

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

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Persons on the attached service list

Please take notice that on the 18th Day of May, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Environmental Groups' Response to Illinois EPA Motion to Stay the Consideration of a Second Notice Opinion and Order in Subdocket A at the Board's May 19th, 2011 Meeting**, a copy of which is hereby served upon you.



By: _____
Ann Alexander, Natural Resources Defense Council

Dated: May 18th, 2011

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CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Environmental Groups' Response to Illinois EPA Motion to Stay the Consideration of a Second Notice Opinion and Order in Subdocket A at the Board's May 19th, 2011 Meeting** 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 18th Day of May, 2011.

A handwritten signature in blue ink that reads "Ann Alexander". The signature is written in a cursive style.

Ann Alexander, Natural Resources Defense Council

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
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WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-09A
CHICAGO AREA WATERWAYS SYSTEM) (Rulemaking- Water)
(CAWS) AND THE LOWER DES PLAINES)
RIVER: PROPOSED AMENDMENTS TO)
35 Ill. Adm. Code Parts 301, 302, 303 and 304)
(Recreational Use Designations))

**ENVIRONMENTAL GROUPS' RESPONSE TO ILLINOIS EPA MOTION TO STAY
THE CONSIDERATION OF A SECOND NOTICE OPINION AND ORDER IN
SUBDOCKET A AT THE BOARD'S MAY 19, 2011 MEETING**

Natural Resources Defense Council, Environmental Law & Policy Center, Friends of the Chicago River, Openlands, Prairie Rivers Network, Alliance for the Great Lakes, Southeast Environmental Task Force, and Sierra Club-Illinois Chapter ("Environmental Groups") submit the following response to the Illinois EPA Motion to Stay the Considering [sic] of a Second Notice of Opinion and Order in Subdocket A at the Board's May 19, 2011 Meeting. The proposed delay is not only pointless, but threatens to undo years of work by the Board and Environmental Groups toward implementation of upgraded water quality standards in the CAWS.

Illinois EPA's ("IEPA") motion is precisely the wrong response to the United States Environmental Protection Agency's ("USEPA") letter to Illinois EPA dated May 11, 2011, Public Comment # 584 ("USEPA Letter"). The USEPA Letter expressly ordered IEPA to "*expeditiously* adopt new or revised water quality standards consistent with this determination" (emphasis added). For reasons that remain unclear in IEPA's motion, IEPA has taken this

directive to respond promptly as an invitation to call a halt to a water quality standards rulemaking that has been nearly a decade in the making, so they can go back and think about it some more. IEPA's approach is wrongheaded and risky for at least three reasons. First, the Board is rapidly approaching the August decision deadline for a Subdocket A rulemaking, and any further delay will almost surely take us past that deadline. Second, action by IEPA is not even necessary to put USEPA's directive in place – the Board can do that on its own. And third, even if the Board chooses to wait for a new IEPA proposal to meet the enhanced use designations proposed by USEPA, the Board can clearly put the currently proposed designations in place now to ensure progress sooner rather than later. The pending proposed rule can and should serve as a building block, an interim step before USEPA's directive can be fully realized.

With respect to the rulemaking deadline, 1 Ill Admin Code 220.1100(c) provides that a proposed rule must be made final within one year of publication of first notice. In subdocket A, that deadline is August 27, 2011. We are now 101 calendar days away from that deadline, and the Joint Committee on Administrative Rules is allowed 45 of those days (with a possible 45-day extension) to comment on the first notice draft – after which IEPA may need to respond to those comments. Thus, we are approaching the last possible opportunity for the Board to issue a second notice, and any further delay would likely make it impossible to meet the deadline. If it is not met, Illinois will be back to the drawing board after years of hearings in a Board proceeding of historic duration, and IEPA will have lost the last opportunity to promulgate a state rule for the CAWS before USEPA overpromulgates with a federal rule.

In terms of next steps, IEPA's proposed delay to allow it to further ruminate makes no sense given that the Board, not just IEPA, has authority to respond immediately to USEPA's directive. IEPA may choose to go back and consider the matter all it likes, but the USEPA letter

is based explicitly on record evidence already presented to the Board in this proceeding, and expressly cites the “41 days of public hearings and . . . approximately 450 public comments expressing support for improving water quality,” and numerous documented instances of full body contact recreational use in the CAWS. USEPA Letter at 5-6. The Board is thus free to adopt a rule consistent with the USEPA letter regardless of how IEPA may choose to respond.

Even if the Board decides not to exercise that authority, there is no reason why it should not adopt the currently proposed rule reflected in the Subdocket A first notice decision as an interim step toward meeting the requirements set forth in the USEPA letter. Nothing in the first notice decision is inconsistent with, or an impediment to, ultimately complying with USEPA’s directive. The Subdocket A testimony supports the conclusion that CAWS use designations must be upgraded to protect recreators, albeit only incidental contact recreators. Any supplemental information that may be necessary to support a rule protecting full body contact recreators, as demanded by USEPA, can be built on the information in the subdocket A record. Moreover, the economic investment in disinfection necessary for the Metropolitan Water Reclamation District to comply with the currently proposed rule is the same as would be required to protect a full body contact use. Failure to put in place the Subdocket A rule as an interim step on the way to inevitable full-body contact use would only delay this critical investment in public health.

For this same reason, IEPA’s assertion that its proposed delay would not be prejudicial lacks appreciation of the entire purpose behind this rulemaking. IEPA’s own position, and certainly that of the Environmental Groups, has all along been that upgraded standards are essential to protect public health in view of the ever-growing recreational use of the CAWS. An

indefinite rulemaking delay would severely prejudice all of the Environmental Groups' members who seek to safely use and enjoy Chicago's waterways.

For these reasons, we respectfully request that IEPA's motion to stay consideration of a second notice decision be denied.

Dated: May 18, 2011

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL
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OPENLANDS
SOUTHEAST ENVIRONMENTAL TASK
FORCE
ALLIANCE FOR THE GREAT LAKES
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Authorized to represent the parties listed above for purposes of this motion