

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9
EFFLUENT LIMITATIONS FOR THE) (Rulemaking - Water)
CHICAGO AREA WATERWAY SYSTEM)
AND THE LOWER DES PLAINES RIVER:) Subdocket A
PROPOSED AMENDMENTS TO 35 Ill.)
Adm. Code Parts 301, 302, 303 and 304)

NOTICE OF FILING

To: ALL COUNSEL OF RECORD
(Service List Attached)

PLEASE TAKE NOTICE that on the 12th day of October, 2010, I electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, the **Metropolitan Water Reclamation District of Greater Chicago's Comments on First Notice of Proposed Rules Establishing Recreational Use Designations for the CAWS and LDPR.**

Dated: October 12, 2010.

**METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO**

By: /s/ Fredric P. Andes
One of Its Attorneys

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PROOF OF SERVICE

The undersigned attorney certifies, under penalties of perjury pursuant to 735 ILCS 5/1-109, that I caused a copy of the foregoing, **Notice of Filing** and **Metropolitan Water Reclamation District of Greater Chicago's Comments on First Notice of Proposed Rules Establishing Recreational Use Designations for the CAWS and LDPR**, to be served via First Class Mail, postage prepaid, from One North Wacker Drive, Chicago, Illinois, on the 12th day of October, 2010, upon the attorneys of record on the attached Service List.

/s/ David T. Ballard

David T. Ballard

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ADM. CODE 301, 302, 303, AND 304)	

**METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S
 COMMENTS ON FIRST NOTICE OF PROPOSED RULES ESTABLISHING
RECREATIONAL USE DESIGNATIONS FOR THE CAWS AND LDPR**

The Metropolitan Water Reclamation District of Greater Chicago (the District), by its attorneys Barnes & Thornburg LLP, hereby submit these comments on the Board's first notice of proposed rules establishing recreational use designations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River (LDPR) (First Notice), dated August 5, 2010, which was published in the Illinois Register on August 27, 2010. The District would like to raise three issues concerning the First Notice. First, the District believes that the Board has misinterpreted federal regulations concerning the definition and protection of existing uses. Where conditions of the waterways—including high flows during and after wet weather, barge traffic, and lack of safe ingress and egress points—threaten the safety of incidental contact recreators, such incidental contact recreation should not be considered an existing use that must be maintained. Second, establishment of a wet weather limited use subcategory is consistent with protection of existing uses and should be included as part of Subdocket A rather than only in Subdocket B after recreational uses are established. Third, the Board should fully consider Asian carp preventive measures being considered by state, federal, and international agencies when establishing appropriate recreational use designations for the CAWS and LDPR.

I. Incidental Contact Recreation Is Not an Existing Use Where Conditions are Unsafe.

The Board determined that the evidence in this rulemaking supports a finding that recreational uses are occurring in the CAWS and LDPR that must be protected. First Notice at 83. As a result, the Board concluded that existing incidental contact recreational uses precluded a non-contact recreational use designation for the following segments of the CAWS:

- Chicago Sanitary and Ship Canal (CSSC) from the South Branch of the Chicago River to the junction with the Calumet-Sag Channel;
- Calumet-Sag Channel;
- Chicago River;
- South Fork of the South Branch of the Chicago River (Bubbly Creek);
- South Branch of the Chicago River; and
- North Branch of the Chicago River from Ashland Avenue to its confluence with the South Branch of the Chicago River at Wolf Point (Lower North Branch Chicago River).

The Board based its determination on evidence of incidental contact activities occurring on these segments, including fishing, boating, canoeing, and rowing. First Notice at 86. However, the Board did not consider the fact that existing uses are not defined solely based on the activities that take place in a particular segment, but also on the conditions present in that segment. The District contends that, although the segments listed above may be used on occasion for incidental contact activities, conditions on those segments are unsafe for such activities. As a result, incidental contact recreation is not fully supported, and cannot be considered an existing use. Therefore, the Board should designate those segments only for non-contact recreational uses.

Existing uses are defined under federal regulations as “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 CFR 131.3(e). Federal regulations do not define when a use is considered to be

“actually attained,” such that it can be considered an existing use. However, the U.S. Environmental Protection Agency (U.S. EPA) has provided guidance on existing use issues that squarely addresses safety concerns such as those raised by the District, and has clearly indicated that existing use inquiries should consider both current or past functional use and current or past water quality, as well as physical conditions. 63 Fed. Reg. 36742, 36752 (U.S. EPA, Jul. 7, 1998). U.S. EPA allows an existing use to be established by demonstrating that certain uses have actually occurred, or that water quality is suitable to allow such uses, “unless there are physical problems which prevent the use regardless of water quality.” *Id.* If such problems are present, a use will not be considered to be an existing use.

U.S. EPA illustrated this point with an example concerning swimming in unsuitable waters:

A somewhat common existing use question applies to primary contact recreation: if a few people on a few occasions “swim” in a water body that does not have the quality or physical characteristics to support swimming, is this an existing use, even if the water body is posted “no swimming” due to bacterial contamination and lacks the physical features to actually support swimming? The straightforward answer to this question is that “swimming” is not an existing use because the present (or past) condition does not support that use. This conclusion is based on the very limited actual “use” and, more importantly, the lack of suitable water quality and physical characteristics that would support a recreational swimming use now or in the future (as determined by the water quality requirements and recreational swimming considerations, including safety considerations, in the State or Tribal classification system for primary contact recreation).

A question has been raised as to how to interpret the regulation in the context of this example. One could determine that because the water body is not suitable for swimming, and has not been since 1975, primary contact recreation is not an existing use. Alternatively, one could determine primary contact recreation to be an existing use because the water body was actually used for swimming, even though the use was occasional and water quality and physical characteristics were not acceptable to support such a use. EPA believes the first alternative is the better interpretation of Agency regulations and guidance in this example, because the use is not established and the water quality and other factors would appear to prohibit actually attaining a recreational swimming use.

Id. at 36752-53 (emphasis added).

The District presented evidence demonstrating that physical conditions and other safety concerns make the segments of the CAWS listed above unsafe for incidental contact activities. Richard Lanyon and Dr. Thomas Granato both testified that the man-made nature of the CAWS can make incidental contact recreational activities such as wading and small craft boating can be hazardous. Physical concerns include lack of a substantial shallow area along the banks, rapid drop offs in depth, banks lined with high vertical sheet piling or large limestone rocks, rapid and unexpected increases in stream velocity due to periodic draw downs of water levels, and frequent barge and large power boat traffic. Pre-Filed Testimony of Richard Lanyon at 5 (Aug. 4, 2008); Pre-Filed Testimony of Thomas Granato Recreational Uses and Standards at 3-4 (Aug. 4, 2008). Elevation changes of as much as seven feet, and velocity increases of up to 7.5 times normal velocity can occur when water levels are drawn down to drain storm runoff and protect streets and basements from flooding. Lanyon at 5; Testimony of Thomas Granato at 134-135 (Oct. 28, 2008). These conditions exceed U.S. Geological Survey guidance for safe wading and recreational conditions, and make it difficult to control hand powered or outboard fishing boats. Testimony of Thomas Granato at 135; Testimony of Samuel Dennison at 79-80 (Sep. 8, 2008). Traffic from thousands of barges that take up much of the width of certain CAWS segments make commercial boating, small craft recreational boating, wading, or other incidental contact activities unsafe, subject to collisions and capsizing. These conditions have been explicitly acknowledged by IEPA as dangerous:

Wakes coupled with vertical-wall construction in many of the waterway reaches make recreational uses dangerous. Small craft can easily be capsized and persons in the water will have little if any route for escape.

IEPA Statement of Reasons at 33.

Given the acknowledged dangers associated with incidental contact activities in certain segments of the CAWS, it would be irresponsible for the Board to encourage those activities through a use designation. U.S. EPA supports use attainability analyses that include “questions about the actual use, existing water quality, water quality potential, recreational facilities, location, safety considerations, physical conditions of the water body, and access.” *Id.* at 36753. In addition, the Board is required to take into account such “existing physical conditions” and the “nature of the ... receiving body of water” during this rulemaking. 415 ILCS 5/27(a) (2008). Furthermore, the Illinois Environmental Protection Agency (IEPA) has acknowledged that designation as non-contact is appropriate where “physical conditions make direct human contact...dangerous.” IEPA Statement of Reasons at 26. As a result, the Board would be justified under federal regulations in determining that the safety issues and physical hazards identified by the District are sufficient to preclude incidental contact recreation as an existing use. Therefore, the District urges the Board to modify the proposed rule to designate the segments of the CAWS listed above for non-contact recreational uses only.

II. A Wet Weather Recreational Use Subcategory Will Protect Existing Uses and Should be Considered as Part of Subdocket A.

The District proposed the adoption of a wet weather recreational use designation to reflect those recreational activities that are appropriate for the CAWS under conditions affected by wet weather and CSO flows. The Board indicated in the First Notice that it would consider the impact of CSOs during Subdocket B concerning the water quality standards and criteria necessary to support recreational uses, including existing uses. The District believes that existing uses would allow the creation of a specific wet weather recreational use subcategory, and that the Board should consider such a use designation in Subdocket A.

As discussed above, U.S. EPA has indicated that it is appropriate when defining existing uses to consider not only actual activities on a particular segment, but also any physical conditions or safety concerns that might affect such activities. In addition, U.S. EPA has indicated that refining designated uses or defining existing uses with specific reference to related water body conditions can be acceptable, and has approved the adoption of wet weather recreational use subcategories in other states.

For example, the Indiana Department of Environmental Management (IDEM) has defined existing uses by recognizing that certain activities are not necessarily appropriate or safe during wet weather events, even if they may be supported during dry weather. U.S. EPA has agreed, indicating that an existing use for waters affected by wet weather flows might appropriately be defined as “CSO impacted recreation use.” *Water Quality Standards: Wet Weather Issues and Recreational Use Protection* (Presentation by King, U.S. EPA, Apr. 27, 2007; found at <http://www.csop.com/WWPWebDocuments/2007%20Chicago%20Presentations/Friday,%20April%2027/6.%20E.%20King.ppt>). As a result, U.S. EPA has indicated that, “in a number of situations, the existing use provisions will allow states to consider changes to their designated uses to reflect this reality.” *Id.*

Indiana has established a wet weather limited use subcategory that replaces the otherwise applicable recreational uses during and immediately after wet weather events. Ind. Code § 13-18-3-2.5. This use subcategory has been approved as a valid revision to Indiana’s water quality standards by U.S. EPA. Correspondence Mathur, U.S. EPA to Pigott, IDEM (Jun. 9, 2008). Indiana has described the full process it uses to identify existing uses and determine whether application of the wet weather limited use subcategory will support existing uses as follows:

As a general matter, in assessing recreational uses attained in a waterbody since November 28, 1975, IDEM may find that a waterbody has several

distinct “existing uses,” relating to different weather conditions or seasons. For example, IDEM might conclude the following for a specific waterbody, that during:

Cold weather: No recreational use has occurred.

Dry, warm weather: Demonstrated recreational use has occurred, and people were exposed in varying degrees (depending on the specific recreational activities) to low bacteria levels in the water.

Wet weather events (and for a short period afterward): Very limited or no recreational use has occurred due to high flows and/or poor water quality, including very high bacteria levels.

Under this guidance, CSO communities may pursue one of two options for determining the existing use of a CSO-impacted waterbody under wet weather conditions:

6.A.1.a. Option a. Determine that primary contact recreation does not occur under wet weather conditions. A community may ask IDEM to make a determination of “no existing recreational use” during specific wet weather events associated with CSO-impacts to the waterbody. The community must define the geographic extent of the “no existing recreational use” determination being requested. To support such a determination, the community would need to demonstrate that recreation does not or has not occurred in the CSO-impacted water during the periods of impact from the specific wet weather events for reasons in addition to poor water quality. An example of such a reason would be high flow conditions that preclude safe stream entry based on factors including, but not limited to the following:

- Flow velocity.
- Stream bottom substrate.
- Stream and bank slope.
- Stream and bank vegetation.

Communities would need to submit information, as outlined in the Step 1 bulleted list (found in 6.A.1.), describing dry-weather and wet-weather conditions related to recreational stream use, flow, and water quality. Based on the information submitted, IDEM may make a determination of no existing recreational use during the specified wet weather events, allowing the community to proceed with a Use Attainability Analysis to determine the attainable use of the waterbody during those specific events. For more information on this approach, see “Information to Support a No Existing Use Determination During Selected Storm Events for CSO-Impacted Portions of Marion County Streams.”

6.A.1.b. Option b. Determine the recreational uses that have occurred and the water quality that has prevailed during periods of CSO-impact. Under this alternative approach, if some recreational activities have occurred since November 28, 1975, in a CSO-impacted waterbody during wet weather, then the pertinent existing use of that waterbody will consist of the recreational activities and the associated water quality that are characteristic of such wet weather conditions. In situations where CSO impacts affect the bacteriological quality of the waterbody such that the criteria supporting the designated recreational use have not been attained, then the existing use of that waterbody will consist of such representative recreational activities occurring under impacted water quality conditions. Such conditions fall short of attainment of the designated recreational use of full-body contact and, under such circumstances, a CSO community could proceed to the second step, which is an evaluation of whether the proposed change in designated recreational use would result in removal of the identified existing use.

6.A.2. Step 2. Determine whether the proposed change to a CSO wet weather limited recreational designated use would result in removal of an existing use. If the determination reached through the approach in Step 1, Option b, above, is that the existing recreational use of a waterbody during wet weather-related CSO impacts falls short of attainment of the designated use, IDEM will consider whether the proposed change in designated use would result in removal of an existing use. Simply speaking, this involves a comparison of the parameters of the existing use with the projected water quality of the waterbody under the CSO wet weather limited use classification.

It is important to recognize in this context, that a proposed change in designated use to the CSO wet weather limited use subcategory should be accompanied, as a result of LTCP implementation, by a reduction in all or some of the following:

- Current physical extent of adverse impacts of CSO discharges.
- Time over which such adverse impacts would occur.
- Number of wet weather events resulting in CSO discharges.

Thus, if the existing use of the CSO-impacted waterbody is determined to be recreational activities occurring under impacted water quality conditions, as described in Step 1, Option b (6.A.1.b. above), the reclassification of the waterbody under the CSO wet weather limited use subcategory would not be expected to remove the existing use, since the use revision will be accompanied by water quality improvements compared to current conditions.

Application of Existing Use Concept in Conducting Use Attainability Analyses for Long Term Control Plan Communities for Primary Contact Recreational Uses (IDEM, Apr. 11, 2008) at pp. 5-6.

The District believes that the Board should identify existing incidental contact recreational uses on the CAWS in a similar manner, particularly where incidental contact recreation is maintained as a designated use. IEPA has acknowledged that wet weather conditions were clearly incompatible with recreational activity, and that the recreational use is not being attained during wet weather conditions. *See* IEPA Statement of Reasons at 45. As with the safety hazards outlined above, if IEPA believes that wet weather conditions are unsafe for incidental contact recreation, it would be irresponsible for the Board to continue to allow such activities under those conditions. As Adrienne Nemura testified:

If no regulatory target is provided to address wet weather conditions, the public will not know when the water is safe for recreation and when it is not, and decisions about appropriate levels of control for sources other than wastewater treatment facilities will be arbitrary.

Pre-Filed Testimony of Adrienne D. Nemura at 4 (Aug. 4, 2008).

To the extent the Board determines that incidental contact is actually occurring during wet weather conditions, the Board should define the existing use consistent with the approach used by Indiana and approved by U.S. EPA. For example, an appropriate existing use could be defined as “incidental contact recreation under CSO-impacted conditions,” which does not imply full support of the incidental contact designated use. If the existing uses are appropriately defined with reference to actual conditions, the establishment of a wet weather limited use subcategory would fully support those existing uses, and would provide better guidance to the public concerning when the waters are actually safe for incidental contact activities. Therefore,

the District urges the Board to more appropriately define existing recreational uses, and to consider the establishment of a wet weather limited use subcategory in Subdocket A.

III. The Board Should Consider Asian Carp Preventive Measures.

As discussed in Section I above, uses should be determined after consideration of “the actual use, existing water quality, water quality potential, recreational facilities, location, safety considerations, physical conditions of the water body, and access.” 63 Fed. Reg. at 36753. The preventive measures under consideration by various state, federal, and international agencies to manage Asian carp include kill zones, poisons, electric barriers, intentional lowering of water quality, reducing diversions, and closing navigational locks. PC295 at 18. These measures could pose additional safety considerations and potentially alter the physical conditions of the CAWS, which will be relevant to establishment of appropriate designated uses and, in fact, may result in physical conditions that actually preclude the incidental contact recreational uses proposed in this rulemaking. Although the CAWS UAA rulemaking was initiated prior to the relevant Asian carp litigation and management strategies, it is likely that such litigation will conclude and management strategies will be finalized before the conclusion of this rulemaking. As a result, the District believes that the Board should consider the outcome of any proceedings concerning Asian carp as it determines appropriate recreational use designations for the CAWS.

Dated: October 12, 2010

**METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO**

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