BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITGO PETROLEUM CORPORATION and PDV MIDWEST REFINING, L.L.C.,	)	
Petitioners,	)	
v.	)	PCB 12-094 (Variance- Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
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John Therriault, Assistant Clerk
Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an **AMENDED MOTION TO VACATE BOARD ORDER** of the Illinois Environmental Protection Agency, copies of which is herewith served upon you. The amended language can be found in paragraph 6 of the **AMENDED MOTION TO VACATE BOARD ORDER**. Due to a citation error, paragraph 6 has been amended to provide a corrected and complete citation in which Illinois EPA submitted the granted variance to USEPA for review and approval.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Sara Terranova

Sara G. Terranova
Assistant Counsel
Division of Legal Counsel

Dated: June 24, 2013
1021 N. Grand Avenue East
P.O. Box 19276
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217/782-5544

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AMENDED MOTION TO VACATE BOARD ORDER

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by one of its attorneys, Sara Terranova, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.904(b)(3), hereby respectfully moves the Illinois Pollution Control Board ("Board") to vacate its October 18, 2012, order granting CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C ("CITGO") a five-year variance extension from 35 Ill. Adm. Code 302.407, in that the United States Environmental Protection Agency ("USEPA") disapproved the variance, effectively rendering it void for purposes of the Clean Water Act and federal law. In support of this motion, the Illinois EPA states as follows:

1. On December 20, 2011, CITGO filed a petition with the Board for extension of its variance from 35 Ill. Adm. Code 302.208(g) and 302.407, provisions of the State of Illinois' water quality standards, for Total Dissolved Solids ("TDS").
2. Under Title IX of the Environmental Protection Act ("Act") (415 1LCS 5/35-38 (2010)), the Board is responsible for granting a variance when a petitioner demonstrates that immediate compliance with the Board regulation would impose an arbitrary or

unreasonable hardship. *See* 415 ILCS 5/35(a) (2010); see also 415 ILCS 5/37(a) (2010) (burden of proof is on the petitioner). The Board may grant a variance, however, only to the extent consistent with applicable federal law. *See* 415 ILCS 5/35(a) (2010).

3. On February 17, 2012, the Illinois EPA filed a recommendation with the Board to grant CITGO's request for an extension of the variance from Ill. Adm. Code 304.407 subject to terms and conditions.
4. Illinois EPA's Recommendation stated CITGO met the requirements of 35 Ill. Adm. Code 104.208(b) and the requested variance was not inconsistent with federal law. This recommendation was made consistent with PCB 08-33 and 05-85, in which the requested variance was determined to not be inconsistent with federal law. *See* Recommendation of the Illinois Environmental Protection Agency at 7, PCB 08-33 at 23, and 05-85 at 14.
5. On October 18, 2012, the Board granted the requested variance extension finding CITGO demonstrated that denial of the requested variance would impose an arbitrary or unreasonable hardship. *See* PCB 12-94 at 1. Additionally, as in PCB 05-85 and PCB 08-33, the Board found the requested variance would not be inconsistent with federal law based upon the Illinois EPA's conclusion that granting the requested variance would not be inconsistent with the CWA or any other federal standard. *See* PCB 08-33 at 22.
6. On November 15, 2012, the Illinois EPA submitted the granted variance to USEPA for review and approval pursuant to 40 CFR 131, including sections 131.5, 131.13, and, 131.20 (c); and the USEPA, Region 5, Technical Assistant Document: *Information for States and Tribes on submittal of new and/or revised water quality standards to U.S. EPA for review under section 303(c) of the Clean Water Act and Federal regulations at 40 CFR 131. See* U.S. Environmental Protection Agency, Region 5, Water Quality Branch.

Technical Assistance Document: *Information for States and Tribes on submittal of new and/or revised water quality standards to U.S. EPA for review under section 303(c) of the Clean Water Act and Federal regulations at 40 CFR 131.* September 13, 2007.

7. On March 15, 2013, USEPA formally disapproved the granted variance. The disapproval letter included a document titled "Basis for USEPA's Disapproval of Illinois Pollution Control Board's Decision Granting a Variance to CITGO Petroleum Corp. and PDV Midwest Refining, L.L.C." *See* Attachment, USEPA letter.
8. According to the disapproval letter, under USEPA regulations, a state may remove a designated use specified in section 101(a)(2) of the CWA, or a subcategory thereof, only if, among other things, the state demonstrates that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g). Similarly, states can modify criteria necessary to protect designated uses only if the state provides an adequate scientific rationale demonstrating that the revised criteria protect designated uses. The letter continued stating that while Illinois asserted that the variance is justified as a time-limited removal of the indigenous aquatic life designated use, Illinois did not provide appropriate technical and scientific data and analyses to support such a use removal as required by 40 CFR 131.5(a)(4). *See* USEPA letter at 1.
9. The disapproval letter went on to state the impact of the USEPA disapproval is that, notwithstanding the Board's variance decision and for CWA purposes, the indigenous aquatic life designated use and the TDS criterion to protect that use set forth in 35 Ill. Adm. Code 302.407 continue to apply to the Chicago Sanitary and Ship Canal ("CSSC"), including with respect to discharges into the CSSC from the oil refinery owned by CITGO. *See* USEPA letter at 2.

10. Pursuant to Section 35 of the Act, the Board may only grant a variance to the extent it is consistent with federal law. *See* 415 ILCS 5/35. USEPA has determined the Board-ordered variance is inconsistent with federal law. *See* USEPA letter. Therefore, the Board-order granting the variance should be vacated.

WHEREFORE, the Illinois EPA respectfully moves the Illinois Pollution Control Board to vacate its October 18, 2012 order granting CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C a variance extension from 35 Ill. Adm. Code 302.407 as it has been demonstrated to be inconsistent with the Clean Water Act and federal law.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Sara Terranova

Sara G. Terranova
Assistant Counsel
Division of Legal Counsel

Dated: June 24, 2013
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
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ATTACHMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONAL ADMINISTRATOR
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 15 2013

John M. Kim, Director
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Dear Mr. Kim:

On November 15, 2012, the Illinois Environmental Protection Agency (Illinois EPA) transmitted a variance, issued by the Illinois Pollution Control Board (IPCB or the Board) to CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C., for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA). IPCB granted the variance from the total dissolved solids (TDS) criterion in Illinois' water quality standards at 35 Ill. Adm. Code 302.407 for protection of Illinois' indigenous aquatic life designated use for the Chicago Sanitary and Ship Canal (CSSC), a segment of the Chicago Area Waterway System. As described below, EPA disapproves the variance.

IPCB granted the variance in accordance with a state statute that allows the Board to grant regulatory relief when "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." The variance effectively removed for a time-limited period the indigenous aquatic life use and removed the TDS criterion necessary to protect that use for that period of time.

The CWA and federal regulations do not allow states to remove designated uses or modify criteria simply because a state believes that such standards "would impose an arbitrary or unreasonable hardship." Instead, under EPA's regulations, a state can only remove a designated use specified in section 101(a)(2) of the CWA, or a subcategory thereof, if, among other things, the state demonstrates that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g). Similarly, states can only modify criteria necessary to protect designated uses if the state provides an adequate scientific rationale demonstrating that the revised criteria protect designated uses.

While Illinois EPA asserts that the variance is justified as a time-limited removal of the indigenous aquatic life designated use, Illinois did not provide appropriate technical and scientific data and analyses to support such a use removal as required by 40 CFR 131.5(a)(4).

Specifically, Illinois did not provide appropriate technical and scientific data and analyses demonstrating that the indigenous aquatic life designated use was not attainable for any of the reasons specified at 40 CFR 131.10(g), and so Illinois did not submit "[u]se designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act" as required by 40 CFR 131.6(a). Consequently, EPA disapproves Illinois' effective time-limited removal of the indigenous aquatic life designated use based upon EPA's conclusion that it was not based upon appropriate technical and scientific data and analyses as required by 40 CFR 131.5(a)(1), 131.5(a)(4), 131.5(a)(5) and 40 CFR 131.10. Furthermore, to the extent that the variance modified Illinois' criteria for protection of the indigenous aquatic life designated use by effectively eliminating the applicable TDS criterion, EPA disapproves the modification in accordance with 40 CFR 131.5(a)(2) and (5) because no adequate scientific rationale demonstrating that removal of the TDS criterion would be protective of the indigenous aquatic life designated use has been provided as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a). The enclosed document, entitled "Basis for EPA's Disapproval of IPCB Decision Granting Variance to CITGO Petroleum Corp. and PDV Midwest Refining, L.L.C.," more fully sets forth the basis for EPA's decision.

To address this disapproval, Illinois needs to take action so that the indigenous aquatic life designated use and the TDS criterion to protect that use at 35 Ill. Adm. Code 302.407 are fully effective under Illinois law with respect to the CSSC, including with respect to discharges into the CSSC from the oil refinery owned by CITGO Petroleum Corporation and PDV Midwest Refining L.L.C.

The impact of today's disapproval is that, for CWA purposes, the indigenous aquatic life designated use and the TDS criterion to protect that use at 35 Ill. Adm. 302.407 apply to the CSSC, including with respect to discharges into the CSSC from the oil refinery owned by CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C., notwithstanding IPCB's variance decision. The use and criterion will apply for CWA purposes until EPA approves a change, deletion, or addition to the water quality standards for the segments impacted by today's disapprovals, or promulgates standards for those segments. *See* 40 CFR 131.21(e).

If Illinois wants to take the effects of deicing activities in the Chicago area into account in the water quality standards for the CSSC, Illinois could attempt to do so as part of IPCB's proceedings pertaining to aquatic life use designations and criteria for the Chicago Area Waterway System in IPCB Subdocket Nos. R2008-09(C) and (D). Specifically, Illinois could perform a structured, scientific assessment of the attainability of aquatic life uses, taking into account deicing activities, and of the criteria necessary to protect aquatic life uses, and revise water quality standards accordingly. Illinois could submit any such revisions to EPA for approval, along with the methods used, analyses conducted, scientific rationale and other information demonstrating the appropriateness under federal law of any revised aquatic life designated use for the CSSC and any new or revised criteria for the protection of the revised aquatic life designated use that differ from those specified at 35 Ill. Adm. Code 302.407.

If you have any questions regarding this matter, please contact me or your staff may contact Linda Holst, Chief, Water Quality Branch, at (312) 886-6758.

Sincerely,

Susan Hedman
Regional Administrator

Enclosure

cc: Marcia Willhite, Illinois EPA
John Therriault, Illinois Pollution Control Board, Clerk's Office

Basis for EPA's Disapproval of Illinois Pollution Control Board's Decision Granting a Variance to CITGO Petroleum Corp. and PDV Midwest Refining, L.L.C."

Date: MAR 15 2013

I. Introduction

On November 15, 2012, the Illinois Environmental Protection Agency (Illinois EPA) submitted a request for the U.S. Environmental Protection Agency to approve in accordance with section 303(c) of the Clean Water Act (CWA), a revision to water quality standards for the Chicago Sanitary and Ship Canal (CSSC). Specifically, Illinois EPA requested that EPA approve an Illinois Pollution Control Board (IPCB) decision granting a "variance" to CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C., from the total dissolved solids (TDS) criterion in Illinois' water quality standards at 35 Ill. Adm. Code 302.407 for protection of Illinois' designated use for aquatic life in the CSSC. *See CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C v. IEPA*, PCB 12-94 (October 18, 2012) (hereinafter "*CITGO Variance Decision*") *available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-77765. The IPCB granted the variance in accordance with a state statute that allows IPCB to grant regulatory relief when "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a); *see also CITGO Variance Decision* at 20.

II. Legal Background

A. Designated Uses and Water Quality Criteria

Section 101(a)(2) of the CWA states the national interim goal of achieving by July 1, 1983, "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (hereafter collectively referred to as "the uses specified in section 101(a)(2)"), wherever attainable. Section 303 of the CWA requires states to adopt water quality standards for waters of the United States within their respective jurisdictions. Section 303(c) of the CWA requires, among other things, that state water quality standards include the designated use or uses to be made of the waters and water quality criteria based upon such uses. Section 303(c)(2)(A) of the CWA requires that water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA. The EPA's regulations at 40 CFR 131.2 explain that:

> "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of [*sic*] public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

EPA's regulations at 40 CFR Part 131 interpret and implement sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards include the uses specified in section 101(a)(2) of the CWA, unless those uses have been shown to be unattainable, in which case a state can adopt subcategories of the uses specified in section 101(a)(2) which require less stringent criteria. *See* 40 CFR 131.5(a)(4), 131.6(a), and 131.10(j), and 131.20(a); *see also Idaho Mining Association v. Browner*, 90 F.Supp. 2d 1078, 1092 (D. Id. 2000); 68 Fed. Reg. 40428, 40430-31 (July 27, 2003). 40 CFR 131.10(g) provides that, once a state designates the uses specified in section 101(a)(2) of the CWA or subcategories thereof for a specific water body, the state can only remove the designated use if, among other things, "the [s]tate can demonstrate that attaining the designated use is not feasible [for at least one of the six reasons set forth at 40 CFR 131.10(g)]."

When a state adopts designated uses that include the uses specified in section 101(a)(2) of the CWA or subcategories thereof, the state must also adopt "water quality criteria that protect the designated use." 40 CFR 131.11(a). "Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." *Id.* Unlike with designated uses, nothing in the CWA or EPA's regulations allows states to relax or modify criteria, based on concepts of attainability, to levels that are not protective of the designated use. Instead, if criteria are not attainable, the CWA and EPA's regulations allow states to (1) remove the current designated use after demonstrating, among other things, that attaining the current designated use is not feasible for one of the 40 CFR 131.10(g) reasons, and replace it with a subcategory of use and, then, (2) adopt new, potentially less stringent, criteria necessary to protect the new designated use.

B. Variances

EPA has long recognized that, where a state satisfies all of the requirements in 40 CFR Part 131 for removing designated uses (or subcategories of uses), including demonstrating that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g), EPA could also approve a state decision to limit the applicability of the use removal to only a single discharger, while continuing to apply the previous use designation and criteria to other dischargers. Such a state decision, which is often referred to as a "variance," can be approved as being consistent with the requirements of the CWA and 40 CFR Part 131. This is because the state's action in limiting the applicability of an otherwise approvable use removal to a single discharger and to a single pollutant is environmentally preferable and would be more stringent than a full use removal; and states have the right to establish more stringent standards under section 510 of the CWA. *See* 58 FR 20802, 20921-22 (April 16, 1993).

C. Water Quality Standard Submission Requirements and EPA Review Authority

40 CFR 131.6 provides that states must submit, among other things, the following to the EPA for review when they adopt new or revised designated uses and criteria:

> (a) Use designations consistent with the provisions or section 101(a)(2) and 303(c)(2) of the Act.

(b) Methods used and analyses conducted to support water quality standards revisions.
(c) Water quality criteria to protect the designated uses.
. . . .
(f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.

40 CFR 131.5(a) provides that, in reviewing new or revised use designations and criteria, the EPA must determine, among other things:

(1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;
(2) Whether the State has adopted criteria that protect the designated uses;
. . . .
(4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and
(5) Whether the State submission meets the requirements included in §131.6 of this part.

40 CFR 131.21(c)(2) provides that new or revised water quality standards that are adopted by states do not become applicable water quality standards for purposes of the CWA until after they have been submitted to and approved by EPA in accordance with section 303(c) of the CWA.

III. Illinois' Water Quality Standards for the CSSC

A. Illinois' Adoption and EPA's Approval of Indigenous Aquatic Life Designated Use and Criteria for the CSSC

As noted above, EPA's regulations at 40 CFR Part 131 interpret and implement sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards include the uses specified in section 101(a)(2) of the CWA, unless those uses have been shown to be unattainable for one of the reasons set forth at 40 CFR 131.10(g). When consistent with the requirements of 40 CFR 131.10(g), a state can adopt subcategories of the uses specified in section 101(a)(2) which require less stringent criteria. In 1974, Illinois demonstrated that providing for protection and propagation of fish – *i.e.,* one of the uses specified in section 101(a)(2) of the CWA – was not attainable for several waters in the Chicago area, and so Illinois adopted a subcategory of aquatic life use, referred to as "indigenous aquatic life" that it applied to the CSSC. *See* 35 Ill. Adm. Code 302 Subpart D. Waters designated as indigenous aquatic life waters are supposed to be capable of supporting an indigenous aquatic life limited only by the physical configuration of the body of water, characteristics and origin of the water and the presence of contaminants in amounts that do not exceed the water quality standards listed in Subpart D. 35 Ill. Adm. Code 302.402. Illinois also adopted criteria to protect the indigenous aquatic life designated use, including the total dissolved solids (TDS) criterion of 1,500

milligrams per liter (mg/L) set forth at 35 Ill. Adm. Code 302.407. The indigenous aquatic life use and associated criteria applicable to the CSSC were approved previously by EPA[1]

B. Variances Pertaining to the CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. oil refinery in Lemont, Illinois

The IPCB first granted to CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. a variance from the TDS criterion on April 21, 2005. *See CITGO Variance Decision* at 3. The variance effectively eliminated the applicability of the TDS criterion of 1,500 mg/L for purposes of deriving a water quality based effluent limit (WQBEL) for TDS in CITGO's National Pollutant Discharge Elimination System permit. The IPCB extended the variance on May 15, 2008, *id.*, and again on October 18, 2012, *id.* at 20. Illinois did not submit either the IPCB's original 2005 variance decision or 2008 extension decision to EPA for review and approval under section 303(c) of the CWA. Consequently, the original 2005 variance and the 2008 extension have never been applicable water quality standards for purposes of the CWA. *See* 40 CFR 131.21(c)(2). On November 15, 2012, Illinois EPA submitted IPCB's October 18, 2012, variance decision to EPA for approval in accordance with section 303(c) of the CWA.

The basis for the variance decision in each instance was IPCB's conclusion that compliance with a WQBEL derived from the TDS criterion "would impose an arbitrary or unreasonable hardship." The variance effectively removed for a time-limited period the indigenous aquatic life designated use and removed the TDS criterion necessary to protect that use for that period of time. Despite statements by Illinois EPA and IPCB that the variances are consistent with federal law (*see* CITGO variance at 17), nothing in the CWA or EPA's water quality standards regulations allows states to remove designated uses or modify criteria on this "hardship" basis alone. Instead, as described above, water quality standards can be revised where it can be demonstrated that it is not feasible to attain a designated use for one of the reasons specified at 40 CFR 131.10(g) (and other requirements are also met); or where criteria are revised based on sound scientific rationale and are protective of applicable designated uses in accordance with 40 CRF 131.6(c) and 131.11(a). As described below, there is no indication in IPCB's 2005, 2008 or 2012 decisions that, in granting and extending the variance, IPCB ever evaluated the feasibility of attaining the indigenous aquatic life use designation in the CSSC utilizing any of the factors in 40 CFR 131.10(g). There also is no indication in IPCB's decisions that removal of the TDS criterion is based upon a sound scientific rationale demonstrating that the indigenous aquatic life designated use would be protected.

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[1] EPA first approved the indigenous aquatic life use applied to the CSSC in 1974 and the adoption of the applicable TDS standard in 1979. In 2011, Illinois revised aspects of its water quality standards pertaining to the Chicago Area Waterway System to update certain designated recreational uses. The revisions also impacted some aspects of the indigenous aquatic life designated use and criteria. On May 16, 2012, EPA approved portions of those revisions and disapproved others. Illinois' 2011 revisions, and EPA's May 16, 2012, action, did not result in any substantive change to either the indigenous aquatic life designated use for the CSSC or the criteria for protection of that use at 35 Ill. Adm. Code 302.407. *See* EPA's May 16, 2012, letter and supporting documents, *available at* http://www.epa.gov/region5/chicagoriver.

IV. EPA's Action on Illinois' Revised Water Quality Standard for the CSSC

A. "Arbitary and Unreasonable Hardship"

EPA cannot approve the IPCB's decision granting the variance as a change to water quality standards solely because the state believes that such standards "would impose an arbitrary or unreasonable hardship." Instead, EPA evaluated Illinois EPA's November 15, 2012 submission to determine whether the change to the standards is consistent with the CWA and federal regulations regarding time-limited use removals (often referred to as "variances to water quality standards") and water quality criteria[2].

B. Time-Limited Use Removal

Illinois EPA, in its November 15, 2012, submission to EPA, asserts that IPCB's variance decision can be justified under 40 CFR 131.10(g)(3) and (g)(6) as a time-limited use removal. Each of these assertions is evaluated below.

1. 40 CFR 131.10(g)(3)

40 CFR 131.10(g)(3) provides that designated uses can be removed "if the [s]tate can demonstrate that attaining the designated use is not feasible because . . . [h]uman 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."

As a threshold matter, to justify removing a designated use under 40 CFR 131.10(g)(3), a state must identify with some specificity the "human caused conditions or sources of pollution [that] prevent the attainment of the use." While the record before IPCB is replete with generalized assertions that winter de-icing activities using road salt and other compounds cause TDS levels in the CSSC to exceed the TDS criterion, there is nothing in the state record that adequately identifies with any specificity where these activities are taking place, what entities are responsible for these activities, and what amount of the total TDS load into the CSSC each entity is responsible for.[3] In addition, it is unclear from the record and IEPA's November 15, 2012,

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[2] EPA also evaluated Illinois EPA's subsequent submission of more detailed references to documents and information Illinois EPA believed to be relevant to the review of the CITGO variance (email from S. Sofat to L. Holst, dated 2/4/13).

[3] Specifically, a state should develop and evaluate information on the amount of loadings of the pollutant at issue from each source (including any point source that is the subject of a variance request) relative to the other sources and also relative to the total loadings to the water body. Here, although there was testimony in the state administrative record that, during snowmelt, the oil refinery effluent makes up between 0.6 to 1% of the total TDS load in the CSSC (Huff 2005 testimony at 35-36), there is no similar information in the record on the other specific sources of TDS. Information on the relative loadings from each source is important in evaluating potential remedial measures.

submission to EPA whether, and to what extent, the state believes that TDS discharges from the oil refinery are one of the "sources" that prevent attainment of the designated use. In sum, Illinois has not adequately identified the "human caused conditions or sources of pollution [that] prevent the attainment of the use."

Once a state identifies with specificity the "human caused conditions or sources of pollution [that] prevent the attainment of the use," then, to justify removing a designated use under 40 CFR 131.10(g)(3), the state must also demonstrate either that the conditions or sources "cannot be remedied" or that implementation of the remedy "would cause more environmental damage to correct than to leave in place." One way that states can make such a demonstration would be to present information on the cost and technical feasibility of a reasonable range of potential remedial measures that could be implemented so that those "conditions or sources of pollution" no longer prevent the attainment of the use. The state must then demonstrate either that it is not feasible to implement such remedial measures (thereby demonstrating that the "human caused conditions or sources of pollution cannot be remedied") or that implementation of such remedial measures would "cause more environmental damage to correct than to leave in place." Here, the state administrative record only includes information regarding the cost, technical feasibility and environmental impacts of remedial measures for one of the sources of pollution – the oil refinery – into the CSSC. The state has not identified – much less evaluated the costs, technical feasibility and environmental impact of – remedial measures for the other sources that the state asserts prevent attainment of the use: *i.e.*, the sources responsible for winter de-icing activities.[4] Nor has Illinois demonstrated in any other way that the "human caused conditions or sources of pollution" cannot be remedied or that implementation of such a remedy "would cause more environmental damage to correct than to leave in place."

Because Illinois has not provided sufficient information identifying the "human caused conditions or sources of pollution prevent[ing] attainment of the use," and has not provided sufficient information demonstrating that such human caused conditions or sources of pollution "cannot be remedied or would cause more environmental damage to correct than to leave in place," Illinois has not demonstrated that attaining the designated indigenous aquatic life use is not feasible under 40 CFR 131.10(g)(3).

[4] CITGO appended testimony to its variance request that was presented in a separate rulemaking effort before IPCB in IPCB Docket No. R2008-09(C) regarding the attainability of proposed revisions to the aquatic life use designation and associated chloride criteria that IPCB is considering adopting for the CSSC. Specifically, CITGO appended testimony that "[a]ttainment of chloride criteria [being considered as being necessary to protect the revised aquatic life use designation being considered by IPCB] requires a 50% reduction of deicing salt use," and that attainable reduction goals could be up to 30%, citing one municipality. However, no such information or analysis is given for the TDS, the pollutant at issue here.

2. 40 CFR 131.10(g)(6)

In regards to 40 CFR 131.10(g)(6), Illinois did provide limited information regarding the costs of one alternative for reducing TDS discharges from the oil refinery using evaporation technology. However, there is nothing in the record providing an evaluation or a demonstration of how implementation of this control or any other controls more stringent than those required by sections 301(b) and 306 of the CWA to control TDS would result in "substantial and widespread economic and social impact." Consequently, Illinois has not adequately demonstrated "that attaining the designated [indigenous aquatic life] use is not feasible because . . . [c]ontrols more stringent than those required by sections 301(b) and 306 of the [CWA] would result in substantial and widespread economic and social impact." 40 CFR 131.10(g)(6).

C. Criteria Revision

Illinois EPA also notes in its November 15, 2012, submission that (1) IPCB removed the TDS criterion for Illinois General Use waters in 2008 and (2) Illinois is considering removing the TDS criterion applicable to the CSSC in the context of adopting revised aquatic life use designations and associated criteria in the Chicago Area Waterway System proceedings, in IPCB Docket No. R2008-09.[5] However, Illinois EPA has not asserted, and the IPCB's orders do not suggest, that IPCB's variance decision can be justified as a revision to the criteria for protection of the indigenous aquatic life designated use for the CSSC. Even if Illinois EPA had made such an assertion, IPCB's variance decision would not be approvable as a modification to criteria. This is because, as described below, the administrative record for the variance decision lacks sufficient scientific rationale as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a) as to why removal of the TDS criterion would be protective of the current indigenous aquatic life use.

The scientific rationale as to why IPCB's removal of the TDS criterion was protective of the aquatic life uses in General Use waters is that (1) chlorides and sulfates are constituents of TDS; (2) IPCB adopted chloride and sulfate criteria for the General Use waters, and so (3) there is no longer any need to include the TDS criterion as a surrogate parameter for chlorides and sulfates. *See* IPCB's First Opinion and Order in "Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards," Docket No. R07-09 (September 20, 2007), at 26, *available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-58772. Ilinois EPA's proposal to not include TDS criterion for any aquatic life use designations that are ultimately adopted for the Chicago Area Waterway System relies on the same scientific rationale. *See* IEPA's Statement of Reasons at 78-79, filed by IEPA on October 26, 2007, in IPCB Docket No. R2008-09, *available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-59147. IPCB's variance decision does not include adoption of chloride and sulfate criteria and so is not supported by either the scientific rationale underlying removal of the TDS criterion from the General Use water quality

[5] Illinois EPA's proposal to remove the TDS criterion can be found in IPCB's Docket No. R2008-09. After IEPA initiated those proceedings, Docket No. R2008-09 was broken into four subdockets. Subdocket No. R2008-09(C) pertains to aquatic life use designations for the Chicago Area Water System, including the CSSC. Subdocket No. R2008-09(D) pertains to criteria necessary to protect any revised aquatic life designations.

standards or Illinois EPA's rationale to remove the TDS criterion from future aquatic life use designations for the Chicago Area Waterway System.

There is opinion evidence in the state administrative record from 2005 indicating that incremental increases in TDS levels in the CSSC resulting from operation of an air pollution control wet gas scrubber at the refinery would have no impact on the receiving stream. *See* PCB 05-85 Opinion and Order, April 25, 2005 at 13. The basis for that opinion appears to be evidence presented by the petitioners that (1) even with the incremental TDS increases, the TDS levels outside of the mixing zone in the CSSC during most times of the year would still be substantially below the 1,500 mg/l TDS criterion, and (2) in the rare instances where deicing activities cause TDS levels in the CSSC to exceed 1,500 mg/l at the refinery's discharge point, the incremental increases in the in-stream TDS levels are so small that there is no further adverse impact beyond any adverse impacts resulting from the fact that the TDS levels already exceed 1,500 mg/l. However, nothing in that testimony addresses the question of whether there is a sound scientific rationale for removing the TDS criterion when chloride and sulfate criteria do not replace the existing TDS criterion.

D. Summary of EPA's action to disapprove the CITGO variance

IPCB's variance effectively removed for a time-limited period the indigenous aquatic life designated use and effectively removed the TDS criterion necessary to protect that use for that period of time. EPA disapproves Illinois' variance based upon EPA's conclusion that it was not based upon appropriate technical and scientific data and analyses as required by 40 CFR 131.5(a)(1), 131.5(a)(4), 131.5(a)(5) and 40 CFR 131.10. Furthermore, to the extent that the variance modified Illinois' criteria for protection of the indigenous aquatic life designated use by effectively eliminating the applicable TDS criterion, EPA disapproves the modification in accordance with 40 CFR 131.5(a)(2) and (5) because no adequate scientific rationale demonstrating that removal of the TDS criterion would be protective of the indigenous aquatic life designated use has been provided as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a).

E. Effect of EPA's Action on Endangered and Threatened Species

EPA is disapproving the IPCB's variance decision as explained in this document. This disapproval does not cause any change to Illinois' federally-applicable water quality standards under the CWA. Because there is no change to the State's federally-applicable water quality standards, there is no effect on listed species or their designated habitat. Therefore, Endangered Species Act consultation is not required.

F. Tribal Consultation

On May 4, 2011, EPA issued the "EPA Policy on Consultation and Coordination with Indian Tribes" to address Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The EPA Tribal Consultation Policy states that "EPA's policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions may affect tribal interests."

There are no federally recognized tribes located in the vicinity of the CITGO Petroleum Corporation and PDV Midwest Refining, L.L.C. discharge or downstream within the action area. Therefore, EPA is not engaging in tribal consultation for this action.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITGO PETROLEUM CORPORATION and PDV MIDWEST REFINING, L.L.C.,	)	
Petitioners,	)	
v.	)	PCB 12-094 (Variance- Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

PROOF OF SERVICE

I, the undersigned, state that I have served the attached **AMENDED MOTION TO VACATE BOARD ORDER** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago IL 60601

Jeffrey C. Fort
Dentons
233 South Wacker Drive
Suite 7800
Chicago, Illinois 60606-6404

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

and mailing it from Springfield, Illinois on June 24, 2013, with sufficient postage affixed as indicated above.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sara Terranova

Sara G. Terranova
Assistant Counsel
Division of Legal Counsel

Dated: June 24, 2013
1021 N. Grand Avenue East
P.O. Box 19276
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