



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 16 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. Code 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 CFR402.03, 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. Information regarding the ongoing IPCB rulemakings for other new and revised standards in these waters is available at 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