

ILLINOIS POLLUTION CONTROL BOARD
May 16, 2013

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

ORDER OF THE BOARD (by D. Glosser):

On February 21, 2013, the Board proposed designations of aquatic life use for the Chicago Area Waterways System (CAWS) and Lower Des Plaines River (LDPR). On April 5, 2013, the Illinois Environmental Regulatory Group (IERG) filed a motion seeking clarification of the Board's order (Mot.). On April 19, 2013, the Illinois Environmental Protection Agency (IEPA) filed a response to IERG's motion (Resp.). Also on April 19, 2013, the Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council and Openlands (Environmental Groups) filed a response in opposition to the motion for clarification.

For the reasons discussed below, the Board grants the motion in part and denies the motion in part. The Board clarifies its intent with regards to water quality standards for aquatic life uses in the Upper Dresden Island Pool (UDIP), as well as the relationship between the proposed aquatic life uses of UDIP and the Chicago River with the adopted Recreational Use designation. The Board invites participants to provide comments and suggestions as to the remaining issues.

The Board first summarizes the Board's February 21, 2013 decision and then summarizes IERG's motion. The Board next summarizes IEPA's response and then the Environmental Groups' response. The Board will then clarify its February 21, 2013 opinion and explain why other issues are not clarified.

SUMMARY OF BOARD'S FIRST NOTICE

After reviewing the record and examining the Clean Water Act (CWA) goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . . ." 33 U.S.C. § 1251(a)(2), the Board proposed two aquatic life use designations and developed definitions of those aquatic life use designations. The Board proposed a CAWS Aquatic Life Use (ALU) A and a CAWS and Brandon Pool Aquatic Life Use (ALU) B. Generally CAWS ALU A waters are capable of supporting communities of native fish that are tolerant and moderately tolerant and may include sport fish species such as channel catfish, largemouth bass, bluegill, northern pike, and black crappie, and non-game fish species such as the tadpole madtom, spotfin shiner, and orangespotted sunfish. CAWS and Brandon Pool ALU B waters are

capable of supporting primarily tolerant fish species, such as central mudminnow, golden shiner, bluntnose minnow, yellow bullhead and green sunfish.

The Board proposed as CAWS ALU A waters: Upper North Shore Channel, Lower North Shore Channel, North Branch of the Chicago River, South Branch of the Chicago River, Calumet-Saganashkee (Cal-Sag) Channel, Calumet River, Little Calumet River, Grand Calumet River, Lake Calumet, and Lake Calumet Connecting Channel. The Board proposes as ALU B waters the Chicago Sanitary and Ship Canal and Brandon Pool.

The Board did not propose an aquatic life use for the Upper Dresden Island Pool (UDIP) designation. Instead, the Board proposed that the UDIP be classified as General Use, based on its ability to meet the CWA goals. However, the Board stated that it would visit the issue of appropriate water quality standards for UDIP in Subdocket D.

The Board also determined that maintaining the General Use standard for the Chicago River is appropriate as the Chicago River can meet the CWA goals in the foreseeable future. Therefore, no change is proposed for the Chicago River.

The Board opened a Subdocket E to examine issues surrounding Bubbly Creek (the South Fork of the South Branch Chicago River) as requested by the Metropolitan Water Reclamation District of Greater Chicago (District) and the Environmental Groups.

IERG'S MOTION

IERG asks that the Board clarify portions of its first-notice opinion and order dealing with the classification of the UDIP as a General Use water. Mot. at 1. IERG opines that clarification is necessary to understand how the proposed amendments will impact facilities on the UDIP. Mot. at 1-2. IERG notes that the Board appeared to recognize that the water quality standards applicable to General Use waters may need revision for the UDIP. Mot. at 2. IERG is concerned that the Board's designation of UDIP as a General Use water may have "far reaching implications not considered by the Board." *Id.* IERG asks that, in order for its members who are participating in Subdocket D, the Board clarify its position on:

1. Does the Board, by proposing to designate the UDIP as General Use, intend for all of the Subpart B water quality standards to apply to the UDIP?
2. Does the Board intend only Subpart B standards derived from aquatic life uses to apply to the UDIP?
3. Either way, how does the Board intend for all of the Subpart B standards to be implemented in the UDIP?
4. If the General Use designation for the UDIP is finalized in Subdocket C, and approved by United States Environmental Protection Agency, as

Subdocket D proceedings are underway, what is the status in the UDIP in terms of applicable water quality standards, *i.e.* do the already established Subpart B standards apply, including the thermal standard, although hearings are being held to establish a thermal standard for the UDIP?

5. In short, does the General Use designation in Subdocket C impose any requirements on the UDIP prior to the conclusion of Subdocket D?
6. Further, does the Board intend for any amendments made to the General Use standards in Subdocket D to apply to all waters in the State designated as General Use?
7. How does the Board intend for the recreational use designation adopted for the UDIP (incidental contact) to interact with the proposed designation of the UDIP as General Use? Mot. at 3.

IERG asks the Board to be cognizant of the fact that while IERG's members are preparing comments in Subdocket C, they will also be preparing for Subdocket D. Mot. at 4. IERG believes that these clarifications are necessary before IERG members can prepare for Subdocket D. *id.*

IEPA'S RESPONSE

IEPA supports IERG's motion for clarification and seeks clarification on other issues. Resp. at 1-2. IEPA states that it shares IERG's "uncertainty as to how the Board's proposal is to be interpreted and implemented." Resp. at 2. Specifically IEPA indicated that a "goal" of its proposal was to propose language that reflected UDIP's unique aquatic life use while recognizing UDIP's inability to meet the Clean Water Act goal for recreational use. Resp. at 3. IEPA questions whether all existing General Use water quality standards will be applicable in the UDIP upon adoption of the Board's proposal. *Id.*

IEPA also calls attention to the Board's decision to continue the General Use water designation for the Chicago River and how that designation impacts the Recreational Use Primary Contact designation. Resp. at 2. IEPA indicates that there may be no practical difference between the General Use Recreational Use standard and the Primary Contact designation, but the Board's opinion "is not clear as to which regulation should be applicable to the Chicago River." Resp. at 2-3.

Similarly, IEPA questions the impact of moving Bubbly Creek to a Subdocket E. Resp. at 3. IEPA notes that for purposes of the Recreational Use designation, Bubbly Creek was considered a part of the South Branch of the Chicago River, which was designated as Incidental Contact. *Id.* While IEPA does not believe Subdocket E will impact the Recreation Use designation, IEPA asks if placeholder language should be included to indicate what non-

recreational use standards are applicable to Bubbly Creek during the pendency of Subdocket E. *Id.*

ENVIRONMENTAL GROUPS' RESPONSE

The Environmental Groups do not believe there is a need for clarification. The Environmental Groups believe the points raised by IERG and IEPA can be addressed by commenting on the first-notice opinion and order and that putting the Board “to the trouble of issuing a separate decision” is an unnecessary step. The Environmental Groups also believe that corrections regarding UDIP criteria can be addressed in Subdocket D.

DISCUSSION

The Board appreciates the concerns raised by IERG and IEPA and will clarify the Board’s first-notice opinion and order in two areas. First, the Board does not intend that the General Use water quality standard will apply to the UDIP until the conclusion of Subdocket D. In Subdocket D, the Board will examine the record to determine appropriate water quality standards for UDIP . The Board invites the participants to provide clarification for the rule to alleviate any confusion. For example, should the Board delay the effective date of the proposed rule, which designates the aquatic life use for UDIP or simply wait to adopt the UDIP aquatic life use designation until Subdocket D is also adopted? These are merely two ways that the rule language could be amended to address this concern.

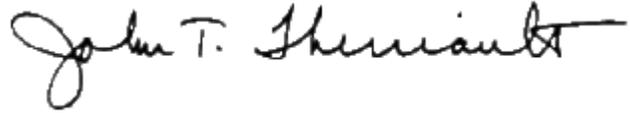
Second, by designating the UDIP as General Use and retaining the General Use designation for the Chicago River the Board did not intend to change or alter the Recreational Use designations and standards decided in Subdockets A and B. If the rule language needs clarification, we invite the participants to propose such clarifications. Likewise, if IEPA believes language is necessary as a placeholder for Bubbly Creek during the pendency of Subdocket E, the Board invites suggestions.

As to the other issues raised by IERG and IEPA, the Board agrees with the Environmental Groups that these are clarifications that can be made as a part of the first notice process. The Board’s first-notice proposal allows for comment, and the Board intended that the proposal elicit discussion. IERG’s motion and IEPA’s response touch on some of the areas in which the Board had anticipated receiving comments. The Board invites all participants to provide suggestions, comments, and to propose alternative language where appropriate.

Based on this discussion the Board denies the motion to clarify in part and grants the motion in part. The hearing officer is directed to establish a date by which comments are to be received.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 16, 2013, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board