BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
WATER QUALITY STANDARDS AND	)	
EFFLUENT LIMITATIONS FOR THE	)	R08-9
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: see attached Service List

PLEASE TAKE NOTICE that on the 26th Day of June, 2008, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Response to the Metropolitan Water Reclamation District of Greater Chicago's Motion To Stay, a copy of which is hereby served upon you.

By: _____
Keith Harley, Chicago Legal Clinic, Inc.

Dated: June 26, 2008

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CERTIFICATE OF SERVICE

I, Keith Harley, the undersigned attorney, hereby certify that I have served the attached Response to the Metropolitan Water Reclamation District of Greater Chicago's Motion To Stay, on all parties of record (Service List attached), by depositing said documents in the United States Mail, postage prepaid, from 227 W. Monroe, Chicago, IL 60606, before the hour of 5:00 p.m., on this 26th Day of June, 2008.

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THE SOUTHEAST ENVIRONMENTAL TASK FORCE'S RESPONSE TO METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S MOTION TO STAY IPCB R08-9

Pursuant to 35 Ill. Adm. Code 101.514 and 101.500(d), Keith Harley of the Chicago Legal Clinic, Inc. on behalf of his client, the Southeast Environmental Task Force, respectfully submits this Response to the Metropolitan Water Reclamation District of Greater Chicago's Motion to Stay.

The Southeast Environmental Task Force ("SETF") opposes the Motion To Stay filed by the Metropolitan Water Reclamation District of Greater Chicago ("MWRDGC") for several reasons.

First, MWRDGC's primary contention in support of a stay is that the existing evidence in the record in support of the rule is inadequate. However, MWRDGC's conclusion that a stay is therefore justified is premature and incorrect. It is premature because a major, legally required component of this rulemaking – the opportunity of participants other than the Illinois Environmental Protection Agency ("IL EPA") to present testimony and written comments – is not complete. If granted, a stay would prematurely terminate the evidence-gathering in this rulemaking that is necessary for the Board to evaluate the arguments that MWRDGC or any other participant might make about the merits of proposed rule. For its part, SETF plans to present witnesses regarding

recreational uses of the Calumet River system and the parks and recreational areas through which the Calumets flow. SETF believes this testimony and SETF's subsequent post-hearing comments will help inform the Board's evaluation of IL EPA's use designations and corresponding proposal for MWRDGC to disinfect pathogen-containing effluent from its Calumet Wastewater Treatment Plant. It would be inappropriate for the Board to stay this proceeding based on the MWRDGC's characterization of the weaknesses of the proposed rule without providing a full and complete opportunity for the completion of evidence-gathering in a manner consistent with Board regulations. 35 Ill. Adm. Code 101.628; 35 Ill. Adm. Code 102.108.

Second, the Board should not accept MWRDGC's characterization of the law that controls this case. In response to MWRDGC's assertions regarding the legal deficiencies of IL EPA's case in support of its proposed rule, SETF believes it is important to point out that the Board is authorized to, and frequently will, issue regulations that:

- control only one source category among several that are sources of a pollutant;
- control discharges despite collateral, indirect environmental impacts related to operating pollution control equipment;
- control discharges because of a potential threat to human health or the environment, without any showing of actual harm that has already occurred;
- control discharges from a source category even if this may not lead to a direct or one-to-one reduction in the exposure rate of any receptor or group of receptors;
- control discharges from a source category even if its relative contribution to cumulative discharges of a pollutant is comparatively small; and/or

- implement requirements even though regulated entities assert they will bear costs, face technical uncertainties, are unconvinced that any benefits can be achieved and state a strong preference to study the matter in a non-regulatory setting.

See, for example, *In The Matter Of Proposed New 35 Ill.Adm.Code 255 – Control Of Emissions From Large Combustion Sources (Mercury)*, R06-25.

SETF's assessment of the legal requirements that are driving this case are very different than MWRDGC's assertions. Simply, IL EPA is under a non-discretionary duty originating in the Clean Water Act to assess Illinois waters to ensure these waters are safe for the people and wildlife using them, now and in the future, until the waters are fully fishable and swimmable. 33 U.S.C. §1313(c)(1); 40 CFR 131.10(j)(1). In fulfillment of this duty, IL EPA engaged in a years-long, multi-stakeholder process to assess the present and attainable uses of the CAWS, concluding that uses of the CAWS have changed since these waters were originally classified decades ago. New recreational uses trigger a Clean Water Act-based mandate to ensure the CAWS are safe for these uses. 33 U.S.C. §1313(c)(2)(A); 40 CFR §131.10(i). MWRDG's wastewater treatment plants are sources of pathogens into waters that are being used for recreation. Disinfection is almost uniformly employed at POTWs in Illinois and throughout the United States to control these kinds of pathogens. Consequently, it is difficult to afford any value to MWRDGC's broad claims that disinfection is technically infeasible or will result in substantial and widespread economic and social impact.

From SETF's perspective, IL EPA's proposal designates the uses for which the CAWS shall be maintained and protected, prescribes the water quality standards required

to sustain these designated uses, and establishes effluent standards to limit the contaminants discharged to the CAWS. In doing so, IL EPA is acting well within its legal mandate under both federal and Illinois law. 35 Ill. Adm. Code 301.102; see also 33 U.S.C. §1370.

Third, granting a stay would be fundamentally unfair to the participants in this rulemaking. As of June 23, 2008, the Board received 72 public comments on the proposed rule. Additionally, on June 16, 2008, 44 individuals provided testimony under oath regarding the proposed rule. In September, for the first time, the environmental organizations that are participants in this proceeding will be given an opportunity to present their testimony and evidence in support of the proposed rule. Against this backdrop, viewed cynically, the timing of the Motion To Stay seems calculated to allow existing public testimony about current uses of the CAWS to go stale by putting it on the shelf for years. Viewed cynically, the timing of the Motion To Stay seems calculated to prevent the environmental advocates and others from presenting evidence in support of the IL EPA proposal. Viewed cynically, the Motion To Stay would afford MWRDGC additional years of delay and the opportunity to prepare its case in opposition at its leisure. Whether viewed cynically or not, granting MWRDGC's Motion To Stay after accepting, even inviting, public participation in this rulemaking process could irreparably damage public trust and confidence in the Board itself.

There is reason to take a cynical view of the timing of the Motion To Stay and, in turn, for the Board to enter an Order that will discourage this kind of tactic. The MWRDGC has every reason to want the public testimony now before the Board to go stale. For example, on June 16th, of the 44 individuals who in good faith accepted the Board's

invitation to testify in this proceeding, 43 provided testimony in support of requiring disinfection. The vast majority of the 72 public commentators who have submitted written comments to the Board offer evidence and/or support for upgrading water quality in a manner that is consistent with, or exceeds, the IL EPA proposal. Most public testimony is accompanied by descriptions of intense, present day recreational uses of the CAWS entirely consistent with the IL EPA's basis for upgrading water quality standards and requiring disinfection. It is clearly in MWRDGC's narrow self interest for the Board to put this public testimony on the shelf in the hope it will no longer be as relevant when the rulemaking resumes. However, this is clearly against the public interest, against the interests of people who provided this testimony, and against the Board's interest in gaining value from public testimony given in good faith in service to the Board's deliberative process.

Granting the Motion to Stay would also allow MWRDGC to subvert a rulemaking process that dozens of participants have engaged in good faith. Many of the internal MWRDGC activities that it cites as the basis for a stay have been underway for years and will take many more years to complete. Yet, MWRDGC allowed this rulemaking to continue for almost nine months, including several days of hearings, before making its Motion To Stay. Notably, in its Motion to Stay, the MWRDGC painstakingly creates a record of the many shortcomings it perceives in IL EPA's presentation of its case. Viewed cynically, it appears MWRDGC would like this rulemaking to continue just to the point where it could create a record of its arguments in opposition, but no further. Having seen the IL EPA's case and having capped the record with its arguments in opposition, MWRDGC would be content to spend the next several years ruminating on

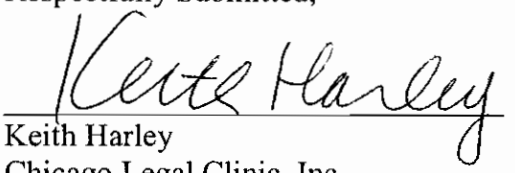
this matter. At a minimum, this means a delay for years; even better for the Movant, it means MWRDGC will have years to prepare for its presentation of its case in opposition. While this tactical maneuver may be consistent with MWRDGC's narrow self-interest, it callously disregards, and would squander, the thousands of hours of time Board members, Board staff, IL EPA staff, other participants and members of the public have cumulatively invested in good faith in this rulemaking.

Granting a Motion to Stay in the middle of this proceeding would damage public trust and confidence in the Board. The rulemaking now before the Board is succeeding in generating public interest and participation from businesses, elected officials, representatives of units of local government, residents and the full range of users of the waterways. Even the most cursory review of testimony reveals that many of these stakeholders support disinfection. Many of the participants in this process cite to the affirmative mandates of the Clean Water Act requiring public officials to ensure waters are safe for the people and wildlife using them, now and in the future, until the waters are fully fishable and swimmable. Other participants express a more urgent concern about increasingly intense recreational uses of waters polluted with pathogens which are discharged in MWRDGC's effluent every day of every year. Against this backdrop, it is clearly in the narrow self interest of MWRDGC to attempt to put a stop to a proceeding in which it is increasingly isolated in its position, seeking for itself the luxury to ruminate on this matter indefinitely. Yet, the risk is that a stay would be ascribed to the Board that issues it, not to the one participant in a rulemaking who selfishly asks for it. The risk is that the Board, not MWRDGC, will be regarded as responsible for allowing additional

years of otherwise avoidable human contact with pathogens in the CAWS and to acting in opposition to the public interest mandate of the Clean Water Act.

For the foregoing reasons, the Southeast Environmental Task respectfully requests the Illinois Pollution Control Board to deny the Metropolitan Water Reclamation District of Greater Chicago's Motion to Stay.

Respectfully Submitted,



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Date: June 26, 2008