

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PRE-HEARING MEMORANDUM

Environmental Law & Policy Center, Natural Resources Defense Council, Prairie Rivers Network and Sierra Club believe that it would be helpful to clarify at this time the Clean Water Act principles regarding water body use designations that govern consideration of the designations and the necessary protections of the CAWS and Lower Des Plaines River. It is clear there is confusion regarding the facts and issues relevant to the use designation decision now before the Illinois Pollution Control Board.

First, some may suggest in this hearing that since these waterways have been altered, they are not worth protecting or are entitled to less protection under the Clean Water Act. The fact is the Clean Water Act still applies.

The Clean Water Act was enacted in 1972 with a stated goal that all of the nation's waters should support healthy aquatic life and the full range of human uses possible in water, including fishing, swimming and other forms of recreation. 33 U.S.C. § 1251(a)(2). The Clean Water Act applies to *all* navigable waters in the United States, regardless of whether the watercourse has been modified by humans or is in other respects manmade (as is the case with parts of the CAWS). 33 U.S.C. § 1362(7) and *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir., 2001) (Even irrigation canals are "waters of the United States."). As stated by Linda Holst, Branch Chief of the Water Quality Branch of Region 5 of the United States Environmental Protection Agency, in her remarks to the Metropolitan Water Reclamation District of Greater Chicago on October 31, 2007:

There were statements made about the waterways, they're channels and they're not natural streams[. . . U]nder federal regulations they're navigable waters, and they are waters of the U.S. and do

still have to meet the requirements of the Clean Water Act.”
(Transcript of MWRDGC Study Session, Oct. 31, 2007, p. 213,
Holst remarks are attached as Ex. A).

Further, there is a rebuttable presumption that a waterbody should support fishable and swimmable uses. *Kansas Natural Resource Council v. Whitman*, 255 F. Supp. 2d 1208, 1209 (D. Kan. 2003); *Idaho Mining Ass’n v. Browner*, 90 F. Supp. 2d 1078, 1097-98 (D. Idaho 2000). In other words, it is assumed that fishing, swimming, and other recreational activities could take place in any water body---and the water body should be designated for those uses---unless the state shows (using one of the six specific factors described below) that those uses could not take place in a particular water body. Water quality criteria must then be established that protect those uses. If a state seeks to designate a water body in a manner that it will not be protected for the full range of recreational (e.g. swimming, fishing boating) and aquatic life uses that are presumed to be attainable, it must conduct a Use Attainability Analysis (UAA) that demonstrates that those uses are not attainable and determine the highest achievable uses. 40 C.F.R. § 131.10(j)(1).

Under the UAA regulations, there are only six ways that a state can rebut the presumption of fishability/swimmability. See 40 CFR §131.10(g). Most of these six reasons have to do with physical limitations of the water body. It is our understanding that Illinois EPA in its proposal believes that some uses are not attainable because of physical constraints in some portions of the CAWS and the Lower Des Plaines. A major issue in the proceeding will be whether it has been demonstrated in the entire portion of the water body that Illinois EPA claims suffers from the proffered constraints.

While some interested parties may argue that the proposed standards should not apply to them because of economic reasons, only one of the six regulatory factors allows for consideration of economic factors and then only under the most extreme circumstances. Under 131.10(g)(6), a use does not have to be designated for protection if the pollution controls “would result in substantial and widespread economic and social impact.” This is a test of affordability, not a cost-benefit analysis. See U.S. EPA, Interim Economic Guidance for Water Quality Standards - Workbook, available at <http://www.epa.gov/waterscience/standards/econworkbook/> (“Demonstration of substantial financial impacts is not sufficient reason to modify a use or grant a variance from water quality standards. Rather, the applicant must also demonstrate that

compliance would create widespread socioeconomic impacts on the affected community.”) As explained by U.S. EPA’s Holst:

There was a question about the widespread social and economic impact and this would be the federal test, if you want to use that, that tests to either remove a use or say that a full fishable/swimmable use is not attainable. That is not the same thing as a cost benefit. It’s an affordability test Oct., 31, 2007 Transcript p. 214, see Ex. A.)

Indeed, Metropolitan Reclamation District General Superintendent Richard Lanyon noted in a prior study session on October 10, 2007 that “[MWRDGC] ha[s] not conducted a formal economic analysis according to the EPA’s guidance. We have looked at this informally. We believe we don’t meet the criteria that the EPA has set out, whether that criteria is objective or not.” (Transcript of MWRDGC Study Session, Oct. 10, 2007, p. 82, Lanyon Statement attached as Ex. B).

In short, economic factors are of little or no relevance to the use-designation question and the UAA must proceed with the proposed use re-designation of the CAWS and Lower Des Plaines River even though there may be significant economic costs associated with it.

Further, from some past discussions and some of the recently filed pre-filed comments it is also clear that some interested parties are overly focused on what recreation and aquatic life the CAWS and Des Plaines River now have. This confuses the purpose of this UAA proceeding that relates primarily to what uses of the water are *attainable* rather than what the water body is being used for now. For example, even if in a hypothetical water body no kayaking were taking place because of pollution, the water body would have to be protected for kayaking (and the pollution abated that currently interferes with this use) if kayaking *could* take place on that water body. In other words, if kayaking is not precluded by one or more of the six factors applicable to recreational use designations referenced above, kayaking is an attainable use and must be protected.

For this reason, studies that focus on the risks of using of the water body as it is used now are of very limited relevance to the use designation question. Further, studies of the level of recreational use now are of limited relevance because they do not tell us what the level of kayaking, fishing, wading or other activity would be if people believed that the water was safe. Simply put, the relevant question is not how many people are becoming ill from current levels of


use of a polluted waterbody, but how many would become ill if it were used to the same extent as a cleaner waterbody.

Further, it is likely that much will be made of the importance of risk assessments and epidemiological studies. While these types of studies are useful in other ways, they are not relevant to the discussion of what uses are *attainable* in the CAWS. The goal of an epidemiological study is to determine how many people are getting sick as a result of current uses, not what uses would be attainable if the current risks were addressed through effluent treatment technology. Certainly, there is no reason to postpone determining what is attainable in order to allow more detailed consideration of what has already been attained. No epidemiological study can define the types of recreational uses (including significant contact uses) that *may be attainable* throughout the CAWS in the future, which is the question before the PCB based on the analysis required by 40 C.F.R. §131.10.


Similarly, studies of the fish species currently present in the lower Des Plaines River do not show what species could be present in the absence of heat pollution and other controllable human impacts on the river. The fact that a species of fish or other form of aquatic life is not present in the Lower Des Plaines shows only that that species cannot live in that water body as it is now treated. It does not say whether that aquatic life would be there with better pollution control.

Respectfully submitted,

/s/
Ann Alexander
Staff Attorney
NRDC



Jessica Dexter
Staff Attorney
ELPC



Albert Ettinger
Senior Staff Attorney
ELPC and Counsel for the Sierra
Club

ELPC EXHIBIT A

STUDY SESSION
COMMITTEE ON INDUSTRIAL WASTE AND WATER POLLUTION
METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO

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Board Room
100 East Erie Street
Chicago, Illinois

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Wednesday, October 31, 2007
10:03 o'clock a.m.

VOLUME II

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STUDY SESSION
COMMITTEE ON INDUSTRIAL WASTE AND WATER POLLUTION
METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO

* * * * *

Held on Wednesday, October 31, 2007,
commencing at the hour of 10:03 o'clock a.m., in the
Board Room, 100 East Erie Street, Chicago, Illinois,
Ms. Patricia Horton, Chairman, presiding.

Present:

Board of Commissioners:

- MS PATRICIA HORTON, Chairman
- MR. TERRENCE J. O'BRIEN, President
- MR. FRANK AVILA
- MRS. GLORIA ALITTO MAJEWSKI
- MRS. BARBARA J. MCGOWAN
- MS. KATHLEEN T. MEANY
- MS. CYNTHIA M. SANTOS
- MS. DEBRA SHORE
- MS. PATRICIA YOUNG

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Also Present:

Mr. Richard Lanyon, General Superintendent

Mr. Frederick M. Feldman, Attorney

Ms. Jacqueline Torres, Director of

Finance/Clerk

Members of the staff

Members of the press

Members of the public

1 that due to the bacteria --

2 PRESIDENT O'BRIEN: That's not the
3 question. The question is do you know of any of
4 those people that are recreating that way, are they
5 becoming sick or --

6 MR. DeYOUNG: No, I don't.

7 PRESIDENT O'BRIEN: -- ill because of
8 their contact with the water?

9 MR. DeYOUNG: No, I do not.

10 COMMISSIONER HORTON: Commissioner Meany.

11 COMMISSIONER MEANY: Mr. Lanyon, I know at
12 one point we discussed having signage along the
13 river just alerting people so that they realize that
14 they could become ill, and I was just wondering in
15 the area that was just mentioned out south, do we
16 have signage posted there?

17 MR. LANYON: Yes, we do.

18 COMMISSIONER MEANY: Thank you.

19 COMMISSIONER HORTON: Okay. Next, our
20 next speaker is Linda Holst.

21 MS. HOLST: I'm Linda Holst. I work at
22 the U.S. Environmental Protection Agency. I know we
23 were mentioned several times today, so I thought I
24 would come up and clarify a few things.

1 When Illinois actually adopts their
2 revised water quality standards for the Chicago area
3 waterways, my program would be the one that would be
4 reviewing those.

5 There were statements made about the
6 waterways, they're channels and they're not natural
7 streams and that under federal regulations they're
8 navigable waters, and they are waters of U.S. and do
9 still have to meet the requirements of the Clean
10 Water Act.

11 There was a question about EPA's
12 recommendation for secondary recreational criteria.
13 We do not have a criterion for secondary rec. Our
14 criterion is for primary contact recreation. We
15 have approved criteria across the country for
16 secondary recreation which had been based on primary
17 where people have taken usually somewhere between
18 five times and ten times the primary recreational
19 criteria, applied that to secondary recreational
20 waters.

21 When Illinois had originally done a draft
22 standards package, there was a secondary rec
23 criterion based on one of those factors, and we had
24 told them at that time that was acceptable to us.

1 And the study that folks mentioned for EPA revising
2 its current primary recreation criteria, that will
3 not come up with the second recreational criteria.

4 So I just want to clarify that. The
5 current guidance that we are doing that folks
6 mentioned in response to litigation in the Beach
7 Act, that is primary only, not secondary recreation.

8 There was a question about the widespread
9 social and economic impact, and this would be the
10 federal test, if you want to use that, that tests to
11 either remove a use or say that a full
12 fishable/swimmable use is not attainable. That is
13 not the same thing as cost benefit. It's an
14 affordability test, so it looks at the median
15 household income of the area that would be impacted.
16 So I want to make sure that -- I know there was cost
17 benefit information. That may or may not be useful
18 to any decision makers, but that's not the same
19 thing as what the federal requirements, if that's
20 the criteria that people want to use to justify
21 something less than full fishable/swimmable.

22 And then I know there was an issue, I know
23 it's a very real issue about the cost of
24 disinfection and trying to get funds for that and

1 competing with the need to get money to finish TARP,
2 and I know this is obvious, but I just thought it
3 needed to be said that there are other cities that
4 do disinfect, they're dealing with CSOs at the same
5 time, and it's not an easy thing to do; but you
6 know, cities like Indianapolis and other cities
7 around the country are grappling with the same thing
8 you're trying to do here.

9 And then finally, there was a statement
10 about disinfection, is it a question of if or when
11 and how; and if you can get beyond the if and the
12 folks -- I mean EPA would be more than happy to
13 engage in the discussions on the when and the how
14 with the District and the State and City. So I just
15 wanted to offer that.

16 COMMISSIONER HORTON: Thank you very much.
17 Next we have Sue Lannin.

18 MS. LANNIN: Actually my name is
19 Sue Lannin, not Lanyon. I'm not related to the
20 Superintendent. I wish I were of course.

21 I am Sue Lannin. I'm in my second year of
22 graduate study in community development at North
23 Park University, and I want to say thank you for
24 having this open session where citizens can come and

ELPC EXHIBIT B

STUDY SESSION
COMMITTEE ON INDUSTRIAL WASTE AND WATER POLLUTION

METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO

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Board Room
100 East Erie
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Wednesday, October 10, 2007

10:35 a.m.

STUDY SESSION
COMMITTEE ON INDUSTRIAL WASTE AND WATER POLLUTION

METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO

* * * * *

Held on Wednesday, October 10, 2007,
commencing at the hour of 10:35 a.m., in the
Board Room, 100 East Erie, Chicago, Illinois,
Ms. Patricia Horton, Chairman, presiding.

PRESENT:

MS. PATRICIA HORTON, Chairman
MR. TERRENCE J. O'BRIEN, President
MR. FRANK AVILA
MS. GLORIA ALITTO MAJEWSKI
MS. BARBARA J. MCGOWAN
MS. CYNTHIA M. SANTOS
MS. DEBRA SHORE
MS. PATRICIA YOUNG

Also Present:

Mr. Richard Lanyon, General Superintendent

Mr. Frederick M. Feldman, Attorney

Ms. Jacqueline Torres, Director of

Finance/Clerk

Members of the staff

Members of the press

Members of the public

1 downstream secondary contact to proposed
2 nonrecreational, are those downgrades is my
3 question?

4 MS. ALEXANDER: Yes. The part that is
5 upstream of North Side is in fact in some respects
6 getting a use downgrade. That's not directly
7 relevant to the question of disinfection, but
8 nonetheless, what you just said is accurate.

9 COMMISSIONER SHORE: Okay. And another
10 question and this one perhaps directed to
11 Mr. Lanyon, in Ann's testimony she said the District
12 has not provided the analysis outlined in the
13 USEPA's economic guidance. Have we ever done that
14 kind of analysis or is one under way?

15 MR. LANYON: We have not conducted a
16 formal economic analysis according to the EPA's
17 guidance. We have looked at this informally. We
18 believe we don't meet the criteria that the EPA has
19 set out, whether that criteria is objective or not.

20 COMMISSIONER SHORE: And finally, Ann, let
21 me ask you to respond to the proposition that some
22 might make, that the Cal-Sag Channel or the Sanitary
23 Ship Canal are man-made vehicles to convey effluent,
24 they're not a natural waterway, what's your response

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, the undersigned, hereby certify that I have served the
attached PRE-HEARING MEMORANDUM OF ENVIRONMENTAL LAW & POLICY

CENTER upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
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via electronic mail on January 23, 2008; and upon the attached service list by depositing said
documents in the United States Mail, postage prepaid, in Chicago , Illinois on January 18, 2008

Respectfully Submitted,



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