

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 (A)  
(Rulemaking – Water)

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To:

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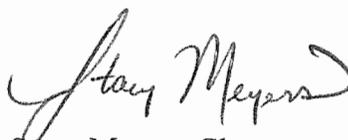
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SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board **ENVIRONMENTAL GROUPS' FINAL COMMENTS SUPPORTING RECREATIONAL USE DESIGNATIONS FOR THE CAWS AND LOWER DES PLAINES RIVER** on behalf of Environmental Groups, Environmental Law and Policy Center, Natural Resources Defense Council, Prairie Rivers Network, Sierra Club – Illinois Chapter, Friends of the Chicago River, and Openlands, a copy of which is herewith served upon you.

Respectfully Submitted,



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DATED: April 15<sup>th</sup>, 2010

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

**ENVIRONMENTAL GROUPS' FINAL COMMENTS  
SUPPORTING RECREATIONAL USE DESIGNATIONS  
FOR THE CAWS AND LOWER DES PLAINES RIVER**

Environmental Law & Policy Center, Natural Resources Defense Council, Openlands, Friends of the Chicago River, Prairie Rivers Network and the Illinois Chapter of Sierra Club (“Environmental Groups”) submit these comments in support of recreational use designations for the Chicago Area Waterways System (“CAWS”) and the Lower Des Plaines River (“LDPR”) that reflect the growing recreational use and investment in these waterways. The Federal Water Pollution Control Act (“Clean Water Act”) and consistent application of corresponding State provisions support the Illinois Environmental Protection Agency’s (“IEPA”) proposed incidental contact recreational use designations.

The Environmental Groups fully support IEPA in its determination that incidental contact recreational uses, such as kayaking,<sup>1</sup> canoeing, jet skiing, wading and fishing, exist and are attainable on the subject waterways. IEPA’s Statement of Reasons (“SOR”) and supporting testimony only begin to capture the extent that people are out on and by the water, and the nature

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<sup>1</sup> The Environmental Groups recognize that the USEPA has referenced kayaking as bordering on primary contact recreational activity. See Exh 49, p. 2; IEPA SOR, p. 43. However, like jet skiing, we agree with the IEPA that

of recreational opportunities that the CAWS and LDPR have to offer. IEPA's proposed designations are therefore minimally necessary to comply with legal requirements governing the triennial review process, the context of the current rulemaking. They are also very timely, as they are crucial to support ongoing documented increases in recreational access and activity, flowing from decades of community planning and capital projects throughout the region that rely on the waterways as a recreational asset and economic driver.

This comment sets forth the following information in support of IEPA's proposed recreational use designations: (i) an explanation of the federal Clean Water Act requirements that mandate the upgraded recreational use designations (Section I), (ii) a general discussion of the proposed designations and why they are factually supportable (Section II), and a specific description of facts supporting the designated incidental contact recreational uses in particular portions of the CAWS and LDPR (Sections III through VI).

**I. The Clean Water Act and Corresponding State Laws Support Proposed Incidental Contact Recreational Use Designations.**

***A. The Clean Water Act governs decisions in this Rulemaking concerning upgrades of designated recreational uses***

The Clean Water Act charges states with setting water quality standards, which are subject to approval by the United States Environmental Protection Agency ("USEPA"). 33 U.S.C. §1313. A critical element of that standard-setting process is the requirement that states conduct a triennial review of any standards that fall short of the Clean Water Act goal of achieving water quality that provides for recreation in and on the water – the "swimmable" part

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such recreational uses are prevalent enough (and qualify as an existing use), and as much must be protected by the proposed water quality standards.

of the broader goal generally referenced as the “fishable and swimmable” standard -- by July 1, 1983. 33 U.S.C. §1251(a)(2). To satisfy this triennial review mandate, the IEPA proposed the recreational use designations for the CAWS and LDPR that are a subject of this rulemaking. Section 5(c) of the Illinois Environmental Protection Act designates the Illinois Pollution Control Board as the authority to adopt such standards. 415 ILCS 5/5(c)(2007).

While IEPA appropriately framed its proposal under Illinois law governing water quality, that law in turn is directly derived from and subject to the delegation of federal Clean Water Act authority to IEPA pursuant to the cooperative federalist structure of the Clean Water Act. As such, all state law applicable to this proceeding and the proposed revised water quality standards must be interpreted consistently with the Clean Water Act. *See* 33 U.S.C. 1342(c)(2). In particular, as the triennial review is mandated by the Clean Water Act, this proceeding is governed by the federal requirements to determine the appropriate recreational use designations for the CAWS and LDPR.

***B. The Clean Water Act requires protection of existing and attainable recreational uses in the CAWS and LDPR***

1. Clean Water Act law supports IEPA proposed recreational use designations

The Clean Water Act requires that water quality standards “protect the public health or welfare, enhance the quality of water and serve the purposes of this Act.” 33 U.S.C. §1313(c)(2)(A). Wherever attainable, standards should provide water quality (in relevant part) to protect and consider the value of recreation in and on the water (the “fishable and swimmable” standard). 40 C.F.R. §131.2.

In setting water quality standards, states *must* protect uses that are already occurring. The Clean Water Act expressly prohibits States from downgrading existing uses (as of November 28, 1975). 40 C.F.R. §131.11(a). Additionally, use designations must reflect any uses (existing or otherwise) that could be attainable by implementing Clean Water Act effluent limits. 40 C.F.R. §131.11(a). States must protect the most sensitive recreational use and address all parameters necessary to do such. 40 C.F.R. §131.11(a).

Above and beyond protecting existing uses, States must upgrade water quality standards to the extent possible to protect primary contact recreational “swimmable” uses, unless they can prove through a Use Attainability Analysis (“UAA”) that at least one of six federal factors below precludes this use. *See* 40 C.F.R. §131.11(g).

- (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 use ...; 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;
- (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 [CWA effluent standards] would result in widespread economic and social impact.

40 C.F.R. §131.10(g). (The fifth UAA factor does not apply to recreational use designations.)

IEPA determined that, based on the six UAA factors, it could not recommend primary contact recreational use designations that meet the Clean Water Act “fishable and swimmable”

goal for the next 10 years. IEPA SOR, p. 39, IEPA Att. A, p. 1-13. Accordingly, in compliance with 40 C.F.R. §131.11(g), it conducted UAAs for the CAWS and LDPR to determine the next highest attainable use that is as close as possible to the Clean Water Act goal. IEPA Att. A, pp. 1-3, 1-4. The IEPA determined that, while UAA factors 3 and 4 preclude protecting intentional full body immersion activities (*i.e.* swimming), the evidence obtained in the UAA requires a recreational use designation upgrade for large portions of the CAWS and LDPR. *See* Section III below. In addition, as discussed in more detail in the next subsection, IEPA in its regulatory proposal did not find that the proposed recreational use designations triggered UAA factor 6 -- widespread and substantial adverse socioeconomic impact that would result from the proposed designation. *See* IEPA SOR, p. 32. IEPA relies on its UAA final reports to provide a compendium of facts to support its proposed recreational use designations.

Thus, in proposing more protective recreational use standards, IEPA is complying with two independent but intertwined Clean Water Act requirements that clearly mandate the upgrade. The designations are designed to reflect existing recreational uses on the CAWS and LDPR, which have increased substantially since the last water quality standards review process. IEPA is additionally prohibited under the Clean Water Act from removing these updated use designations, since they are based on uses that IEPA determined are attainable (regardless of any existing uses) if appropriate pollution control technology is used.

In opposition to the proposed recreational use designations, the Metropolitan Water Reclamation District of Greater Chicago (“MWRD” or the “District”) and others failed to rebut the overwhelming evidence that uses protected by IEPA’s proposed standards are “existing” and cannot be removed. Additionally, with respect to attainable uses (governed by the UAA factors analysis), they either do not directly address these factors or fail to show how the existence of

any condition precludes recreational uses that are unquestionably widespread (and thus indisputably “existing”) in the CAWS and LDPR. The bulk of their assertions (which will be addressed in detail in Sections III through VI below) argue that (i) the subject water bodies are not actually heavily used for recreation, and (ii) physical characteristics of waterways designated for incidental contact recreational use, combined with commercial boat traffic render these water bodies unsafe for use. Both of MWRD’s propositions have been overwhelmingly refuted by the Environmental Groups’ evidence, as will be explained in the subsequent sections.

Thus, MWRD’s arguments fail because they ignore the most fundamental principle of the UAA use designation process that existing uses must be protected. None of the District’s evidence disproves IEPA findings that the CAWS and LDPR support existing and attainable incidental contact recreational uses. Specifically, MWRD fails to show that existing and attainable uses are infeasible because of human caused conditions that cannot be remedied (Factor 3), unrestorable hydrologic modifications that prevent recreational use (Factor 4), or widespread and substantial adverse economic impact (Factor 6) – the latter discussed in more detail in the section below.

2. Designation opponents admittedly have not, and cannot, show that Factor 6 applies to prevent the proposed use designations.

Given that the District has devoted extensive testimony to the cost of effluent disinfection, the economic cost associated with the proposed use designation upgrades, we address that factor separately and in more detail in this section. Specifically, as has been extensively discussed in this proceeding, IEPA proposed to support its incidental contact recreational use designations with a technology-based effluent limit (the 400 cfu/100 colonies

fecal coliform discharge limit) that effectively requires MWRD to disinfect at its Stickney, Calumet and Northside wastewater treatment plants (“WWTP”). While the record reflects controversy over the exact cost of disinfection, it is indisputably clear – and the District has admitted – that none of the evidence in the record concerning the cost of disinfection supports a finding of widespread economic and social impact, the standard articulated in Factor 6.

*a. The Factor 6 test circumscribes and defines the state law “economic reasonableness” test*

In the first instance, we note that, for the reasons explained in the previous section, the Illinois “economic reasonableness” standard must be interpreted consistently with UAA Factor 6 under the Clean Water Act. That is, the economic reasonableness test, 415 ILCS 5/27 (2007), cannot be conducted by the Board in a vacuum. Rather, IEPA’s regulatory proposal is, as a matter of federal law, economically reasonable if it does not trigger Factor 6. The cooperative federal structure of the Clean Water Act, and the obligations it imposes on delegated states, do not allow for higher recreational use designations to be rejected based on considerations of cost and economic impact that do not rise to the level specified in Factor 6 – which, in turn, has been explicitly defined by USEPA in guidance documents. *See* Interim Economic Guidance for Water Quality Standards, Workbook, Appendix M to the *Water Quality Standards Handbook - Second Ed.* (EPA-823-B-94-005a), EPA-823-B-95-002 (Mar. 1995), IEPA SOR, Att. C (“USEPA Factor 6 Guidance”), p. 1-5.

In particular, it is essential to recognize that Factor 6 is *not* a cost-benefit analysis test and cannot be applied as such, notwithstanding any cost-benefit elements that may factor in to the general state “economic reasonableness” analysis in other contexts. *See* transcript of MWRD Committee on Industrial Waste and Water Pollution Study Session (MWRD Tr.) (Oct. 31, 2007

at 10:03 a.m.), p. 214:8, attached hereto as Environmental Groups Att. A). According to the USEPA, the UAA factors control setting use designations that fall short of the Clean Water Act fishable swimmable goal. *See* Environmental Groups Att. A, p. 214:8. USEPA Factor 6 Guidance clearly states that “[d]emonstration of substantial financial impacts is not sufficient reason to modify a use .... Rather, the applicant must also demonstrate that compliance would create widespread socioeconomic impacts on the affected community.” USEPA Factor 6 Guidance, p. 1-5. The federal guidance document provides a five-step test that evaluates the scope and type of impacts to the median household income in a rulemaking area. *See* USEPA Factor 6 Guidance, p. 1-7.

*b. The record does not support applying Factor 6 to preclude proposed use upgrades*

Richard Lanyon, MWRD General Superintendent, expressly admitted at a District hearing that “we believe we don’t meet the criteria [of UAA factor 6] that EPA has set out, whether that criteria is objective or not.” *See* MWRD Tr. (Oct. 10, 2007 at 10:35 a.m.), p. 82:15, attached hereto as Environmental Groups Att. B). His conclusion was supported by analyses conducted both by the District engineer and USEPA. Both MWRD and the USEPA contractor that reviewed MWRD’s associated costs made findings supporting a conclusion that the prescribed disinfection would pass this affordability test. Specifically, MWRD estimated that costs for disinfection at its Northside, Calumet and Stickney WWTPs ranged from \$963 million to approximately \$2.7 billion (*see* IEPA SOR, p. 100). The MWRD analysis set forth no evidence that this cost, calculated at \$6.78 per household per month would result in “widespread and substantial” economic impact, per Factor 6 that would “cause far reaching and serious impacts to the community.” *See* USEPA Factor 6 Guidance, p. 1-5.

Subsequently, an independent review conducted by the Science Applications International Corporation (SAIC) for the USEPA indicated that MWRD significantly overestimated its cost for disinfection. The SAIC report estimated that the total ultraviolet (UV) project capital costs at all three plants would be much lower - approximately \$242 million. *See* “Review of a Technical Memorandum, 1WQ-Disinfection Evaluation Prepared on Behalf of the MWRDGC - Final Report” (SAIC Report) (Oct. 26, 2006), p. 9, attached hereto as Environmental Groups Att. F. The SAIC projected that overall annual operations and maintenance at the plants would cost approximately \$7 million. SAIC Report, Environmental Groups Att. F, p. 9. This breaks down to approximately \$2 to \$3 more per household per month, which the SAIC concluded would be “affordable to system users.” SAIC Report, Environmental Groups Att. F, p. 17. In fact, the projected \$1.94 price to residents would even be less because the SAIC estimate did not include commercial users in its cost division. *Id.* The SAIC estimate also does not account for any potential state or federal financial assistance that MWRD has historically received for larger capital projects, like its Tunnel and Reservoir Plan (TARP).

Although MWRD admitted that Factor 6 is not applicable, it has made many references in this proceeding to purported budgetary constraints as a claimed obstacle to implementing disinfection. Clearly, the plain language of Factor 6 does not leave room for invocation of current lack of funds as a basis to avoid water quality standards upgrades – the test focuses on regional economic impact, not merely the fiscal impact on any given entity charged with protecting the public. That said, it bears noting that the information presented by the District concerning its budget does not even support a conclusion that the budgetary constraints are prohibitive. Available evidence supports a conclusion that MWRD is not only able, but has already mounted much larger projects than the one at hand. In contrast to the SAIC estimate of

\$256 million, MWRD has already spent \$2.9 billion out of a total cost of \$3.76 billion to build TARP. *See* Exh. 354, p. 1.

MWRD's narrowly-focused budget argument should also be considered – to the extent it is considered at all – in light of the hundreds of millions (if not billions) of dollars already invested by communities and government entities throughout the region that rely on water quality in the rulemaking area as an economic, recreational and ecological asset. *See* Exh. 354. In this regard, we note that Factor 6 requires consideration of the change in socioeconomic conditions that would occur as a result of compliance. *See* USEPA Factor 6 Guidance, p. 1-6. Municipalities, such as Blue Island, Robbins, and Riverdale, with the support of the South Suburban Mayors and Managers Association, have raised over a million dollars throughout the last decade to create plans to revitalize the Calumet area by using the Calumet River system as an environmental and recreational amenity. Exh. 354, pp. 3-4. This has led to investments by private development, such as \$180 million by Fay's Point and Senior Living Corporation, which have featured access to the Calumet-Sag Channel. Exh. 354, pp. 13-14. The City of Chicago similarly developed the Chicago River Agenda for "Chicago's Second Shoreline" to "improve water quality, protect nature and wildlife in the city, balance river uses, and enhance neighborhood and community life." Exh. 276, p. 1.

To forge a regional vision, the Illinois Department of Natural Resources (IDNR) commissioned the Northeastern Illinois Regional Water Trail Plan (*see* Exh. 345) in 1998, which was a broad initiative to improve and connect recreational access for non-motorized boating. The plan set an ambitious goal to offer boat launches every three miles along waterways throughout the region. It has largely been a success, and has resulted in numerous large scale capital projects. Communities have invested in over 25 boat launches along or near and

connected to the CAWS, many of which are on land leased by MWRD. *See* Exh. 354, p. 6; Exh. 346; Exh. 353. For example, the Chicago Park District and Chicago Department of Transportation have contributed a large portion of the \$5,794,000 to build six of these launches along the CAWS. The River Park and Park 526 boat launches alone cost over \$3.5 million to construct. Exh. 354, pp. 6-7.

In addition, communities have spent significant sums to draw people to the riverfront for recreation, tourism and commerce. The Chicago Park District and City of Chicago alone have spent well over \$ 139.2 million in just the projects listed in Exhibit 354 to extend parks and riverwalks along the CAWS. Local, state and federal funding have contributed to the \$7.5 million spent so far on the Calumet-Sag Trail and Centennial Trail along the CSSC. Exh. 354, pp. 12-13. These trails are part of a larger regional legacy, such as the Grand Illinois Trail, National Heritage Park Corridor and the Burnham Centennial Plan.

Communities - both public and private entities - have also invested in recreational opportunities along the CAWS and LDPR. Numerous liveries and marinas in the rulemaking area generate millions in revenue each year. Exh. 354, p. 13. The Chicago Park District invested in summer programs to bring thousands of kids out canoeing on the CAWS between 2004 and 2007. *See* Exh. 270; R08-09 Tr. at p. 39 (May 6, 2010 at 9 a.m.). Communities expend hundreds of thousands of dollars annually for high school kids and college students to train for sculling competitions on the CAWS - this is in addition to municipal investments in national competitions, such as the Division I Southland Regatta on the Calumet-Sag Channel. Exh. 354, pp. 7, 14. Examples of restoration and education projects in different phases along the CAWS and LDPR tally over \$60,674,500. Exh. 354, pp. 9-12.

All of these figures exclude revenue generated from riverwalk restaurants, business that sell recreational equipment and other commerce linked to the health of the waterways. In 2005, northeastern Illinois paddling communities spent approximately \$7 million alone on expenditures for canoe and kayak trips. *See* Exh. 347, p. 2. According to the National Marine Manufacturer's Association, approximately 28,546 recreational boaters are registered in the Chicago area. They spend a recorded \$110 million on recreational marine products, services and boating trips each year. *See* Exh. PC #53.

It is no wonder that with this level of investment in planning and projects that communities support the proposed improvements to water quality standards for the CAWS and LDPR. The resounding commitment to these waterways is reflected in a number of comments calling for the Board to protect incidental contact recreational uses. In addition to the participants in the UAA process, the following government entities and community leaders have submitted comment letters in support of upgrading the recreational use standards: IDNR (PC #182), City of Chicago (PC #10), City of Evanston ("Recreational Information Pertaining to Sculling, Boat Launches and other Recreational Activities" (Corresponds with IEPA SOR Att. K) ("IEPA Supp. to SOR Att. K") (Mar. 4, 2008), Chicago Park District, (PC #249), Forest Preserve District of Cook County (PC #187), Forest Preserve District of Will County (PC #4), Governor Pat Quinn (as former Lt. Governor) (PC #51), Congressman Mark S. Kirk (PC #75), Congressman Mike Quigley (as former Cook County Commissioner) (PC #68), State Representative Jesse Jackson, Jr. (PC #37), State Representative Elizabeth Coulson (PC #38), State Representative Elizabeth Hernandez (PC #58), State Representative Kevin Joyce (PC #61), and City of Chicago Alderman Scott Waguespack (PC #43). The sum of the regional reliance on

the health of these river systems should be considered as part of the economic reasonableness of protecting for incidental contact recreational uses.

## **II. Evidence in the Record Supports Overall the Proposed Recreational Use Upgrades.**

IEPA proposes three tiers of recreational use designations: incidental contact recreation, non contact recreation and non-recreation. IEPA divided the CAWS and LDPR into seventeen river reach segments and applied the tiered uses to these stretches as follows:

- *Incidental contact recreation*, which is “any activity in which human contact with the water is incidental and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, commercial boating, small craft recreational boating, and any limited contact associated with shoreline activity such as wading,” applies to 12 segments of the CAWS and LDPR, as described in the IEPA SOR. *See* IEPA SOR, pp. 38-9. Please see the appended map (Exh. 346), attached as Environmental Groups Att. C, for clarity.
- *Non contact recreation*, defined as “any recreational or other water use in which human contact with the water is unlikely, such as pass through commercial or recreational navigation, and where physical conditions or hydrologic modifications make direct human contact unlikely or dangerous,” applies to the Calumet River from Lake Michigan to Torrence Avenue.
- *Non-recreation*, or “a water body where the physical conditions or hydrologic modifications preclude primary contact, incidental contact and non-contact recreation,” applies to the CSSC from its confluence with the Calumet-Sag Channel to its confluence with the Des Plaines River; and the LDPR from its confluence with the CSSC to the Brandon Road Lock and Dam.

For purposes of discussion in this comment, the Environmental Groups separate the CAWS and LDPR into four incidental contact recreational use areas (collectively encompassing the 12 separate segments proposed by IEPA), as the segments in these four areas bear rough similarities in manner and degree of recreational use; and loosely correspond to effluent discharge locations of the North Side, Stickney and Calumet Metropolitan Water Reclamation District (MWRD) wastewater treatment plants (“WWTPs”). These four areas are as follows:

- *North Chicago River System*: includes stretches from the North Shore Channel to below the confluence with the South Fork of the South Branch of the Chicago River;
- *CSSC*: includes waters below the confluence of the South Fork of the South Branch of the Chicago River to below the confluence with the Calumet-Sag Channel.
- *Calumet River System*: includes the Calumet-Sag Channel to the Calumet River at Torrence Avenue; and
- *LDPR*: includes waters from the Brandon Road Lock and Dam to the Interstate 55 bridge.

The Sections below first generally establish how facts in the record support existing and attainable “incidental contact” recreational uses, and then more specifically discuss evidence supporting each of the four segments identified above.

### **III. Incidental Contact Recreational Uses Exist and are Attainable Throughout on the CAWS and LDPR.**

The evidence in the record overwhelmingly supports a conclusion that recreational uses on the CAWS and LDPR are both “existing” and attainable for Clean Water Act purposes. These uses are ongoing, on the rise, supported and encouraged by current and planned development, and thus legally and practically in need of protection through the proposed use designation upgrade.

The record is replete with evidence of a wide variety of existing and attainable recreational uses on and along the CAWS and LDPR that must be protected. *See* IEPA SOR at pp. 34, 43, 92-3; IEPA Att. B, pp. 1-11, 1-13, 5-10. IEPA relied on recreational use surveys and other forms of research during the UAA process to determine the types and amount of activities on the waterways. IEPA SOR at p. 25.

Evidence overwhelmingly shows that, contrary to MWRD assertions, the physical structure of the CAWS and LDPR do not limit incidental contact recreational uses. People with experience on the CAWS and LDPR testified and submitted comments that they actually prefer

the attributes of these waterways to other water trails in the region, and found no real conflict between recreation and navigational uses, such as commercial and barge traffic. In fact, the experience level of the tens of thousands of paddlers on the water ranges from novices that rent a canoe or participate in classes and events such as the Flatwater Classic to high school and college kids that practice sculling two hours a day for six days a week for up to 10 months out of the year. See “Students become summer scientists,” *Chicago Tribune, Local - Evanston / Skokie* (July 23-29, 2009), pp. 1, 5, attached hereto as Environmental Group Att. D. Kids as young as three years old all of the way through adults into (and well beyond) their 60s canoe and kayak the waterways. See Exh. 347; “Paddle your own canoe,” *Chicago Parent - Going Places* (Summer 2009), cover at p. 77, attached hereto as Environmental Group Att. E.

***A. Numerous types of “Incidental Contact” Recreational Activities Occur on the CAWS and LDPR.***

The IEPA, in its UAA reports and supporting documents, substantiated numerous recreational uses on the CAWS and LDPR that fall under its incidental contact use designation. It reported the existence of: non-motorized boating (canoeing, kayaking and sculling), jet skiing, wading, fishing and birdwatching. IEPA SOR, p. 34, IEPA Att. A, pp. 7-39, 7-44; IEPA Att. B, pp. 1-11, 1-13, 3-9, 6-4; IEPA Att. K; IEPA Supp. to SOR Att. K. MWRD supplemented IEPA findings with recreational data that they collected when they had opportunity for observation during their work day. MWRD trip logs from 2003 to 2005 corroborate numerous instances of fishing, canoeing, sculling, kayaking, wading, and “skiing or tubing” on the CAWS. See IEPA Supp. to SOR Att. K; Exh. 63. Of note, canoeing, sculling and kayaking occurred on every proposed incidental contact recreational use stretch of the CAWS, including the CSSC. See Exh. 63. In a separate 2003 study, the Alliance for the Great Lakes substantiated “unprecedented”

public recreational use of the CAWS. Over the span of seven and a half days, the study team documented 1,284 uses, including but not limited to such activities as canoeing, kayaking, sculling, power boating, fishing, jet skiing and wading. *See* Exh. 55, p. 15. These findings are corroborated by testimony and over 200 comments by organizations, liveries and recreational users in the rulemaking area.

***B. Recreators include “sensitive” populations, such as children, elderly and immunocompromised people.***

As stated earlier, the state must establish criteria that protect the most sensitive recreational uses in the rulemaking area. §40 C.F.R.131.11(a). According to Dr. Charles Gerba, who testified in support of the MWRD Microbial Risk Study, 25% to 35% of the U.S. population is comprised of sensitive users that fall within an immunocompromised class. This subset of the population consists of elderly (over 60 years old), children, pregnant women and people with immunity deficiencies. *See* R08-09 Tr. at p. 62 (Sept. 9 2008, 1:20 p.m.).

It is well documented that both children and elderly people recreate on waterways subject to this rulemaking. According to a 2006 survey by Openlands and Friends of the Chicago River, over 20% of paddlers in Northeastern Illinois were at least 60 years old. *See* Exh. 347 at p. 2. Children as young as six participate in events such as the Flatwater Classic. R08-09 Tr. at p. 21 (May 6, 2009, 9 a.m.). Liveries allow children as young as three years old to sit in the back of tandem kayaks for downtown Chicago tours. *See* Environmental Groups Att. E. Thousands of children have participated in Chicago Park District activities. R08-09 Tr. at p. 21 (May 6, 2009, 9 a.m.). School groups are out on the river systems studying water quality. According to the Chicago Tribune, a group of 19 incoming 7<sup>th</sup> graders spent four weeks in July 2009, studying the North Shore Channel as part of a program partnership between MWRD, Evanston Ecology

Center and the U.S. Army Corps of Engineers. This includes collecting samples of insects from canoes near “sewage pipes.” See Environmental Groups Att. D.

In addition, a significant number of sculling teams practice and compete on the CAWS. Approximately 11 clubs, high school and college crew teams row on these waterways. See Exh. 268. Lincoln Park Juniors (or LPJ Chicago), extends the opportunity to row on the Chicago River to high school students from a number of schools, such as Lincoln Park High School, Oak Park/River Forest, Von Stuben, Latin, the Lab School, Northside College Prep and Walter Payton. See Exh. 268. North Park University, Northwestern University and the University of Chicago all have crew teams on the CAWS. See Exh. 268.

***C. Incidental contact recreational uses are not only attainable, but are increasing on the CAWS and LDPR.***

It is universally accepted by all but MWRD that incidental contact recreational uses are increasing on and along the CAWS and LDPR. According to IEPA, the level of recreational activities in the rulemaking area has risen, and is expected to continue to grow. See IEPA SOR, p. 42. In support, IDNR commented that, over the last decade, our region has seen both a surge of recreational access and activity. Since 1998, communities have mobilized to implement its Northeastern Illinois Regional Water Trail Plan, and have completed 80% of its vision - 174 canoe launch sites throughout 480-miles of non-motorized water trails. Over the last 10 years, over 40 new launch sites have been added and more than 200 miles of water trails have been improved. The plan includes many of the proposed incidental contact recreational use waterways. See PC #182. Eight new boat launches have been established in the CAWS rulemaking area since the plan was adopted, including one along the CSSC. See Exh. 345; Exh.

346. Several launches have been built in addition to those recommended in the plan, and more are slated for future construction. *See* Exh. 346.

Standing alone, MWRD is the only party to contest the increase in recreational use. William Stuba, Assistant Chief Engineer in its Research and Development department testified that recreational uses remained the same between 2005 and 2007. He relied exclusively on logs recorded by MWRD employees that noticed recreational activities while performing their regular work functions. R08-09 Tr. (Sept. 8, 2009, 1:00 p.m.), p. 41. Mr. Stuba admitted that this narrow view failed to take into account not only weekend activity, but a vast amount of evidence from other sources. The assessment by MWRD is not only inaccurate, but out of touch with the various types of recreation occurring on the CAWS.<sup>2</sup>

For instance, MWRD did not cross-reference observations with statistics from liveries, such as Chicago River Canoe and Kayak, which have seen annual increases in canoe and kayak rentals along the CAWS. Ryan Chew, owner of Chicago River Canoe and Kayak, testified that his company alone puts about 7,000 paddlers on the water in a given year. Over an eight year span, they sent out 55,000 paddling trips on the Chicago River. *See* R08-09 Tr. (June 16, 2008), p. 54. His business has grown by 20 to 30 percent each year since it opened in 2001. *See* R08-09 Tr. (Oct. 5, 2009), p. 145. Kayak Chicago put an additional 10,000 people on the Chicago River in the summer of 2008. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), p. 29. They have seen a marked increase in rentals, adding 1,000 participants a year since they opened in 2000. *Id.*; R08-09 Tr. (Oct. 5, 2009), p.150. Geneva Kayak Center, the largest paddlesport retailer in Illinois, puts thousands of paddlers on the water each season through classes and the Windy City Kayak

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<sup>2</sup> This may in part be due to the fact that one of the main MWRD recreational use witnesses had not been out on the CAWS since 2003, and had never canoed, kayaked or sculled these waterways. R08-09 Tr. (Sept. 8, 2008, 1 p.m.), pp. 105, 107.

Symposium. See “Statement of Support and Objection to the Proposed Rules by the Chicago Area Sea Kayakers Association and Various Co-Petitioners,” PC #23.

Similarly, MWRD failed to account for an increase in rowing races, events and classes on the CAWS over the last decade. R08-09 Tr. (Sept. 8, 2009, 1:00 p.m.), pp. 49-51. For instance, MWRD logs did not capture hundreds of people paddling the Flatwater Classic in 2007. *Id.* at p. 49; Exh. 62, p. 16. According to Friends of the Chicago River, the event, over ten years running, has seen an increase from the initial count of 120 paddlers to an average of 511. From the first year of the event through 2007, “over 4,600 people ages 6 to 92 from 186 towns in Illinois and 18 other states have spent over \$413,000 supporting and paddling the Classic.” See Exh. 259. In addition, MWRD logs did not reflect the 2007 Cal Sag Collegiate Regatta, where over 350 students from seven universities competed in a Division I sculling race on the Calumet-Sag Channel. See Exh. 62, p. 17; Exh. 338, p. 8. MWRD logs also failed to document the 34 Chicago Park District trips led by Friends of the Chicago River for over 1,000 attendees, the vast majority (76%) of which were within the rulemaking area. See Exh. 62; Exh. 259; Exh. 270.

Even during days where MWRD recorded activities on the CAWS, its boat logs are missing observed recreational uses. For instance, the MWRD boat log for July 16, 2008, failed to note fishing and jet skiing, shown in photographs by Friends of the Chicago River that were taken as part of a tour of the CAWS. See Exh. 266; Exh. 346; R08-09 Tr. (Sept. 8, 2009) at pp. 44-46; R08-09 Tr. (May 6, 2009, 9 a.m.), p. 14. This is in part understandable, since the main reason that MWRD employees are on the waterways is to focus on assigned tasks, such as servicing its dissolved oxygen monitoring equipment. See R08-09 Tr. (Sept. 8, 2009) at pp. 55, 57, 61. Employees never were sent just to observe recreational activities. See R08-09 Tr. (Sept.

8, 2009), p. 56. In addition, only two boats on any given workday would travel through any given portion of the CAWS. *See* R08-09 Tr. (Sept. 8, 2009), p. 59.

Overall, the record demonstrates that, in stark contrast to MWRD's assessment, there is overwhelming evidence of existing incidental contact recreational uses that are not only attainable, but likely to escalate in the future. None of MWRD's arguments would warrant downgrading the most sensitive existing uses, such as kayaking and jet skiing, which are existing throughout the CAWS.

***D. The CAWS and LDPR are not only suitable for incidental contact recreational use, but have physical characteristics that are preferable to other water trails in the region.***

Environmental Groups support IEPA in its conclusion that UAA Factors 3 (hydrological modifications) and 4 (human caused conditions or sources of pollution) do not preclude incidental contact recreational uses on the CAWS and LDPR. While the record clearly supports this position, MWRD disputed the IEPA assessment, stating that the proposal inappropriately designated several stretches as incidental contact recreational areas because: "(1) the man-made and modified waterways do not have a shallow area along the banks; (2) the depth along the banks increase very rapidly proceeding away from the sides of the waterways; (3) the banks of the waterways are lined with high vertical sheet piling or large limestone rocks; (4) periodic draw downs of the water level cause an unexpected rapid increase in stream velocity and (5) a large number of commercial barges and large private power boats operate in the CAWS." *See* R08-09 Tr. (Sept. 8, 2008), pp. 64-65. The position taken by MWRD ignores the fundamental Clean Water Act principle that the State cannot downgrade designations for existing recreational uses. In addition, their own testimony as well as evidence presented by people that have more recently been out on the water and recreate on the CAWS overwhelmingly refutes these points,

and demonstrates how characteristics of the waterways support paddling and other incidental contact recreational activities.

1. There are countless points along the CAWS where incidental contact recreational users can leave the water.

IEPA in assessing UAA Factors 3 and 4, found that proposed incidental contact stretches along the CAWS and LDPR are accessible, with stream banks that range from steep slopes to gradual sloped, manicured banks. IEPA SOR, p. 34. Both Tom Bamonte and Margaret Frisbie testified that there are entrance and exit points throughout the CAWS system. R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 35, 65. According to Mr. Bamonte, there are plenty of opportunities (such as mini beaches) to leave the water - "All you need is about three feet to get out of your kayak and stand on shore." R08-09 Tr. (May 6, 2009, 9 a.m.), p. 69. This conclusion is supported by evidence of countless public and private access points throughout these waterways.

Many of the stretches in the rulemaking already meet or exceed the goal of the Northeastern Illinois Regional Water Trail Plan of building launch points every three to five miles along a water trail. *See* Exh. 345 at p. 8; Exh. 349. For instance, the distance between North Branch Chicago River public boat launches at River Park and Berteau Street is only 1.2 miles, and the stretch between the Worth Park District boat ramp to Howe's Landing along the Calumet-Sag Channel is 2.3 miles. *See* Exh. 349. These established boat launches do not include a vast number of private docks along the CAWS. Friends of the Chicago River counted 47 private docks alone on the North Branch Chicago River between Clark Park and River Park boat launches. *See* Exh. 264; Exh 349.

In addition, there are numerous other places where recreational users could leave the water. Several parties (including MWRD) testified that gradual banks line significant portions of

stretches in the CAWS. For example, contrary to his initial statement, Samuel Dennison, an MWRD biologist, agreed that there are substantial wooded expanses along the North Branch Chicago River that do not have walls. *See* R08-09 Tr. (Sept. 8, 2008, 1 p.m.), pp. 86-87. Photographs submitted by Openlands and Friends of the Chicago River illustrate numerous places throughout the CAWS that have gradual slopes and soft banks. *See* Exh. 265, Exh. 351. Laura Barghusen, Openlands, testified that, during a 2009 boat tour of the CAWS, she was struck by the mix of areas along the waterways without any seawalls. R08-09 Tr. (Oct. 5, 2010, 10 a.m.), p. 181. As a paddler, she stated she would be comfortable using these gradual slopes and banks in the rare instance that she needed to leave the water. R08-09 Tr. (Oct. 5, 2010, 10 a.m.), p. 182.

A number of ladders along the CAWS offer another way to exit the water. *See* Exh. 350. This is especially true along the mainstem Chicago River, where some of the ladders almost a block apart. *Id.* Paddlers could use these ladders to either steady themselves or leave the CAWS. *Id.*

Contrary to MWRD's assertion, there is also clear evidence of shallow wadeable areas along the CAWS. Photos submitted by Openlands and Friends of the Chicago River show people wading in various stretches of the waterways (including someone standing several feet out in the North Branch Chicago River), as well as examples of shallow places along shorelines (ie along the North Branch Chicago River by Berteau Street), and birds wading along a vegetated bank of the Calumet-Sag Channel near Fay's Point Marina. *See* Exh. 351; Exh. 265.

2. The depth of the water poses no issue to incidental contact recreational users.

Despite MWRD's assertion that the depth of the CAWS is a potential issue for paddlers, recreational users have not found this to be true. They testified that, when you fall out of your

boat, you either get back in or use your boat as a flotation device. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), p. 34; R08-09 Tr. (Oct. 5, 2009, 10 a.m.), p. 179. Beginning kayakers are taught what to do when they fall out of their boat, and how to quickly and effectively get back in. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), p. 79; R08-09 Tr. (Oct. 5, 2009, 10 a.m.), p. 179. Recreational users, like Tom Bamonte, have found the CAWS, and all of the possible places you can exit the river systems, a much better place for novices than paddling open bodies of water, such as Lake Michigan. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 68-69. A broad coalition of canoe, kayak and rowing associations agreed in their joint comments to the Board. *See* PC #23

3. Paddlers successfully coexist with other navigational uses on the CAWS, and have no reported issues with water flow.

MWRD's argument that navigational uses in the CAWS inherently conflict with recreational uses is not only unfounded, but proven to be false. Communities, such as Chicago and Blue Island, have championed a balance between these uses, both in their plans and practice. *See e.g.* Exh. 276. Experienced paddlers have also never seen a conflict. Margaret Frisbie testified that she was not aware of any conflicts with barges or boats in any of the paddling programs in the almost nine years that she worked with Friends of the Chicago River. R08-09 Tr. (May 6, 2009, 9 a.m.), p. 12. Laura Barghusen also had never heard of any incidents with barges. R08-09 Tr. (Oct. 5, 2009, 10 a.m.), p. 181. Tom Bamonte testified that never in all of the years of active paddling discussion with the Chicago Area Sea Kayakers Association "has anyone mentioned any unusual water conditions or passing vessel issues on the CAWS system." R08-09 Tr. (May 6, 2009, 9 a.m.), p. 71. He found that "there's no stretch of the CAWS that the kayakers consider off limits because of those factors." *Id.* at p. 65.

Moreover, Tom Bamonte and Margaret Frisbie both testified that the CAWS was a much more sheltered and suitable place for beginning paddlers than other exposed water trails, such as

the open waters of Lake Michigan, busy inland lakes or free-flowing rivers. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), p. 34, 69. They testified that on the CAWS, paddlers were less likely to capsize, and was advantageous because of warmer water, less waves, protection from wind, a clearer view of boat traffic, and easier egress. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), p. 34, 69-71. The Northeastern Illinois Regional Water Trail Plan similarly discusses challenges, such as high waves and wind on the Lake Michigan water trail, and choppy water and power boats traveling at high speeds in all directions on the Chain O' Lakes. Exh. 346, pp. 30, 59. There is also more of an opportunity to summon help from passers-by on bridges and along the banks. R08-089 Tr. (May 6, 2009, 9 a.m.), pp. 69-71. For these and other reasons, the CAWS offer a preferred environment for paddlers.

**IV. The Record Establishes that Heavy Recreational Uses (such as Fishing and Paddling) of the North Chicago River System Already Exists, and Will Continue to Grow (and be Attainable) in the Future.**

***A. Incidental contact recreational uses in the North Chicago River System are pervasive and have been growing over the past two decades.***

The North Chicago River System is extensively used for incidental contact recreational activities. According to Tom Bamonte, “there is an extremely heavy interest in use of the north shore channel down through the river into the loop to Ping Tom Park.” R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 73-75. The UAA documents uses on all stretches of the Chicago River within the rulemaking area, including paddling (canoeing and kayaking), wading, fishing, skiing, fishing and other activities. IEPA SOR Att. B, pp. 4-44 - 4-48. Public access to the CAWS and associated amenities, such as the Chicago Downtown Riverwalk, have become a fundamental venue for recreation and commerce. *See e.g.* 2005 Chicago River Agenda, Exh. 276.

Canoe and kayak liveries offer entry points on the northern half of the CAWS, as well as organized trips, single-day events and multi-day collaboratives, such as the Windy City Kayak Symposium. Chicago River Canoe and Kayak, with rental locations at Clark Park on the North Branch Chicago River, and at Oakton Street on the North Shore Channel, has generated over 55,000 trips over the last eight years. R08-09 Tr. (June 16, 2008), pp. 54-57. Kayak Chicago, located at North Avenue on the Chicago River, put 10,000 people on the water in 2008. The business facilitates paddling along the Main Stem Chicago River. As stated above, over the last ten years, business at these and other liveries have markedly increased.

Numerous agencies and organizations promote access and recreation on the CAWS. Chicago Park District and City of Chicago have invested millions in 6 of the 11 boat launches along these waterways. Many of these launch sites are leased by MWRD. (*See e.g.* commemorative signage at Clark Park in Exh. 348.) Additional sites, such as Ladd Arboretum, are in the planning stages. *See* Exh. 346. Friends of the Chicago River has taken thousands of paddlers out on its canoe trips from 1998-2008. *See* Exh. 267. During this time, over 4500 paddlers participated in the Friends' Flatwater Classic Canoe and Kayak Race. R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 37-39. Chicago Park District canoe trips from 2004 to 2008 put over 1300 paddlers - many of which were children - on the CAWS. *See* Exh. 270.

In addition (as described above), many rowing clubs and teams use the CAWS for practice and regattas. During the hearing on June 16, 2008, Susan Urbas, President of Chicago River Rowing and Paddling Center, testified that their membership (which includes individuals ranging from 16 to 70 years old) "make daily use of the Chicago River from April 15 through October 15 each year. R08-09 Tr. (June 16, 2008), pp. 72-74.

These uses have only continued to grow throughout the last decade. *See* PC #182. In the 2006 Paddling Survey conducted by Openlands and Friends of the Chicago River, the North Branch of Chicago River ranked 2<sup>nd</sup> in rivers paddled in 2005, and 4<sup>th</sup> in terms of total number of trips taken that year. *See* Exh. 347. This was also reflected in the highest amount of observed canoeing, sculling and other “hand-powered boating activity” along the North Branch. *See* IEPA SOR, Att. B, p. 4-45.

It is no wonder that the Chicago River water trails are one of the most popular places to paddle in the region. The Northeastern Illinois Regional Water Trail Plan describes the North Branch Chicago River Trail - “Almost entirely protected by Cook County forest preserves, it provides a safe and quiet opportunity to enjoy nature in an otherwise highly developed suburban and urban area.” Exh. 345, p. 36. It also states the North Shore Channel is “a straight canal with a slow current and few power boats. [It] is ideal for race practice, newer paddlers, and rowing shells.” Exh. 345, p. 37. Of note, the water trails plan highlights the importance of the Main Branch: “History, architecture, industry, commerce, civil engineering, and hundreds of thousands of people come together to create an unparalleled paddling experience. *Id.* The South Branch water trail, at the terminus of the I&M Canal, and its South Fork host youth and high school rowing practice, and several events, such as River Rescue Day and UCAN canoe trips. IEPA SOR, Att. B, p. 4-47.

It is important to note that the development of the CAWS as a recreational asset to the region did not come without massive public investment and planning. From 1999 to 2008, the City of Chicago and Chicago Park District invested \$73 million and \$22 million respectively in riverfront improvements and increased access. *See* Exh. 271. The Chicago River Agenda plans

for numerous amenities, such as the Downtown River Walk, along the Chicago River. During her testimony, Margaret Frisbie pointed out that many of these amenities are already in place, such as multi-use trails, boat docks, paddling launches, liveries, fishing opportunities, bird watching, water trails, high school and collegiate regattas and practices, rowing clubs, habitat improvements and commercial investments such as restaurants. R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 43-47.

***B. The Clean Water Act Prohibits Removal of These Existing Uses and Requires that the State Protect Attainable Uses.***

It is readily apparent from the wealth of evidence on record that incidental contact recreational uses, including sensitive uses such as children as young as three kayaking on the North Chicago River System, is a well-established existing (and attainable) use that warrants protection. As Mr. Bamonte stated, “[p]addling inevitably requires contact with the water. You have contact through your paddles, as you are sweeping side to side with your boat, your hands are often getting in the water. There’s water that runs down the paddle shaft. When you get in and out of your boat, you are often putting your hands on the bottom and immersing your hands in the river water.” R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 64-65.

For the reasons described above in Section III, none of the unsubstantiated arguments by MWRD warrant downgrading this highest attainable use on the North Chicago River System - nor would it be permissible to remove these existing uses under Clean Water Act regulations. 40 C.F.R. §131.11(a). Overwhelming evidence of substantial public and private access points, no known incidents from changes in flow, and successful coexistence of recreational and navigational uses refutes arguments by MWRD that there are any physical or hydrological barriers (under UAA Factors 3 and 4) that would otherwise inhibit the massive amount of recreational uses already occurring on these waterways.

**V. Incidental Contact Recreational Activities along the Chicago Sanitary and Ship Canal (“CSSC”) (to the Confluence with the Calumet-Sag Channel) are Existing Uses That Warrant Protection under the Clean Water Act.**

***A. Incidental contact recreational uses, such as kayaking, canoeing, wading and fishing, occur in the CSSC to the confluence with the Cal-Sag Channel.***

IEPA reported several incidental contact recreational uses, such as fishing, canoeing and other hand-powered boating activities, along the CSSC during its 2003 surveys. MWRD corroborated this in its boat logs, where employees recorded 55 instances where people were canoeing, kayaking and sculling on weekdays in 2006. *See* R08-09 Tr. (Sept. 8, 2008, 1 p.m.), p. 103-04. Jet skis were also seen in 2009 in the water along the edge of the Summit Boat launch. *See* Exh. 353, p. 5. According to the IEPA, the City of Chicago conducts student activities at Western Avenue, and Friends of the Chicago River reported users on the CSSC during its annual River Rescue Day. IEPA SOR, Att. B, 4-70. In addition, Tom Bamonte testified that he has paddled a popular route down from the Chicago River along the CSSC to the Summit boat launch. R08-09 Tr. (May 6, 2009, 9 a.m.), p. 74.

Recreational access along this waterway is growing. Summit operates a boat launch on MWRD land along the CSSC south of the Stickney WWTP, near the Chicago Youth Rowing Club and Kenwood Academy launch site. *See* Exh. 353; *see also* Summit sign commemorating MWRD assistance with the boat launch, Exh 348, p. 3. The Chicago Park District recently completed the Richard J. Daley Park and Boat Launch at Western Avenue and 32<sup>nd</sup> Street, which allows better access along the northern part of the CSSC. The launch cost \$550,000 to construct. *See* Exh. 354, p. 7; Exh. 353, p. 5. In addition, a new Job Corps launch site has been proposed on the CSSC approximately 1.2 miles from the boat launch at Western Avnue. It is important to note that this waterway provides a key regional connection between the well-trafficked water

trails in the Northern Chicago River System, the Calumet-Sag Channel and other Calumet River segments. As they see intensified incidental contact activity, this waterway will only continue to grow in importance to recreational users.

Contrary to MWRD assertions, evidence shows that there are additional points along the CSSC where a paddler could leave the waterway. Its own witness testified that a quarter of the streambank does not have high vertical walls. *See* R08-09 Tr. (Sept. 8, 2008), p. 99. Laura Barghusen testified that she observed ladders, such as the one along the river's edge near Loomis Avenue. *See* Exh. 350; R08-09 Tr. (Oct. 5, 2009), p. 178. She also testified that, in 2009, she observed places where the seawalls dip or disappear along the CSSC, which would allow paddlers to get out of the water. *See* R08-09 Tr. (Oct. 5, 2009), pp. 181-82. There are also shallow stretches along the CSSC, such as where children were observed wading in the water. *See* Exh. 279; R08-09 Tr. (May 6, 2009, 9 a.m.), p. 51. IEPA reported streamside access along the south bank along the Prairie trail (I&M Corridor Trail), Willow Springs, Lemont, Summit and on MWRD property. IEPA SOR, Att. L. While these additional access points expand opportunities for egress, it is important to note that, on the rare instance that a paddler tips, he or she will usually just get back in the boat (which doubles as a flotation device).

***B. The Clean Act Again Prohibits Removal of Existing Recreational Uses Along the CSSC, and Requires the State to Protect Attainable Uses.***

For the same reasons expressed in Sections III and V.B., the Clean Water Act requires that the State protect for the existing incidental contact recreational uses along the northern part of the CSSC. This especially includes the most sensitive class of users - kayakers, jet skiers and children wading in the water, which have the greatest exposure to the water. The IEPA clearly documents incidental contact recreational uses that have been occurring for at least the better part of a decade along this stretch. Recreational users confirm this use. No proof of conflicts

was brought to light during testimony by MWRD or recreational users to show how changes in flow or barge traffic pose limitations to paddling along the CSSC. To the contrary, Tom Bamonte testified that he (and other members of the Chicago Area Sea Kayakers Association) knew of no instances where either factor caused a problem. *See* R08-09 Tr. (May 6, 2009, 9 a.m.), pp. 70-71. He confirmed testimony by Laura Barghusen that there are entrance and exit points throughout the CAWS system, and found it was relatively easy for kayakers to pull off and get close to a bank to sidestep passing boats. *Id.* at p. 66. For all of these reasons, the incidental contact recreational uses proven to occur on this stretch must be protected.

**VI. The record establishes that heavy recreational uses of the Cal-Sag Channel and Calumet River segments (such as fishing, jet-skiing and non-motorized boating) already exists and will likely increase in the future.**

***A. Incidental contact recreational uses are well documented along the Calumet-Sag Channel and Calumet River segments, such as fishing, canoeing, kayaking, sculling, wading and jet-skiing.***

The UAA Report reported that in 2003 several types of recreational activities were occurring in the Calumet River System, such as fishing, canoeing, sculling, wading, and jet skiing. *See* IEPA SOR, pp. 4-83 - 4-86. Since that time, paddling uses, especially sculling, have intensified along these waters. According to the Calumet Ecological Park Association, people fish, paddle, row and ride power boats daily on the Calumet waterways. PC #151. The Chicago Area Sea Kayaking Association commented that, each year, it organizes paddles on the Calumet River / Lake Calumet area. PC #, p. 2. Its members regularly paddle the Calumet-Sag Channel. *Id.* The Chicago Rowing Center has also added to sculling practice on the Calumet-Sag Channel. R08-09 Tr. (May 6, 2009, 9 a.m.), p. 31; Exh. 269. In addition, improved water quality and restoration of natural areas, such as Hedgewich Marsh, have created wonderful opportunities

for bird watching along the river system. R08-09 Tr. (May 6, 2009, 9 a.m.), p. 44; Exh. 357; Exh. 355; “Bald is Back,” Exh. 356. Great Blue Herons and Great Egrets commonly rest on branches and wade along shallow edges of the Calumet River System, especially along the miles of stretches of Forest Preserve District land (such as Beaubien Woods) that line the waterway. *See* Exh. 351; Exh. 355.

There is a lot of access for recreational activities along the Calumet River System. Six established launch sites are situated along the proposed incidental contact stretches of the Calumet River System. *See* Exh. 346. Launches at the Village of Alsip and Worth are heavily used. IEPA SOR, Att. B, p. 4-85. The boat launch at Beaubien Woods offers paddlers access from the Cook County Forest Preserves. Numerous private boat launches and docks also offer points of egress along the waterways. *See* IEPA SOR, Att. B, p. 4-84. Fay’s Point Development recently constructed a boat launch that gives paddlers further access to the Little Calumet and Calumet-Sag Channel. *See* Exh. 346. Several marinas along the river system increase the number of places where paddlers could leave the water. *See* Exh. 346; IEPA SOR, Att. L.

Gradual slopes and breaks in seawalls also are places of egress throughout the Calumet River System. *See* Exh. 351. MWRD witness, Samuel Dennison, contradicted his own objections, by testifying that there were places along the Calumets (i.e. the Calumet-Sag Channel) without steep limestone channel walls where a canoe or kayak could exit the water. *See* R08-09 Tr. (Sept. 8, 2008, 1 p.m.), pp. 108-109. IEPA lists streamside locations, such as Saugaunashkee Slough (Cook County Forest Preserves) in its 2007 inventory of public access along the CAWS. IEPA SOR, Att. L. Additionally, areas along the streambank, like the bench along the Calumet-Sag Channel near Harlem Avenue offer unmarked places where paddlers could exit the waterway. *See* Exh. 351.

Incidental contact recreational uses will likely increase because of a tremendous focus on integrating recreational activities into land use planning and managed development. See Exh. 344; Exh. 361; Exh. 362; Exh. 363. Communities in the Calumet Area have invested over a million dollars over a decade of planning initiatives to utilize the Calumet River system as a recreational and ecological asset, and an economic driver to revitalize the area. Exh. 354, pp. 3-4. For example, the Calumet River Corridor Economic Development Vision and Strategy for seven communities (Robbins, Blue Island, Calumet Park, Riverdale, Dolton, Calumet City and Burnham) discusses how the “Little Calumet River and Calumet-Sag Channel provide unique and valuable assets for the future development of the area.” See Exh. 361, p. 3. It balances recreation and freight uses on the river (Exh. 361, p. 8), and lists as a key feature: a “high profile signature festival or event that involves all of the communities and showcases the river and surrounding Corridor, such as a rowing competition.” Exh. 361, p. 7. It also proposes “multiple access points to the river, multi-purpose marinas and a variety of water related activities.” *Id.*

Municipalities, such as Blue Island are already taking action on this plan. In November 2008, Blue Island hosted the Division I Southland Regatta on the Calumet-Sag Channel, where 350 collegiate women on teams from eight different Midwest universities competed in a series of sculling races. See Exh. 338; Exh. 354, pp. 7, 14. Blue Island planned to expand these regional competitions on the Calumet-Sag Channel in the future to additionally include men’s sculling teams. See Exh 338. Loyola Academy in Wilmette also recently asked Blue Island to host high school rowing events on the Calumet-Sag Channel. *Id.* The interest in high school and college regattas indicates that this use is very likely to continue (and increase) in the future.

In addition to expanding sculling opportunities, Blue Island has also fostered development that connects residents to the Calumet waterways. Fay’s Point Development

invested approximately \$20 million in housing, an 88-slip marina and canoe launch to provide homes and an outlet to the Little Calumet at the confluence of the Calumet-Sag Channel. *See* Exh. The developer drew Senior Living Corporation, a 90-unit senior center, to the area, which will ultimately be worth as much as \$140 million in new development. *Id.* Businesses are responding to the drive to use the Calumet River System as a draw for tourism and commercial activity. R08-09 Tr. (May 6, 2009, 9 a.m.), p. 47. Restaurants along the Calumet System (like ones along the Chicago River) benefit from the increased incidental contact recreational uses. *See* Exh. 277. All of these new developments and recreational opportunities once again stand in stark contrast to MWRD's isolated opinion that "there is generally a lack of any trend towards changing any recreational use of the Chicago Area Waterway System." R08-09 Tr. (Sept. 8, 2008, 1 p.m.), p. 32.

***B. The Clean Water Act Mandates that the State Protects Existing Uses, such as Kayaking and Jet Skiing, as Well as Attainable Uses.***

Paddlers are resoundingly out on the CAWS. The Calumet River System is no exception. Their presence is evidence of existing uses that must be protected under the Clean Water Act. Suppositions by MWRD that these uses are precluded by five factors listed above are resoundingly refuted by evidence in the record to the contrary. For example, the record supports numerous places of egress, from established launch sites and marina docks to soft banks and forest preserve district shorelines. All of the paddling organizations and people that recreate on the waterways testified and commented that they have never experienced problems with the flow of the waterways or from barge or commercial boat traffic. Every indication suggests that recreational activity and access (especially sculling) on these waterways is on the rise.

The Northeastern Illinois Regional Water Trail Plan further demonstrates the co-existence of incidental contact recreational uses and other activity on the waterways. The plan included the many of the stretches of the Calumet River System as water trails, recommending in 1998 that communities build additional launch sites along the Calumet-Sag Channel. Like many other areas, such as Lake Michigan and the Fox River system, it recommended the Calumet-Sag channel for more experienced users. Of important note, it did not find motorized uses, such as industrial traffic and jet skis to bar this use. They were merely a consideration when suggesting the experience level for paddling. The water plan recognizes the historic and cultural value of paddling in this area, stating that the “monumental, hulking and rusting relics of the river’s industrial past create an interesting and unique river trip in this section.” *See* Exh. 345, p. 72.

For all of these reasons, the existing (and readily attainable) incidental contact recreational uses - especially the most sensitive uses of sculling, jet skiing and kayaking - must be protected pursuant to the Clean Water Act mandate.

#### **VIII. The Environmental Groups Support the Uncontested IEPA Proposal for an Incidental Contact Recreational Use Designation Along the LDPR.**

##### ***A. IEPA determined that incidental contact recreational uses exist and are attainable along designated stretches of the LDPR.***

Environmental Groups support the IEPA determination that incidental contact recreational uses, such as paddling, fishing and wading, occur on the LDPR “Upper Dresden Island Pool” from the Brandon Street Lock and Dam south to the Interstate 55 bridge. *See* IEPA SOR, pp. 29, 34, 39; Exh. 346. IEPA found this portion of the LDPR to be like all other incidental contact waters in that it is “more accessible to the public and support[s] a greater variety of recreational activities” than other stretches designated for non-contact recreational use or non-recreational uses. IEPA SOR, p. 34.

Parties to this proceeding have presented no evidence to contest that these incidental contact recreational uses occur and are attainable for this particular stretch of regulatory waterway. Testimony and comments in this proceeding only serve to bolster IEPA findings. CASKA, joined by other paddling organizations, stated that its members have paddled this stretch (and every other in the rulemaking) in recent years. PC #23, p. 2. The 2006 paddling survey conducted by Openlands and Friends of the Chicago River corroborates this, showing that survey respondents paddle the Des Plaines River system. Exh. 347. In the UAA study of the LDPR Upper Dresden Island Pool, all state and local contacts that were asked about recreational opportunities on this stretch answered that incidental contact recreational uses, such as fishing, canoeing, bird watching would increase if water quality improved. IEPA SOR, Att. A, p. 7-39.

***B. Existing and Attainable Incidental Contact Recreational Uses in the LDPR Upper Dresden Island Pool Stretch Must Be Protected.***

The record unilaterally supports the IEPA proposal that incidental contact recreational uses must be protected on the LDPR. The UAA found that neither access nor navigation were a barrier to recreational uses. There are four marinas and a public landing downstream, but in proximity to this stretch (see Exh. 346). In addition, Joliet plans to build a boat launch facility that will increase boating opportunities in the area. See IEPA SOR, Att. A, p. 7-45. The riverbanks along the Upper Dresden Island stretch also afford plenty of opportunities for recreational users to leave the waterway. They are not armored, and have more gradual slopes with vegetation. IEPA SOR, Att. A, p. 4-12. Immediately downstream of the I-55 bridge, the river is designated as a “General Use” waterway, and is “surrounded by forest and natural lands.” This connection is important in that the LDPR segment proposed for incidental contact recreational use is a continuation of a larger water trail system. See Exh. 345.

**IX. Conclusion: Environmental Groups Support IEPA Proposed Incidental Contact Recreational Use Designations, which Must Protect Existing and Attainable Uses on the CAWS and LDPR.**

For the above reasons, the Environmental Groups support the IEPA proposal to update recreational use designations to reflect the current status of existing and attainable recreational uses on the CAWS and LDPR. The proposed designation of “incidental contact recreational uses” are required to protect recreational activities on these waterways, such as kayaking, canoeing, sculling, fishing, bird watching, jet skiing and wading. Overwhelming evidence shows that these uses are existing, and pursuant to the Clean Water Act, cannot be removed. In addition, evidence on record irrefutably shows that such uses are also attainable, and with massive community support will likely increase in the future. None of the UAA factors could or do preclude protecting these established uses.

Dated: April 15, 2010

Respectfully submitted,

ENVIRONMENTAL LAW AND POLICY  
CENTER

FRIENDS OF THE CHICAGO RIVER

NATURAL RESOURCES DEFENSE COUNCIL

OPENLANDS

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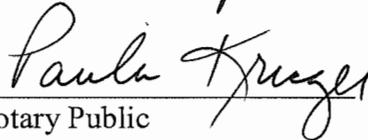
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  )  
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**PROOF OF SERVICE**

I, Stacy Meyers-Glen, on oath state that I have served the attached **ENVIRONMENTAL GROUPS' FINAL COMMENTS SUPPORTING RECREATIONAL USE DESIGNATIONS FOR THE CAWS AND LOWER DES PLAINES RIVER** via U.S. Mail, first class postage prepaid, from 25 E Washington Street, Illinois to All Counsel of Record on the attached Service List, on this 15<sup>th</sup> day of April, 2010.

  
Stacy Meyers-Glen  
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Subscribed and sworn to before me  
This 15<sup>th</sup> Day of April, 2010

  
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