerant species were identified in the LDIP, which the UAA evaluation indicates is not subject to either thermal or low dissolved oxygen stresses, it is apparent that the physical habitat limitations (channelized, impounded pools) of the UDIP and LDIP are the environmental conditions that preclude

the development of sustainable populations of intolerant fish species. In fact,

ExxonMobil has previously commented:

The macroinvertebrate populations in the UDIP are also demonstrated to be limited in diversity and abundance due to lack of suitable habitat conditions. The UAA describes the entire study area, including the UDIP, as having limited invertebrate habitat such as "woody debris, cobbles and stable substrate." In addition, as noted above, the UAA cites low velocities in deeper water formed by the impounded pools, homogeneous fine-grained sediments, and ship and barge traffic⁷ that suspends bottom sediments as additional habitat stressors that preclude development of diverse benthic macroinvertebrate communities.

Pre-First Notice Comments at 4. (Internal citations, except for footnote, omitted.)

ExxonMobil further commented in regards to the habitat in the UDIP:

The Board has heard testimony discussing the habitat limitations in the UDIP. The prefiled testimony of G. Allen Burton and Greg Seegert provide a detailed evaluation of the irreversible habitat limitations in the UDIP that prevent attainment of a higher aquatic life use subcategory and the deficiencies in the proposed Section 303.237 use definition. Their testimony identifies flaws in Illinois EPA's UAA evaluation of the aquatic life use that is attainable in the UDIP, including the evaluation of additional field data on sediment and habitat quality. For example, Illinois EPA's Statement of Reasons states that the Qualitative Habitat Evaluation Index ("QHEI") scores for the UDIP ranged from 45 to 80, which correspond to a fair to excellent biological potential. In fact, as pointed out by Mr. Seegert in his testimony on the 2008 QHEI study, approximately half of the QHEI scores are below 45, which represent habitat that is only "fair." Furthermore, Mr. Seegert also noted that, as per protocol, the area within the navigation channel was not evaluated for the 2008 QHEI, which is approximately 50% of the UDIP. Due to barge

⁷ ExxonMobil has provided information regarding the constant barge traffic on the LDPR. In his pre-filed testimony, Mr. Robert Elvert, on behalf of ExxonMobil, stated:

Barge traffic on the LDPR is a constant twenty-four hour a day, seven days a week activity. In 2007, 825 barges were unloaded or loaded at the ExxonMobil Refinery dock, with each barge being moved across the river or upstream on the river by tugboat two to three times during loading and unloading operations. This amounts to hundreds of trips by tugboats and over 2,400 barge movements back and forth across the width of the LDPR. In addition to the barges that are unloaded or loaded at the Refinery, several other facilities along the LDPR are served by barges, and thus, the actual number of barges on the LDPR could be substantially greater than that noted above.

Pre-Filed Testimony of Robert S. Elvert, R08-09 at 3 (Ill.Pol.Control.Bd. Aug. 4, 2008).

traffic⁸ and other factors, Mr. Seegert surmised that the navigational channel “certainly would have scored well below 45 had it been evaluated.” Thus, relying on Illinois EPA’s “modified” QHEI scores is not a scientifically supportable basis for assigning the described aquatic life use for the UDIP.

Pre-First Notice Comments at 4-5. (Internal citations, except for footnote, omitted.); *see generally* Pre-Filed Testimony of G. Allen Burton, R08-09 (Ill.Pol.Control.Bd. Sept. 8, 2008) (hereafter “Burton Testimony”) and Pre-Filed Testimony of Greg Seegert, R08-09 (Ill.Pol.Control.Bd. Sept. 8, 2008) (hereafter cited at “Seegert Testimony”).

The site-specific data collected for over a decade document that the UDIP does not support intolerant fish species or diverse benthic macroinvertebrate communities, and the irreversible physical habitat conditions of this water body preclude the development of sustainable populations of such species. Therefore, the classification of the UDIP as achieving General Use is not representative of the existing or achievable use and should be revised. The appropriate aquatic life use designation of the UDIP should continue to be supportive of “UDIP indigenous aquatic life,” which does not mean that the water body is not meeting the CWA goal of fishable water, but rather reflects habitat limitations that do not justify classification as General Use which is based on sustainable populations of intolerant, intermediately tolerant and tolerant fish and macroinvertebrates. Most states have recognized that water bodies can achieve the basic CWA aquatic life use goals but that local habitat conditions limit the fish and macroinvertebrate populations that are indigenous to the water body. The “one size fits all” General Use classification in the Illinois WQSs is unscientific and unsuitable because it fails to recognize intrinsic differences between aquatic habitat types, which includes both the stream flow regime of

⁸ See footnote 7.

a water body and the physical characteristics of the stream channel and riparian areas. Illinois should acknowledge the differences in achievable aquatic life uses between the UDIP and water bodies that do not have its limiting hydrologic and physical habitat characteristics by taking advantage of the subcategory provisions of 40 C.F.R § 131.10(c), which many states utilize to assure that aquatic life use classifications are appropriate to the specific characteristics of each surface water segment.

III. THE RECORD DEMONSTRATES THAT UDIP HABITAT CANNOT SUPPORT AND DOES NOT SUPPORT A BALANCED INDIGENOUS AQUATIC ECOSYSTEM.

In ExxonMobil's Response to Pre-First Notice Comments, ExxonMobil notes several ways in which Illinois EPA mischaracterized the achievable aquatic life use in the UDIP by selective evaluation of the physical, chemical, and biological data from the LDPR UAA and additional data collected by other public and private entities, including Midwest Generation's extensive biological studies conducted over a period of many years. Response to Comments at 2-8. Even though Illinois EPA presents an overly optimistic evaluation of the UDIP habitat, it did not recommend a General Use classification for the aquatic life in this water body because the UDIP clearly has irreversible physical habitat and water chemistry that cannot support a balanced, indigenous aquatic ecosystem, the definition of which must include both water column and benthic species.

The Subdocket C record contains extensive documentation that the benthic macroinvertebrate population in the UDIP is not balanced or diverse. UAA at 5-14 and 5-17. The UAA also clearly states that the lack of diversity in the benthic macroinvertebrate populations is due to habitat limitations. Pre-First Notice Comments

at 4 (citing the UAA at 5-14). ExxonMobil asserted that it is inappropriate to apply the General Use aquatic life classification to the UDIP because the UAA and all other supporting data demonstrate that the aquatic ecosystem, which includes both water column species and benthic species, cannot be considered balanced and diverse if those characteristics cannot be achieved by the benthic macroinvertebrate community. *See generally* Pre-First Notice Comments.

ExxonMobil requests that the Board note that USEPA supports the concept of “tiered” aquatic life uses to better describe aquatic life populations that are limited in some respect by physical and chemical habitat conditions.⁹ Several states already use such an approach and it is clearly applicable to the UDIP, which all available biological data demonstrate cannot achieve the balanced indigenous water column and benthic organism populations implied by assigning the General Use classification. *See* Section II of these Comments. Illinois EPA’s initial proposal for a UDIP aquatic life use was an attempt to establish such a tiered aquatic life use classification, although it inappropriately included intolerant aquatic species in the definition.

ExxonMobil urges the Board to review its conclusions regarding the General Use designation for the UDIP because the biological and physical habitat data in the Subdocket C record demonstrates that the General Use aquatic life classification is not scientifically supported for the UDIP. Indeed, the Board acknowledged this fact in its First Notice when it stated that the General Use temperature standards may have to be modified for the LDPR and the UDIP when the Subdocket D numeric criteria are

⁹ DRAFT: *Use of Biological Information to Better Define Designated Aquatic Life Uses in State and Tribal Water Quality Standards: Tiered Aquatic Life Uses*, USEPA, Office of Science and Technology (Aug. 10, 2005).

adopted. First Notice at 221. Because the General Use numeric standards have specific numeric temperature criteria, it is inconsistent to, on one hand, adopt the General Use classification for the UDIP, and on the other hand, adopt a separate temperature criteria for the water body that is different than the thermal standard applied to General Use waters.

IV. THE BOARD'S PROPOSAL TO APPLY THE GENERAL USE AQUATIC LIFE CLASSIFICATION TO THE UDIP IGNORES THE EVIDENCE THAT THE BOARD DESCRIBES IN ITS FIRST NOTICE SHOWING THAT THERE ARE IRREVERSIBLE HABITAT CONDITIONS THAT LIMIT AQUATIC LIFE USE.

At First Notice, the Board states that it concurs with Illinois EPA that none of the UAA factors apply to the UDIP. First Notice at 221. It further states that Midwest Generation's arguments (and presumably ExxonMobil's arguments) that UAA Factors 3, 4, 5 and 6¹⁰ are "unconvincing," and therefore, the General Use classification should apply to the UDIP.

First, as discussed elsewhere in these comments, the regulations at 40 C.F.R. § 131.10(c) allow a state to adopt aquatic life use subcategories that represent different achievable biological conditions without having to make a determination that one or more of the UAA factors apply. Neither the Board nor Illinois EPA acknowledge that a specific aquatic life use for a water body that does not have biology and physical habitat

¹⁰ The six UAA factors at 40 C.F.R. § 131.10(g) are as follows: 1) Naturally occurring pollutant concentrations prevent the attainment of the use; or 2) Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use...; or 3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or 4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or 5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or 6) Controls more stringent than those required by sections 301(b) and 306 of the Act [CWA effluent standards] would result in widespread economic and social impact.

consistent with the General Use definition can be adopted by the Board without any of the UAA Factors being demonstrated as applicable. This is a major oversight in the Board's proposed decision for the UDIP.

Second, ExxonMobil asserts that Illinois EPA's conclusion that UAA Factors 3, 4, 5, and 6 are not applicable to the UDIP was made without adequate consideration of the physical habitat conditions, including the following facts described in ExxonMobil's Pre-First Notice Comments:

- Over ninety (90) percent of the dry weather flow and a majority of the wet weather flow in the UDIP consist of treated wastewater, combined sewer overflows (recognizing the TARP has reduced these), and urban runoff from the Greater Chicago Metropolitan Area;
- The UDIP has a maintained (dredged) navigation channel to support the designated commercial navigation use and restoring the channel to its "original condition" would mean eliminating the navigation use. The impounded pools are also used for flood control for the Greater Chicago Metropolitan Area, and thus, river flows and levels are subject to rapid change, which are limiting factors on aquatic populations in the UDIP;
- The UDIP is an impounded pool that has no riffle habitat and has a channel bottom consisting primarily of fine-grained, contaminated sediment. The low ambient velocities and significant water depths in the pool and the continual scouring of sediments by barge traffic create poor habitat conditions for both benthic macroinvertebrates and fish; and
- The UAA stated that the poor quality habitat cannot be "improved without removal or major modification to the navigation system." The report continues by stating that these habitat limitations are irreversible as long as the LDPR is used for commercial navigation, which is a designated use. The UDIP is also a component of the CAWS and its flow and hydraulic characteristics are actively managed using a system of control structures to prevent flooding and maintain water levels for navigation, which also limits the suitability of LDPR as aquatic life habitat. Changes in any of these uses would result in widespread social and economic impacts.

Pre-First Notice Comments at 7-10.

ExxonMobil disagrees with Illinois EPA's position that water quality limitations associated with treated effluents and urban runoff can be eliminated through more restrictive point source permit limits and best management practices for urban runoff; this is simply not achievable. *See generally* Burton Testimony. Human activities invariably alter the natural composition of water (e.g. ratios and concentrations of the inorganic cations and anions) so that the aquatic species that can sustain populations in surface waters that consist primarily of treated effluent are different from those populations that occur in surface waters that have a small fraction of effluent. Urban runoff causes even more stress on aquatic populations, and despite a national focus on best management practices to improve water quality in such runoff during the past 30 years, there are no examples of where runoff quality from an area the size of the Chicago Metropolitan Area has been improved to the extent that it would not adversely impact aquatic life populations when such runoff represents the majority of the wet weather flow in a water body. For example, the use of salt for snow and ice control on roads is unlikely to be replaced or see a major use reduction in the foreseeable future for safety and economic reasons.

V. **ILLINOIS EPA SHOULD DEVELOP A CHLORIDES STANDARD USING A SIMILAR APPROACH TO THE ONE SUGGESTED BY USEPA FOR DISSOLVED OXYGEN.**

Throughout this rulemaking proceeding, Illinois EPA and various stakeholders have been discussing the proposed water quality standard for chlorides. In the Illinois EPA's original proposed amendments to Parts 301, 302, 303, and 304, Illinois EPA states with regards to chlorides:

The Illinois EPA expects that there will be violations of the chloride standard during the winter months when road salting takes place to

address winter weather events and the safety of Illinois motorists. This problem is not unique to the CAWS and Lower Des Plaines River and the Illinois EPA has issued National Pollutant Discharge Elimination System stormwater permits to municipalities requiring the implementation of best management practices and other programs to minimize storm related water quality impacts from salts and other contaminants. The Agency hopes to continue to work with state and local government entities to mitigate the potential harm to aquatic life from these practices.

SOR at 76-77. At this time, however, to our knowledge, Illinois EPA has not addressed this issue with stormwater permits issued to state and local government entities along the LDPR.

In fact, Illinois EPA has not yet determined how to address the seasonal chloride issue resulting from road salt and has not articulated the type of best management practices that would be appropriate in these circumstances for state highway, large and small municipalities, commercial and private use, as well as for facilities along the LDPR. In order to address the issues raised by stakeholders in regards to the proposed chlorides WQS, Illinois EPA should consider the approach that USEPA has suggested for addressing dissolved oxygen ("DO") issues resulting from combined sewer overflows ("CSOs").

The Metropolitan Water Reclamation District of Greater Chicago ("MWRD") has been in discussions with regulators and environmental groups with respect to WQSs for the CAWS and, in particular, the aquatic life designated uses and aquatic life WQSs for DO.¹¹ In a recent filing with the Board, MWRD included a letter from USEPA that discusses approval of WQSs and variances in accordance with Section 303(c) of the CWA. Although the discussion pertains specifically to a potential variance request,

¹¹ Report of MWRD and Environmental Groups on Agreement Regarding Proposed Aquatic Life Designated Uses, R08-9(C) (Ill.Pol.Control.Bd. Jan. 9, 2013).

USEPA acknowledges that there is an opportunity in this situation to potentially claim that a human-caused source of pollution prevents attainment of the DO criterion for a portion of the CAWS. The “human-caused condition” is referring to the UAA factor at 40 C.F.R. § 131.10(g)(3): “Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.”

Just as CSOs are a human-caused condition contributing to the nonattainment of the proposed DO standard in the waterways, road salting is a human-caused condition that results seasonally in chloride concentrations in excess of the proposed numeric standard.¹² In addition, USEPA stated with regards to chlorides in terms of this rulemaking:

If Illinois wants to take the effects of deicing activities in the Chicago area into account in the water quality standards for ..., Illinois could attempt to do so as part of the IPCB’s proceedings pertaining to aquatic life use designations and criteria¹³

Accordingly, the Board should adopt an appropriate aquatic life designated use and aquatic life WQS for chlorides consistent with these current conditions, relying on the “human-caused conditions” UAA factor. Illinois EPA has previously proposed such a designated use when it proposed the “UDIP Aquatic Life Use Waters,” which accounts for the unique nature of the UDIP. ExxonMobil requests that the Board reconsider its

¹² See generally Pre-filed Testimony of J. Huff, R08-9(C) (Ill.Pol.Control.Bd. Feb. 2, 2011) (hereafter referenced as “2011 Huff Testimony”); Transcript of March 9, 2011 Hearing, R08-9(C) (Ill.Pol.Control.Bd. Mar. 18, 2011).

¹³ Comments of United States Environmental Protection Agency submitted by Susan Hedman, Regional Director regarding CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. v. IEPA, PCB 12-94, R08-9(D) at 2 (Ill.Pol.Control.Bd. Mar. 19, 2013).

proposed General Use designation for the UDIP and re-examine the water segment specific "UDIP Aquatic Life Use Waters" designation.

VI. VARIANCES FROM WQSs AND THE TRIENNIAL REVIEW PROCESS.

The Board and Illinois EPA should consider in Subdocket C the potential impacts to small sources that may result from future variance requests from the largest load sources. As noted above, MWRD's summary of its agreement with environmental groups with respect to DO outlines the anticipated approach that MWRD plans to take and one that has been supported in concept by multiple environmental groups. In the summary, MWRD suggests a future variance per the provisions of 35 Ill. Admin. Code Part 104.

In such cases where the largest point-source dischargers need significant time to study, engineer and implement controls, there is the potential for a situation to result, where significantly smaller contributing sources will be forced to unnecessarily install controls. In some situations, the large point-source discharger may be the load that drives impairment. Smaller sources may be forced to install costly controls and/or request variances in kind. A rulemaking followed by multiple immediate variance requests is an inefficient way to improve water quality. A more efficient approach would be to incorporate a compliance schedule into the regulation itself at the time of rulemaking for the benefit of all existing dischargers.

In addition, instead of issuing variances from newly adopted WQSs to various petitioners, the Board should consider utilizing the triennial review process to more effectively transition WQSs (designated uses and water quality criteria) where there are issues in common for multiple dischargers. In the original proposal to modify 35 Ill.

Admin. Code Parts 301, 302, 303, and 304, Illinois EPA outlined the triennial review process:

CWA Section 303 provides that “the State water pollution control agency. . . shall from time to time (but at least once each three year period beginning with October 18,1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.”

SOR at 3. (Internal citations omitted). Illinois EPA further explained:

The CWA describes this obligation by the states to set water quality standards as follows:

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Clean Water] Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation. This proposal is a culmination of the State's requirement to conduct a triennial review and includes both the designation of uses for the specified waters and establishment of numeric and narrative criteria intended to protect these designated uses.

Id. at 4. (Internal citations omitted.)

In this triennial review, Illinois EPA effectively outlined the history of WQSs for the CAWS and LDPR, including the pre-1970 designation of LDPR as “industrial water supply sector,” the 1968 Sanitary Water Board designation of the CAWS as “commercial vessel and barge shipping, recreational boating transit, withdrawal and return of industrial cooling and process water, and to receive effluents from industrial and domestic waste treatment facilities,” and the designation, since 1972, of the CAWS and LDPR as Secondary Contact and Indigenous Aquatic Life Use. SOR at 7. The existing

designations clearly took into consideration “their use and value for industrial and other purposes.” Although the unique uses of the CAWS and LDPR have not changed, these uses appear to be disregarded in the current rulemaking. Instead, the proposed rule abruptly changes from existing, limited-use designations for the subject waterways to full aquatic life use designations and their associated water quality criteria. In some cases, no criterion existed before, and yet the most stringent numeric criterion has been proposed in this rulemaking.

During the course of the rulemaking, there have been several parameters (e.g., DO, temperature, chloride, sulfate, etc.) for which there has been testimony regarding WQSs (uses and/or criteria) that are not attainable based on one or more of the six UAA factors in 40 C.F.R. § 131.10(g).¹⁴ In all too many cases for the CAWS and LDPR, there appears to be no recognition of “human caused conditions or sources of pollution” or “widespread economic and social impact,” yet these have historically been considered of great significance. The triennial process allows for standards to be revisited frequently, as human caused conditions improve (e.g., CSOs eliminated, effective alternatives implemented for de-icing roads and parking lots), and accordingly, the Board should consider using the step-wise triennial review process as its basis for establishing reasonably achievable aquatic life uses and WQSs based upon the unique features and current uses for the CAWS and LDPR, rather than promulgating uses and WQSs that are not reasonably achievable given human caused conditions present for the foreseeable future in the Greater Chicago Metropolitan Area. Accordingly, ExxonMobil requests that

¹⁴ See generally Pre-Filed Testimony of C. Adams and R. Garibay, R08-9 (Ill.Pol.Control.Bd. Aug. 4, 2008); Pre-Filed Testimony of J. Wozniak, R08-9 (Ill.Pol.Control.Bd. Aug. 4, 2008)(hereafter “Wozniak Testimony”); Pre-Filed Testimony of J. Huff, R08-9 (Ill.Pol.Control.Bd. Aug. 4, 2008); and 2011 Huff Testimony.

the Board thoroughly consider the impact that potential variances granted to large sources may have on small sources, and consider focusing on implementing incremental changes to the WQSs through the triennial review process.

VII. IERG'S MOTION FOR CLARIFICATION AND THE BOARD'S RESPONSE.

On April 5, 2013, the Illinois Environmental Regulatory Group ("IERG") filed a Motion for Clarification Regarding the First Notice Opinion and Order for Subdocket C ("Motion") requesting that the Board clarify several issues raised by the designation of the UDIP as General Use.¹⁵ On May 16, 2013, the Board granted the Motion in part and denied it in part.¹⁶ In doing so, the Board invited participants to provide clarification on issues in comments, including providing suggested rule language. As discussed in more detail below, ExxonMobil strongly urges the Board to make clarifying changes to the First Notice proposal to alleviate the concerns of the regulated community should the Board adopt a Second Notice wherein the UDIP is designated as General Use.

A. Status of Standards for UDIP after Adoption of Aquatic Life Use Designation

In the Board's response to the Motion, the Board clarified a single issue regarding the timing of applicability of the proposed General Use standards to the UDIP. The Board stated that it "does not intend that the General Use water quality standard, will apply to the UDIP until the conclusion of Subdocket D." Order at 4. The Board further stated that it "will examine the record [in Subdocket D] to determine appropriate water quality standards for UDIP." *Id.* The Board requested that participants provide

¹⁵ The Illinois Environmental Regulatory Group's Motion for Clarification Regarding the First Notice Opinion and Order for Subdocket C, R08-9(C) (Ill.Pol.Control.Bd. April 5, 2013).

¹⁶ Board Order, R08-9(C) (Ill.Pol.Control.Bd. May 16, 2013) (hereafter cited as "Order").

clarifications on whether the Board should delay the effective date of the proposed rule in Subdocket C, or wait to adopt the aquatic life designation until the WQSs are adopted in Subdocket D.

Although ExxonMobil disagrees with the General Use designation for aquatic life in the UDIP, ExxonMobil prefers that the Board delay the adoption of the aquatic life use designation until the corresponding WQSs are ready to be finalized and adopted by the Board. As discussed in IERG's Motion and in the sections below, the designation of the UDIP as General Use creates uncertainty as to how General Use WQSs will apply in the UDIP, a unique, habitat limited water body that does not share the characteristics of General Use waters. In order to reduce the uncertainty created by the designation of the UDIP as a General Use water, the Board should delay the adoption of the aquatic life use designation until appropriate WQSs are adopted; at which time, the use designation and corresponding WQSs can be adopted simultaneously. Although ExxonMobil prefers that the aquatic use designation for the UDIP be delayed until WQSs are adopted, ExxonMobil supports the Board's other proposed option – delaying the effective date of use designation until the time the WQSs are adopted.

B. Applicability of all General Use Standards to the UDIP

The Board clarified that it does not intend for the General Use standards to apply to the UDIP until the conclusion of Subdocket D. However, the Board failed to fully respond to IERG's questions on whether all General Use standards will apply to the UDIP. Specifically, IERG asked, "Does the Board, by proposing to designate the UDIP as General Use, intend for all of the Subpart B water quality standards to apply to the UDIP?" And, also asked, "[H]ow does the Board intend for **all** of the Subpart B

standards to be implemented in the UDIP?" Motion at 3. The Board acknowledged in its First Notice that "particularly in the area of temperature, water quality standards may need to be adapted for the UDIP." First Notice at 221. The Board also noted its determination that "the UDIP should be designated as General Use because the proposed standards are nearly identical except for more stringent standard for April to November temperatures and mercury and a less stringent temperature standard for December to March." *Id.*

The Board did not accurately characterize the Illinois EPA's proposal when it labeled it "nearly identical" to the General Use standards. The Board seems to have failed to recognize that General Use waters are also subject to the derived toxics criteria in Subpart F. The Subpart F standards add dozens of constituents for evaluation by a facility, which were not previously required for facilities subject to the Secondary Contact and Indigenous Aquatic Life Standards. Applying Subpart F requirements to the UDIP, given its unique nature, has not yet been evaluated. No economic analysis or technical feasibility study has been performed to determine the impact of imposing Subpart F requirements on dischargers to the UDIP. Further, neither ExxonMobil nor other dischargers to the UDIP can be confident that the criteria derived from Subpart F are appropriate for the UDIP as the methodology for deriving the criteria was developed with General Use waters in mind rather than waters subject to Secondary Contact and Indigenous Life Standards. It is clear that the proposed designation of the UDIP as General Use by the Board is not "nearly identical" to Illinois EPA's initially proposed designation, but in fact, it is significantly different than Illinois EPA's original proposal for the UDIP.

In addition, the Board did not address IERG's question regarding implementation of all the General Use standards. Although the Board now recognizes that the UDIP designation should become effective or be adopted at the same time as WQSs in Subdocket D, the Board has not clarified how the General Use standards should be implemented in UDIP. Clarification on this issue is crucial in order to alleviate uncertainty for discharges to the UDIP. For instance, Section 302.211(f) provides a process and schedule for transitioning to the General Use temperature standards, a significant issue for the UDIP's existing, large (<150 megawatts or 0.5 billion Btu/hr) and small thermal sources.

C. Impact on General Use Waters not Subject to this Rulemaking

In its Motion, IERG asked whether the Board "intend[s] for any amendments made to the General Use standards in Subdocket D to apply to all waters in the State designated General Use?" Motion at 3. The Board did not provide a response to IERG's question. ExxonMobil requests that the Board clarify its intention regarding the General Use waters outside the CAWS and LDPR and whether those waters will be subject to any revisions made to the General Use standards in Subdocket D. Given that facilities discharging to General Use waters that are not the subject of this rulemaking have not been given any notice that this rulemaking could impact them, any changes made to the General Use WQSs should only be applicable to those segments of the CAWS and LDPR that are the subject of this rulemaking. Further, the Board should question the appropriateness of revising General Use WQSs in this rulemaking without providing dischargers to General Use waters in the rest of the State the opportunity to provide testimony and comment. If any revisions to the General Use WQSs in Subdocket D

would apply state-wide to all General Use waters, proper notice of a rulemaking of general applicability should be provided to all potentially impacted stakeholders.

D. Conflicting Recreational and Aquatic Life Use Designations for the UDIP

The First Notice stated that the “current designation of General Use addresses aquatic life together with recreational use without providing for the possibility that a segment may attain one but not the other.” Motion at 3 (citing First Notice at 173). IERG questioned the Board on how it “intend[ed] for the recreational use designation for the UDIP (incidental contact) to interact with the proposed designation of the UDIP as General Use?” Motion at 3. The Board responded that it “did not intend to change or alter the Recreational Use designations and standards decided in Subdocket A and B.” Order at 4. Although it may not have intended to alter the recreational uses that have already been adopted, by proposing a General Use designation for the UDIP, the Board created a conflict between the USEPA approved provisions at Sections 303.204 (stating that the CAWS and LDPR are not required to meet the general use standards) and 303.225 (designating the UDIP as incidental contact) and the General Use designation for the UDIP. Should the Board move forward with designating the UDIP as General Use, revisions to the language in Part 303, Subpart B, and possibly the WQSs at Part 302, Subpart B will be required in order to resolve the conflict between the Incidental Contact designation for the UDIP for recreational use and the General Use designation for aquatic life use, that as acknowledged by the Board, is linked with recreational use.

VIII. ADDITIONAL CONCERNS

A. Statement in First Notice Opinion and Order Regarding AS 96-10

The Board in its recitation of the LDPR UAA states that “Midwest Generation has an adjusted standard [AS 96-10]¹⁷ that is applicable to its discharges from its plant to the Interstate 55 Bridge.” First Notice at 38 (citing UAA at 2-82). This sentence could easily be misinterpreted. For clarity in the record, ExxonMobil requests that this excerpt be revised as follows: “Midwest Generation has an adjusted standard [AS 96-10] that is applicable to its discharges from its plants to the existing General Use waters that begin approximately seven miles downstream of the Joliet stations at the Interstate 55 Bridge.” The seven-mile intermediate stretch¹⁸ of the UDIP has historically been subject to the less stringent Secondary Contact and Indigenous Aquatic Life Use temperature standards and is not within the scope of AS 96-10.

B. JCAR Economic Analysis

Pursuant to the Administrative Procedure Act, 5 ILCS 100/1-1 *et seq.*, the Joint Committee on Administrative Rules (“JCAR”), in rulemaking proceedings, requests an economic analysis of the rulemaking from the Board. As discussed in detail above, the Board has proposed to designate the UDIP as General Use for aquatic life. However, the Board’s proposal to adopt the General Use designation for the UDIP has not undergone an economic analysis by either the Board or JCAR. The General Use designation has applied to waters that are not the subject of this rulemaking, and thus, any economic analysis of the General Use standards is not representative of the economic impact of

¹⁷ Board Order, *In the Matter of: Petition of Commonwealth Edison Company for Adjusted Standard from 35 Ill. Adm. Code § 302.211(d) and (e)*, AS 96-10 (Ill.Pol.Control.Bd. Oct. 3, 1996).

¹⁸ To review a map of the Upper Illinois Waterway, showing the locations of the Midwest Generation plants and I-55 Bridge, *see* Attachment 1 to Wozniak Testimony.

imposing General Use standards in waterways that have warranted Secondary Contact and Indigenous Aquatic Life Standards since the adoption of the original WQSs by the Board. Prior to adopting a General Use designation for the UDIP, an economic analysis of such designation should be conducted.

IX. CONCLUSION

ExxonMobil disagrees with the Board's proposed designation of the UDIP as General Use and requests that the Board reconsider its proposed designation, given the unique character of the UDIP and the complexities associated with implementing General Use standards in a segment of the LDPR that is limited in habitat and does not support intolerant species in sustainable populations. ExxonMobil appreciates the opportunity to provide these comments, and it respectfully requests that the Board consider the issues raised above and in previous ExxonMobil submittals and revise the proposed aquatic life use designation for the UDIP consistent with these comments.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: July 1, 2013

By: /s/ Monica T. Rios
Monica T. Rios

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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