



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 15 2010

REPLY TO THE ATTENTION OF: WQ-16J

RECEIVED
CLERK'S OFFICE

APR 15 2010

STATE OF ILLINOIS
Pollution Control Board

PC# 290

Illinois Pollution Control Board, Clerk's Office
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Re: R2008-009 (A): In The Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304 (Recreational Use Designations)

Dear Illinois Pollution Control Board:

U.S. Environmental Protection Agency has reviewed the October 2007 proposed revisions to water quality standards (WQS) pertaining to recreational use designations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR) that are currently pending before the Illinois Pollution Control Board, and the Statement of Reasons in support of those proposed revisions. We offer the following comments for your consideration.

Section 101(a)(2) of the Clean Water Act (CWA) provides that "it is the national goal that wherever attainable, an interim goal of water quality which provides 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." Section 303(c)(2)(A) of the CWA requires state WQS to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." EPA's regulations at 40 CFR Part 131 interpret and implement these CWA provisions by requiring that WQS provide for CWA section 101(a) goal uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. See 40 CFR 131.5(a)(4), 131.6(a), and 131.10(j), and 131.20(a). The presumption may be rebutted through a use attainability analysis (UAA), which is defined at 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors." In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment.

Federal regulations (40 CFR 131.10(j)) require a UAA whenever the state designates or has designated uses that do not include the CWA section 101(a) goal uses, when the state wishes to remove CWA section 101(a) goal uses, or when the state adopts subcategories of section 101(a) goal uses that require less stringent criteria. A state can only justify not including one or

more of the section 101(a)(2) goal uses for a particular water body by demonstrating through a UAA that the use is not attainable for one of the six reasons set forth at 40 CFR 131.10(g)

Federal regulations (40 CFR 131.20(a)) also require states to re-examine water body segments that are not designated for the uses specified in section 101(a)(2) of the CWA, including for “recreation in and on the water,” every three years to determine if any new information has become available; and, if new information indicates that “recreation in and on the water” is attainable for water body segments that were not previously designated for such recreation, the state must revise its WQS accordingly. EPA commends Illinois for its current efforts to update the standards for these waters, in light of the fact that the last review of WQS for the CAWS and LDPR occurred in 1985.

At this time, Illinois Environmental Protection Agency has proposed use designations for all segments of the CAWS and LDPR that do not provide for recreation in the water; and has proposed use designations for certain of those segments that also do not provide for recreation on the water. Illinois EPA relies upon two of the six UAA factors specified in 40 CFR Part 131.10(g) to support its proposal:

(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; [and]

(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 attainment of the use.

Illinois EPA makes four primary assertions to support its proposed recreational uses. First, Illinois EPA asserts that untreated combined sewer overflows (CSOs) and undisinfected discharges from municipal wastewater treatment plants prevent recreation in the water. Second, Illinois EPA asserts that a number of human caused conditions--such as barge and other commercial boat traffic, vertical concrete walls, channelization, steep embankments, the fact that flow rates and pool stages are actively managed to prevent flooding and to maintain navigation, and the fact that development has resulted in limited shoreline access to certain waters--prevent recreation in (and, in some cases, on) the water consistent with the first factor listed above. Third, Illinois EPA asserts that many of these conditions (e.g. vertical concrete walls, channelization) also constitute hydrological modifications that preclude attainment of these recreational uses. Lastly, Illinois EPA provided in its Statement of Reasons information indicating that certain local governmental authorities have placed legal restrictions on recreational use of the CAWS and LDPR and lack definitive plans to implement measures to encourage recreation in the water.

Based upon the information in the UAA, and for the following reasons, EPA questions whether Illinois EPA has adequately demonstrated that recreation in and on the waters are not attainable for any of the six bases set forth at 40 CFR 131.10(g). First, human caused sources of pollution (specifically, CSOs and undisinfected discharges from municipal wastewater treatment

plants) can be remedied through construction and operation of storage, conveyance and treatment facilities. There also has been no demonstration that construction and operation of such facilities would either “cause more environmental damage” than the damage caused by allowing the continued discharge of pollutants (40 CFR 131.10(g)(3)), or “would result in substantial and widespread social and economic impact” (40 CFR 131.10(g)(6)). EPA notes that, in appropriate circumstances, states may be able to adopt revisions to WQS to address residual CSO discharges remaining after implementation of a CSO Long Term Control Plan, where the costs of elimination or treatment of such discharges would result in substantial and widespread social and economic impact. *See, e.g.*, EPA’s June 9, 2008, letter to the Indiana Department of Environmental Management, which can be accessed at <http://www.epa.gov/reg5oh2o/wqs5/IN%20CSO%20Rule%20Approval%20Letter.pdf>.

Second, the human caused conditions noted by Illinois EPA are not present in all segments of the CAWS and LDPR at all times, and the extent to which these conditions may impact recreation in and on the water can vary greatly from segment to segment. For example, barge traffic may not occur in all segments, the intensity of barge traffic may not be equal among all segments, and there may be certain times when barge traffic is less intense, such as holidays or weekends. Similarly, accessibility to the waterways may vary by segment, and even segments that are not directly accessible from the shoreline are accessible by boat. Moreover, there has been no demonstration that some or all of these conditions cannot be remedied or operated in a manner that would allow for recreation in and on the water. For example, place, time and manner restrictions could be placed on barge and commercial boat traffic, with complementary restrictions on recreational use.

Third, EPA notes that the UAA and public comments submitted on the proposed recreational use designations document widespread recreational use on the water (e.g., power boating, canoeing, kayaking, fishing and wading) at various times in nearly all segments of the CAWS and LDPR; and, to a lesser extent, recreation in the water (e.g., swimming, water skiing, tubing and jet skiing) in a number of segments. The fact that such recreational activities have been occurring in and on the water, notwithstanding the various human caused conditions and hydrological modifications that Illinois EPA cites in support of the proposed recreational use designations, suggests that (1) such human caused conditions and hydrologic modifications do not in fact prevent attainment of recreation in and on the water in all segments of the CAWS and LDPR and/or (2) recreation in and on the water is likely to be attainable, if the water quality limitations impacting the use are remedied, notwithstanding any current physical limitations that may be impacting the use.

Fourth, EPA believes that information on recreational prohibitions and the current lack of local government plans to promote recreation in the water are of limited relevance in assessing the attainability of use designations consistent with the section 101(a)(2) goal uses and the UAA factors set forth at 40 CFR 131.10(g).

For the reasons described above, EPA recommends that Illinois revise its proposed recreational uses to include recreation in and on the water for all segments of the CAWS and LDPR. Alternatively, Illinois could use its existing information, plus any additional information that it wishes to present, to attempt to demonstrate, on a segment-by-segment basis, that

recreation in and on the water is not attainable for one or more of the reasons set forth at 40 CFR 131.10(g). Finally, EPA notes that, although the Illinois Pollution Control Board has chosen to separate its proceedings on Illinois EPA's proposed recreational use designations from its proceedings on criteria issues, Illinois will eventually need to adopt water quality criteria to protect all of its designated uses. 40 CFR 131.11(a).

If you have any questions, please contact Candice Bauer of my staff at (312) 353-2106 or at bauer.candice@epa.gov.

Sincerely,

A handwritten signature in cursive script that reads "Linda Holst".

Linda Holst, Chief
Water Quality Branch

cc: Marcia Willhite, IEPA