

**John Therriault - Re: USEPA Letter re R2008-009**

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**From:** Gary Prichard <Prichard.Gary@epamail.epa.gov>  
**To:** "John Therriault" <THERRIAJ@ipcb.state.il.us>  
**Date:** 5/22/2012 4:20 PM  
**Subject:** Re: USEPA Letter re R2008-009  
**Attachments:** caws-letter-201216.pdf; caws-summary-20120510.pdf; caws-basis-for-decision-20120510.pdf

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*PC#1338*

John - On May 10, you were cc'd on a letter signed by Regional Administrator Susan Hedman regarding EPA's actions with regard to remaining aspects of the IPCB's decision in Subdocket A. There were a number of typographical errors in the May 10 letter, which resulted in several sentences being repeated and several other being inadvertently omitted. To clear up any confusion, the Regional Administrator signed another letter on May 16, which supersedes the May 10 letter. You were cc'd on the May 16 letter as well, which I am attaching it to this message. I am also attaching the two enclosures that accompany the May 16 letter. You included the May 10 letter and enclosures as PC 1337 in various subdockets for the R2008-009 rulemaking. We would appreciate it if you would also include in the dockets for those proceedings the May 16 letter, which supersedes the May 10 letter.

Please let me know if you have any questions.

Thank you,

Gary Prichard  
Associate Regional Counsel  
(312) 886-0570

*(See attached file: caws-letter-201216.pdf)(See attached file: caws-summary-20120510.pdf)(See attached file: caws-basis-for-decision-20120510.pdf)*



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

**MAY 18 2012**

REPLY TO THE ATTENTION OF:

John M. Kim, Interim Director  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

Dear Mr. Kim:

On September 26, 2011, the Illinois Environmental Protection Agency transmitted Illinois' new and revised water quality standards for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR) for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA). The EPA also received a letter from the Illinois Attorney General's Office on October 26, 2011, certifying in accordance with 40 CFR 131.6(e) that the standards were duly adopted pursuant to Illinois law.

On November 3, 2011, the EPA approved in accordance with section 303(c)(3) of the CWA the portion of Illinois' new and revised water quality standards that: (1) defined "Incidental Contact Recreation" and "Primary Contact Recreation" at 35 Ill. Admin. Code 301.282 and 301.323, and (2) established a Primary Contact Recreation use designation for five segments of the CAWS at 35 Ill. Admin. Code 303.220(a)-(b) and (d)-(f). In a letter dated May 10, 2012, the EPA intended to take action in accordance with section 303(c)(3) on the remaining portions of Illinois' new and revised water quality standards, by approving most aspects of those new and revised water quality standards and disapproving others. However, due to typographical errors, several sentences in one paragraph on page 4 of that letter were repeated again on page 5, and several sentences that should have been in the paragraph that started at the bottom of page 5 were inadvertently omitted. To clear up any confusion, the EPA is issuing today's letter, which supersedes the May 10, 2012, letter, and enclosing again the May 10, 2012, enclosures. Today's letter and enclosures are identical to the May 10, 2012, letter and enclosures except for the addition of this explanatory paragraph, removal of the redundant sentences and inclusion of the sentences that were inadvertently omitted from the May 10, 2012, letter.

The new and revised water quality standards that the EPA is acting on today were the result of the Illinois Pollution Control Board's finalization of one of Illinois' four rulemaking proceedings that, together, will update all aspects of Illinois' water quality standards for the CAWS and LDPR. The new and revised water quality standards that the Illinois EPA submitted on September 26, 2011, reflect the IPCB's decisions on recreational use issues in Subdocket A of the CAWS and LDPR proceedings. However, they also include revisions pertaining to other uses and criteria (e.g., aquatic life) for certain segments of the CAWS. In contrast to the recreational

designated uses submitted to the EPA for review, the IPCB has not finalized its proceedings regarding other uses and criteria. Therefore, these changes are not yet supported by sufficient data and analyses. It is possible that Illinois will be able to resolve today's disapprovals pertaining to the changes in Illinois' new and revised standards that affect the uses and criteria not pertaining to recreation once it finalizes and submits the results of the IPCB's proceedings in Subdockets C and D.

**I. The EPA Approves Illinois' Revisions for Five Primary Contact Recreation Water Segments Addressed in its November 3, 2011 Action but Disapproves Criteria Deletion for Lower North Shore Channel**

The EPA approves Illinois' revisions that ensure the continued applicability of Illinois' previously-approved Indigenous Aquatic Life standards in 35 Ill. Admin. 302, Subpart D to the five segments listed below:

1. The Lower North Shore Channel from the North Side Water Reclamation Plant to its confluence with the North Branch of the Chicago River.
2. The North Branch of the Chicago River from its confluence with the North Shore Channel to its confluence with the South Branch of the Chicago River and Chicago River.
3. The South Branch of the Chicago River.
4. The Little Calumet River from its confluence with the Calumet River and Grand Calumet River to its confluence with the Calumet-Sag Channel.
5. The Calumet-Sag Channel.

The EPA also approves Illinois' removal of the Secondary Contact recreational use designation for these five segments of the CAWS. That designation is now obsolete for these segments in light of Illinois' designation of those segments as Primary Contact Recreation Waters, which the EPA approved on November 3, 2011.

The EPA disapproves Illinois' removal of the site-specific dissolved oxygen criteria that previously applied to the Lower North Shore Channel from the North Side Water Reclamation Plant to its confluence with the North Branch of the Chicago River. The EPA is disapproving Illinois' removal in accordance with 40 CFR 131.5(a)(2) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a).

To address this disapproval, Illinois must revise its water quality standards to reinstate its dissolved oxygen criteria that previously existed at 35 Ill. Admin. Code 303.441(j) for the Lower North Shore Channel. Alternatively, as part of the IPCB's proceedings in Subdockets C or D, Illinois could develop and provide to the EPA a sound scientific rationale for adoption of criteria for the Lower North Shore Channel that are less stringent than the dissolved oxygen criteria specified at 35 Ill. Admin. Code 303.441(j) so long as they adequately protect the applicable designated uses.

## **II. The EPA Approves Illinois Changing the Name of the Primary Contact Recreation Use Designation for the Chicago River and Disapproves the Removal of Other Uses and Criteria**

The EPA approves Illinois' changing the name of the primary contact recreation use designation for the Chicago River from "General Use" to "Primary Contact Recreation."

The EPA disapproves Illinois' removal of the General Use designation for the Chicago River to the extent that it removed the aspects of the General Use designation that "protect the State's water for aquatic life . . . , wildlife, agricultural use, . . . and most industrial uses and ensure the aesthetic quality of the State's aquatic environment." The EPA also disapproves Illinois' removal of the General Use criteria set forth at 35 Ill. Admin. Code 302, Subpart B that previously applied to the Chicago River. The EPA is disapproving Illinois' revisions in accordance with 40 CFR 131.5(a)(1), (2), (4) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a).

To address the disapprovals pertaining to this segment, Illinois must revise its water quality standards to adopt both: (1) designated uses that "protect the State's water for aquatic life . . . , wildlife, agricultural use, . . . and most industrial uses and ensure the aesthetic quality of the State's aquatic environment" (i.e., the aspects of the General Use designation that Illinois removed) along with criteria that are as protective of these uses as the criteria at 35 Ill. Admin. Code 302, Subpart B, and (2) criteria that protect the newly adopted Primary Contact Recreation use designation. Alternatively, as part of the IPCB's proceedings in Subdockets C or D, Illinois could develop and provide to the EPA methods used, analyses conducted, scientific rationale and other information demonstrating the appropriateness under federal law of both: (1) Illinois' removal of the aspects of Illinois' General Use designation for the Chicago River that "protect the State's water for aquatic life . . . , wildlife, agricultural use, . . . and most industrial uses and ensure the aesthetic quality of the State's aquatic environment," and (2) adoption of criteria for the Chicago River that differ from those specified at 35 Ill. Admin. Code 302, Subpart B.

## **III. The EPA Approves Illinois Changing the Name of the Secondary Contact Recreation Use Designation for Seven Incidental Contact Water Segments**

The EPA approves Illinois' changing the name of the secondary contact recreation use designation for the following seven segments of the CAWS and LDPR from "Secondary Contact" to "Incidental Contact Waters:"

1. The South Fork of the South Branch of the Chicago River (Bubbly Creek).
2. The Chicago Sanitary and Ship Canal from its confluence with the South Branch of the Chicago River to its confluence with the Calumet-Sag Channel.
3. Lake Calumet.
4. The Lake Calumet Connecting Channel.
5. The Grand Calumet River.

6. The Lower Des Plaines River from the Brandon Road Lock and Dam to the Interstate 55 Bridge.
7. The Calumet River from the O'Brien Locks and Dam to its confluence with the Grand Calumet River and the Little Calumet River.

The EPA also approves Illinois' revisions that ensure the continued applicability of Illinois' previously-approved Indigenous Aquatic Life standards set forth in 35 Ill. Admin. Code 302, Subpart D to the seven segments listed above.

**IV. The EPA Disapproves Illinois' Removal of the General Use Designation and General Use Criteria Previously Applicable to the Upper North Shore Channel from the Wilmette Pumping Station to North Side Water Reclamation Plant**

Illinois removed the General Use designation and criteria, by designating this segment as an Incidental Contact Recreation water and making Illinois' less stringent Indigenous Aquatic Life designated use and criteria applicable to this segment. The EPA is disapproving Illinois' removal in accordance with 40 CFR 131.5(a)(1), (2), (4) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a).

To address the disapprovals pertaining to this segment, Illinois must revise its water quality standards to either: (1) reinstate the General Use designation and applicable criteria set forth at 35 Ill. Admin. Code 302, Subpart B, or (2) adopt standards that are as protective as Illinois' General Use standards for both recreation and other uses. Alternatively, as part of the IPCB's proceedings in Subdockets C or D, Illinois could develop and provide to the EPA methods used, analyses conducted, scientific rationale and other information demonstrating the appropriateness under federal law of both: (1) Illinois' removal of all aspects of the General Use designation, which include both recreation and other uses, for this segment, and (2) adoption of criteria for this segment that differ from those specified at 35 Ill. Admin. Code 302, Subpart B so long as they adequately protect the applicable designated uses.

**V. The EPA Disapproves Illinois' Removal of the General Use Designation and General Use Criteria Previously Applicable to the Calumet River from Lake Michigan to the O'Brien Locks and Dam.**

Illinois removed the General Use designation and criteria by designating this segment as an Incidental Contact Recreation water (in the portion of the Calumet River from Torrence Avenue and O'Brien Locks and Dam) and Non-Contact Recreation water (in the portion of the Calumet River from Lake Michigan to Torrence Avenue); and by making Illinois' less stringent Indigenous Aquatic Life designated use and criteria applicable to this entire segment. The EPA is disapproving Illinois' removal in accordance with 40 CFR 131.5(a)(1), (2), (4) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a).

To address the disapprovals pertaining to this segment, Illinois must revise its water quality standards to either: (1) reinstate the General Use designation and applicable criteria set forth at 35 Ill. Admin. Code 302, Subpart B, or (2) adopt standards that are as protective as Illinois' General Use standards for both recreation and other uses. Alternatively, as part of the IPCB's proceedings in Subdockets C or D, Illinois could develop and provide to the EPA methods used, analyses conducted, scientific rationale and other information demonstrating the appropriateness under federal law of both: (1) Illinois' removal of all aspects of the General Use designation, which include both recreation and other uses, for this segment and (2) adoption of criteria for this segment that differ from those specified at 35 Ill. Admin. Code 302, Subpart B so long as they adequately protect the applicable designated uses.

**VI. The EPA Approves and Disapproves Actions Regarding the: (1) Chicago Sanitary and Ship Canal from its Confluence with the Calumet-Sag Channel to its Confluence with the Des Plaines River, and (2) Lower Des Plaines River from its Confluence with the Chicago Sanitary and Ship Canal to the Brandon Road Lock and Dam**

The EPA approves Illinois' revisions that ensure the continued applicability of Illinois' previously-approved Indigenous Aquatic Life standards set forth in 35 Ill. Admin. 302, Subpart D to the: (1) Chicago Sanitary and Ship Canal from its confluence with the Calumet-Sag Channel to its confluence with the Des Plaines River, and (2) Lower Des Plaines River from its confluence with the Chicago Sanitary and Ship Canal to the Brandon Road Lock and Dam.

The EPA disapproves Illinois' removal of the Secondary Contact recreational use designation from these two segments and their designation as Non-Recreational Waters. The EPA is disapproving Illinois' removal in accordance with 40 CFR 131.5(a)(1), (4) and (5) because no adequate rationale has been provided for removal of the use as required by 40 CFR 131.6(a) and 131.10(g).

To address the disapprovals pertaining to these segments, Illinois must revise its water quality standards to either: (1) reinstate the Secondary Contact recreational use, or (2) adopt a recreational use that is substantively the same as the Secondary Contact recreational use designation (*e.g.*, Incidental Contact). Alternatively, as part of the IPCB's proceedings in Subdockets C or D, or a new rulemaking proceeding, Illinois could develop and provide to the EPA methods used, analyses conducted, scientific rationale and other information demonstrating that the Secondary Contact recreation use designation for these segments is not attainable and that the appropriate use is indeed Non-Recreational Water.

**VII. The EPA Takes No Action on the Following Two Provisions**

Illinois' repeal of the procedural requirements previously applicable to the process for designating Secondary Contact and Indigenous Aquatic Life uses at 35 Ill. Admin. Code 303.102 is not a revision to water quality standards and so is not subject to review and approval or disapproval under section 303(c)(3) of the CWA.

Additionally, Illinois has proposed designating only three waters as either “Non-Contact Recreational” or “Non-Recreational” waters, and the EPA disapproved Illinois’ proposal in all three instances. Consequently, Illinois’ definitions of those terms at 35 Ill. Admin. Code 301.324 currently have no applicability for purpose of the CWA, and so the EPA is not acting to approve or disapprove those definitions at this time. The EPA will take action on these definitions at a future time if Illinois submits new or revised standards pertaining to today’s disapprovals and adequately demonstrates that they are an appropriate use for one or more waters.

#### **VIII. The EPA’s Approval of Water Quality Standards is a Federal Action Which May be Subject to Section 7(a)(2) of the Endangered Species Act**

Section 7(a)(2) of ESA states that “each federal agency . . . shall . . . insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical.” Under 50 CFR 402.03, section 7 of the ESA applies to agency actions “in which there is discretionary agency action or control.”

Consideration of effects on any endangered or threatened species is not within the EPA’s discretion in deciding whether to approve Illinois’ new and revised water quality standards pertaining to recreational use designations. Consequently, the EPA’s actions pertaining to recreational use designations are not subject to the requirements of section 7(a)(2) of the ESA, as described in 50 CFR 402.03.

With regards to EPA’s approvals and disapprovals pertaining to other aspects of Illinois’ water quality standards, Illinois’ changes and EPA’s action results in no change to the effective aquatic life use standards for any segment. The EPA has determined that EPA’s actions with regard to aquatic life use standards will have no effect on endangered species and, therefore, consultation is not required.

#### **IX. Conclusion**

The new and revised water quality standards that the EPA approved today and on November 3, 2011, are now applicable water quality standards for purposes of the CWA. *See* 40 CFR 131.21(c). However, in the case of EPA’s disapprovals, the standards that had been in effect under Illinois law prior to September 9, 2011, are the applicable standards for CWA purposes until the EPA either: (1) approves a change, deletion, or addition to the water quality standards for the segments impacted by today’s disapprovals, or (2) promulgates standards for those segments. *See* 40 CFR 131.21(e).

The first enclosure with this letter contains a table that summarizes the actions that the EPA is taking today on each specific regulatory change that Illinois submitted to the EPA on September 26, 2011. The table also outlines the recreational, aquatic life and other uses and criteria that are applicable for CWA purposes for the CAWS and LDPR in light of today’s action. The EPA has

also enclosed a document entitled "Basis for the EPA's Decision Regarding New and Revised Water Quality Standards for the CAWS and LDPR," which provides the EPA's rationale for today's action.

Today's letter and enclosures, as well as information regarding prior actions on recreational uses for the Chicago River, are available at [www.epa.gov/region5/chicagoriver](http://www.epa.gov/region5/chicagoriver). Information regarding the ongoing IPCB rulemakings for other new and revised standards in these waters is available at [www.ipcb.state.il.us](http://www.ipcb.state.il.us).

If you have any questions regarding this matter, please contact Linda Holst, Chief, Water Quality Branch at (312) 886-6758.

Sincerely,



Susan Hedman  
Regional Administrator

Enclosures

cc: Marcia Willhite, Illinois EPA  
John Therriault, Illinois Pollution Control Board, Clerk's Office

**SUMMARY OF EPA'S ACTIONS ON ILLINOIS' NEW AND REVISED WATER QUALITY STANDARDS FOR THE CAWS AND LDPR**

On September 26, 2011, the Illinois Environmental Protection Agency (IEPA) submitted, for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA), Illinois' new and revised water quality standards for 17 specific segments of the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR). These new and revised water quality standards are set forth at 35 Ill. Admin. Code 301.247, 301.282, 301.307, 301.323, 301.324, 303.102, 303.204, 303.220, 303.225, 303.227 and 303.441. The IEPA also submitted relevant portions of the administrative record developed by the Illinois Pollution Control Board (IPCB) in support of the new and revised water quality standards, including Use Attainability Analyses (UAAs) for the CAWS and the LDPR. On October 26, 2011, the Illinois Attorney General's Office submitted a letter to the EPA certifying, in accordance with 40 CFR 131.6(e), that Illinois' new and revised water quality standards were duly adopted pursuant to Illinois law.

On November 3, 2011, the EPA approved a portion of Illinois' new and revised water quality standards in accordance with section 303(c)(3) of the CWA. Specifically, the EPA approved 35 Ill. Admin. Code 301.282, 301.323 and 303.220(a)-(b) and (d)-(f), which established definitions of "Primary Contact Recreation" and "Incidental Contact Recreation," and established a Primary Contact Recreation use designation for five segments of the CAWS. The already-approved provisions establishing the primary contact use are not at issue in today's action.

Today's action, as summarized in Table 1, addresses new and revised standards pertaining to recreation for the 12 segments not addressed in EPA's November 3, 2011 letter, as well as other uses (e.g., aquatic life) and associated criteria for all CAWS and LDPR segments. Each category of action described in Table 1 includes a reference to the relevant section of a document entitled "Basis for the EPA's Decision Regarding New and Revised Water Quality Standards for the CAWS and LDPR," which provides the EPA's rationale for today's action. The "Basis for Decision" document is not enclosed with the letter to the IEPA setting forth the EPA's action, but is available from the EPA's Chicago River website at [www.epa.gov/region5/chicagoriver](http://www.epa.gov/region5/chicagoriver).

**Table 1. Summary of EPA’s actions regarding each segment of the CAWS and LDPR and their applicable water quality standards with regards to recreation and uses other than recreation, where “uses other than recreation” means the aspects of the General Use that provides protection for aquatic life and wildlife, agricultural use, most industrial uses, and aesthetic quality as described in 35 Ill. Admin. Code 302.202.**

| <b>Lower North Shore Channel</b> from North Side Water Reclamation Plant to confluence with North Branch of the Chicago River; <b>North Branch of the Chicago River</b> from its confluence with North Shore Channel to its confluence with South Branch of the Chicago River and Chicago River; <b>South Branch of the Chicago River</b> ; <b>Little Calumet River</b> from its confluence with Calumet River and Grand Calumet River to its confluence with Calumet-Sag Channel; <b>Calumet-Sag Channel</b> |  |
|---|--|
| <b>Today’s EPA Actions</b>  | <b>Applicable WQS</b>  |
| <b>Recreational Uses</b>  |  |
| <p><b>Approved</b> 35 Ill. Admin. Code 301.282, 301.323, and 303.220(a)-(b) and (d)-(f) to the extent that they establish a primary contact recreation use for these five segments.</p> <p><i>Per EPA’s Nov. 3, 2011 action letter.</i></p>   | <b>Primary Contact Recreation Use</b>  |
| <b>Other Standards</b>  |  |
| <p><b>Approved</b> 35 Ill. Admin. Code 301.247 and 303.204 to the extent that they retain previously-approved Indigenous Aquatic Life standards for these five segments.</p> <p><b>Approved</b> repeal of 303.441(b),(c), (g), and (h) and the first sentence of (j).</p> <p><i>See</i> Basis for Decision Section III.A.4</p>  | <p><b>Indigenous Aquatic Life Use</b> and criteria set forth in 35 Ill. Admin Code 302 Subpart D.</p> <p>Additionally, the <b>dissolved oxygen in the Lower North Shore Channel</b> shall not be less than 5 mg/l during 16 hours of any 24 hour period, nor less than 4 mg/l at any time.</p> |
| <p><b>Disapproved</b> repeal of last sentence at 35 Ill. Admin. Code 303.441(j) that removed the site-specific dissolved oxygen criteria that previously applied for the Lower North Shore Channel.</p> <p><i>See</i> Basis for Decision Section III.C.3</p>  |  |

**Table 1 (Continued)**

| <b>Chicago River</b>   |  |
|--|--|
| <b>Today's EPA Actions</b>   | <b>Applicable WQS</b>  |
| <b>Recreational Uses</b>   |  |
| <p><b>Approved</b> 35 Ill. Admin. Code 303.220(c) to the extent that it changed the name of the recreation use designation from "General Use" to "Primary Contact Recreation."</p> <p><i>See</i> Basis for Decision Section III. A. 3</p>  | <p><b>Primary Contact Recreation Use</b></p>   |
| <b>Other Standards</b>   |  |
| <p><b>Disapproved</b> 35 Ill. Admin. Code 301.247, 303.204 and 303.220(c) to the extent that they removed: (1) the aspects of Illinois' General Use designation that protected uses other than recreation, and (2) all General Use criteria, including criteria protecting primary contact recreation and uses other than recreation.</p> <p><i>See</i> Basis for Decision Section III.C.3</p> | <p><b>General Use</b> and criteria set forth in 35 Ill. Admin Code 302 Subpart B</p> |

**Table 1 (Continued)**

| South Fork of the South Branch of the Chicago River ( <b>Bubbly Creek</b> ); <b>Chicago Sanitary and Ship Canal</b> from its confluence with South Branch of the Chicago River to its confluence with Calumet-Sag Channel; <b>Lake Calumet; Lake Calumet Connecting Channel; Grand Calumet River; Lower Des Plaines River</b> from the Brandon Road Lock and Dam to Interstate 55 bridge  |  |
|---|--|
| Today's EPA Actions   | Applicable WQS   |
| <b>Recreational Uses</b>  |  |
| <p><b>Approved</b> 35 Ill. Admin. Code 303.225(b)-(c) and (e)-(h) that changed the name of the recreational use designation from "Secondary Contact" to "Incidental Contact Waters" for these six segments.</p> <p><b>Approved</b> repeal of 303.441(d), (f), and (g) to the extent the repeal removes the previous "Secondary Contact" use for these segments.</p> <p><b>Approved</b> repeal of 303.441(a) to the extent the repeal removes the previous "Secondary Contact" use for the portion of the Chicago Sanitary and Ship Canal extending from its confluence with South Branch of the Chicago River to its confluence with Calumet-Sag Channel.</p> <p><b>Approved</b> repeal of 303.441(i) to the extent the repeal removes the previous "Secondary Contact" use for the portion of the Lower Des Plaines River from the Brandon Road Lock and Dam to Interstate 55 bridge.</p> <p><i>See</i> Basis for Decision Section III.A.1</p> | <p><b>Incidental Contact Recreation Use</b></p>  |
| <b>Other Standards</b>  |  |
| <p><b>Approved</b> 35 Ill. Admin. Code 301.247, 301.307 and 303.204 to the extent that they retain previously-approved Indigenous Aquatic Life standards pertaining to these six segments.</p> <p><b>Approved</b> repeal of 303.441(a), (d)-(g), and (i) to the extent they retain previously-approved Indigenous Aquatic Life standards for these six segments.</p> <p><i>See</i> Basis for Decision Section III.A.4</p>   | <p><b>Indigenous Aquatic Life Use</b> and criteria set forth in 35 Ill. Admin Code 302 Subpart D</p> |

**Table 1 (Continued)**

| <b>Calumet River</b> from O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River  |   |
|--|---|
| <b>Today's EPA Actions</b>   | <b>Applicable WQS</b>   |
| <b>Recreational Uses</b>   |   |
| <p><b>Approved</b> 35 Ill. Admin. Code 303.225(d) to the extent that the revisions changed the name of the recreational use designation "Secondary Contact" to "Incidental Contact Waters" for the portion of the Calumet River from O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River</p> <p><i>See</i> Basis for Decision Section III.A.2</p>  | <p><b>Incidental Contact Recreation Use</b></p>   |
| <b>Other Standards</b>   |   |
| <p><b>Approved</b> 35 Ill. Admin. Code 301.247, 301.307 and 303.204 to the extent that they retain previously-approved Indigenous Aquatic Life standards for the portion of the Calumet River from O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River</p> <p><b>Approved</b> repeal of 303.441(e) to the extent that they retain previously-approved Indigenous Aquatic Life standards for the portion of the Calumet River from O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River</p> <p><i>See</i> Basis for Decision Section III.A.4</p> | <p><b>Indigenous Aquatic Life Use</b> and criteria set forth 35 Ill. Admin Code 302 Subpart D</p> |

**Table 1 (Continued)**

| <b>Upper North Shore Channel</b> from Wilmette Pumping Station to North Side Water Reclamation Plant; <b>Calumet River</b> from Lake Michigan to the O'Brien Locks and Dam  |   |
|---|---|
| <b>Today's EPA Actions</b>  | <b>Applicable WQS</b>   |
| <b>Recreational Uses</b>  |   |
| <p><b>Disapproved</b> 35 Ill. Admin. Code 303.225(a), 303.225(d), and 303.227(a) to the extent that they removed the aspects of the General Use designation providing for recreation in and on the water for these two segments.</p> <p><i>See</i> Basis of Decision Section III.C.1</p>  | <b>General Use</b>  |
| <b>Other Standards</b>  |   |
| <p><b>Disapproved</b> 35 Ill. Admin. Code 301.247, 303.204, 303.225(a), 303.225(d), and 303.227(a), to the extent that they removed: (1) the aspects of Illinois' General Use designation that protected uses other than recreation and (2) all General Use criteria, including criteria protecting primary contact recreation and uses other than recreation.</p> <p><i>See</i> Basis for Decision Section III.C.3</p> | <b>General Use</b> and criteria set forth in 35 Ill. Admin Code 302 Subpart B |

**Table 1 (Continued)**

|  |   |
|--|---|
| <p><b>Chicago Sanitary and Ship Canal</b> from its confluence with the Calumet-Sag Channel to its confluence with Des Plaines River; <b>Lower Des Plaines River</b> from its confluence with Chicago Sanitary and Ship Canal to the Brandon Road Lock</p>  |   |
| <p><b>Today's EPA Actions</b></p>  | <p><b>Applicable WQS</b></p>  |
| <p><b>Recreational Uses</b></p>  |   |
| <p><b>Disapproved</b> 35 Ill. Admin. Code 303.227(b) that changed the recreation use designation from "Secondary Contact" to "Non-recreational" for these two segments.</p> <p><b>Disapproved</b> repeal of 303.441(a) to the extent the repeal removed the Secondary Contact Recreational Use designation for the Chicago Sanitary and Ship Canal from its confluence with the Calumet-Sag Channel to its confluence with Des Plaines River.</p> <p><b>Disapproved</b> repeal of 303.441(i) to the extent the repeal removed the Secondary Contact Recreational Use designation for the Lower Des Plaines River from its confluence with Chicago Sanitary and Ship Canal to the Brandon Road Lock.</p> <p><i>See</i> Basis for Decision Section III.C.2</p> | <p><b>Secondary Contact Recreation Use</b></p>  |
| <p><b>Other Standards</b></p>  |   |
| <p><b>Approved</b> 35 Ill. Admin. Code 301.247, 301.307 and 303.204 to the extent that they retain previously-approved Indigenous Aquatic Life standards for these two segments.</p> <p><b>Approved</b> repeal of 303.441(a) and (i) to the extent that they retain previously-approved Indigenous Aquatic Life standards for these two segments.</p> <p><i>See</i> Basis for Decision Section III.A.4</p>   | <p><b>Indigenous Aquatic Life Use</b> and criteria set forth 35 Ill. Admin Code 302 Subpart D</p> |

**BASIS FOR THE EPA'S DECISION ON ILLINOIS' NEW AND REVISED WATER QUALITY STANDARDS FOR THE CHICAGO AREA WATERWAY SYSTEM AND LOWER DES PLAINES RIVER**

**(35 ILL ADMIN. CODE 301.247, 301.307, 301.324, 303.102, 303.204, 303.220(c), 303.225, 303.227 AND 303.441)**

Date: **MAY 10 2012**

**I. BACKGROUND**

On September 26, 2011, the Illinois Environmental Protection Agency (IEPA) submitted, for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA), Illinois' new and revised water quality standards for 17 specific segments of the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR). These new and revised water quality standards are set forth at 35 Ill. Admin. Code 301.247, 301.282, 301.307, 301.323, 301.324, 303.102, 303.204, 303.220, 303.225, 303.227 and 303.441. The IEPA also submitted relevant portions of the administrative record developed by the Illinois Pollution Control Board (IPCB) in support of the new and revised water quality standards, including Use Attainability Analyses (UAAs) for the CAWS and the LDPR. On October 26, 2011, the Illinois Attorney General's Office submitted a letter to the EPA certifying, in accordance with 40 CFR 131.6(e), that Illinois' new and revised water quality standards were duly adopted pursuant to Illinois law.

On November 3, 2011, the EPA approved a portion of Illinois' new and revised water quality standards in accordance with section 303(c)(3) of the CWA. Specifically, the EPA approved 35 Ill. Admin. Code 301.282, 301.323 and 303.220(a)-(b) and (d)-(f), which established definitions of "Primary Contact Recreation" and "Incidental Contact Recreation," and established a Primary Contact Recreation use designation for five segments of the CAWS. The already-approved provisions establishing the primary contact use are not at issue in today's action.

Today's action addresses new and revised standards pertaining to recreation for the 12 segments not addressed in EPA's November 3, 2011, letter, as well as other uses (e.g., aquatic life) and associated criteria for all CAWS and LDPR segments.

**II. ILLINOIS' WATER QUALITY STANDARDS FOR THE CAWS AND LDPR**

**A. Water Quality Standards for the CAWS and LDPR Prior to Illinois' Recent Adoption of New and Revised Water Quality Standards**

Illinois' water quality standards provide that all waters of the state are designated for "General Use," unless a specific use designation has been otherwise established. *See* 35 Ill. Admin. Code 303.201. 35 Ill. Admin. Code 302.202 provides:

The General Use standards will protect the State's water for aquatic life . . . ,<sup>[1]</sup> wildlife, agricultural use, secondary contact use and most industrial uses and ensure the aesthetic quality of the State's aquatic environment. Primary contact uses are protected for all General Use waters whose physical configuration permits such use.

The General Use designation, therefore, includes the uses specified in section 101(a)(2) of the CWA. Illinois has also adopted numeric and narrative criteria for the General Use waters. *See* 35 Ill. Admin. Code 302.201-302.212. Until Illinois' recent revisions, no specific use designation had been established for three CAWS segments:

- Chicago River;
- North Shore Channel extending from Lake Michigan to the North Side Sewage Treatment Works (hereinafter referred to as the "Upper North Shore Channel"); and
- A 6.8 mile segment of the Calumet River extending from the O'Brien Locks and Dam to Lake Michigan.

Consequently, the use designation for those three segments had been General Use.

The other 14 segments of the CAWS and LDPR had been specifically designated as "Secondary Contact and Indigenous Aquatic Life" (hereinafter referred to as "Secondary Contact Waters"), and thus neither the General Use designation nor the General Use criteria applied to those segments. *See* 35 Ill. Admin. Code 303.441, as it existed under Illinois law prior to September 9, 2011.<sup>2</sup> The 14 segments that had been "Secondary Contact Waters" are:

- Lower North Shore Channel from North Side Water Reclamation Plant to confluence with North Branch of the Chicago River;
- North Branch of the Chicago River from its confluence with North Shore Channel to its confluence with South Branch of the Chicago River and Chicago River;
- South Branch of the Chicago River;
- South Fork of the South Branch of the Chicago River (Bubbly Creek);
- Little Calumet River from its confluence with Calumet River and Grand Calumet River to the Calumet-Sag Channel; and
- Calumet-Sag Channel.
- Chicago Sanitary and Ship Canal from its confluence with South Branch of the Chicago River to its confluence with Calumet-Sag Channel;

<sup>1</sup> The omitted language says "(except as provided in Section 302.213)." Section 302.213 was repealed in 2002, *see* 35 Ill. Admin. Code 302.213, and so the omitted language no longer has any applicability.

<sup>2</sup> 35 Ill. Admin. Code 303.441 divided the CAWS and LDPR up into 10 specified segments. In the recent revisions that are the subject of today's action, the IPCB subdivided the Chicago Sanitary and Ship Canal and the Des Plaines River into two segments each, and added separate designations for the Lake Calumet Connecting Channel and Bubbly Creek. This is why this document refers to 14 segments that had been previously designated as Secondary Contact Waters, rather than 10 segments.

- Chicago Sanitary and Ship Canal from its confluence with the Calumet-Sag Channel to its confluence with Des Plaines River;
- Lake Calumet;
- Lake Calumet Connecting Channel;
- Grand Calumet River;
- The Calumet River, except the 6.8 mile segment extending from the O'Brien Locks and Dam to Lake Michigan;
- Lower Des Plaines River from its confluence with Chicago Sanitary and Ship Canal to the Brandon Road Lock and Dam; and
- Lower Des Plaines River from the Brandon Road Lock and Dam to Interstate 55 bridge (hereinafter, the "Upper Dresden Island Pool").

The Secondary Contact Waters use designation was:

intended for those waters not suited for general use activities but which will be appropriate for all secondary contact uses and which will be capable of supporting an indigenous aquatic life limited only by the physical configuration of the body of water, characteristics and origin of the water and the presence of contaminants in amounts that do not exceed the water quality standards listed in Subpart D.

35 Ill. Admin. Code 302.402. "Secondary Contact" was defined under Illinois' water quality standards as:

any recreational or other water use in which contact with the water is either incidental or accidental and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, commercial and recreational boating and any limited contact incident to shoreline activity.

35 Ill. Admin. Code 301.380.

Thus, the Secondary Contact Waters use designation did not include the uses specified in section 101(a)(2) of the CWA. Illinois' water quality standards also included aquatic life numeric and narrative criteria for the Secondary Contact Waters use designation that are less stringent than those for General Use waters. *See* 35 Ill. Admin. Code 302.403 - 302.410. Illinois' water quality standards do not have any recreational criteria for Secondary Contact Waters.

## **B. Illinois' New and Revised Water Quality Standards**

In October 2007, the IEPA filed an omnibus proposal with the IPCB to revise the recreational and aquatic life standards for all segments of the CAWS and LDPR. The IEPA provided Use Attainability Analyses for the CAWS and the LDPR that addressed the attainability of recreational and aquatic life uses. The IPCB subsequently received extensive testimony, technical information and public comments on the IEPA's proposal pertaining to recreational and aquatic life standards for the CAWS and LDPR.

On March 18, 2010, the IPCB broke the omnibus CAWS and LDPR rulemaking process into four subdockets to separately address issues related to recreational use designations (Subdocket A); issues related to disinfection and whether disinfection would be necessary to meet recreational use designations (Subdocket B); issues related to aquatic life use designations (Subdocket C); and issues related to criteria necessary to meet aquatic life use designations (Subdocket D). On August 18, 2011, the IPCB concluded its rulemaking process in Subdocket A by adopting a Final Rule that consists of new and revised recreational use designations for seventeen CAWS and LDPR segments. The IPCB has also concluded the Subdocket B proceedings, but has made no final decisions with respect to the issues involved in the aquatic life subdockets C and D.

As noted above, the EPA approved a portion of Illinois' new and revised water quality standards that resulted from the Subdocket A proceedings--the provisions that established a Primary Contact Recreation use designation for five segments of the CAWS--on November 3, 2011, and those provisions are not at issue in today's action. The portions of the new and revised water standards submitted to EPA for review on September 26, 2011, that the EPA has not already acted upon are summarized below.

**1. New and Revised Water Quality Standards Pertaining to Recreational Use Designations**

**a. Non-Substantive Name Change from "Secondary Contact" to "Incidental Contact Waters" for Six Segments Previously Designated for Secondary Contact (35 Ill. Admin. Code 303.225(b)-(c) and (e)-(h), and the repeal of 303.441(a), (d), (f), (g) and (i))**

As described in Section II.A of this document, fourteen of the seventeen CAWS and LDPR segments had been designated as Secondary Contact Waters prior to the IPCB's completion of the Subdocket A proceedings. The Secondary Contact designation covered "any recreational or other water use in which contact with the water is either incidental or accidental and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, commercial and recreational boating and any limited contact incident to shoreline activity." 35 Ill. Admin. Code 301.380 (emphasis added). For six of the fourteen segments that had been previously designated as Secondary Contact Waters, the IPCB determined that the use designation should continue to cover the same broad category of secondary contact recreational activities as the previous Secondary Contact Waters recreational use designation, albeit under a different name: "Incidental Contact Recreation Waters." The six segments are:

- South Fork of the South Branch of the Chicago River (Bubbly Creek);
- Chicago Sanitary and Ship Canal from its confluence with South Branch of the Chicago River to its confluence with Calumet-Sag Channel;
- Lake Calumet;
- Lake Calumet Connecting Channel;
- Grand Calumet River; and
- Lower Des Plaines River from the Brandon Road Lock and Dam to Interstate 55 bridge.

The IPCB accomplished this by repealing the portions of 35 Ill. Admin. Code 303.441(a), (d)-(f) and (i) that applied to the segments described above (whereby 35 Ill. Admin. Code 303.441 specified CAWS and LDPR segments that were designated Secondary Contact Waters); creating the Incidental Contact Waters use designation, *see* 35 Ill. Admin. Code 301.282; and specifying that six segments are now designated as Incidental Contact Recreation Waters, *see* 35 Ill. Admin. Code 303.225(b)-(c), and (e)-(h). Illinois' new and revised water quality standards define "Incidental Contact" as:

any recreational 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.

35 Ill. Admin. Code 301.282. The definition of "Incidental Contact" is substantively identical to the definition of "Second Contact." This is evident from the following comparison of the two definitions, using underline/strikeout (language that is included in the definition of "Incidental Contact that is not in the definition of "Secondary Contact" is underlined; language in the definition of "Secondary Contact" and not in the definition of "Incidental Contact" is shown in strikeout; and all other language is the same in both definitions):

~~"Secondary Contact"~~ "Incidental Contact" means any recreational activity ~~or other water use~~ in which human contact with the water is ~~either incidental or accidental~~ and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, ~~commercial boating; and small craft~~ recreational boating; and any limited contact ~~incident to~~ associated with shoreline activity such as wading.

**b. Change in Recreational Use Designation for the Chicago River from "General Use" to "Primary Contact Recreation Water" Designation (35 Ill. Admin. Code 303.220(c))**

The IPCB also determined that the Chicago River, a segment that had been designated as a General Use Water prior to the completion of the Subdocket A proceedings, should continue to provide for primary contact recreational activities; albeit under a different name, the newly adopted Primary Contact Recreation Water use. *See* 35 Ill. Admin. Code 303.220(c). Both the General Use designation and the Primary Contact Water designation provide for recreation in and on the water, consistent with the recreational uses specified in section 101(a)(2) of the CWA.

**c. Removal of General Use Recreation Use Designation for the Upper North Shore Channel (35 Ill. Admin. Code 303.225(a))**

The IPCB removed the General Use recreational use designation for the Upper North Shore Channel by placing it in the Incidental Contact Recreation use class at 35 Ill. Admin. Code 303.225(a).

**d. Changes to Recreation Use Designations for Calumet River (35 Ill. Admin. Code 303.225(d) and 303.227(a))**

As described in Section II.A of this document, a 6.8 mile segment of the Calumet River from Lake Michigan to the O'Brien Locks and Dam had been designated as a General Use water. The remainder of the Calumet River from the O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River had been designated as a Secondary Contact Water. In Subdocket A, the IPCB moved the boundary between the two Calumet River segments so that the dividing line between the two segments became Torrence Avenue instead of the O'Brien Locks and Dam.

The IPCB deleted the prior Secondary Contact Water designation for the Calumet River at 35 Ill. Admin. Code 303.441(e). The IPCB then placed the new Lake Michigan to Torrence Avenue segment into the Non-Contact Recreation Waters use class at 35 Ill. Admin. Code 303.227(a), and it placed the segment from Torrence Avenue to its confluence with the Grand and Little Calumet Rivers into the Incidental Contact Recreation Waters use class at 35 Ill. Admin. Code 303.225(d).

Non-Contact Recreation is defined at 35 Ill. Admin. Code 301.324(a) 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.

The effect of these changes was:

- the General Use designation that had previously been in effect for the segment of the Calumet River from Lake Michigan to the O'Brien Locks and Dam was removed (with the Lake Michigan to Torrence Avenue portion of that segment being designated as a Non-Contact Recreation Water (35 Ill. Admin. Code 303.227(a)), and the Torrence Avenue to the O'Brien Locks and Dam segment being designated as an Incidental Contact Water (a portion of segment described at 303.225(d)); and
- the name of the recreational use designation for the segment of the Calumet River from the O'Brien Locks and Dam to the confluence with the Grand and Little Calumet Rivers (a portion of the segment described at 303.225(d)) was changed from the prior "Secondary Contact" to the substantively identical "Incidental Contact Recreation."

**e. Removal of Secondary Contact Waters Recreational Use Designation for Two Segments (35 Ill. Admin. Code 303.227(b) and repeal of 303.441(a) and (i))**

The IPCB determined that the Secondary Contact Water recreational use designation should be removed for the following two segments, to be replaced by a new "Non-Recreational Waters" use designation:

- Chicago Sanitary and Ship Canal from its confluence with the Calumet-Sag Channel to its confluence with Des Plaines River (hereinafter, "the Lower CSSC"); and
- Lower Des Plaines River from its confluence with Chicago Sanitary and Ship Canal to the Brandon Road Lock (hereinafter, "the Brandon Pool").

The IPCB accomplished this by repealing the portions of 35 Ill. Admin. Code 303.441(a) and (i) that applied to the segments described above (whereby 35 Ill. Admin. Code 303.441 specified CAWS and LDPR segments that were designated Secondary Contact Waters); creating the Non-Recreational Waters use designation, *see* 35 Ill. Admin. Code 301.324(b); and specifying that these two segments are now designated as Non-Recreational Waters, *see* 35 Ill. Admin. Code 303.227(b)(1)-(2). Illinois' new and revised water quality standards define "Non-Recreational" at 35 Ill. Admin. Code 301.324(b) as "a water body where the physical conditions or hydrologic modifications preclude primary contact, incidental contact and non-contact recreation."

**2. New and Revised Water Quality Standards for the CAWS and LDPR Pertaining to Use Designations Other Than Recreation and Criteria (35 Ill. Admin. Code 301.247, 301.307 and 303.204 and the repeal of 303.441)**

Along with adopting new and revised water quality standards addressing recreational use designations for the CAWS and LDPR, the IPCB also made other revisions that pertain to criteria and uses other than recreation for all 17 of the CAWS/LDPR segments, as well as the criteria applicable to those waters. These revisions were accomplished through (1) adoption of a definition of "Chicago Area Waterway System" at 35 Ill. Admin. Code 301.247 that included all of the segments of the CAWS (including segments that had previously been designated as General Use); (2) adoption of a definition of "Lower Des Plaines River" at 35 Ill. Admin. Code 301.307; (3) the repeal of 35 Ill. Admin. Code 303.441 that had listed all of the waters that Illinois had previously designated as Secondary Contact; and (4) adoption of the following new provision at 35 Ill. Admin. Code 303.204:

The Chicago Area Waterway System and Lower Des Plaines River Waters are designated to protect for incidental contact or non-contact recreational uses (except where designated as non-recreational waters) and commercial activity (including navigation and industrial water supply uses) limited only by the physical condition of these waters and hydrologic modifications to these waters. *These waters are required to meet the secondary contact and indigenous aquatic life standards contained in 35 Ill. Adm. Code 302, Subpart D, but are not required to meet the general use standards or the public and food processing water supply standards of 35 Ill. Adm. Code 302, Subpart B and C.* Designated recreational uses for each segment of the Chicago Area Waterway System and Lower Des Plaines River are identified in this Subpart.

35 Ill. Admin. Code 303.204 (emphasis added).

With one exception, these changes had no substantive effect on the 14 segments that had previously been designated as Secondary Contact Waters. This is because, for the CAWS and LDPR segments that had previously been designated as Secondary Contact and Indigenous Aquatic Life Waters, these changes simply ensure the continued applicability of the aquatic life criteria at 35 Ill. Admin. Code 302, Subpart D that had previously been in effect and approved by EPA. The one exception is that these changes eliminated the site-specific aquatic life dissolved oxygen criteria at 35 Ill. Admin. Code 303.441(j) (last sentence) that previously applied to the Lower North Shore Channel, which stated "[t]he dissolved oxygen in said Channel shall be not

less than 5 mg/L during 16 hours of any 24 hour period, nor less than 4mg/L at any time.” In contrast, Illinois’ Indigenous Aquatic Life criteria provides that “[d]issolved oxygen (STORET number 00300) shall not be less than 4.0 mg/l at any time.”

For the three CAWS segments that had previously been General Use waters, these changes had the effect of: (1) removing or downgrading the portion of the General Use designation providing protection for aquatic life, wildlife, agricultural use, most industrial uses, and aesthetic quality as described in 302.202, and (2) the removal of General Use criteria that protect primary contact recreational uses and uses other than recreation (*i.e.*, uses providing protection for aquatic life, wildlife, agricultural use, most industrial uses, and aesthetic quality) at 35 Ill. Admin. Code 302, Subpart B, which were replaced with the less protective Secondary Contact and Indigenous Aquatic Life criteria at 35 Ill. Admin. Code 302, Subpart D. These changes, among other things, eliminated the recreational criteria and resulted in the application of less stringent criteria for the protection of aquatic life for the three segments that had previously been General Use waters.

### **III. THE EPA’S ACTIONS ON ILLINOIS’ NEW AND REVISED WATER QUALITY STANDARDS FOR CERTAIN SEGMENTS OF THE CAWS AND LDPR**

#### **A. New and Revised Water Quality Standards that the EPA is Approving**

##### **1. The EPA Approves 35 Ill. Admin. Code 303.225(b)-(c) and (e)-(h) and the Repeal of 303.441(a), (d), (f), (g) and (i), but Only to the Extent that the Revisions Result in the Non-Substantive Recreational Use Name Change from “Secondary Contact” to “Incidental Contact Waters” for Six Segments Described Below**

As explained in Section II.B.1.a of this document, the IPCB revised Illinois’ water quality standards to change the name of the recreational use designation from “Secondary Contact Recreation Waters” to “Incidental Contact Waters,” for six segments, without changing the scope of activities covered by the recreational use designation. The six segments are:

- South Fork of the South Branch of the Chicago River (Bubbly Creek);
- Chicago Sanitary and Ship Canal from its confluence with South Branch of the Chicago River to its confluence with Calumet-Sag Channel;
- Lake Calumet;
- Lake Calumet Connecting Channel;
- Grand Calumet River; and
- Lower Des Plaines River from the Brandon Road Lock and Dam to Interstate 55 bridge.

The EPA approves these non-substantive revisions to Illinois’ previously-approved water quality standards. Specifically, the EPA approves the provisions at 35 Ill. Admin. Code 303.225(b)-(c) and (e)-(h) that specify that the six segments listed above are designated for Incidental Contact Recreation.<sup>3</sup> The EPA also approves Illinois’ repeal of 35 Ill. Admin. Code 303.441(a), (d), (f),

<sup>3</sup> The EPA previously approved the definition of Incidental Contact at 35 Ill. Admin. Code 301.282 on November 3, 2011, and so need not approve that definition again in today’s action.

(g) and (i) with respect to the aspects of that repeal that removed the Secondary Contact Waters recreational use designation for the six segments listed above that now have the substantively identical Incidental Contact Recreation Water recreational use designation. As explained in Section III.C.1.b and C.2 of this document, the EPA is disapproving the repeal of 35 Ill. Admin. Code 303.441 as it pertains to several other segments of the CAWS and LDPR.

**2. The EPA Approves 35 Ill. Admin. Code 303.225(d), and the Repeal of 303.441(e), but Only to the Extent that the Revisions Result in the Non-Substantive Recreational Use Name Change from “Secondary Contact” to “Incidental Contact Waters” for the Calumet River from O’Brien Locks and Dam to its Confluence with Grand Calumet River and Little Calumet River**

As explained in Section II.B.1.d of this document, the IPCB revised Illinois’ water quality standards to change the name of the recreational use designation from “Secondary Contact Recreation Waters” to “Incidental Contact Waters,” for the Calumet River from O’Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River, without changing the scope of activities covered by the recreational use designation. The EPA approves these non-substantive revisions to Illinois’ previously-approved water quality standards. Specifically, the EPA approves 35 Ill. Admin. Code 303.225(d) and the repeal of 35 Ill. Admin. Code 303.441(e), but only to the extent that those provisions apply to the portion of the Calumet River from O’Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River. As explained in Section III.C.1.b of this document, the EPA is disapproving 35 Ill Admin Code 303.225(d) and the repeal of 35 Ill. Admin. Code 303.441(e) to the extent that those new and revised water quality standards pertain to the portion of the Calumet River from Torrence Avenue to the O’Brien Locks and Dam.

**3. The EPA Approves 35 Ill. Admin. Code 303.220(c), but Only to the Extent that it Results in a Non-Substantive Name Change for the Recreational Use Designation for the Chicago River from “General Use” to “Primary Contact Recreation”**

As explained in Section II.B.1.b of this document, the IPCB determined that the recreational use designation for the Chicago River should continue to provide for the primary contact recreation use protected in General Use waters ; albeit, under a different name, Primary Contact Recreation (as defined at 35 Ill. Admin. Code 301.323). The EPA approves this non-substantive change to Illinois’ water quality standards--specifically, 35 Ill. Admin. Code 303.220(c)—to the extent it changes the name of the recreational use designation for the Chicago River from General Use to Primary Contact Recreation. However, as described in Section III.C.3 of this document, the EPA is disapproving 35 Ill. Admin. Code 303.220(c) to the extent that it removed the General Use recreational criteria set forth at 35 Ill. Adm. Code 302.209 that previously applied to the Chicago River. Moreover, as explained in Section III.C.3 of this document, the EPA is disapproving 35 Ill. Admin. Code 303.220(c) to the extent that it removed the portion of the General Use designation providing protection for aquatic life, wildlife, agricultural use, most industrial uses, and aesthetic quality as described in 302.202 and (2) the General Use criteria at 35 Ill. Admin. Code 302, Subpart B, which were replaced with the less protective Secondary Contact and Indigenous Aquatic Life criteria at 35 Ill. Admin. Code 302, Subpart D.

**4. The EPA Approves 35 Ill. Admin. Code 301.247, 301.307 and 303.204, and the Repeal of 303.441, but Only to the Extent that the Revisions Make Non-Substantive Changes that Retain the Previously-Approved Indigenous Aquatic Life Use and Criteria for Fourteen Segments That Had Previously Been Designated as Secondary Contact and Indigenous Aquatic Life Waters**

As explained in Section II.B.2 of this document, the IPCB revised Illinois' water quality standards so that the EPA-approved aquatic life criteria at 35 Ill. Admin. Code 302, Subpart D that were previously applicable to Secondary Contact and Indigenous Aquatic Life Waters would continue to apply without change to all fourteen of the segments whose recreational use designations had been changed. *See* 35 Ill. Admin. Code 301.247 (definition of Chicago Area Waterway System), 301.307 (definition of Lower Des Plaines River), and 303.204 (providing that the criteria for Secondary Contact and Indigenous Aquatic Life Waters continue to apply to all segments of the CAWS and LDPR). The EPA approves these non-substantive revisions, but only to the extent that they make the previous EPA-approved 35 Ill. Admin. Code 302 Subpart D Indigenous Aquatic Life criteria applicable to the fourteen segments that had previously been designated as Secondary Contact and Indigenous Aquatic Life Waters.

As described in Section III.C.3 of this document, the EPA is disapproving these provisions to the extent that they (1) removed the General Use designation and associated criteria that had been in place for the three segments of the CAWS to which the General Use waters designation had previously applied (the Chicago River, the Upper North Shore Channel, and Calumet River from Lake Michigan to the O'Brien locks and dam); and (2) removed the more stringent dissolved oxygen criteria at 35 Ill. Admin. Code 303.441(j) that previously applied for the Lower North Shore Channel and replaced it with less stringent Secondary Contact dissolved oxygen criteria.

**C. New and Revised Water Quality Standards That the EPA is Disapproving**

Section 101(a)(2) of the CWA states the national interim goal of achieving by July 1, 1983, "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (hereafter collectively referred to as "the uses specified in section 101(a)(2)"), wherever attainable. Section 303 of the CWA requires states to adopt water quality standards for waters of the United States within their respective jurisdictions. Section 303(c) of the CWA requires, among other things, that state water quality standards include the designated use or uses to be made of the waters. Section 303(c)(2)(A) of the CWA requires that water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA. The EPA's regulations at 40 CFR 131.2 explain that:

"Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of [*sic*] public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

The EPA's regulations at 40 CFR 131 interpret and implement sections 101(a)(2) and 303(c)(2)(A) of the CWA through a requirement that water quality standards include the uses specified in section 101(a)(2), 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), 131.10(j) and 131.20(a). See *Idaho Mining Association v. Browner*, 90 F.Supp. 2d 1078, 1092 (D. Id. 2000); 68 Fed. Reg. 40428, 40430-31 (July 27, 2003). The presumption may be rebutted through a 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 uses specified in section 101(a)(2), or when the state adopts subcategories of the uses specified in section 101(a)(2) that require less stringent criteria. A state can only justify not including one or more of the section 101(a)(2) uses for a particular water body by demonstrating through a UAA that the use is not attainable for at least one of the six reasons set forth at 40 CFR 131.10(g).

In addition to designating uses, states must adopt "water quality criteria that protect the designated use." See 40 CFR 131.11(a). "Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." *Id.*

40 CFR 131.6 provides that states must submit, among other things, the following to the EPA for review when they adopt new or revised designated uses and criteria:

- (a) Use designations consistent with the provisions or section 101(a)(2) and 303(c)(2) of the Act.
- (b) Methods used and analyses conducted to support water quality standards revisions.
- (c) Water quality criteria to protect the designated uses.
- ....
- (f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.

40 CFR 131.5(a) provides that, in reviewing new or revised use designations and criteria, the EPA must determine, among other things:

- (1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;
- (2) Whether the State has adopted criteria that protect the designated water uses;
- ....
- (4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and
- (5) Whether the State submission meets the requirements included in 131.6 of this part.

**1. The EPA Disapproves 35 Ill. Admin. Code 303.225(a), 303.227(a), and 303.225(d) to the Extent that They Remove the General Use Designation Providing for “Recreation In and On the Water” for the Upper North Shore Channel and the Calumet River from Lake Michigan to the O’Brien Locks and Dam**

**a. Upper North Shore Channel**

As explained in Section II.B.1.c of this document, the IPCB determined that the recreational use designation for the Upper North Shore Channel should be downgraded from General Use to Incidental Contact Recreation. The IPCB concluded that Illinois’ “recreation in and on the water” General Use designation for the Upper North Shore Channel cannot be attained based upon 40 CFR 131.10(g)(3) because this segment “experiences little or no flow over long periods due to reduced discretionary diversion from Lake Michigan . . . [and] the lack of flow creates stagnant conditions resulting in low dissolved oxygen (D.O.) conditions and bacteria levels exceeding General Use bacteria criteria.” IPCB Second Notice Opinion and Order in R2008-009(A) at 35 (June 16, 2011). However, to establish infeasibility under 40 CFR 131.10(g)(3), it is necessary to demonstrate that the “conditions or sources of pollutants . . . cannot be remedied or would cause more environmental damage to correct than the leave in place.” Nothing in the state administrative record makes these required demonstrations. To the contrary, the IPCB found that, for other segments of the CAWS, high bacteria levels can be remedied by the Metropolitan Water Reclamation District’s (MWRDGC) implementation of the Tunnel and Reservoir Plan (TARP) to address combined sewer overflows (CSOs) and through construction and utilization of disinfection facilities at the MWRDGC’s Northside and Calumet Water Reclamation Plants (WRP), *id.* at 34, 37, 39, 44 and 46; and there is nothing in the state administrative record demonstrating that these measures would not also remedy the high bacteria levels in the Upper North Shore Channel. In addition, the EPA is unaware of any information in the record from the state administrative proceedings demonstrating that the low flow and/or stagnant conditions themselves prevent the attainment of primary contact recreation activities in the Upper North Shore Channel.

In its August 5, 2010, First Notice Opinion and Order in the Subdocket A proceedings, the IPCB also suggested that primary contact recreation might not be attainable in the Upper North Shore Channel because:

large portions of the CAWS, including the upper North Shore Channel . . . have steep sides, are deep draft, and have very little shallow shoreline [and] that, due to these limitations along with the access limitations placed upon most of the waterways by the District and other riparian land owners, the physical hazards in the waterways and the high use of commercial navigation traffic, the attainment of primary contact recreation is not feasible at this time.

IPCB First Notice Opinion and Order in R2008-009(A) at 82 (August 5, 2010). In light of the narrower explanation for removing the General Use designation set forth in the Second Notice Opinion and Order, it is unclear whether the IPCB still agrees with this broader explanation from the First Notice Opinion and Order. In any event, as the EPA previously noted in its October 8, 2010, comments to the IPCB, there is nothing in the state administrative record that demonstrates

that access limitations in fact prevent recreation in and on the water. To the contrary, there is ample evidence in the state administrative record that recreational users do, in fact, have substantial means for accessing the Upper North Shore Channel via at least two formalized shoreline access points (Att. L); as well as via recreational power boats, jet skis, kayaks and canoes that launch into this segment or segments downstream. Furthermore, to support removal of any of the uses specified in section 101(a)(2) of the CWA under 40 CFR 131.10(g)(3) based on access limitations, Illinois must also demonstrate that any such limitations “cannot be remedied or would cause more environmental damage to correct than to leave in place.” As explained in the EPA’s October 8, 2010, comments to the IPCB, Illinois has made no such demonstration, as Illinois has not demonstrated that any access limitations that do impact recreational uses could not be remedied by state or local governments taking legislative, regulatory or other actions to ensure that additional, direct shoreline access points are constructed. Finally, with regard to issues associated with commercial navigation, the IPCB concluded in its Second Notice Opinion and Order that “any safety issues with barge traffic are not a concern in [the North Shore Channel].” IPCB Second Notice Opinion and Order in R2008-009(A) at 34 (June 16, 2011); *see also id.* at 15 (citing evidence to support the conclusion that “safety issues with barge traffic are not a concern [in the North Shore Channel]”).<sup>4</sup> Therefore, the EPA concludes that Illinois has not demonstrated that lack of access is a human caused condition that prevents attainment of recreation in and on the water that cannot be remedied.

For the reasons described above, the information submitted to support removal of the General Use designation and adoption of the Incidental Contact Recreation use designation was not sufficient to demonstrate that “recreation in and on the water” is not attainable for the Upper North Shore Channel. In particular, Illinois failed to provide appropriate technical and scientific data and analyses as required by 40 CFR 131.5(a)(4) that recreation in and on the water was not attainable for any of the reasons specified at 40 CFR 131.10(g), and so failed to submit “[u]se designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act” as required by 40 CFR 131.6(a). Consequently, the EPA disapproves Illinois’ removal of the General Use recreational use designation and associated recreational criteria set forth at 35 Ill. Admin. Code 302.209 for the Upper North Shore Channel and adoption of Incidental Contact Recreation as codified at 35 Ill. Admin. Code 303.225(a) in accordance with 40 CFR 131.5(a)(1), (2), (4) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a).

**b. Calumet River**

<sup>4</sup> The IPCB also noted in its Second Notice Opinion and Order that the EPA’s May 11, 2011, letter, which determined that upgraded primary contact recreation use designations were necessary for five segments of the CAWS that had previously been designated for Second Contact recreation, did not mention the Upper North Shore Channel. Second Notice Opinion and Order in R2008-009(A) at 35 (June 16, 2011). However, the EPA did not include the Upper North Shore Channel in its May 11 letter because that segment was already designated for primary contact recreation (*i.e.*, Illinois’ General Use designation), and so a use upgrade was not necessary.

As explained in Section II.B.1.d of this document, the IPCB revised Illinois' water quality standards to remove the General Use recreational use designation for the 6.8 mile segment of the Calumet River from Lake Michigan to the O'Brien Locks and Dam and to replace it with (1) an Incidental Contact Recreation Water designation for the portion of the Calumet River from Torrence Avenue to the O'Brien Locks and Dam, and (2) a Non-Contact Recreation Water designation for the portion of the Calumet River from Lake Michigan to Torrence Avenue.

The IPCB concluded that the "recreation in and on the water" aspect of Illinois' General Use designation for the Calumet River between Lake Michigan and Torrence Avenue cannot be attained based upon factors 3 and 4 listed at 40 CFR 131.10(g) because "human caused conditions and sources of pollution coupled with the impacts [of] physical barriers and hydrological modifications preclude primary or Incidental Contact Recreation in [those segments]." IPCB Second Notice Opinion and Order in R2008-009(A) at 47 (June 16, 2011). The information cited by the IPCB in support of this conclusion can be divided into three general categories of information that demonstrates that, in this segment of the Calumet River: (1) direct access is limited because the "banks consist of sheet-pile, concrete walls and rip-rap," *id.*; (2) there are high levels of "PCBs, silver, high pH, total phosphorus, and fecal coliform," *id.*; and (3) there is heavy barge traffic, which creates hazardous conditions for recreators, *id.* Furthermore, the Board stated that the conditions from Torrence Avenue to the confluence with the Grand Calumet River are similar to those described above, *id.*

With regard to the access issue, as the EPA previously noted in its October 8, 2010, comments to the IPCB, EPA's review indicates that there is evidence in the state administrative record that there are at least two means of direct, shoreline access to this segment. *See* Attach. L, (Lake Calumet Connecting Channel streamside access point); Exh. 331 and 332, (Crowley's Yacht Yard on the Calumet River upstream from the O'Brien Locks and Dam). Furthermore, nothing in the state administrative record demonstrates that the public is unable to access the Calumet River to recreate in and on the water via recreational power boats, jet skis, canoes, kayaks, and other watercraft. To the contrary, there is testimony suggesting that canoeing and kayaking takes place in and around this segment (6 May 2009 9am transcript at 75), and large numbers of recreational vessels use this segment each year (Public comment #584). Furthermore, to support removal of any of the uses specified in section 101(a)(2) of the CWA under 40 CFR 131.10(g)(3) based on access limitations, Illinois must also demonstrate that any such limitations "cannot be remedied or would cause more environmental damage to correct than to leave in place." As explained in the EPA's October 8, 2010, comments to the IPCB, Illinois has made no such demonstration, as Illinois has not demonstrated that any access limitations that do impact recreational uses could not be remedied by state or local governments taking legislative, regulatory or other actions to ensure that additional, direct shoreline access points are constructed. Therefore, the EPA concludes that Illinois has not demonstrated in accordance with 40 CFR 131.10(g)(3) that lack of access is a human caused condition that prevents attainment that cannot be remedied.

With regard to the "high levels of PCBs, silver, high pH, [and] total phosphorus," EPA's review indicates that nothing in the state administrative record demonstrates that any of these pollutants are at levels that pose a risk to recreational users of the waterway to prevent attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place. Moreover, with regard to fecal coliform, nothing in the state administrative record

demonstrates that high fecal coliform levels are present throughout the entire recreational season. Instead, it appears that fecal coliform levels often comply with criteria (MWRD report 07-79 at 24, MWRD report 10-36 at AII-92 and AII-93; available from: [www.mwrdr.org](http://www.mwrdr.org)), but that higher levels occur during and after rainfall events when CSOs may be discharging (MWRD report 07-79 at 22, 24 and 25; available from: [www.mwrdr.org](http://www.mwrdr.org)). And, as noted above, the IPCB also found for other segments of the CAWS, high bacteria levels can be remedied by the MWRDGC's implementation of the TARP to address CSOs and through construction and utilization of disinfection facilities at the MWRDGC's WRPs, *id.* at 34, 37, 39, 44 and 46; and the EPA is unaware of any information demonstrating that these measures would not also remedy high bacteria levels in the Calumet River from Lake Michigan to the O'Brien locks and dam. Therefore, the EPA concludes that Illinois has not demonstrated in accordance with 40 CFR 131.10(g)(3) that the presence of "high levels of PCBs, silver, high pH, [and] total phosphorus" in this segment is a human caused condition that prevents attainment that cannot be remedied.

With regard to barge traffic, as the EPA previously noted in its October 8, 2010, comments to the IPCB, EPA's review indicates that there does not appear to be information in the state administrative record demonstrating that barge traffic is consistently heavy at all times of the year, on both weekdays and weekends, and in all portions of this segment, such that recreation in and on the water is never attainable. In addition, to the extent that barges could make it unsafe for people to recreate and potentially be considered a human caused condition that prevents attainment of the use, the EPA is unaware of information in the state administrative record demonstrating that legislative, regulatory or voluntary efforts (*e.g.*, time, manner, and place restrictions, increased number of recreational warnings/advisories, local ordinances and planning to better coordinate among users, or more egress and access sites) could not be undertaken to allow this segment to be used for both recreation and navigation. Therefore, the EPA concludes that Illinois has not demonstrated in accordance with 40 CFR 131.10(g)(3) that barge traffic in this segment is a human caused condition that prevents attainment that cannot be remedied.

Finally, as noted above, the IPCB cited to 40 CFR 131.10(g)(4) as additional support for its decision to remove the General Use designation for this segment. 40 CFR 131.10(g)(4) provides that states can remove designated uses that are not existing uses if they can demonstrate attaining the use is not feasible because:

Dams, diversion 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.

Although there is ample information in the state administrative record establishing that this segment of the CAWS has been subject to extensive hydrologic modifications, the EPA is unaware of any information in the record demonstrating that those hydrologic modifications preclude recreation in and on the water. Moreover, although the IPCB relied in a conclusory manner on this factor, the IPCB did not analyze whether the hydrologic modifications that it was relying upon could be operated in a way that would allow for recreation in and on the water in this segment. Therefore, the EPA concludes that Illinois has not demonstrated in accordance with 40 CFR 131.10(g)(4) that hydrologic modifications preclude the attainment of the use and that it

is not feasible to operate such modification in a way that would result in the attainment of the use.

For the reasons described above, the information submitted to the EPA to support removal of the General Use designation and adoption of either Incidental Contact Recreation or Non-contact Recreation was not sufficient to demonstrate that recreation in and on the water is not attainable for the Calumet River from Lake Michigan to the O'Brien Locks and Dam. In particular, Illinois failed to provide appropriate technical and scientific data and analyses as required by 40 CFR 131.5(a)(4) that recreation in and on the water was not attainable for any of the reasons specified at 40 CFR 131.10(g), and so failed to submit "[u]se designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act" as required by 40 CFR 131.6(a). Consequently, the EPA disapproves Illinois' removal of the General Use recreational use designation and associated criteria set forth at 35 Ill. Admin. Code 302.209 for the Calumet River from Lake Michigan to the O'Brien Locks and Dam as codified at 35 Ill. Admin. Code 303.225(d) (with respect to the portion of the Calumet River from Torrence Avenue to O'Brien Locks and Dam<sup>5</sup>) and 303.227(a) (with respect to the portion of the Calumet River from Lake Michigan to Torrence Avenue) in accordance with 40 CFR 131.5(a)(1), (2), (4) and (5) because no adequate rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a).

**2. The EPA Disapproves 35 Ill. Admin. Code 303.227(b), and the Repeal of 303.441(a) and (i), to the Extent that it Removes the Secondary Contact Recreational Use Designation for the Lower CSSC and the Brandon Pool**

As explained in Section II.B.1.e of this document, the IPCB concluded that Primary Contact and Secondary Contact recreation use designations cannot be attained in the Lower CSSC and the Brandon Pool *See* IPCB Second Notice Opinion and Order in R2008-009(A) at 6-7 (June 16, 2011); IPCB First Notice Opinion and Order in R2008-009(A) at 83 (August 5, 2010). The following reasons were noted by the IPCB to support this conclusion:

(1) there is no shoreline access to these segments because they are "composed of vertical-walled, deep draft channels;" and

(2) it is not safe to engage in Secondary Contact recreation activities in those segments because:

(a) the MWRDGC periodically draws down water levels in the CAWS and LDPR to drain storm runoff during rain events to prevent flooding, resulting in sudden flow fluctuations that makes recreation unsafe,

<sup>5</sup> As explained in Section III.A.2 of this document, the EPA approves 35 Ill. Admin. Code 303.225(d) and the repeal of 35 Ill. Admin. Code 303.441(e) as those new and revised water quality standards apply to the portion of the Calumet River from O'Brien Locks and Dam to its confluence with Grand Calumet River and Little Calumet River.

(b) barges and large power boats use the segments and could collide with people engaged in Secondary Contact recreation activities, and

(c) the barges and large power boats create significant wakes that could cause people engaged in Secondary Contact recreation activities to capsize, with those people being unable to escape from the water due to the fact that these segments are “composed of vertical-walled, deep-draft channels.

See IPCB First Notice Opinion and Order in R2008-009(A) at 33, 47 and 83 (August 5, 2010).

**a. The IPCB’s Conclusion is Inconsistent With Evidence in the State Administrative Record**

The EPA’s review indicates that the IPCB’s conclusion that Secondary Contact recreation activities are not attainable is inconsistent with evidence in the state administrative record demonstrating that individuals have in fact been engaging in those activities in both the Lower CSSC and the Brandon Pool. Specifically, 979 recreational boats traveled through the Lockport lock, which connects the lower CSSC and Brandon Pool, and 1316 recreational boats traveled through the Brandon Road Lock, which connects the Brandon Pool to the downstream Dresden Island Pool segment of the LDPR in 2001 (Att. A at 7-36). Additionally, MWRD reports 2, 20 and 56 observations of canoeing, fishing, and recreational boating, respectively, in the Lower CSSC (Att. 1-3 of prefiled testimony of William J Stuba, filed 08/04/2008).

**b. Access Issues**

With regard to the access issue, the state administrative record shows the following points of access to these waters: shoreline access to the Lower CSSC via the Prairie trail or I&M Corridor trail in the vicinity of Lemont (Att. L), and public access to the Brandon Pool at the Joliet Bicentennial Park where fishing could take place, (Att. A at 7-22). In addition, nothing in the state administrative record demonstrates that people are unable to access these segments to engage in secondary contact recreation from upstream locations (for the Lower CSSC), or downstream locations (for the Brandon Pool). Specifically, the state administrative record shows that nearby public access points are approximately 10 miles upstream or downstream of the Lower CSSC and Brandon Pool, respectively (Att. A in Exh. 338, Att. A at 7-45). Therefore, there is no evidence that the lack of access constitutes a human caused condition that prevents attainment of the use and cannot be remedied, as the state contends. Furthermore, as the EPA previously noted in its October 8, 2010, comments to the IPCB, to the extent that the lack of direct, shoreline access to this segment is in fact an impediment to secondary contact recreation occurring in these segments, nothing in the state administrative record demonstrates that this condition could not be remedied by state or local governments taking legislative, regulatory or other actions to ensure that additional, direct shoreline access points are constructed.

**c. Safety Issues**

With regard to safety issues, the EPA is unaware of information in the state administrative record regarding how frequently the “draw-down” conditions cited by the IPCB exist in these two

segments or the length of time that such conditions exist, and so there is no basis to conclude that the need for “draw downs” prevents Secondary Contact recreation activities at all times and places in these two segments. Similarly, the EPA is unaware of information in the state administrative record regarding how frequently barges and power boats cause the asserted unsafe conditions to exist in these two segments. Moreover, as the EPA previously noted in its October 8, 2010, comments to the IPCB, Illinois has not demonstrated that any such unsafe conditions cannot be remedied. Finally, as the EPA previously noted in its October 8, 2010, comments to the IPCB, with regard to concerns over people’s ability to get out of the water in the event of a capsized, nothing in the state administrative record demonstrates that this condition could not be remedied by state or local governments taking legislative, regulatory or other actions to construct structures such as docks, ladders, or other structures that would provide safe means for directly exiting these segments, in the event of a capsized.

**d. Conclusion Regarding Illinois’ Removal of Secondary Contact Recreation Use Designation for the Two Segments**

For the reasons described above, the information submitted to the EPA to support Illinois’ removal of the Secondary Contact recreation use for Lower CSSC and the Brandon Pool does not demonstrate that the use is not attainable in either of those segments in accordance with 40 CFR 131.10(g). The EPA is disapproving Illinois’ removal in accordance with 40 CFR 131.5(a)(1), (4) and (5) because no adequate rationale has been provided for removal of the use as required by 40 CFR 131.6(a) and 131.10(g). Specifically, the EPA disapproves: (1) Illinois’ repeal of 35 Ill. Admin. Code 303.441(a) and (i) to the extent that the repeal removes the Secondary Contact recreation use previously applicable to the Lower CSSC and the Brandon Pool, and (2) 35 Ill. Admin. Code 303.227(b)(1) and 303.227(b)(2), which specify that the Lower CSSC and the Brandon Pool are designated as Non-Recreation Waters.

**3. The EPA Disapproves 35 Ill. Admin. Code 301.247, 303.204, 303.220(c), 303.225(a) and (d) and 303.227(a) to the Extent These Changes (1) Removed the Aspects of the General Use Designation Pertaining to Activities Other than Recreation and (2) Replaced the General Use Criteria that Previously Applied to these Three Segments When They were General Use Waters that are Set Forth at 35 Ill. Adm. Code 302 Subpart B with the Secondary Contact and Indigenous Aquatic Life Use Criteria Set Forth at 35 Ill. Admin. Code 302 Subpart D for the Chicago River, the Upper North Shore Channel, and the Calumet River from Lake Michigan to O’Brien Locks and Dam**

As described in Section II.B.2 of this document, changes to 35 Ill. Admin. Code 301.247 (definition of Chicago Area Waterway System), and 303.204 (providing that the criteria set forth at 35 Ill. Adm. Code 302 Subpart D apply to all segments of the CAWS and LDPR), in conjunction with the listing of the Chicago River, the Upper North Shore Channel, and the Calumet River from Lake Michigan to the O’Brien Locks (in 35 Ill. Adm. Code 303.220(c), 303.225(a) and (d) and 303.227(a), respectively), removed the General Use designation and its criteria set forth in 35 Ill. Adm. Code 302 Subpart B that had been in place prior to Illinois’ recent revision. In accordance with 40 CFR 131.5(a)(1), (2), (4) and (5), the EPA is disapproving the changes at 35 Ill. Admin. Code 301.247, 303.204, 303.220(c), 303.225(a) and (d) and

303.227(a) to the extent that they: (1) remove the aspects of the General Use designation that provide protection for aquatic life, wildlife, agricultural use, most industrial uses and aesthetic quality as described in 35 Ill. Admin. Code 302.202 for these three CAWS segments through the replacement of the General Use with the Indigenous Aquatic Life use described at 35 Ill. Admin. Code 302.402, and (2) replace the General Use criteria (set forth in 35 Ill. Adm. Code 302, Subpart B) with the Secondary Contact and Indigenous Aquatic Life criteria set forth at 35 Ill. Adm. Code 302 Subpart D for these three CAWS segments because no rationale has been provided as required by 40 CFR 131.6(a), (b), (c) and (f), 131.10(g) and 131.11(a). Specifically, EPA is disapproving both: (1) the removal of criteria intended to protect primary contact recreation at 302.209, and (2) the removal of criteria intended to protect the aspects of the General Use designation other than recreation set forth in other parts of 35 Ill. Admin. Code 302 Subpart B. In addition, the EPA is disapproving Illinois' repeal of 35 Ill. Admin. Code 303.441(j) that removed the site-specific aquatic life dissolved oxygen criteria for the lower North Shore Channel at 35 Ill. Admin. Code 303.441(j) (last sentence) in accordance with 40 CFR 131.5(a)(2) and (5) because no rationale has been provided as required by 40 CFR 131.6(b), (c) and (f) and 131.11(a).