

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 the ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S SUBDOCKET C FIRST NOTICE COMMENTS ON AQUATIC LIFE USE DESIGNATIONS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: July 1, 2013

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

Alec M. Davis
General Counsel
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

CERTIFICATE OF SERVICE

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

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on July 1, 2013; and upon:

Ms. Marie E. Tipsord
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Frederick M. Feldman
Ronald M. Hill
Margaret T. Conway
Metropolitan Water Reclamation District
100 East Erie Street
Chicago, Illinois 60611

Matthew J. Dunn
Thomas Shepherd
Environmental Bureau North
Office of the Attorney General
State of Illinois
69 West Washington, Suite 1800
Chicago, Illinois 60602

Claire A. Manning
Brown, Hay & Stephens, LLP
700 First Mercantile Bank Building
205 South Fifth Street
Post Office Box 2459
Springfield, Illinois 62705-2459

Deborah J. Williams
Stefanie N. Diers
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Robert VanGyseghem
City of Geneva
1800 South Street
Geneva, Illinois 60134-2203

Roy M. Harsch
Drinker, Biddle, & Reath, LLP
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698

Jerry Paulsen
Cindy Skrukud
Environmental Defenders
of McHenry County
110 South Johnson Street, Suite 106
Woodstock, Illinois 60098

Keith I. Harley
Elizabeth Schenkier
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, Illinois 60606

Frederick D. Keady
Vermilion Coal Company
1979 Johns Drive
Glenview, Illinois 60025

Mark Schultz
Navy Facilities and
Engineering Command
201 Decatur Avenue, Bldg. 1A
Great Lakes, Illinois 60088-2801

W.C. Blanton
Husch Blackwell LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112

James Eggen
City of Joliet, Department of Public
Work and Utilities
150 W. Jefferson Street
Joliet, Illinois 60431

Kay Anderson
American Bottoms RWTF
One American Bottoms Road
Sauget, Illinois 62201

Bob Carter
Bloomington Normal Water
Reclamation District
Post Office Box 3307
Bloomington, Illinois 61702-3307

Bernard Sawyer
Thomas Granato
Metropolitan Water Reclamation District
6001 West Pershing Road
Cicero, Illinois 60650-4112

Lisa Frede
Chemical Industry Council of Illinois
1400 East Touhy Avenue, Suite 110
Des Plaines, Illinois 60019-3338

Fredric P. Andes
Erika K. Powers
Barnes & Thornburg
1 North Wacker Drive, Suite 4400
Chicago, Illinois 60606

James L. Daugherty
Thorn Creek Basin Sanitary District
700 West End Avenue
Chicago Heights, Illinois 60411

Tracy Elzemeyer
American Water Company
727 Craig Road
St. Louis, Missouri 63141

Jack Darin
Sierra Club
70 East Lake Street, Suite 1500
Chicago, Illinois 60601-7447

Cathy Hudzik
City of Chicago – Mayor's Office
of Intergovernmental Affairs
121 North LaSalle Street
City Hall – Room 406
Chicago, Illinois 60602

Kenneth W. Liss
Andrews Environmental Engineering
3300 Ginger Creek Drive
Springfield, Illinois 62711

Albert Ettinger
53 West Jackson, Suite 1664
Chicago, IL 60604

Lyman C. Welch
Alliance for the Great Lakes
17 N. State St., Suite 1390
Chicago, Illinois 60602

Ann Alexander
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

Dr. Thomas J. Murphy
2325 North Clifton Street
Chicago, Illinois 60614

Ariel J. Teshler
Jeffrey C. Fort
Dentons US LLP
233 South Wacker Drive, Suite 7800
Chicago, Illinois 60606

Jessica Dexter
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601

Kristen Laughridge
Susan Franzetti
Nijman Franzetti LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

Tom Muth
Fox Metro Water Reclamation
682 State Route 31
Oswego, Illinois 60543

Stacy Meyers-Glen
Openlands
25 East Washington Street, Suite 1650
Chicago, Illinois 60602

Beth Steinhour
2021 Timberbrook
Springfield, Illinois 62702

James Huff
Huff & Huff, Inc.
915 Harger Road, Suite 330
Oak Brook, Illinois 60523

Irwin Polls
Ecological Monitoring and Assessment
3206 Maple Leaf Drive
Glenview, Illinois 60025

John Reichart
American Water Company
727 Craig Road
St. Louis, MO 63141

Vicky McKinley
Evanston Environment Board
223 Grey Avenue
Evanston, Illinois 60202

Olivia Dorothy
Office of Lt. Governor Sheila Simon
Room 414 State House
Springfield, IL 62706

Susan Charles
Thomas Dimond
Ice Miller LLP
200 West Madison, Suite 3500
Chicago, IL 60606

Traci Barkley
Prairie Rivers Network
1902 Fox Drive, Suite 6
Champaign, Illinois 61820

Katherine D. Hodge
N. LaDonna Driver
Monica T. Rios
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776

Jared Policicchio
Chicago Department of Law
30 N LaSalle Street
Suite 900
Chicago, Illinois 60602

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on July 1, 2013.

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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S SUBDOCKET C
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 May 16, 2013, Hearing Officer Order, hereby submits its 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 Pollution Control Board’s (“Board”) proposed aquatic life use designations.

BACKGROUND

On March 5, 2012, IERG filed Pre-First Notice comments. Illinois Environmental Regulatory Group’s Subdocket C Final Pre-First Notice Comments on Aquatic Life Use Designations, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed 35 Ill. Adm. Code Parts 301, 302, 303 and 304*, R08-9 (C), (Ill.Pol.Control.Bd. March 5, 2012) (hereafter “Pre-

First Notice Comments” rulemaking hereafter “R08-9 (C)”). IERG’s comments identified a deficiency in the Board’s record related to making a determination of aquatic life use attainability stemming from a known chlorides problem resulting from de-icing. *Id.* IERG also made the Board aware that it was in discussions with the Illinois EPA in an attempt to rectify the chlorides issue. *Id.* at 6-7.

On February 21, 2013, the Board issued its First Notice Opinion and Order in Subdocket C, which was established as the subdocket for the Board to evaluate the aquatic life use designations proposed by the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”). First Notice opinion and Order, R08-9 (C), (Ill.Pol.Control.Bd. Feb. 21, 2013) (hereafter “Opinion and Order”). In the Opinion and Order, the Board proposes aquatic life designations for the Chicago Area Waterways System (“CAWS”) and Lower Des Plaines River (“LDPR”). The Board proposes a CAWS Aquatic Life Use A and a CAWS and Brandon Pool Aquatic Life Use B. *Id.* at 1. However, the Board declined to propose a special aquatic life use designation for the Upper Dresden Island Pool (“UDIP”), as proposed by the Illinois EPA and, instead, states that “identifying the UDIP as General Use is appropriate.” *Id.* at 1 and 221. Notably absent, although possibly as a result of IERG’s stated intent to work with the Agency to resolve the issue, is any acknowledgment of the chlorides issue.

On April 5, 2013, IERG filed a Motion for Clarification requesting that the Board clarify its position with respect to the UDIP being classified as a General Use water. The Illinois Environmental Regulatory Group’s Motion for Clarification Regarding the First Notice Opinion and Order for Subdocket C, R08-9 (C) (Ill.Pol.Control.Bd. April 5, 2013) (hereafter “Motion”). IERG stated that the “Board’s decision to designate the UDIP as General Use may have far reaching implications not considered by the Board” and asked questions regarding the use

designation including, but not limited to, how and when the Board intended to apply the General Use standards to the UDIP, as well as how the recreational uses adopted in Subdocket A interact with the proposed General Use designation. *Id.* at 2 and 3.

On May 16, 2013, the Board granted in part and denied in part IERG's Motion. Order of the Board, R08-9 (C), (Ill.Pol.Control.Bd. May 16, 2013) (hereafter "Response"). In its Response, the Board responded to IERG's questions regarding its General Use designation for the UDIP that it "does not intend that the General Use water quality standard will apply to the UDIP until the conclusion of Subdocket D" and reiterated that it "will examine the record to determine appropriate water quality standards for the UDIP [in Subdocket D]." *Id.* at 4. The Board invited participants in the rulemaking to "provide clarification for the rule to alleviate any confusion." *Id.*

As for the questions regarding the impacts of the adoption of recreational uses in Subdocket A on the proposed General Use designation, the Board stated it "did not intend to change or alter the Recreational Use designations and standards decided in A and B." *Id.* Again, the Board invited participants to offer comments to clarify and alleviate confusion.

The Board declined to elaborate further on the other issues raised in IERG's Motion stating that the remaining clarifications could be addressed in First Notice comments.

PROPOSED GENERAL USE DESIGNATION OF THE UDIP

Despite its First Notice findings that "UAA factors do not justify an aquatic life use less than the [Clean Water Act ("CWA")] goal," and "that identifying UDIP as General Use is appropriate," the Board recognizes that the UDIP is not capable of achieving all General Use water quality standards that are intended to protect for that aquatic life use. Opinion and Order at 221. Specifically, the Board states it "is mindful that, particularly in the area of temperature,

water quality standards may need to be adapted for the UDIP.” *Id.* Further, in the Board’s Response to the portion of IERG’s Motion pointing out that the General Use standards include those derived for protection of more than just aquatic life uses, the Board indicated that it did not intend for the recreational use designation of the UDIP (the incidental contact designation finalized on August 18, 2011, in Subdocket A) to be impacted by the General Use designation; however, it left unanswered questions pertaining to what other aspects of the General Use water quality standards that the Board would intend to be applicable. For instance, Section 302.210 in the General Use standards is entitled “Other Toxic Substances,” and specifically identifies harm to human health as one of the bases for deriving standards, should arguably not be included in the mix of standards necessary to protect the aquatic life use designation of the UDIP.

Attempting to divine the Board’s intent with regard to the UDIP, it appears that the Board would like the General Use water quality standards that are intended to protect for aquatic life use, except for those that are identified and modified through some process in Subdocket D, to apply. IERG would suggest that it might be easier for the Board to craft a UDIP-specific use, and utilize the Subdocket D process to establish water quality standards to protect for that use, rather than continue with its General Use designation, given the degree of uncertainty that exists regarding what special conditions or exemptions would be necessary.

IERG would also caution the Board that changes to the General Use standards, which are applicable to all waters of the state not specifically identified as otherwise, will result in confusion among the regulated community located throughout the state that are subject to the General Use water quality standards. Further, the possibility that the Board’s actions would impact dischargers outside of the waters subject to this rulemaking would suggest, if not require,

notice be given to those potentially impacted sources so that they would have an opportunity to participate in the rulemaking.

For all these reasons stated above, IERG believes that an aquatic life use designation applicable solely to the UDIP is appropriate.

TIMING OF THE ADOPTION OF USE DESIGNATIONS AND WATER QUALITY STANDARDS

In its response to IERG's motion, the Board invited participants to provide clarification to the rule intended to make clear its stated intent that the General Use water quality standards not apply to the UDIP until the conclusion of Subdocket D. Response at 4. In so doing, the Board mentioned delaying the effective date of the proposed rule or waiting to adopt the UDIP aquatic life use designation until the culmination of Subdocket D as two possible options. *Id.*

Under the Illinois Administrative Procedure Act, "No rule or modification or repeal of any rule may be adopted, or filed with the Secretary of State, more than one year after the date the first notice period for the rulemaking under subsection (b) commenced." (5 ILCS 100/5-40(e)). The Board's First Notice proposal was published in the *Illinois Register* on March 15, 2013. 37 Ill. Reg. 2851. It seems highly unlikely that the Subdocket D proceeding will be complete by March 15, 2014, given that this rulemaking has spanned seven years, and testimony regarding water quality standards has yet to begin. Thus, waiting to finalize the Subdocket C proposal until Subdocket D is complete is not advisable.

Regardless of whether the Board determines to retain the proposed General Use designation for the UDIP, or create a UDIP-specific aquatic life use designation, IERG suggests postponing the effective date for the UDIP redesignation in the Subdocket C rulemaking until the corresponding Subdocket D water quality standards are final and effective.

**CHLORIDES AND USE ATTAINABILITY ANALYSIS OF PROPOSED AQUATIC
LIFE USE DESIGNATIONS**

In IERG's Pre-First Notice Comments on the Aquatic Life Use Designations, IERG stated that, based on Agency testimony, a real potential exists "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." Pre-First Notice Comments at 1. IERG also stated that "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 by the Illinois Environmental Protection Act." *Id.* at 6. IERG indicated that it "[was] 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." *Id.* at 1-2.

Since filing Pre-First Notice comments, IERG met with the Agency on several occasions to discuss IERG's concerns with the chloride water quality standard, as well as potential resolutions. On February 13, 2012, IERG met with the Agency to discuss IERG's concerns and, as a result of that discussion, IERG committed to drafting language to address potential impacts of the proposed chloride standard.

IERG presented the Agency in April 2012 with draft chloride language for it to potentially discuss with U.S. EPA. At that time, the Agency seemed receptive to IERG's draft language. In follow-up conversations with the Agency, IERG was informed that the chlorides issue was raised briefly during a conference call with U.S. EPA but, because of

time limitations, IERG's proposed language was not discussed, and that U.S. EPA instructed the Agency to look at Iowa's chloride standard. Ultimately, IERG determined that the Iowa provisions did not provide a pathway for successful resolution given the vast differences in urban density, number of dischargers, and other characteristics of the CAWS and LDPR waterways.

On August 28, 2012, IERG met with the Illinois EPA to discuss IERG's suggested changes to the proposed chloride water quality standard in the CAWS and LDPR rulemaking. During the meeting, Illinois EPA stated that it no longer intended to pursue IERG's draft language approach, and that it believed that the issue could be addressed in the permitting process via compliance schedules or the development of a TMDL.

Because IERG has been unable to address its members' concerns, it must once again reiterate what it perceives to be deficiencies in the Board's record, as well as a failure to consider whether chloride levels due to road de-icing precludes attainability of the aquatic life uses proposed by the Board.

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 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”).
Further,

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.* Nowhere, in either study, is the impact of chlorides due to road de-icing on the CAWS and LDPR assessed. Nowhere, in either study, is the feasibility for the waterways to attain the 500 mg/L chloride water quality standard considered.

As testified by both the Agency and various sources subject to this rulemaking, adoption of the 500 mg/L proposed chloride standard will result in violations during winter months and compliance concerns for dischargers to the water bodies. Pre-First Notice Comments at 5. But neither the Agency, who has proposed the chloride water quality standard, nor the Board, know whether it is attainable, because chlorides did not undergo the same level of analysis in either the CAWS UAA or the LDPR UAA study. IERG was optimistic that it could reasonably resolve this issue with the Agency; however, efforts to seek such a resolution have failed.

Given the concerns delineated above, IERG asks the Board to either: 1) create a Subdocket F for the purpose of addressing the aforementioned concerns, and direct the Agency to revisit its UAA for the CAWS and LDPR for chlorides; 2) amend its proposed use designations to recognize chloride-laden snow melt from deicing activities as a limitation on the aquatic life uses during the winter months, and adopt water quality standards in Subdocket D that take into account this limitation; or 3) acknowledge the Board's desire to adopt appropriate water quality standards in Subdocket D to include

practical compliance options for chlorides dischargers, as opposed to the Agency's proposed 500 mg/L chloride water quality standard.

U.S. EPA COMMENTS

IERG is aware of comments submitted by Tinka Hyde, Director of U.S. EPA Region V Water Division, dated June 27, 2013, regarding the Board's proposal and justification of aquatic life uses for the CAWS and LDPR. IERG's initial review of these comments reveals a number of significant issues for its membership, and further detailed analysis is clearly necessary. At this time, IERG would like to alert the Board to its intention to file additional responsive comments in the near future.

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 does not demonstrate that the UDIP is capable of fully achieving the goals of the CWA as reflected in the adoption of an incidental contact recreational use, nor attaining compliance with the General Use water quality standards, as recognized by the Board in its own comments that some General Use water quality standards would need to be revisited for this segment. IERG suggests that the Board reconsider identifying the UDIP as a General Use aquatic life designation and, instead, create a specific aquatic life use designation solely applicable to the UDIP.

Regardless of what action the Board deems prudent regarding the aquatic life use designation for the UDIP, IERG also suggests postponing the effective date for UDIP

designation in the Subdocket C rulemaking until the corresponding Subdocket D water quality standards are also effective.

Finally, the record before the Board indicates that the proposed chloride standard is regularly violated in winter months, due to de-icing activities, and that the impact of those chlorides on the attainability of aquatic life use designations has not been studied. Therefore, IERG encourages the Board to take one of the three courses of action outlined above.

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: July 1, 2013

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

Alec M. Davis
General Counsel
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512