

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: John Therriault, Clerk
 Marie Tipsord, Hearing Officer
 James R. Thompson Center
 Illinois Pollution Control Board
 100 West Randolph Street, Suite 11-500
 Chicago, Illinois 60601
 (VIA electronic mail and First Class Mail)

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board COMMENTS OF THE ILLINOIS EPA ON THE ILLINOIS POLLUTION CONTROL BOARD'S SUBDOCKET C FIRST NOTICE OPINION, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
 PROTECTION AGENCY

By:/s/Stefanie N. Diers
 Stefanie N. Diers
 Assistant Counsel

Dated: November 4, 2013
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-09 (Subdocket C)
CHICAGO AREA WATERWAY SYSTEM) (Rulemaking – Water)
AND THE LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 Ill.)
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)

**COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY ON THE ILLINOIS POLLUTION CONTROL BOARD'S SUBDOCKET C
SECOND NOTICE OPINION AND ORDER**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorney, hereby submits its Comments on the Second Notice Opinion issued by the Illinois Pollution Control Board ("Board") on October 3, 2013. In support thereof, the Illinois EPA states as follows:

I. Procedural History

On October 26, 2007, the Agency filed a rulemaking proposal to update the designated uses and accompanying water quality standards and effluent limitations for the waters currently designated for Secondary Contact and Indigenous Aquatic Life Use, which includes most waters in the Chicago Area Waterway System ("CAWS") and Lower Des Plaines River. The Board docketed this proposal as R08-09. On March 18, 2010, the Board issued an order dividing R08-09 into four separate subdockets.

On October 3, 2013, 2011, the Board issued a Second Notice Opinion and Order in subdocket C proposing two key changes: (1) Proposing an Upper Dresden Island Pool ("UDIP") aquatic-life use rather than designating the UDIP as General Use; and (2) Proposing amendments to the definitions for Aquatic Life Use A, Aquatic Life Use B and

Upper Dresden Island Pool, in response to concerns raised during First Notice. Because of the changes now proposed in the Second Notice Opinion and Order, the Board is giving the participants an opportunity to comment before the Board proposes the rule to the Joint Committee on Administrative Rules ("JCAR"). (Opinion P. 1).

II. Amended Definitions for Aquatic Life Use A, Aquatic Life Use B and the Upper Dresden Island Pool

The Illinois EPA appreciates the Board's attempt to clarify the aquatic-life-use definitions based on the comments received during First Notice. However, the changes proposed by the Board in Second Notice can cause some additional confusion; therefore, the Agency provides the following comments to be considered by the Board before sending this rule to JCAR.

1. Recommendation to Revise 35 Illinois Administrative Code 303.230 and 303.235

For reasons explained in more detail below, Illinois EPA believes that the Second Notice additions of 35 Illinois Adm. Code Sections 303.230(a)(2), 303.230(b)(2), and 303.235(b) introduce potential confusion into the proposed regulatory language. These paragraphs do not clearly distinguish the two different aquatic-life goals that are distinguished in the Clean Water Act—namely, the interim, less-natural goal of balanced populations of aquatic life versus the ultimate goal of *biological integrity*, which represents a highly natural condition. More specifically, the language in these added paragraphs does not clearly address the interim Clean Water Act goal that serves as the primary focus of the aquatic-life uses proposed in this rulemaking.

To clarify and better focus the proposed regulatory language, Illinois EPA recommends the deletion of these three paragraphs and slight modification of the accompanying paragraphs currently at 35 Illinois Adm. Code Sections 303.230(a)(1),

303.230(b)(1), and 303.235(a). These recommended revisions more clearly and directly address the relevant interim Clean Water Act aquatic-life goal than do the Second Notice versions proposed by the Board in its Second Notice Opinion and Order. Also, these recommended revisions retain the Board's Second Notice intent to describe, for each proposed use, aquatic-life conditions that are not attainable as well as those that are attainable.

Illinois EPA recommends the following revisions (including some minor corrections) to existing Second Notice versions:

Section 303.230:

a) Chicago Area Waterways System Aquatic Life Use A Waters

1) Waters designated as Chicago Area Waterway System Aquatic Life Use A Waters are capable of maintaining aquatic-life populations predominated by individuals of tolerant and ~~moderately~~ intermediately tolerant types that are adaptive to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use, flood control, and drainage functions of the waterway system. Such aquatic life may include, but is not limited to, fish species, such as channel catfish, largemouth bass, bluegill, ~~and~~ black crappie, spotfin shiner, orangespotted sunfish, common carp, and goldfish. These waters are not capable of attaining balanced aquatic life.

~~2) Waters designated as Chicago Area Waterway System Aquatic Life Use A Waters are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region, due to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use, flood control, and drainage functions of the waterway system.~~

b) Upper Dresden Island Pool Aquatic Life Use Waters

1) Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 bridge ~~shall be~~ is designated as the Upper Dresden Island Pool Aquatic Life Use. These waters are capable of maintaining aquatic-life populations consisting of individuals of tolerant, ~~moderately~~ intermediately tolerant, and intolerant types that are adaptive to the unique flow conditions necessary to maintain navigational use and upstream flood control functions of the waterway system. Such aquatic life may

include, but is not limited to, largemouth bass, bluntnose minnow, channel catfish, ~~orange-spotted~~ orangespotted sunfish, smallmouth bass, shorthead redhorse, and spottail shiner. These waters are capable of attaining balanced aquatic life.

~~2) Upper Dresden Island Pool Aquatic Life Use Waters are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region due to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use and flood control functions of this waterway system.~~

Section 303.235:

a) Waters designated as Chicago Area Waterway System and Brandon Pool Aquatic Life Use B Waters are capable of maintaining aquatic-life populations predominated by individuals of tolerant types that are adaptive to unique physical conditions and modifications of long duration, including artificially constructed channels consisting of vertical sheet-pile, concrete and rip-rap walls designed to support commercial navigation, flood control, and drainage functions in deep-draft, steep-walled shipping channels. Such aquatic life may include, but is not limited to, fish species, such as common carp, golden shiner, bluntnose minnow, yellow bullhead, and green sunfish. These waters are not capable of attaining balanced aquatic life.

~~b) Waters designated as Chicago Area Waterway System and Brandon Pool Aquatic Life Use B Waters are not presently capable of maintaining a balanced, integrated, adaptive aquatic community of organisms having a species composition, diversity, and functional organization comparable to the natural habitat of the region due to irreversible modifications that result in limited physical habitat and stream hydrology.~~

The following discussion provides additional detail about why Illinois EPA recommends the above revisions to the amended definitions the Board is proposing in Second Notice. Overall, Illinois EPA recommends that these definitions address the Clean Water Act interim goal of balanced aquatic life (sometimes referred to—albeit imprecisely—as the "fishable" goal), not the ultimate goal of *biological integrity*.

The Clean Water Act recognizes an ultimate goal of a highly natural biological condition, called "*biological integrity*". See, Clean Water Act, Section 101(a). *Biological*

integrity is currently defined as the condition "a balanced, integrated, adaptive system having a full range of ecosystem elements (genes, species, assemblages) and processes (mutation, demographics, biotic interactions, nutrient and energy dynamics, and metapopulation dynamics) expected in areas with no or minimal human influence (Karr and Dudley 1981, Karr and Chu 2000)" (page 1252 in Davies, S.P. and S.K. Jackson. 2006. *The Biological Condition Gradient: a descriptive model for interpreting change in aquatic ecosystems*. Ecological Applications 16:1251-1266). This current definition of *biological integrity* is a refinement of the earlier definition from Karr and Dudley (1981) that the Board cites on page 46 of the Second Notice. The earlier definition by Karr and Dudley (1981) and its later refinements share the fundamental property that *biological integrity* means a highly natural condition, not merely a condition of acceptably balanced aquatic-life communities. Specifically, the words, "expected in areas with no or minimal human influence", of the newer definition directly reflect the words, "comparable to that of the natural habitat of the region", of the Karr and Dudley (1981) definition. Despite the fact that relatively few waters in the eastern and Midwestern United States and perhaps none in Illinois can reasonably be expected to attain *biological integrity* in the foreseeable future, this ultimate goal serves as a useful guiding principal that represents the farsighted intent of the Clean Water Act.

The Clean Water Act also recognizes a less-natural goal: a biological condition that represents acceptably balanced communities of aquatic life. See, Clean Water Act, Section 101(a)(2). This interim goal does not represent a biological condition that is as highly natural as the condition of *biological integrity*, rather, it represents a reasonably attainable step toward achieving that ultimate goal. This interim goal is

sometimes referred to (albeit imprecisely) as the "*fishable*" goal. This interim goal of less-natural, nonetheless balanced communities of aquatic life represents the threshold that pertains directly to use-attainability analysis and therefore represents the most relevant aquatic-life goal for this rulemaking. This same interim aquatic-life goal also serves as the aquatic-life protection goal of Illinois General Use water-quality standards.

The following Figure 1 illustrates the aforementioned distinctions between these two aquatic-life goals of the Clean Water Act. Considering these distinctions, Illinois EPA believes that, in this rulemaking, adding language (e.g., Second Notice, 35 Ill. Adm. Code Section 303.230(a)(2)) that mentions the inability to attain the highly natural condition of *biological integrity* seems peripheral. The Illinois EPA instead prefers that the regulatory language help clarify that one of the proposed uses (i.e., *Upper Dresden Island Pool Aquatic Life Use*) represents ability to attain the interim Clean Water Act goal of balanced aquatic-life communities; whereas, the other two uses represent inability to attain this interim goal. These distinctions directly reflect the focus of the use-attainability analyses that pertain to this docket of this rulemaking.

Appropriately, the Second Notice descriptions at 35 Illinois Adm. Code Sections 303.230(a)(1), 303.230(b)(1), and 303.235(a) directly address the ability or inability to attain the interim Clean Water Act goal of balanced aquatic life in terms of the ability to maintain intolerant, intermediately tolerant, and tolerant types of aquatic life. However, the Second Notice additions at 35 Illinois Adm. Code Sections 303.230(a)(2), 303.230(b)(2), and 303.235(b) do not clearly reinforce these distinctions; rather, these paragraphs address inability to attain the ultimate Clean Water Act goal of *biological integrity*. While, technically, these paragraphs are accurate, they introduce potential

confusion by shifting the focus away from the more relevant interim goal of balanced aquatic life and thus blur the primary distinctions being made among the three proposed uses. Specifically, *Upper Dresden Island Pool Aquatic Life Use* represents the ability to attain such balance; whereas, the other two aquatic-life uses each represent a biological condition of imbalance, i.e., neither of these uses represent the capability to attain the interim Clean Water Act goal. The revisions recommended above by Illinois EPA refocus these descriptions on the interim Clean Water Act goal rather than on the ultimate Clean Water Act goal of *biological integrity*.

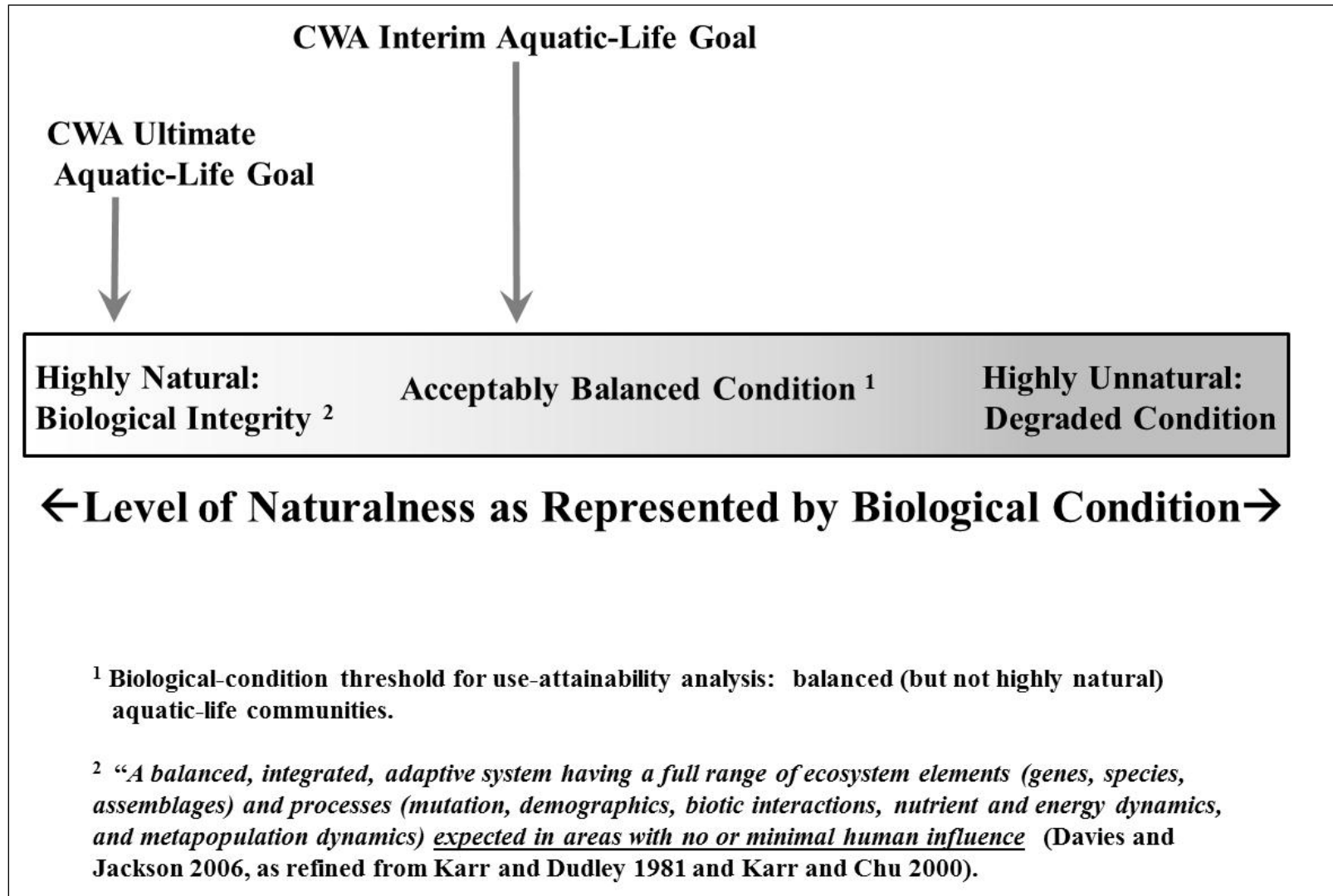


Figure 1. Distinctions between the ultimate and interim aquatic-life goals of the Clean Water Act.

2. Recommendation to Replace "Moderately Tolerant" With "Intermediately Tolerant" in Definitions for Two of the Three Proposed Aquatic-Life Uses

Illinois EPA recommends that the word, "*moderately*," be replaced by the word, "*intermediately*," in each of the Second Notice aquatic-life-use definitions at 35 Illinois Adm. Code Sections 303.230(a)(1) and 303.230(b)(1). Usage of the words, "*intermediately tolerant*," differs intentionally from that of the words, "*moderately tolerant*," as indicated by Figure 2 below. As shown in Figure 2, using the terms, "*intermediately tolerant*," in the Illinois definitions of aquatic-life uses allows distinguishing between types that are moderately intolerant and types that are moderately tolerant. The existing Second Notice usage of "*moderately tolerant*" does not allow such clear distinction; specifically, the words, "*moderately tolerant*," imply a position within the tolerant half of the tolerance continuum rather than in the middle of the entire continuum. Replacing "*moderately tolerant*" with "*intermediately tolerant*" more clearly represents the middle of this continuum, which is the intended meaning in the proposed use definitions.

Illinois EPA's recommended usage of the words "*intermediately tolerant*" is consistent with the Ohio Environmental Protection Agency (Ohio EPA) usage of "*Intermediate Tolerance*." Such usage is also consistent with U.S. Environmental Protection Agency usage of the term, "*Intermediate*," as a fish-tolerance category in Appendix C of Barbour et al. (1999; *Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers, EPA 841-B-99-002*), which is a compendium of fish-tolerance categorizations that are used for biological assessment in the eastern and Midwestern United States. (See, citations to this document in Attachment A to Statement of Reasons at p. 5-19 and Attachment B to the Statement of Reasons at p. 5-

15.) For Illinois regulatory language that defines the three aquatic-life uses of this rulemaking, Illinois EPA recommends using the terms, "*intermediately tolerant*," (rather than "*moderately tolerant*") to be consistent with the U.S. EPA and Ohio EPA rating systems for fish and to allow clear distinction between moderately intolerant versus moderately tolerant types. A change to "*intermediately tolerant*" does not create a need to remove any of the fish species that currently serve as examples in the Second Notice descriptions of each aquatic-life use.

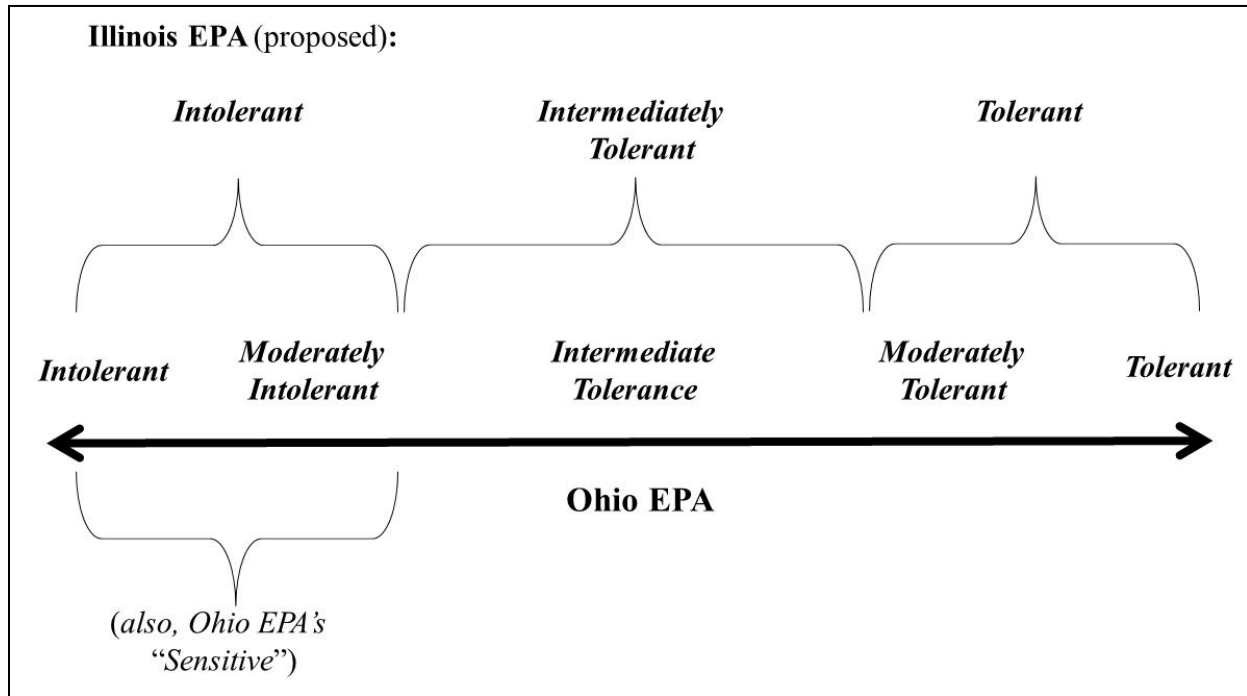


Figure 2. Tolerance continuum showing the terms that Illinois EPA recommends using for defining three proposed aquatic-life uses for lower Des Plaines River and the Chicago Area Waterways System, relative to Ohio EPA tolerance categories.

3. Recommendation to Add Shorthead Redhorse to the List of Fish Species in the Definition of Upper Dresden Island Pool Aquatic Life Use

Illinois EPA recommends adding shorthead redhorse to the list of fish species named in the Second Notice definition of *Upper Dresden Island Aquatic Life Use* at 35 Illinois Administrative Code Section 303.230(b)(1). The Second Notice version of 35 Illinois Administrative Code Section 303.230(b)(1) contains only a single species on the intolerant half of the tolerance continuum: smallmouth bass. (See, Figure 3). To improve the representativeness of this list of fish species, the Agency recommends adding shorthead redhorse. This species inhabits Upper Dresden Island Pool (See, Exhibit 367) and is rated as moderately intolerant by Ohio EPA. (See, Attachment T to the Statement of Reasons at B-1). Figure 3 shows the Ohio EPA tolerance rating of each fish species mentioned in the Second Notice definition of *Upper Dresden Island Pool Aquatic Life Use*; shorthead redhorse is added.

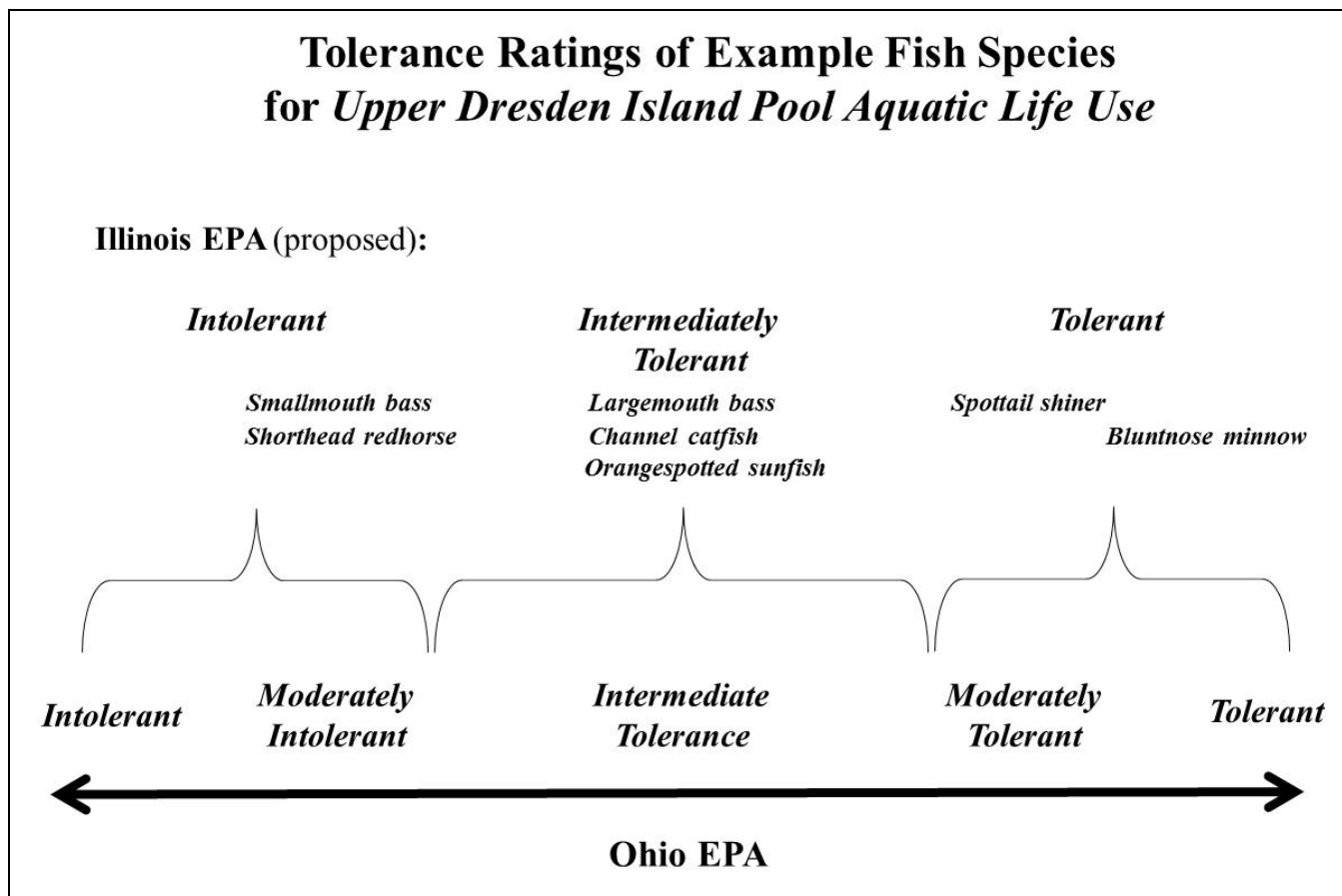


Figure 3. Tolerance ratings (based on Ohio EPA) of fish species used as examples in the Second Notice description (at proposed 35 IAC 303.230(b)(1)) of *Upper Dresden Island Pool Aquatic Life Use*. Ohio EPA rates smallmouth bass and shorthead redhorse as "Moderately Intolerant" and spottail shiner as "Moderately Tolerant".

4. Recommendation to Reorganize, in the Illinois Regulatory Language, the Three Proposed Definitions of Aquatic-life Uses

Illinois EPA recommends a reorganization, of the aquatic-life-use definitions, that better emphasizes how the two uses, *Chicago Area Waterway System Aquatic Life Use A* and *Chicago Area Waterway System and Brandon Pool Aquatic Life Use B*, represent inability to attain the Clean Water Act interim aquatic-life goal; whereas, *Upper Dresden Island Pool Aquatic Life Use* represents ability to attain this goal. The Second Notice organization of these uses unclearly combines *Chicago Area Waterway System Aquatic Life Use A* with *Upper Dresden Island Pool Aquatic Life Use* under a single section,

303.230. Whereas, the third use, *Chicago Area Waterway System and Brandon Pool Aquatic Life Use B*, occurs in its own section, 303.235. Illinois EPA interprets that this language would be clearer and more logical if a separate section were created for each use, or at least if ...*Use A* and ...*Use B* language were combined under a single section rather than combining ...*Use A* with *Upper Dresden... Use*. Specifically, the Agency recommends a separate section for the UDIP as originally proposed by the Agency. (See, Statement of Reasons, P. 47.). Such reorganization would help emphasize the primary relevant differences in biological potential among these uses.

Illinois EPA recognizes the difficulty of defining these aquatic-life uses. Overall, the Agency believes that the intent of these goals is best served by language that represents a balance between over-specifying and over-generalizing the biological condition that each use represents relative to the Clean Water Act interim aquatic-life goal---not relative to the ultimate goal of *biological integrity*, a potential that none of these uses is intended to represent.

III. Recommendation for an Upper Dresden Island Pool Aquatic Life Use

The Second Notice Opinion and Order proposes the Upper Dresden Island Pool have its own aquatic-life use rather than a General Use designation, as proposed by the Board in its First Notice Opinion. (Opinion, P. 1). The Illinois EPA is agreeable to the UDIP having its own aquatic life use designation, as originally proposed by the Agency. (Statement of Reasons, P. 47). However, the Agency does offer a few suggestions to the Board.

The Agency recommends the UDIP have its own section in the rule as previously proposed by the Agency in Section 303.237. (See, Statement of Reasons, P. 47). The

current placement proposed by the Board places the UDIP in Section 303.230(b), which is confusing when considering the rule as a whole. The aquatic-life uses are three distinct uses and should be represented as such in the regulatory language.

Also, Section 303.230(b) is not clear in the Board's proposal. On Page 1 of the Opinion and Order, the Board states, "that the biological condition in the UDIP many (this appears to be a typo and should actually read "may") not fully meet the CWA goal of fishable" and then on page 42 of the Opinion and Order, the Board states, "the Board continues to believe that the CWA aquatic life goal is attainable in the UDIP". In the proposed language found in the Board's Opinion and Order, Section 303.230(b) states, "Upper Dresden Island Pool Aquatic Life Use Waters are not presently capable ...". If the Board is somehow saying the UDIP is not presently meeting the interim Clean Water Act goal, but believes the UDIP can meet the goal in the future, then Illinois EPA recommends this clarification be made before submitting the rule to JCAR.

Finally, on October 11, 2013, Exxon Mobil filed a Motion with the Board expressing their concerns that since the Board has now proposed a UDIP aquatic life use instead of the UDIP being a General Use water, they are unsure what standards would now apply to the UDIP. (See, Exxon Mobile, Motion, P. 4). The Agency recommends that the standards for the UDIP be the standards that are consistent with what was proposed by the Agency in its original proposal filed with the Board in 2007, what was then amended by the Agency in May 2013 and the comments now being filed with the Board. (See, IEPA's Statement of Reasons, P. 47-48; See also, IEPA's Motion to Amend the Regulatory Proposal Filed in 2007). Furthermore, since the Agency has already testified to the proposed standards, the participants should have enough

information with respect to the proposal for the UDIP aquatic life use and there would no need for the Agency to testify again on the proposal.

IV. Changes That Would Need to be Addressed if the Board Adopts an Upper Dresden Island Pool Aquatic Life Use

The following are changes that the Agency proposes to its original proposal should the Board adopt a UDIP aquatic- life use.

The first changes are Period Average temperatures that changed due to the changes in the background station (Chicago Sanitary and Ship Canal – Route 83 station to the Cal-Sag Channel – Route 83 station) and using the least restrictive of the 75th percentile of the temperatures from the MWRDGC effluent and the 90th percentile, instead of the 75th percentile, of the temperature from the Cal-Sag Channel – Route 83 station.

- d) Water temperature for the Upper Dresden Island Pool, as defined in 35 Ill. Adm. Code 303.237, shall not exceed the period average limits in the following table during any period on an average basis.

<u>Months – dates</u>	<u>Period Average (°F)</u>	<u>Daily Maximum (°F)</u>
<u>January 1-31</u>	<u>54.3</u>	<u>88.7</u>
<u>February 1-28</u>	<u>53.6</u>	<u>88.7</u>
<u>March 1-31</u>	54.4 <u>57.2</u>	<u>88.7</u>
<u>April 1-15</u>	58.9 <u>60.8</u>	<u>88.7</u>
<u>April 16-30</u>	62.9 <u>62.1</u>	<u>88.7</u>
<u>May 1-15</u>	68.1 <u>69.2</u>	<u>88.7</u>
<u>May 16-31</u>	70.4 <u>71.4</u>	<u>88.7</u>
<u>June 1-15</u>	75.5 <u>74.2</u>	<u>88.7</u>
<u>June 16-30</u>	<u>85.1</u>	<u>88.7</u>
<u>July 1-31</u>	<u>85.1</u>	<u>88.7</u>
<u>August 1-31</u>	<u>85.1</u>	<u>88.7</u>
<u>September 1-15</u>	<u>85.1</u>	<u>88.7</u>
<u>September 16-30</u>	76.5 <u>77.0</u>	<u>88.7</u>

<u>October 1-15</u>	<u>73.2</u>	<u>88.7</u>
<u>October 16-31</u>	<u>69.4</u> 69.6	<u>88.7</u>
<u>November 1-30</u>	<u>66.2</u>	<u>88.7</u>
<u>December 1-31</u>	<u>59.9</u>	<u>88.7</u>

The second change is that the dissolved oxygen rule that was originally proposed as 302.405(a) needs to be added back in. It was proposed to be removed by the Agency when the Board's First Notice Opinion proposed changing the UDIP Use to General Use.

Finally, it should be noted that additional changes may be needed for Sections 302.101(d) and 302.401, depending on how the Board finalizes the UDIP aquatic life use.

V. Conclusion

The Agency appreciates the opportunity to comment on the Board's Second Notice Opinion and Order and the time and effort invested by the Board in addressing the issues covered in subdocket C. The Agency supports the other aspects of the Board's Second Notice Opinion and Order that are not addressed in detail in these comments and looks forward to the conclusion of this rulemaking docket.

WHEREFORE, the Illinois EPA respectfully requests the Illinois Pollution Control Board consider the comments and regulatory changes recommended by the Agency before proceeding to JCAR.

Respectfully submitted,

By: /s/Stefanie N. Diers
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Assistant Counsel
Division of Legal Counsel

Date: November 4, 2013

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PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached COMMENTS OF ILLINOIS EPA'S ON THE ILLINOIS POLLUTION CONTROL BOARD'S SUBDOCKET C SECOND NOTICE OPINION AND ORDER upon the person to whom it is directed by placing it an envelope addressed to:

John Therriault, Clerk
Marie Tipsord, Hearing Officer
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100 West Randolph Street, Suite 11-500
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via electronic mail on November 4th, 2013 and by mailing the document to those listed on the attached Service List by First Class Mail from Springfield, Illinois on November 4, 2013, with sufficient postage.

/s/ Stefanie N. Diers

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