



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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 77 WEST JACKSON BOULEVARD
 CHICAGO, IL 60604-3590

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JUN 27 2013

STATE OF ILLINOIS
 Pollution Control Board

JUN 26 2013

REPLY TO THE ATTENTION OF: WQ-16J



ORIGINAL

PC# 1372

(c)

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

Dear Illinois Pollution Control Board:

The U.S. Environmental Protection Agency commends the Illinois Pollution Control Board (IPCB) for issuance of its First Notice of Proposed Rulemaking in Subdocket C of R08-009. EPA is providing comments on several issues related to the Board's proposal and justification of aquatic life uses for the Chicago Area Waterway System and Lower Des Plaines River (CAWS and LDPR).

I. UAA Analysis

IPCB has proposed adopting designated uses throughout the CAWS and LDPR that do not include the uses specified in section 101(a)(2) of the Clean Water Act (CWA) in that the proposed designated uses do not provide for the protection and propagation of fish, shellfish, and wildlife. IPCB asserts in its First Notice Order on Subdocket C that attaining such uses is not feasible for the reasons specified at 40 CFR 131.10(g)(3), (4) and (5).

40 CFR 131.10(g)(3) provides that a state may remove or establish a subcategory of a designated use if the State can demonstrate, among other things, that attainment of the use is not feasible because:

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.

IPCB concluded that stormwater and Combined Sewer Overflows (CSOs) are human caused sources of pollution that prevent attainment of the uses specified in section 101(a)(2) of the CWA. However, EPA is unaware of information in the record before IPCB adequately demonstrating either that those sources of pollution cannot be remedied or that any such remedies that might exist would cause more environmental damage to correct than to leave in place. To the contrary, information in the record suggests that CSOs into the CAWS and LDPR can be remedied through the completion of the Tunnel and Reservoir Plan. Absent such a demonstration, EPA questions whether 40 CFR 131.10(g)(3) provides an adequate basis to justify adoption of designated uses that do not include the uses specified in section 101(a)(2) of the CWA of providing for the protection and propagation of fish, shellfish, and wildlife.

40 CFR 131.10(g)(5) provides that a state may remove or establish a subcategory of a designated use if the State can demonstrate, among other things, that attainment is not feasible because:

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.

IPCB concluded, at least for some waters, that low flow conditions preclude attainment of the uses specified in section 101(a)(2) of the CWA pertaining to aquatic life. However, EPA is not aware of information in the record before the IPCB that adequately demonstrates that the low flow conditions cited by IPCB are related to the natural features of the water body, and so EPA questions whether 40 CFR 131.10(g)(5) is applicable. Further, EPA questions whether such low flow conditions do, in fact, preclude attainment of the use.

40 CFR 131.10(g)(4) provides that a state may remove or establish a subcategory of a designated use if the State can demonstrate, among other things, that attainment 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.

EPA believes that, with regard to this factor, IPCB should strengthen its rationale for each water where use designations are proposed that do not include the uses specified in section 101(a)(2) of the CWA pertaining to aquatic life to show: (1) what information demonstrates that the hydromodifications “preclude the attainment of the use,” based upon the administrative record regarding existing physical and biological conditions, and (2) the basis for concluding that “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.” In any instances where IPCB asserts that the record supports a conclusion that it is not possible to restore the water body to its original condition, IPCB should also document that the modification cannot be operated “in a way that would result in the attainment of the use”.

The following comments are on the rationale provided by IPCB for specific waters:

- Chicago River and Upper Dresden Island Pool: EPA supports IPCB’s proposal to designate aquatic life uses consistent with those specified in section 101(a)(2) of the CWA.
- Calumet River System: IPCB should explain why the portions of the Calumet River system, including Lake Calumet, which are hydrologically connected to Lake Michigan at all times, are not capable of supporting aquatic life uses consistent with those specified in section 101(a)(2) of the CWA.
- Non-navigable segments: While the habitat of the wide, deep, hydrologically modified shipping channels present throughout much of the CAWS and LDPR waters may not be able to be restored to a level that supports aquatic life consistent with the 101(a)(2) goal, it is unclear how hydrological modifications preclude attainment of 101(a)(2) aquatic life

uses in the more narrow and shallow waters present in the CAW, which are not used for navigation purposes. IPCB should provide specific information on the hydrologic modifications of the Grand Calumet River, North Shore Channel, and North Branch of the Chicago River north of Addison Street that explains how these modifications preclude attainment of 101(a)(2) aquatic life uses. Further, IPCB should provide the basis for concluding that the aquatic life uses of the waters in question cannot be restored (i.e., through habitat improvements) or the modifications cannot be operated in a way that would result in attainment of the 101(a)(2) aquatic life use goal.

- Chicago Sanitary and Ship Canal and Brandon Pool: IPCB should provide a better demonstration that the hydromodification present in these waters prevents attainment of the Aquatic Life Use A designation proposed for other waters and that the proposed use protects existing uses.

II. Aquatic Life Use A and B Descriptions

IPCB has substantially modified the proposed aquatic life use designations that will apply to CAWS and LDPR waters. EPA has identified several aspects of the proposed designations that do not appear to be consistent with federal law. Specifically, the uses appear to restrict aquatic life use protection to fish only. However, this restriction appears to be inconsistent with the requirement in 40 CFR 131.10(i) that designated uses reflect the uses actually being attained. As documented repeatedly in the administrative record, aquatic life, including macroinvertebrates and various plants, algae, and wildlife, are currently maintained and supported in the CAWS and LDPR waters. Further, fish identified in the proposed designated uses depend upon such aquatic life for their protection and propagation. In the absence of the specific inclusion of the goal that these waters will provide for the protection of aquatic life such as macroinvertebrates, plants, algae, and wildlife or proposed aquatic life criteria that show that this aquatic life is indeed protected in the CAWS and LDPR, EPA questions whether the proposed designated uses are consistent with federal law. As such, EPA recommends that IPCB revert to the designated use language proposed by the Illinois Environmental Protection Agency in its Statement of Reasons. However, if language from the IPCB's proposed use is retained, EPA further questions whether the word "may" preceding the fish species list should be included in the description of the designated uses.

III. Bacteria Criteria for Primary Contact Waters

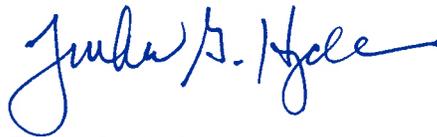
EPA commends Illinois' protection of waters designated for primary contact recreation through the application of Illinois' bacterial water quality standards that are effective in other Illinois waters. However, EPA notes that Illinois is directed by the CWA (section 303(i)(1)(B)) to update and submit to EPA revised standards for the Great Lakes recreational waters consistent with the 2012 Recreational Water Quality Criteria and EPA encourages Illinois to update all recreational water standards for all recreational waters in Illinois, including the CAWS and LDPR, during this same action.

IV. Next Steps

Again, EPA commends IPCB's progress to adopt new and revised water quality standards for the CAWS and LDPR. EPA encourages IPCB to carefully review these comments in formulating its second notice of proposed rulemaking in Subdocket C and looks forward to the adoption of new aquatic life uses and bacterial water quality standards for these waters. Further, EPA looks forward to IPCB's timely adoption of water quality standards to address EPA's previous disapprovals to the extent that the ongoing rulemakings will not resolve the disapprovals.

Please contact Candice Bauer of my staff if you have any questions. She can be reached at (312) 353-2106 or bauer.candice@epa.gov.

Sincerely,



Tinka G. Hyde
Director, Water Division

cc: Marcia Willhite, Illinois Environmental Protection Agency