

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

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Please take notice that on July 1, 2013, we filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached **Comments on Opinion and Order of Board on Proposed Rule, First Notice** a copy of which is served upon you.

CITGO PETROLEUM CORPORATION, and
 PDV MIDWEST, LLC, Petitioners

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**COMMENTS ON OPINION AND ORDER OF BOARD
ON PROPOSED RULE, FIRST NOTICE**

CITGO PETROLEUM CORPORATION, and PDV MIDWEST, LLC, (collectively, the “Lemont Refinery”) submit the following comments with respect to the referenced Opinion and Order of the Board (“Opinion”), which was issued in this Docket on February 21, 2013. By order of the Hearing Officer dated May 16, 2013, the due date for these comments to be received by the Board is July 1, 2013.

OVERVIEW

The Lemont Refinery supports and endorses the definition of “Use B Aquatic Waters” as proposed by the Board. That language contains important modifications to the language proposed by the IEPA (“Agency”) and provides needed specificity and clarity. The inclusion of specific fish species as examples of tolerant species provides content and context that are critical to a description of the uses and to the forthcoming Docket D hearings.

This comment also provides further information in response to the queries posed by the Board with respect to its “concerns” and its accompanying discussions on pages 174-176 of the Opinion.

Based on the Board's clarifications and precision added by the Board to its articulation of "Use B", we do not see the need to advocate for or to continue to seek a "Use C" for the Lower Ship Canal or with respect to the Regulated Navigation Zone) (which extends from River Mile 295.5 to 297.2) and within that reach the "Black Safety Zone" at River Mile 296.1 to 296.7. (The outfall of the Lemont Refinery is within the Regulated Navigation Zone and 0.1 mile upstream of the Black Safety Zone.) However, the Lemont Refinery continues to strongly recommend that the Board include a specific reference in the description of Use B and that among the uses for the Lower Ship Canal is to host a "invasive species barrier" such as the present electric fish barrier. We have included suggested language.

I. THE LEMONT REFINERY SUPPORTS AND ENDORSES THE DEFINITION OF "USE B AQUATIC WATERS" AS PROPOSED BY THE BOARD. THAT PROPOSED DEFINITION CONTAINS IMPORTANT MODIFICATIONS TO THE LANGUAGE PROPOSED BY THE AGENCY. MORE SIGNIFICANTLY, IT IS BASED ON THE RECORD AND THE TESTIMONY AND EXHIBITS SUBMITTED IN DOCKET C.

The language used by the Agency Proposal to describe "Aquatic Use B" was vague and it was quite difficult to determine exactly what was intended. We appreciate that the Board saw the same issue. The combination of the vagueness of the definitions of the various "uses" and the proposed water quality standards, it appeared that the Agency was proposing an "upgrade" in use. Robin Garibay and Jim Huff, two witnesses who testified on behalf of Citgo saw it as exactly that. See Opinion at pp. 84-85. Having now gone through the entire set of hearings in Docket C (as well as earlier hearings) it is very clear that there is no justification for an "upgrade" in the uses of the Ship Canal, and particularly the uses of the Lower Ship Canal, defined as from the confluence of the Ship Canal with the Cal-Sag Canal, down to the Lockport Locks. Indeed, this is particularly true with respect to the Black Safety Zone and the Regulated Navigation Zone. [See Attachment 1 for a map of this area.]

There is no dispute that the Lower Ship Canal fits at least three of the reasons recognized by U.S.EPA for designating uses less than a “fishable/swimmable use.” Factors 3, 4 and 5¹ were discussed by the Board’s proposed Opinion as justifying a use less than the goals of the Clean Water Act. For the Lower Ship Canal, that evidence came not only from the CAWS UAA report, but also from the testimony of several witnesses, including Robin Garibay and Jim Huff. Their testimony was summarized by the Board at pages 81 to 88 of the Opinion, with respect to the three factors and then specifically with respect to the Asian Carp issue and its relevance to Factor 3.

This same testimony makes clear that there is no reason to “upgrade” the uses of the Lower Ship Canal. The Board has already recognized that the Lower Ship Canal should be “Non-recreational” with respect to recreational uses. Indeed, now the electric fish barrier, which was installed as a device to minimize invasive species migration, certainly cannot be considered an improvement in the habitat of the Lower Ship Canal for aquatic life. No testimony was presented which showed the Lower Ship Canal had any identifiable improvements in its uses for aquatic life.

The record is replete with references to the poor habitat conditions for aquatic life along the Lower Ship Canal. The Board’s proposed Opinion reviews the extensive testimony and exhibits as to the poor aquatic habitat in the Lower Ship Canal in pages 82-88 of the Opinion. For example, the following is documented:

- the aquatic habitat is rated by IEPA as poor to very poor, and the overall stream uses is designated as non-supportive of aquatic life;

¹ See 40 CFR 131.10(g)(3), (4), (5)

- the discharge from the MWRDGC plants contribute 70% of the total flow of the CSSC at Lockport, The District's wastewater treatment plants discharge the equivalent of 9.5 million people to the ship Canal, all upstream of the Lemont Refinery;
- storm water and combined sewer overflow runoff from this highly urbanized area also flows into the Ship Canal;
- barge traffic causes disturbances to aquatic life as well as re-suspending sediments in the Ship Canal;
- the Ship Canal has minimal slope and low velocities which are not optimal conditions for aquatic habitat but are optimal conditions for sediment deposition;
- the shoreline is predominantly commercially owned and downstream from the Cal-Sa channel to the confluence with the Des Plaines River, no public access points exist;
- given the poor habitat, any improvement in aquatic life in the Ship canal is questionable.

See Opinion at pp. 84-85. And of course, the Lower Ship Canal is also the area in which the current invasive species barrier (the "electric fish barrier") is located. That issue is addressed in further detail below.

The Board's justification for its proposed aquatic life use designation for the Ship Canal is well supported and we concur with the Board's rationale:

The Board finds that the biologic, habitat and water quality conditions indicated that the CSSC is not capable of attaining the CWA goals for aquatic life. The Board agrees with IEPA that the UAA Factors 3, 4 and 5 prevent the attainment of the CWA goals in the CSSC.... Both the IBI and MBI scores for the CSSC are indicative of poor to very poor quality. The Board finds that while water quality has improved in the CSSC and a result a greater number of fish species have been documented as occurring, problems persist with DO and temperature.... While the potential exists for some improvement, the record indicates that such improvements will not make a significant difference in terms of attaining the CWA goals in the foreseeable future. Opinion at p. 196.

The Lemont Refinery therefore supports the inclusion in the proposed definition of those "tolerant" species which occupy the Chicago Sanitary and Ship Canal. The listing of these

species is supported by the UAA for the CAWS, which the First Notice Opinion quotes at pages 32 with respect to the "Limited Warm-water Aquatic Life" category. The UAA identified this LWAL category as appropriate for the Ship Canal. See Opinion at Table 4, p. 33. Therefore the Board's selection of these species is supported by the record and particularly by the UAA with respect to the Ship Canal. We are aware of no other testimony or exhibits which would contradict this listing.

While the Board has adopted the Agency's proposed "Use B" nomenclature, the definition used is more clear and differs in important ways. The aquatic habitat is what it is, as are the lack of recreational uses for the Ship Canal, and especially the Lower Ship Canal. The potential for improvement in the Ship Canal is unlikely. The Board's definition and listing of species to be protected provides necessary clarity and objectivity for the development of appropriate water quality standards. Moreover, the language used by the Board does not justify an "upgrade" in the aquatic or recreational uses of the Lower Ship Canal, which is consistent with the evidence in the record. Therefore, as long as the Board follows through and adopts the definition of "Use B" and applies it to the Lower Ship Canal, as proposed, the Lemont Refinery will not continue to seek a "Use C" category for the Lower Ship Canal or for the Regulated Navigation Zone.

Lastly, we understand that USEPA has filed a short comment. Insofar as it relates to Use B, it suggests the listing of species is incomplete. We note that the Board did not assert that these were the only species present, specifically saying that the Use B segment had tolerant species, "which *may* include but are not limited to central mudminnow, golden shiner, bluntnose minnow,

yellow bullhead and green sunfish.”² Opinion at p. 177. There is no basis to further extend this rulemaking to catalog all the species present. Rather, we believe the appropriate step is that, if there are other species that are relevant to the setting of a water quality standard for that segment (e.g. the Ship Canal), such information be brought forward and considered in Docket D. This proceeding has lasted long enough and the record ought be complete enough that the Board can proceed to Docket D.

II. INFORMATION IN RESPONSE TO THE QUERIES POSED BY THE BOARD WITH RESPECT TO ITS “CONCERNS” AND ITS ACCOMPANYING DISCUSSIONS

At page 175 of the Opinion, the Board requests input on several issues relating to the appropriate use and descriptions of the CAWS and LDPR water bodies. The Lemont Refinery offers the following information and comments on four of those issues³:

The second issue topic was phrased as “The Board found it difficult to reconcile IEPA’s Proposed definitions for ALU A, ALU B and UDIP with the corresponding water quality standards...” The Lemont Refinery shares that observation. Given the role of uses being set first and then water quality standards as necessary to protect those uses, there does not seem to be any way to reconcile the Docket D proposal of the Agency with Docket C Uses. The UAA Report makes clear that some habitat are “very poor” to “supporting aquatic life.” For the “poor” to “very poor” habitat, no matter what the water quality is, the kinds of intolerant species which the Clean Water Act intends to support will not live or thrive. The IEPA appears to have simply copied all the General Use Water Quality standards into all the water bodies that are now

² “USEPA suggests, in the alternative, that the Board remove the word “may” from the proposed definition of Use B. We do not oppose that suggested change. However, we believe that most of the USEPA’s comments with respect to the applicability of Factors 3, 4 and 5 do not take into account that the Ship Canal would not even exist as water body without the human caused conditions that make up the Ship Canal.”

³ The first issue is directed to the Agency.

Secondary Contact and Indigenous Use Waters. Indeed, when one reads the May 24 proposal of the Agency in Docket D, one of the changes is in the title to Subpart D, where the Agency simply strikes through "Secondary Contact and Indigenous Aquatic Life Standards" and replaces that phrase with "Chicago Area Waterway System and Lower Des Plaines River Water Quality Standards". And the water quality standards proposed are, in general, the General Use Standards from Part 302, subpart B. In this manner, the Agency makes no distinction among parts of the CAWS which the Agency had proposed to be General Use, those proposed to be Use A and those proposed to be Use B. This issue will occupy a great amount of time in Docket D and the Lemont Refinery has already filed questions of Mr. Twait on this issue.

The third issue identified by the Board was the meaning of "tolerant, intermediately tolerant and intolerant." We too were confused by what those terms actually meant, particularly given the Agency not using the terminology from the CAWS UAA (such as "Limited Warm-water Aquatic Life" or "LWAL"). As noted above, the Lemont Refinery supports the Board's listing of species and notes that it is based on the UAA and hence supported by the record for the CSSC.

The fourth issue identified is similar to the previous two - the lack of a consistent correlation between water quality and aquatic habitat in the Agency proposal. The key point here is that habitat is critical to having the kind of uses which the Clean Water Act is intended to promote, but some habitats are not conducive to supporting such fishable/swimable streams. Thus, the first step is to identify the "uses", which starts with an assessment of the habitats. See Attachment B to Statement of Reasons, at pp 4-1 to 4-105. The water quality standards are to follow and support the uses; they are not to be set in advance. USEPA guidance first directs the

states to look at the uses and conditions in the receiving stream, and only then consider water quality standards which are necessary to protect those uses.

The physical characteristics of the Ship Canal are a particularly vivid example of the effect of habitat in the Ship Canal. The Limnotech, 2010 report (Public Comment 284), prepared for the MWRDGC (Limnotech, 2010. Chicago Area Waterway System Habitat Evaluation and Improvement Study: Habitat Evaluation Report), concluded that even if all the potential habitat “improvement” were undertaken, the change would be so modest as to be “still within the range of the individual station scores in the reach [referring to the Chicago Sanitary and Ship Canal], suggesting that the changes would not likely have a significant impact on fisheries quality.” *Id.* at p. 53. Thus, habitat is the first step and one of the keys for evaluation of uses.

The final question asked about “Connectivity” among stream segments. Our only point on this issue is that the invasive species barrier is a critical example of how “connectivity” between different parts of the CAWS can have adverse effects and need to be taken into account. “Fish swim” can be both good and bad for aquatic life in the CAWS, as the Asian carp testimony amply demonstrates. This issue is discussed in greater detail below.

III. THE LEMONT REFINERY CONTINUES TO STRONGLY RECOMMEND TO THE BOARD THAT IT INCLUDE A SPECIFIC REFERENCE THAT THE USES FOR THE LOWER SHIP CANAL INCLUDE THE PRESENCE OF A “INVASIVE SPECIES BARRIER” SUCH AS THE PRESENT ELECTRIC FISH BARRIER.

We continue to believe that the Board should include a description of the “use B” that reflects the current practices and conditions in the CSSC. For at least a decade now, the Lower Ship Canal has hosted the electric fish barrier for the purposes of preventing the migration of

invasive species and particularly now is the principal method for restraining Asian Carp from reaching Lake Michigan.

Not only is the Lower Ship Canal, already the host for the electric fish barrier, but the other possible locations for a physical barrier, a physical separation, or for another kind of barrier, are all in the Ship Canal. The prestigious Great Lakes Commission has published a report with its views on a physical separation between the Lake Michigan basin and the Illinois River Basin. Not surprisingly, the suggested options are in the Ship Canal and the favored location is, like the electric fish barrier, in the Lower Ship Canal.⁴ The record also shows that while the original plan was to have a single electric fish barrier, there are now three such barriers installed in the Black Safety Zone. That Black Safety Zone is bounded by two protective areas. Together, they comprise the Regulated Navigation Zone, which is one of only a handful established in this country. The invasive species issue is not going to go away and the Lower Ship Canal is likely to be used for that purpose, whether by a physical separation or by another means such as the electric barriers.

This use is precisely the kind of activity which Factor 3 envisions: "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." 40 CFR131.10(g)(3). Factor 4 is also triggered by the invasive species barrier: "Dams, diversions ore 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 modifications in such a way that would result in the attainment of the use." 40 CFR131.10(g)(4). Robyn Garibay specifically testified

⁴ See Appendix 5 to Final Pre-First Notice Comments on Subdocket C by the Lemont Refinery, PC#1278.

that to remove the electric fish barrier would do more harm than good. The Board quotes her testimony in Opinion at page 85.

Therefore, we strongly urge the Board to add the following sentence at the end of the proposed definition of "Use B".

"These waters are also used for the purposes of one or more invasive species barriers, to prevent or minimize the migration of invasive species between the Lake Michigan Basin and the Illinois River basin".

No one can dispute the importance, from an aquatic resource view, that there needs to be a "barrier." It is also clear that the Lower Ship Canal not only already has such a barrier, but it is likely to continue to be the preferred location for such a barrier.

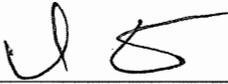
CONCLUSION

The Lemont Refinery appreciates the opportunity to submit these comments and requests that the Board include these recommendations as it moves forward to Second Notice in this Docket.

Dated: July 1, 2013

Respectfully submitted,

CITGO PETROLEUM CORPORATION, and
PDV MIDWEST, LLC, Petitioners

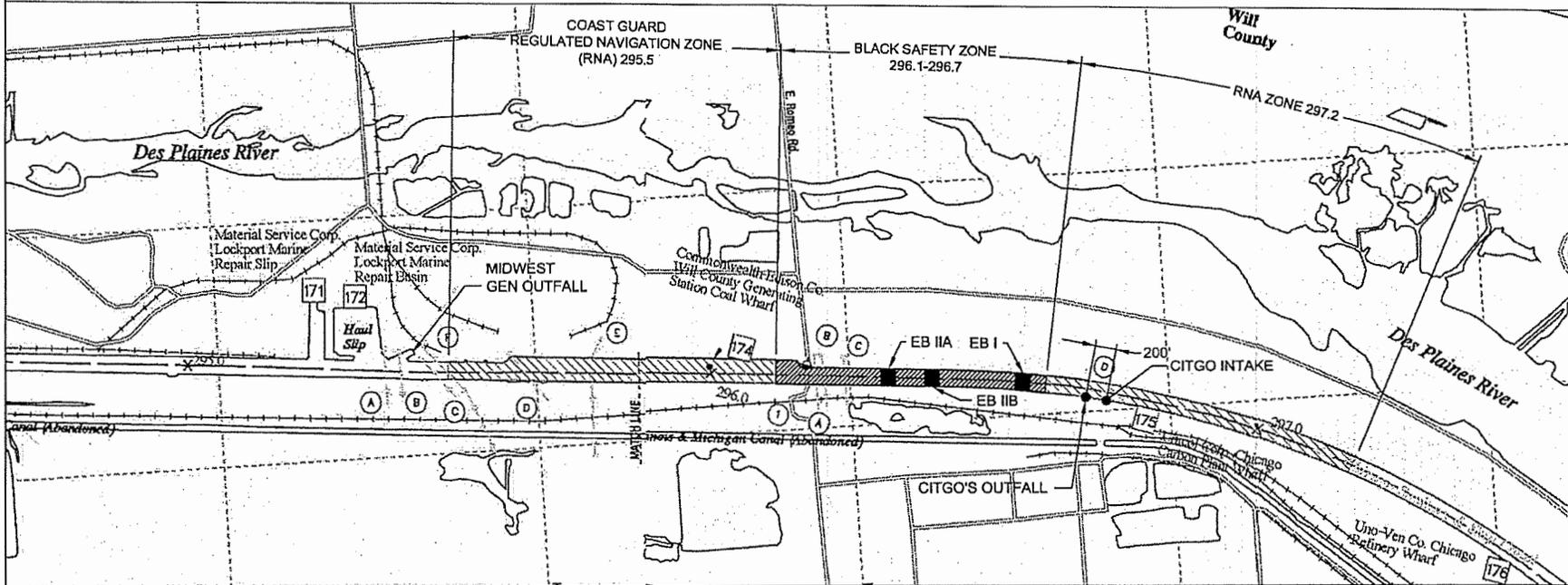
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ATTACHMENT 1

CADFILE: UAA



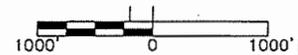
COAST GUARD (BLACK) SAFETY ZONE
RM 296.1 TO 296.7

COAST GUARD REGULATED NAVIGATION ZONE
RM 295.5 TO 297.2

CITGO'S OUTFALL RM 296.8 (0.1 MILES UPSTREAM OF THE BLACK ZONE)
EB - ELECTRIC BARRIER

 BLACK SAFETY ZONE

 REGULATED NAVIGATION ZONE



CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that I have served upon the individuals named on the attached Notice of Filing true and correct copies of the enclosed **Comments on Opinion and Order of Board on Proposed Rule, First Notice**, by First Class Mail, postage prepaid, on July 1, 2013.

A handwritten signature in blue ink is positioned above a horizontal line. The signature consists of a stylized 'U' followed by a large, sweeping 'S'.

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