

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

John Therriault, Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph St., Suite 11-500
 Chicago, IL 60601

Marie Tipsord, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph St, Suite 11-500
 Chicago, Il 60601

Persons included on the attached
SERVICE LIST

PLEASE TAKE NOTICE that the Environmental Law & Policy Center, Natural Resources Defense Council, Openlands, Friends of the Chicago River, Southeast Environmental Task Force, Prairie Rivers Network and the Illinois Chapter of Sierra Club (“Environmental Groups”) have today filed an ENVIRONMENTAL GROUPS’ FIRST-NOTICE COMMENTS ON SUBDOCKET C in R2008-009, a copy of which is herewith served upon you.

Respectfully Submitted,



Albert Ettinger
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 Environmental Law and Policy Center
 35 East Wacker Drive, Suite 1300
 Chicago, IL 60601
 312-795-3707

DATE: July 1, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-09 Subdocket C
CHICAGO AREA WATERWAYS SYSTEM) (Rulemaking- Water)
AND THE LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 Ill. Adm. Code))
Parts 301, 302, 303 and 304)
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ENVIRONMENTAL GROUPS' FIRST-NOTICE COMMENTS
ON SUBDOCKET C

Environmental Law & Policy Center, Natural Resources Defense Council, Openlands, Friends of the Chicago River, Southeast Environmental Task Force, Prairie Rivers Network Alliance for the Great Lakes and the Illinois Chapter of Sierra Club (“Environmental Groups”) support all but one of the (Board’s) proposed Aquatic Life Use Designations and congratulate the Board on synthesizing a massive record on these issues. Generally speaking, the Board effectively balanced the weight of the evidence to arrive at improved aquatic life goals that will guide a long-neglected system toward a more ecologically-sound future.

Environmental Groups stand by our previously-submitted testimony and comments, but for the most part these comments on the Board’s First Notice rule will not attempt to reargue points the Board has already acknowledged. Instead, our comments will focus on responding to some of the Board’s stated concerns about the proposed use designations. First, we will discuss the Board’s proposed Aquatic Life Use definitions. Then we will briefly touch on issues related to the designation of three particular segments.

I. Aquatic Life Use Definitions

Environmental Groups believe that, by adding examples of species to the Aquatic Life Use definitions, the Board has improved the clarity of these designations. The final rules, of course, should make clear that these are only examples and that IEPA biologists should make sure that all of the species are protected that should be.

Over the course of the proceeding, there has been some discussion about whether or not particular uses protect for early life stages of fish. See, e.g. Prefiled Testimony of Roy Smogor at 6-7 (Dec. 21, 2007). It may be helpful for the Board to clarify in the record that the Aquatic Life Use A and Aquatic Life Use B designations are meant to protect the described fish communities throughout their life cycles. Fish eggs, larvae and young-of-the-year fish have been found throughout the waters at issue in this case where collection methods were capable of catching those organisms. See, e.g. PC #505 and 11/10/09Tr. at 15-16. Dr. David Thomas and the Illinois Department of Natural Resources have opined that spawning currently occurs within the system, including in the Brandon Pool and Chicago Sanitary and Ship Canal. Thomas Prefiled Testimony at 5 (Aug. 4, 2008), 08/14/09PMTr. at 19-20 and PC #505. For these reasons, and because supporting communities of fish also entails supporting fish reproduction and growth, we ask the Board to state in the record that it intends Aquatic Life Use Designations A and B to protect early life stages of fish and adult fish.

The proposed definitions for CAWS Aquatic Life Use A Waters and CAWS and Brandon Pool Aquatic Life Use B Waters state that waters designated thereunder are “not presently capable of maintaining a balanced, integrated, adaptive community of warm-water fish.” It appears this language was borrowed from aquatic life use designations in Ohio and elsewhere. The use of the descriptor “adaptive” is a bit confusing in this context, as one could describe

“tolerant” species as “adaptive” to adverse environmental circumstances. We recommend that the word “adaptive” be deleted from the definitions to make the comparison between the aquatic life communities clearer.

There is also a slight difference in wording between the ALU A and ALU B definitions that should be reconciled to avoid future problems with interpretation of the regulations. ALU A describes a “community of warm-water fish and macroinvertebrates,” while ALU B describes a “community of warm-water fish and macroinvertebrate community.” We recommend that the language in ALU A be used in both definitions, to avoid a situation where a court might attempt to derive a difference in meaning where none was intended.

Because water quality criteria already exist for waters designated as “General Use,” the Board has asked whether those criteria should become effective immediately for waters that would be newly-designated as General Use (Chicago River and Upper Dresden Island Pool). Thermal criteria in the Upper Dresden Island Pool are the only criteria expected to be at issue in the Chicago River or Upper Dresden Island Pool. We believe that after hearing the evidence regarding temperature that has not yet been heard, the Board should ultimately adopt all the General Use thermal criteria for the Upper Dresden Island Pool in Subdocket D. All General Use criteria except thermal criteria for the Upper Dresden Island Pool should immediately come into effect at the time the Board adopts General Use designations for those waters.

II. Designation of Particular Segments

The Board invited comment on how to reconcile the record’s focus on individual stream segments with the need to address larger aquatic systems and connectivity inherent to such systems. Environmental Groups agree that ecological connectivity is important, as Dr. Thomas

stated in his testimony. See, e.g., 08/14/09AMTr. at 66, 73. In our view, the overall effect of the Board's proposal to designate almost all waters at issue in this case as Aquatic Life Use A addresses that "big picture" issue. Under the Board's proposal, fish will have access to a large interconnected system of waterways that will enjoy more or less good water quality throughout, despite the other impacts that currently prevent the Clean Water Act goal from being attained. Similarly, the decision to designate the Upper Dresden Island Pool and the Chicago River as General Use waters expands the connectivity of Illinois waters that do attain the Clean Water Act goal. The broad strokes of the proposed designations allow fish to travel through these waterways to access higher quality habitat tributary to these waterways. By contrast, that ecological connectivity would suffer if the Board had proposed a patchwork of use designations (and consequently lower water quality) based only on the habitat that is immediately available within a short stream reach.

For this reason, the Environmental Groups support the Board's decision to retain the current General Use standard for the Chicago River. For clarity, Environmental Groups advise that the Board maintain General Use standards in the Chicago River for recreational purposes as well. Further, Environmental Groups recommend that the current General Use designation be retained for the Calumet River upstream of the O'Brien Lock and Dam. This waterway segment is directly connected to Lake Michigan, which has high water quality. Given the direct Lake Michigan connection, this segment has the potential for improvement in the foreseeable future and Environmental Groups oppose degrading the current General Use standard for this segment.

Below we present brief comments on the Board's proposed use designations for three stream segments: Brandon Pool, Upper Dresden Island Pool, and Lower North Shore Channel.

a. Brandon Pool

Environmental Groups maintain our position that Brandon Pool should be designated as Aquatic Life Use A. When designating aquatic life uses, the Board is obligated by law to protect existing uses of our waterways. 40 CFR 131.10 (g) and (h). In some circumstances it is acceptable to weigh the value of available habitat against the value of water quality data in order to determine the highest attainable aquatic life use. But habitat and water quality data cannot eclipse the fact that a community of moderately tolerant fish species already exists in the Brandon Pool.

Between the IDNR sampling and the EA sampling, every one of the species proposed to represent Aquatic Life Use A assemblages has been collected in the Brandon Pool area. PC #505 at Table 2 and Exh. 370, CD1 at 9.3-18—9.3-19. Further, the results of the IDNR fish sampling operation demonstrate that two-thirds of the fish species present in the Brandon Pool are considered moderately tolerant. (PC #505 at 3.) These species include important sport fishing species like sauger, bluegill, largemouth bass, walleye, and northern pike. (*Id.*) The EA sampling also found important sport fishing species in the Brandon Pool, including rainbow trout, northern pike, bluegill, black crappie and largemouth bass. Exh. 370, CD1 at 9.3-18—9.3-19. One species found by IDNR's superior sampling methods, the smallmouth bass, is considered intolerant. (PC #505 at 3.)

Getting the Brandon Pool aquatic life use designation right is important to ecological connectivity because the Des Plaines River meets the Chicago Sanitary and Ship Canal here, providing fish access to much better habitat upstream. IDNR opines that the deep water downstream of the Lockport Lock may be an important overwintering area for sauger. (*Id.*) The Board's First Notice Opinion does not acknowledge the good habitat available directly adjacent

to the Brandon Pool at Des Plaines River mile 290.1 (QHEI score 68.5). (Exhs. 5 and 6, and see Attachment A to this comment for context of where the sample site is located). Moderately tolerant species are already present in the Brandon Pool. Here, as elsewhere in the system, fish communities can be supported as long as they can access good habitat nearby.

Fish and macroinvertebrate IBI scores are measures of water quality. If the Board declines to designate the Brandon Pool as Aquatic Life Use A, we may never know if the accompanying improvement in water quality could result in more robust IBI scores.

The burden is not on environmental groups to show that a use can be attained, it is on those who would lower the use to show that it cannot. The presence of moderately tolerant and intolerant species suggests that this waterway has a higher attainable use than the Board has given it credit for in its first notice proposal.

b. Upper Dresden Island Pool

Environmental Groups fully agree with the Board's proposal to designate the Upper Dresden Island Pool as General Use. As the Board has recognized, QHEI scores show that fish in the Upper Dresden Island Pool have access to good habitat, water quality is generally as good as many other Illinois General Use waters, and fish assemblages have been improving in recent years. We agree that not one of the UAA factors has been demonstrated for the Upper Dresden Island Pool and that the water should be designated General Use.

c. Lower North Shore Channel

We gather from other sections of the Board's Opinion and Order that the Board is proposing to designate the Lower North Shore Channel as Aquatic Life Use A, but the narrative on pages 184-185 fails to state the proposed designation. We note this so the Board can correct the error prior to Second Notice. Thank you for your consideration of these comments.

Respectfully submitted,

ENVIRONMENTAL LAW & POLICY CENTER
FRIENDS OF THE CHICAGO RIVER
NATURAL RESOURCES DEFENSE COUNCIL
OPENLANDS
PRAIRIE RIVERS NETWORK
ALLIANCE FOR THE GREAT LAKES
SIERRA CLUB - ILLINOIS CHAPTER
SOUTHEAST ENVIRONMENTAL TASK
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*Authorized to represent the parties listed above for
the purposes of these comments*

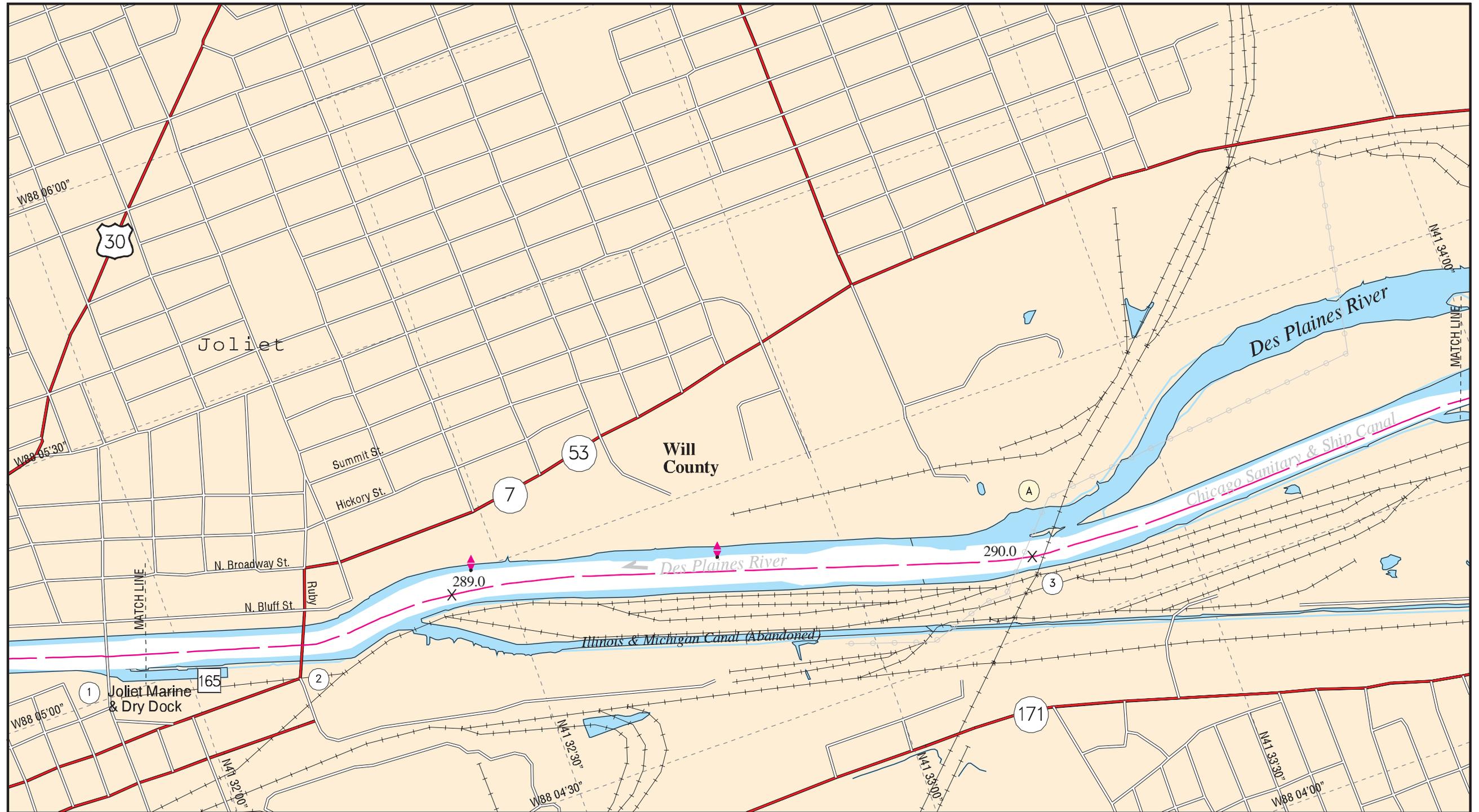
ATTACHMENT A:

US Army Corps of Engineers IL Waterway
Map No. 113

US ARMY CORPS OF ENGINEERS

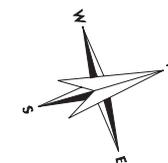
ILLINOIS WATERWAY

MILE 288.4 TO 290.8



1998

- 1) The legend is located immediately preceding map No. 1
- 2) Barge Facility information and submerged cable and pipeline clearances are located in appendices A and B respectively.



MAP NO. 113

CERTIFICATE OF SERVICE

I, Albert Ettinger, hereby certify that I have served the attached **ENVIRONMENTAL GROUPS' FIRST-NOTICE COMMENTS ON SUBDOCKET C** upon the below service list via the United States Mail, postage prepaid, in Chicago, Illinois on July 1, 2013.



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