

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 LOWER DES PLAINES RIVER: )  
PROPOSED AMENDMENTS TO 35 ILL. )  
ADM. CODE 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 ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S SUBDOCKET C FINAL PRE-FIRST NOTICE COMMENTS ON AQUATIC LIFE USE DESIGNATIONS on behalf of the Illinois Environmental Regulatory Group, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

Dated: March 5, 2012

By: /s/ Alec M. Davis  
Alec M. Davis

Alec M. Davis  
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**CERTIFICATE OF SERVICE**

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached  
ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S SUBDOCKET C FINAL  
PRE-FIRST NOTICE COMMENTS ON AQUATIC LIFE USE DESIGNATIONS upon:

Mr. John T. Therriault  
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100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on March 5, 2012; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in  
Springfield, Illinois on March 5, 2012.

By:           /s/ Alec M. Davis            
Alec M. Davis

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**ILLINOIS ENVIRONMENTAL REGULATORY GROUP’S SUBDOCKET C  
FINAL PRE-FIRST NOTICE COMMENTS ON AQUATIC LIFE USE DESIGNATIONS**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”) by and through its attorney, Alec M. Davis, and pursuant to the February 3, 2012, Hearing Officer Order, hereby submits its final pre-first notice comments in the above-captioned matter.

IERG is a not-for-profit Illinois corporation affiliated with the Illinois Chamber of Commerce. IERG is composed of fifty-one (51) member companies that are regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or other policies. A number of IERG member companies have facilities located along, and discharging to, the waterways subject to this rulemaking. As such, IERG and its member companies have participated in this rulemaking, and IERG offers the following comments regarding the Illinois Environmental Protection Agency’s (“Illinois EPA” or “Agency”) proposed aquatic life use designations.

In order to ensure that the record in this rulemaking is complete, the Illinois Pollution Control Board (“Board”) should be aware that a real potential exists, as confirmed by Agency testimony, for violations of the proposed chloride water quality standard in the winter months that could result in noncompliance for dischargers to the waterways subject to this rulemaking. IERG is working with the Agency to develop draft language, including best management

practices for chlorides during the winter months, and will be submitting it for the Board's consideration during the course of the Subdocket D proceedings.

**I. BACKGROUND**

The Illinois Environmental Protection Act directs the Board to adopt, amongst other things, water quality standards pursuant to the procedures described in Title VII of the Act. 415 ILCS 5/13(a). Title VII specifies that:

In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.

415 ILCS 5/27(a).

Section 102 of the Clean Water Act ("CWA") specifies that "it is the national goal that *wherever attainable*, an interim goal of water quality which proves for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. §1251(a)(2), (Emphasis added). Section 303 of the CWA specifies that when states adopt or revise water quality standards they shall consist of both designated uses and the water quality criteria that protect those uses. 33 U.S.C. §1313(c)(1)(2)(A). Regulations adopted pursuant to the CWA specify a process to be followed in designating uses that cannot achieve the Section 101(a)(2) goals. 40 C.F.R. §131.10(j).

Specifically, a state must demonstrate that attaining the designated use is not feasible because:

- 1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
- 2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent

discharges without violating State water conservation requirements to enable uses to be met; or

- 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 Act would result in substantial and widespread economic and social impact.

40 C.F.R. §131.10(g). This process is referred to as the Use Attainability Analysis (“UAA”).

In developing its rulemaking proposal, the Illinois EPA performed UAAs for the CAWS and LDPR and described them as follows:

The UAA for Lower Des Plaines River identified the water quality problems of Lower Des Plaines River and suggested remedies particular to each problem. It is clear from the UAA that Lower Des Plaines River continues to be a highly modified water body that does not resemble its pre-urbanized state. The main goal of the UAA was to find an ecologically and recreationally attainable state that would as closely as possible approach the aquatic life and recreational goals of the Clean Water Act without causing an adverse widespread socio-economic impact.

Statement of Reasons, *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code Parts 301, 302, 303 and 304*, R08-9 at 22 (Ill.Pol.Control.Bd. Oct. 26, 2007) (hereinafter referred to as “Statement of Reasons”; rulemaking hereinafter “*CAWS/LDPR Rulemaking*”) and:

The UAA for the CAWS was undertaken to determine the existing and potential uses of the waterway. The project was to assess the factors limiting the potential

uses and evaluate whether or not those factors can be controlled through appropriate technology and regulations.

Statement of Reasons at 23.

Based on the UAAs conducted for both the CAWS and LDPR, Illinois EPA concluded that the aquatic life use attainability depends primarily on physical habitat conditions such as physical conditions, flow patterns, and operational controls designed to maintain navigational use, flood control, and drainage functions in deep-draft, steep-walled shipping channels.

Statement of Reasons at 47-52. Further, the UAAs compared water quality data against general use standards as screening criteria to identify bacteria, temperature, and dissolved oxygen (“DO”) as constituents of concern. Chicago Area Waterway System Use Attainability Analysis Final Report, CDM, Aug. 2007, 4-48 to 4-53, 4-76, and 4-91; and Lower Des Plaines River Use Attainability Analysis Final Report, AquaNova International and Hay and Associates, Dec. 2003, at 2-34 and 2-95. The UAA analyses provide significant detail regarding how bacteria, temperature, and DO impact recreational and aquatic life uses, as well as many other factors, and the Agency proposes corresponding water quality standards it believes to be protective of its proposed aquatic life use designations. Id.

## **II. DISCUSSION**

Unlike the Agency’s treatment of bacteria, temperature, and DO, the proposed water quality standard for chloride did not undergo the same level of analysis in either the CAWS UAA or the LDPR UAA study. During the initial screening process in developing the UAAs, chlorides were not identified as a major water quality constraint; however, later in the process, the Agency identified chloride as a major water quality issue when it reviewed the existing data

against its proposed standard. Transcript of March 12, 2008 Hearing, *CAWS/LDPR Rulemaking* at 206-07 (Ill.Pol.Control.Bd. Apr. 8, 2008) (hereinafter “March 12, 2008 Transcript”).

In its pre-filed testimony, the Illinois EPA stated that it “expects that there will be violations of the chloride standard during the winter months when road salting takes place to address winter weather events and the safety of Illinois motorists.” Pre-filed Testimony of Scott Twait, *CAWS/LDPR Rulemaking* at 9 (Ill.Pol.Control.Bd. Dec. 21, 2007). Further, the Agency stated that all of the exceedances it can project for the proposed chloride standard can be traced back to snow melt. March 12, 2008 Transcript at 194.

Throughout the rulemaking process the Board has heard testimony from IERG member companies regarding potential issues with the Illinois EPA’s proposed aquatic life use designations, as well as potential issues with the corresponding proposed water quality standards that protect the designated uses. See Pre-Filed Testimony of Carl Adams and Robin Garibay, *CAWS/LDPR Rulemaking* at 11 and 14-15 (Ill.Pol.Control.Bd. Aug. 4, 2008), Updated Pre-Filed Testimony of James E. Huff, P.E., *CAWS/LDPR Rulemaking* at 8-11 (Ill.Pol.Control.Bd. Mar. 25, 2009), and Pre-Filed Testimony of James E. Huff, P.E., *CAWS/LDPR Rulemaking* Subdocket (C) at 3-11 (Ill.Pol.Control.Bd. Feb. 2, 2011). More specifically, IERG Members have expressed compliance concerns regarding the proposed chloride water quality standard of 500 milligrams per liter (“mg/L”) for the CAWS/LDPR waterways.

Had the Agency included chlorides in the UAAs, it is conceivable that it would have led to a different conclusion regarding the attainability of its proposed designated uses. The statements above, tying the chloride problem to road salt application for public safety, seem to implicate UAA factors 3 and 6, dealing with human caused sources of pollution and widespread social and economic impact. Instead, the Agency proposed the same 500 mg/L chloride standard

for both the CAWS and LDPR as the General Use water quality standard; a numeric standard that is expected to be systematically exceeded during the winter months when de-icing activities occur and will result in compliance issues for point sources discharging to the CAWS and LDPR. Further, without a use attainability analysis for chlorides, the Board has no basis for determining whether the proposed aquatic life uses are attainable, as required by the CWA, or the technical feasibility or economical reasonableness of the proposal, as required under the Illinois Environmental Protection Act.

It is arguable, then, that there is a deficiency in the Board's record as pertains to chlorides. This could be resolved in a number of ways, from the Board opening yet another subdocket to address chlorides, to revisiting the proposed chloride standard. In order to resolve resulting noncompliance issues of the proposed 500 mg/L chloride standard in the winter months when road salting activities occur, IERG is focusing on the latter option, and is working with the Agency to develop proposed language that includes best management practices for point source discharges.

**III. CONCLUSION**

IERG has participated in this rulemaking because its member companies will be directly impacted by the proposed aquatic life use designations and corresponding water quality standards developed during this proceeding. The record before the Board has identified that the proposed chloride standard is regularly violated in winter months, due to de-icing activities, but the impact of those chlorides on the attainability of aquatic life use designations has not been studied. IERG is working with the Agency to develop amendments to the proposal to relieve the potential compliance issues for dischargers of chlorides, and hopes to submit it for the Board's consideration during the course of the Subdocket D proceedings. IERG looks forward to addressing other comments submitted in this subdocket in its response prior to the Board moving to first notice.

IERG appreciates the opportunity to provide these comments. Thank you for your consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

Dated: March 5, 2012

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