

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 SECOND NOTICE COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

Dated: November 4, 2013

By: /s/ Katherine D. Hodge
Katherine D. Hodge

Katherine D. Hodge
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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached **EXXONMOBIL OIL CORPORATION'S SECOND NOTICE**

COMMENTS upon:

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Assistant Clerk of the Board
Illinois Pollution Control Board
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Suite 11-500
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via electronic mail on November 4, 2013; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield,
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/s/ Katherine D. Hodge
Katherine D. Hodge

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)

EXXONMOBIL OIL CORPORATION'S SECOND NOTICE COMMENTS

NOW COMES EXXONMOBIL OIL CORPORATION (“ExxonMobil”), by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the October 3, 2013 Opinion and Order of the Board, submits the following Second 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 (C) (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 (C) (Ill.Pol.Control.Bd. Mar. 19, 2012) (hereafter “Response to Comments”).

On February 21, 2013, the Board issued its First Notice Opinion and Order in Subdocket C and determined that the UDIP should be designated General Use for aquatic life.³ Following the publication of First Notice, ExxonMobil documented its opposition to this approach in its First Notice Comments.⁴ On October 3, 2013, the Board issued its Second Notice Opinion and Order in Subdocket C and revised its approach towards the UDIP.⁵ In its Second Notice, the Board continues to find that the CWA aquatic life goal is attainable in the UDIP. However, the Board now proposes to designate the UDIP as UDIP Aquatic Life Use Waters instead of General Use waters.

ExxonMobil appreciates the Board's recognition that the UDIP is unique and conditions in the UDIP justify a separate use designation. However, ExxonMobil respectfully requests the Board reconsider its conclusion that the UDIP meets CWA goals. As described below, the record supports applying four of the six factors in 40 C.F.R. § 131.10(g) ("UAA factors") to the UDIP and a finding that the UDIP does not meet CWA goals, although it does support aquatic life populations consisting of tolerant, moderately tolerant, and only those intolerant types that are adapted to its unique physical and hydrologic characteristics. The UDIP Aquatic Life Use Waters definition at Proposed 35 Ill. Admin. Code § 303.230(b) conflicts with itself, the Board's findings, and the existing or achievable uses in the UDIP. However, ExxonMobil supports the Board's decision to address pollutants such as chlorides and temperature in Subdocket D, but

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").

⁴ ExxonMobil Oil Corporations First Notice Comments, R08-9(C) (Ill.Pol.Control.Bd. July 1, 2013) (hereafter referenced and cited as "First Notice Comments").

⁵ Second Notice Opinion and Order, R08-9 (C) (Ill.Pol.Control.Bd. Oct. 3, 2013) (hereafter referenced and cited as "Second Notice").

requests clarification as to the meaning of the Board's findings for purposes of setting water quality standards.

II. THE RECORD SUPPORTS APPLYING UAA FACTORS TO THE UDIP AND A FINDING THAT THE UDIP DOES NOT MEET CWA GOALS.

The Board's Second Notice recognizes that "the biologic condition in the UDIP may not fully meet the CWA goal of fishable." Second Notice at 1, 43. However, the Board "continues to believe that the CWA aquatic life goal is attainable in UDIP." *Id.* at 42. To address concerns raised by participants, the Board proposes to designate the UDIP as UDIP Aquatic Life Use waters instead of General Use waters. *Id.* The Board explains that this designated use is consistent with the Illinois Environmental Protection Agency's ("Illinois EPA's") finding that the UDIP "minimally meets the CWA aquatic life goal." *Id.* at 43. The Board declined to invoke any of the UAA factors for the UDIP and references back to its First Notice for a detailed discussion of biologic, habitat, and water quality conditions in the UDIP and its rationale for not invoking any of the UAA factors. *Id.* ExxonMobil respectfully requests that the Board reconsider its findings that none of the UAA factors apply to the UDIP and that the UDIP meets CWA aquatic life goals. As described below, UAA factors apply to the UDIP that support use subcategories that do not achieve CWA goals. Conclusions in the Board's Second Notice support this finding. However, even if the Board finds that

A. UAA Factors Apply to the UDIP, as Previously Indicated by ExxonMobil.

In previous comments, ExxonMobil outlined evidence in the record that illustrates the irreversible physical habitat conditions in the UDIP and other justifications for applying 40 C.F.R. § 131.10(g) factors for the establishment of designated use

subcategories that do not achieve CWA goals. In particular, the following four UAA factors can be applied to the UDIP:

(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 [CWA] would result in substantial and widespread economic and social impact.

40 C.F.R. 131.10(g).

In support of applying UAA factor 3, ExxonMobil pointed to evidence showing that the majority of flow in the UDIP consists of treated wastewater, combined sewer overflows, and urban runoff, and that the Des Plaines River is heavily polluted and impaired. Pre-First Notice Comments at 7. Despite the gains achieved through TARP for combined sewer overflows, there are currently no technically or economically feasible treatment or management methods that could be applied to waste sources or impairments to achieve the General Use standards in the UDIP. *Id.* at 7-8.

In support of applying UAA factor 4, ExxonMobil explained that nearly the entire Lower Des Plaines River ("LDPR"), including the UDIP, that was designated secondary contact and indigenous aquatic use, is impounded. *Id.* at 8. In addition, the UDIP is maintained to support the designated use of commercial navigation. *Id.*

Supporting the applicability of UAA factor 5, ExxonMobil alerted the Board of the LDPR Use Attainability Analysis⁶ finding that the impoundment of the LDPR creates deep pool environment lacking in coarse substrate, channel diversity, riffle habitat, and gradient. *Id.* The UAA found that, as long as commercial navigation, a protected use under the CWA, takes place on the LDPR, changes in habitat features are irreversible. *Id.* at 8-9.

Finally, ExxonMobil noted that UAA factor 6 should apply since the poor habitat quality cannot be improved unless the navigational system undergoes major modification or is removed. *Id.* at 9. Achieving the use that meets CWA aquatic life goals would require, at a minimum, “elimination of commercial navigation, restoration of the UDIP channel, including removal of all contaminated sediment, and treatment of all wastewater and urban runoff.” *Id.* at 10. Such changes would likely require significant costs and affect thousands of jobs that are dependent on commercial navigation in the area. *Id.*

Given the irreversible physical habitat conditions and the applicability of the UAA factors as described above, it is clear that applicability of UAA factors support designated use categories for the UDIP that do not achieve CWA goals.

B. The Board Acknowledges Applicability of UAA Factors to the LDPR.

In its Second Notice, the Board clarifies the applicability of UAA factors to segments of the LDPR in response to comments from the United States Environmental Protection Agency (“USEPA”). Second Notice at 34-40. The Board does not differentiate specific segments of the LDPR where UAA factors apply from the UDIP, and in most cases agrees that UAA factors apply to the entire LDPR. In fact, all of the

⁶ Statement of Reasons, Attachment A – Lower Des Plaines River Use Attainability Analysis Final Report (Dec. 2003), R08-9 (Ill.Pol.Control.Bd. Oct. 26, 2007) (hereafter cited as “LDPR UAA”).

justification provided by the Board for applying these UAA factors to the LDPR are also applicable to the UDIP stretch of the LDPR.

For example, in the case of UAA factor 3, the Board provides evidence as to why the factor applies despite progress made on TARP and notes that “the Board believes that the impact of the elimination of CSOs on CAWS and LDPR can be evaluated only after completion of TARP reservoirs.” *Id.* at 37. The Board further explains that human caused conditions on the habitat quality, as documented in the CAWS and LDPR UAAs and the Limno Tech Habitat Study, were also a significant factor in the designation of aquatic life use in the CAWS and LDPR. *Id.* The Board states that UAA factor 3 limits the ability of many CAWS and LDPR segments from attaining CWA goals related to aquatic life use. *Id.* The Board notes that until TARP is completed, the waters will continue to be “severely impacted by storm events,” and that even when TARP is completed, many segments will still be impacted by human caused conditions. *Id.* at 38. As documented by ExxonMobil in prior comments, and in the LDPR UAA, all these limitations apply to the UDIP. Therefore, the Board should find that UAA factor 3 should apply to the UDIP.

Similarly, in support of applying UAA factor 4, the Board notes that the CAWS and the LDPR “have been modified extensively for purposes of navigation, drainage, and wastewater treatment.” *Id.* at 38 (citing First Notice at 5-7). Indeed, all three of these modifications apply to the UDIP section of the LDPR. The Board states that it cannot endorse a concept that would require hydrologic modifications to be removed. *Id.* at 39. Further the Board states that “the extensive record supports a finding that UAA Factor 4 prevents the CAWS and LDPR from achieving the CWA goal of fishable.” *Id.*

ExxonMobil agrees wholeheartedly with these findings and encourages the Board to revise its CWA goal conclusions for the UDIP in other parts of the Second Notice to be consistent with these findings.

Finally, as to UAA factor 5, the Board concludes that it is “convinced that the evidence in the record is overwhelming that the physical limitations of the CAWS and LDPR prevent attainment of the CWA goal.” *Id.* at 40. The Board explains that the record is “replete with evidence” that limitations in addition to flow lead to a determination that UAA factor 5 supports use designations of less than the CWA goal. *Id.* at 39. ExxonMobil agrees with these conclusions. UAA factor 5 addresses 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. Among other things, the Board points to a passage in the CAWS UAA to support its finding. *Id.* As noted earlier, the LDPR UAA supports ExxonMobil’s contention that UAA factor 5 applies to the UDIP. As outlined by ExxonMobil in its Pre-First Notice Comments, the following conditions documented in the LDPR UAA support applicability of UAA factor 5 to the UDIP:

- Impoundment of the LDPR creates a deep pool environment that is lacking in course substrate, channel diversity, riffle habitat, and gradient.
- Commercial navigation causes changes to habitat features (i.e. substrate, channel morphology, pool quality, riffle quality, and stream gradient) that are irreversible.
- The LDPR is heavily used for commercial barge traffic, which is a protected use under the CWA.
- The major causes of degraded habitat are irreversible since the lock and dam system is vital to commercial navigation.

Pre-First Notice Comments at 8-9.

Accordingly, ExxonMobil encourages the Board to make its conclusions related to the UDIP in other parts of its Second Notice consistent with its findings related to the UAA factors in response to USEPA's comment.

C. **The Board's Second Notice Supports a Use Subcategory for UDIP Aquatic Life Use Waters.**

ExxonMobil requests that the Board take official notice of the recently proposed regulation entitled "Water Quality Standards Regulatory Clarifications" published at 78 Fed. Reg. 54518 (Sept. 3, 2013) ("Clarifications Rule"). In the preamble to this proposed regulation, which would insert clarifying language into several provisions of 40 C.F.R. Part 131, USEPA describes its interpretations of certain CWA water quality standards provisions that are of considerable importance to the Subdocket C and D rules.

Pursuant to the principles set forth in the Clarification Rule, even if the Board continues to find that the UDIP minimally achieves CWA aquatic life goals, the Board's proposed definition of UDIP Aquatic Life Use Waters is still consistent with concepts in USEPA's Clarifications Rule that allow subcategories of CWA Section 101(a)(2) designated uses and the adoption of numeric water quality criteria that are protective of those uses. 78 Fed. Reg. 54522-23. The Clarifications Rule presents several examples of situations where a single, statewide aquatic life use and the accompanying criteria (e.g., Illinois' General Use) cannot be achieved in a surface water segment for one or more reasons (generally, due to one or more of the six 40 C.F.R. § 131.10(g) factors), but where that segment has an existing aquatic life use, which is a subcategory of aquatic life uses, and a corresponding unique numeric criteria adopted to protect that use. 78 Fed. Reg. 54522-54524. USEPA's examples in the preamble to the proposed rule are analogous to the site-specific conditions in the UDIP and could be viewed as consistent

with the Board's decision to propose the definition of UDIP Aquatic Life Use Waters. Furthermore, the Clarifications Rule states that USEPA intends to grant states "considerable discretion" in defining subcategories of uses and the applicable water quality criteria to protect such uses. 78 Fed. Reg. 54523.

An underlying reason for USEPA's Clarifications Rule is that the CWA Section 101(a)(2) goal is "...the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water..." 33 U.S.C. 1251.101(a)(2). This "fishable" goal does not require that the definition of protected fish and shellfish be limited to ecosystems that are equal to natural, pre-anthropogenic conditions. USEPA elaborates in the Clarifications Rule on the highest attainable use ("HAU") and clarifies that an assigned aquatic life use for a specific water body can reflect limiting physical and hydrologic conditions. 78 Fed. Reg. 54524.

III. THE UDIP AQUATIC LIFE USE WATERS DEFINITION AT PROPOSED 35 ILL. ADMIN. CODE § 303.230(b) IS INAPPROPRIATE BECAUSE IT CONFLICTS WITH ITSELF, THE BOARD'S FINDINGS, AND THE EXISTING AND ACHIEVABLE USES OF THE UDIP.

The Board's definition of the UDIP Aquatic Life Use Waters contains internal conflicts, and it conflicts with the Board's findings that no UAA factors apply and that the UDIP achieves CWA goals. The definition does not represent the existing and achievable uses of the UDIP since it provides that the UDIP is capable of maintaining intolerant aquatic life populations.

A. The Board's Definition of UDIP Aquatic Life Use Waters Contains Internal Conflicts.

The Board's definition of UDIP Aquatic Life Use Waters contains language that conflicts with itself. The Board proposes to adopt the following definition of UDIP Aquatic Life Use Waters:

b) Upper Dresden Island Pool Aquatic Life Use Waters

- 1) Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 bridge shall be designated as the Upper Dresden Island Pool Aquatic Life Use. These waters are capable of maintaining aquatic-life populations consisting of individuals of tolerant, moderately tolerant, and intolerant types that are adaptive to the unique flow conditions necessary to maintain navigational use and upstream flood control functions of the waterway system. Such aquatic life may include, but is not limited to largemouth bass, bluntnose minnow, channel catfish, orange-spotted sunfish, smallmouth bass, and spottail shiner.
- 2) Upper Dresden Island Pool Aquatic Life Use Waters are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region due to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use and flood control functions of this waterway system.
- 3) Upper Dresden Island Pool Aquatic Life Use Waters must meet the water quality standards of 35 Ill. Adm. Code 302. Subpart D.

Second Notice at 48; Proposed 35 Ill. Admin. Code § 303.230(b).

First, Proposed Section 303.230(b)(1) of the UDIP Aquatic Life Use Waters definition states that "[t]hese waters are capable of maintaining aquatic-life populations consisting of individuals of tolerant, moderately tolerant, and intolerant types that are adaptive to the unique flow conditions necessary to maintain navigational use and

upstream flood control functions of the waterway system.” That is, the Board finds that the UDIP is capable of maintaining tolerant, moderately tolerant, and intolerant aquatic life populations. But this capability is limited to only such populations that are tolerant enough to be adaptive to the unique conditions in the UDIP. These two concepts conflict with each other. How can the Board find that the UDIP is capable of maintaining tolerant, moderately tolerant, and intolerant aquatic life and, in the same sentence, find that the UDIP is only capable of maintaining aquatic life that is adaptive to the unique conditions in the UDIP?

Likewise, Proposed Section 303.230(b)(2) of the UDIP Aquatic Life Use Waters definition states that waters in the UDIP “are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region due to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use and flood control functions of this waterway system.” This second provision appears to conflict with the statement in Proposed Section 303.230(b)(1), which states that UDIP is capable of maintaining tolerant, moderately tolerant, and intolerant aquatic life populations. Accordingly, the UDIP Aquatic Life Use Waters definition conflicts with itself by stating that it is capable of maintaining intolerant aquatic life populations and, at the same time stating, that it is only capable of maintaining aquatic life populations that are adaptive to the unique conditions in the UDIP.

B. The Board's UDIP Aquatic Life Use Waters Definition Conflicts with the Board's Finding that no UAA Factors Apply to the UDIP and that the UDIP Meets CWA Goals.

The Board's proposed definition of UDIP Aquatic Life Use Waters conflicts with the Board's finding that UAA factors do not apply to the UDIP and that the UDIP meets CWA goals. In particular, the definition asserts that the UDIP is capable only of maintaining aquatic life populations that are "adaptive to the unique flow conditions necessary to maintain navigational use and upstream flood control functions of the waterway system." Proposed 35 Ill. Admin. Code § 303.230(b)(1). This limits the aquatic life capability to only certain adaptive aquatic life populations.

Further, the proposed definition acknowledges that the UDIP Aquatic Life Use Waters "are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to the natural habitat of the region. . . ." Proposed 35 Ill. Admin. Code § 303.230(b)(2). This appears to acknowledge that CWA goals are not met in the UDIP. This limitation is due to the "unique physical conditions, flow patterns, and operational control necessary to maintain navigational use and flood control functions of this waterway." The reasoning for this limitation appears to invoke UAA factors 3-5. Therefore, the UDIP Aquatic Life Use Waters definition conflicts with the Board's finding that no UAA factors apply to the UDIP and that the UDIP meets CWA goals.

C. The UDIP Aquatic Life Use Waters Definition should be Consistent with the Existing and Achievable Uses on the UDIP.

The UDIP Aquatic Life Use Waters definition states that the UDIP is capable of maintaining, among other things, aquatic-life populations consisting of intolerant types.

However, as documented by ExxonMobil in the past, the UDIP does not now maintain, and is not capable of maintaining, intolerant aquatic life populations.

Specifically, in its Pre-First Notice Comments, ExxonMobil pointed out that benthic organisms live on the bottom, and the physical and chemical conditions of the bottom habitat determine the success of benthic macroinvertebrate populations. Pre-First Notice Comments at 3. ExxonMobil pointed to the LDPR UAA to show that the impounded pool depths, minimal ambient velocities, homogeneous fine-grained sediments, sediment pollutant concentrations, scouring of sediments during storm events, and continuous sediment disturbances by barge traffic limit the potential benthic macroinvertebrate populations in the UDIP and LDIP. *Id.* at 3-4. ExxonMobil also documented the lack of invertebrate habitat in the UDIP. *Id.* at 4. ExxonMobil also pointed out testimony in the record related to habitat limitations and called into question conclusions made by Illinois EPA regarding Qualitative Habitat Evaluation Index (“QHEI”) scores. *Id.* at 4-5. Finally, ExxonMobil pointed out that not only were no intolerant species found in the UDIP in the LDPR UAA, but there were no intolerant species found in the Lower Dresden Island Pool either, which indicates that the physical habitat is limited in the entire LDPR. *Id.* at 2-6. The LDPR UAA stated that intolerant fish species were “very rare or absent in all samples.” LDPR UAA at 6-13.

Accordingly, evidence in the record demonstrates that the UDIP is not capable of maintaining intolerant aquatic life populations. The designated aquatic life use subcategory for the UDIP should represent existing, achievable habitat condition, not aspirational uses that are unsupported by the data.

D. The Proposed Clarification Rule Provides the Board with a Regulatory Basis for Designating Appropriate Location-Specific Existing and Attainable Uses for the UDIP.

The preamble to USEPA's proposed Clarifications Rule very clearly authorizes states to establish location-specific uses and to adopt criteria to protect those uses. 78 Fed. Reg. 54524. The proposed rule clarification would require states to adopt the HAU. This requirement does not mean the use that could be achieved in the absence of any and all man-made disturbances, whether permanent (navigation, hydrologic modifications and the effluent-dominated flows) or temporary (e.g., storm water quality before TARP is completed). The Board has already indicated its intention to adopt site-specific numeric criteria for the UDIP in Subdocket D (e.g., temperature and chlorides) and it has described the aquatic life community attainable in the UDIP as "adapted" to the unique flow conditions of the water body. These findings are consistent with a HAU that is unique to the UDIP.

E. The Record Supports an Alternative UDIP Aquatic Life Use Waters Definition.

To more fully capture the true characteristics of the UDIP, and consistent with ExxonMobil's comments above, ExxonMobil respectfully requests that UDIP Aquatic Life Use Definition at Proposed 35 Ill. Admin. Code § 303.230(b)(1) be revised as follows:

b) Upper Dresden Island Pool Aquatic Life Use Waters

- 1) Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 bridge shall be designated as the Upper Dresden Island Pool Aquatic Life Use. These waters are capable of maintaining aquatic-life populations consisting of individuals of tolerant, moderately tolerant, and only those intolerant types that are adaptive to the unique flow conditions necessary to maintain navigational

use and upstream flood control functions of the waterway system and the sources and characteristics of the upstream flow. Such aquatic life may include, but is not limited to largemouth bass, bluntnose minnow, channel catfish, orange-spotted sunfish, smallmouth bass, and spottail shiner.

IV. EXXONMOBIL SUPPORTS THE BOARDS CONSIDERATION OF ISSUES IN SUBDOCKET D.

The Board recognizes the issue of chlorides raised by ExxonMobil and the Illinois Environmental Regulatory Group and agrees that chloride levels in the waters will need to be addressed in the Chicago Sanitary and Ship Canal and the LDPR. Second Notice at 51. ExxonMobil appreciates the Board's acknowledgement of the issue and is hopeful that the issue will be appropriately addressed in Subdocket D. ExxonMobil believes that the presence of chlorides and certain other pollutants from upstream anthropogenic sources prevent the attainment of proposed water quality standards in the foreseeable future because of the applicability of one or more of the UAA factors. For example, chloride levels are elevated at certain times of the year due to the application of salt to roads in the winter in an effort to de-ice the roads. This is a human caused condition with a considerable non-point source component, and the elimination of this activity would cause widespread impact due to safety concerns. Conditions may prevent attainment of a water quality standard even before water reaches ExxonMobil's intake.

In addition, ExxonMobil supports the Board's finding in its First Notice that appropriate thermal water quality standards may need to be specially adapted for the UDIP. First Notice at 221. Although the Board no longer proposes to designate the UDIP as a General Use waterway, ExxonMobil notes that thermal issues remain in the UDIP that require special consideration.

V. **EXXONMOBIL REQUESTS CLARIFICATION FROM THE BOARD RELATED TO THE APPROPRIATE UDIP WATER QUALITY STANDARDS.**

Some of the Board's findings do not fit into a usable roadmap for moving forward in Subdocket D, and ExxonMobil requests clarification from the Board of its findings. Additionally, following the Board's decision to designate the UDIP as UDIP Aquatic Life Use Waters, there is currently no proposal before the Board for water quality standards applicable to the UDIP in Subdocket D. Therefore, ExxonMobil believes the Board should allow appropriate time for participants and Illinois EPA to develop water quality standards for the UDIP in Subdocket D, after the Board provides additional clarification.

On one hand, the Board "continues to believe that CWA aquatic life goal is attainable in UDIP." Second Notice at 42. The Board explains that this designated use is consistent with Illinois EPA's finding that the UDIP "minimally meets the CWA aquatic life goal." *Id.* at 43. On the other hand, the Board's Second Notice recognizes that "the biologic condition in the UDIP may not fully meet the CWA goal of fishable." *Id.* at 1, 43. And the Board declines to invoke any of the UAA factors for the UDIP. *Id.* at 43. These findings conflict with each other and clarification is needed in order to develop water quality standards for a waterway that partially meets CWA goals.

There is currently no proposal in Subdocket D that addresses water quality standards applicable to the UDIP. Illinois EPA's most recent proposal, incorporating General Use standards for the UDIP, is inconsistent with the Board's Subdocket C Second Notice. Neither Illinois EPA nor any other participants have introduced proposed

water quality standards for the UDIP that is consistent with the Board's Subdocket C Second Notice.

It is not clear whether the Board's proposed applicability of water quality standards in Part 302, Subpart D to the UDIP, as proposed in its Subdocket C Second Notice: 1) was proposed as a temporary bridge until more specific UDIP water quality standards are proposed in Subdocket D; 2) should prompt Illinois EPA to re-propose its initial UDIP-specific water quality standard provisions contained in the initially proposed regulations in 2007; or 3) should prompt Illinois EPA or other participants to propose entirely new UDIP water quality standards.

It will be difficult, if not impossible for participants to testify about proposed water quality standards for the UDIP when none exist at this time. Without at least some direction from the Board, or an amended proposal from Illinois EPA, participants will be unable to adequately present testimony on the UDIP to the Board in Subdocket D. Therefore, ExxonMobil requests direction from the Board on how to interpret its findings, and sufficient time to develop appropriate water quality standards in Subdocket D.

VI. CONCLUSION

In conclusion, ExxonMobil agrees that the UDIP is unique, and that conditions in the UDIP justify a separate use designation. However, ExxonMobil respectfully requests that the Board reconsider its conclusion that the UDIP meets CWA goals. In fact, four of the six UAA factors apply to the UDIP, and the UDIP does not meet the CWA goal of fishable. The UDIP Aquatic Life Use Waters definition conflicts with itself, the Board's findings, and the existing or achievable uses in the UDIP. However, ExxonMobil

supports the Board's decision to address pollutants such as chlorides in Subdocket D, but requests clarification as to the meaning of the Board's findings.

Respectfully submitted,

EXXONMOBIL OIL CORPORATION,

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