



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

**NOV 03 2011**

REPLY TO THE ATTENTION OF:

**WQ-16J**

**Marcia T. Willhite, Chief  
Bureau of Water  
Illinois Environmental Protection Agency  
P.O. Box 19276  
Springfield, Illinois 62794-9276**

**Dear Ms. Willhite:**

Thank you for your September 26, 2011 letter, transmitting Illinois' new and revised water quality standards for review and approval by the U.S. Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act (CWA). Specifically, you have submitted Illinois' new and revised recreational use designations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (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 the standards were duly adopted pursuant to Illinois law.

By this letter, the EPA approves a portion of Illinois' new and revised water quality standards in accordance with section 303(c)(3) of the CWA: the provisions establishing a Primary Contact Recreation use designation for five segments of the CAWS at 35 Ill. Admin. Code 301.282, 301.323, and 303.220(a)-(b) and (d)-(f). The basis for today's decision is set forth in the enclosure with this letter. The EPA is still reviewing, and has made no decision on, Illinois' other new and revised water quality standards that you submitted in your September, 26, 2011 letter. The EPA will take a separate action in accordance with section 303(c)(3) of the CWA at a later date on those other portions of Illinois' new and revised water quality standards for the CAWS and LDPR.

The EPA's approval of water quality standards is considered a federal action which may be subject to the section 7(a)(2) consultation requirements of the Endangered Species Act (ESA). Section 7(a)(2) of the 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' adoption of the Primary Contact Recreation use designation. Consequently, the EPA's action to approve Illinois' Primary Contact Recreation use designation is not subject to the requirements of section 7(a)(2) of the ESA, as described in §50 CFR 402.03.



**EPA'S BASIS FOR APPROVAL OF ILLINOIS' NEW AND REVISED WATER QUALITY STANDARDS AT 35 ILL ADMIN. CODE 301.282, 301.323 AND 303.220(a)-(b) & (d)-(f) ESTABLISHING PRIMARY CONTACT RECREATION USE DESIGNATION FOR PORTIONS OF THE CHICAGO AREA WATERWAY SYSTEM**

**Date:** NOV 03 2011

**I. INTRODUCTION**

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 recreational use designations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR) that were adopted by the Illinois Pollution Control Board (IPCB). 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 IPCB in support of the new and revised recreational use designations. 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 recreational use designations were duly adopted pursuant to Illinois law.

Today, the EPA is taking action in accordance with section 303(c)(3) of the CWA to approve a portion of the new and revised water quality standards submitted by the IEPA. Specifically, in this action, the EPA is approving the new and revised water quality standards at 35 Ill. Admin. Code 301.282, 301.323 and 303.220(a)-(b) and (d)-(f), which establish a Primary Contact Recreation use designation for the following five segments of the CAWS:

- 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;
- Little Calumet River from its confluence with Calumet River and Grand Calumet River to its confluence with Calumet-Sag Channel; and
- Calumet-Sag Channel.

Today's action pertains only to these five segments. The EPA is still reviewing, and has made no decision on, the remaining new and revised water quality standards that the IEPA submitted to the EPA in its letter of September 26, 2011 which pertains to other segments of the CAWS and the LDPR. The EPA will take a separate action on those remaining new and revised water quality standards in accordance with section 303(c)(3) of the CWA at a later date.



The basis for today's decision is set forth below.

## **II. THE EPA'S REVIEW UNDER THE CLEAN WATER ACT AND 40 CFR PART 131**

40 CFR §131.21(b) provides, in relevant part, that the EPA's "approval or disapproval of a State water quality standard shall be based on the requirements of the Act as described in §§131.5 and 131.6." Under 40 CFR §131.5(a), the EPA's review of new and revised water quality standards involves a determination of:

- (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;
- (3) Whether the State has followed its legal procedures for revising or adopting standards;
- (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 and, for Great Lakes States or Great Lakes Tribes (as described in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR Part 132.

40 CFR §131.5(b) provides that, "[i]f EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section, EPA approves the standards."

As described below, the EPA has determined that Illinois' new and revised water quality standards at 35 Ill. Admin. Code 301.282, 301.323, and 303.220(a)-(b) and (d)-(f) establishing a Primary Contact Recreation use designation for the five segments of the CAWS listed above are consistent with the factors specified in 40 CFR §131.5(a).

### **A. Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act.**

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 Part 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) (i.e., “protection and propagation of fish, shellfish, and wildlife and . . . recreation in and on the water”) unless those uses have been shown to be unattainable. See *Idaho Mining Association v. Browner*, 90 F.Supp. 2d 1078, 1092 (D. Id. 2000); 68 Fed. Reg. 40428, 40430-31 (July 27, 2003). Thus, State use designations that are consistent with the uses specified in section 101(a)(2) of the CWA are consistent with the CWA for purposes of 40 CFR §131.5(a)(1).

Illinois’ Primary Contact Recreation use designation for the five segments of the CAWS listed above is defined by 35 Ill. Admin. Code 301.323 as:

any recreational activity in which human contact consists of full body contact with the waters such as swimming, diving, or jumping; and, including all Incidental Contact Recreation.

“Incidental Contact Recreation” is defined by 35 Ill. Admin. Code 301.282 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.

Illinois’ Primary Contact Recreation use designation, therefore, provides for recreation in and on the water, consistent with the recreation use specified in section 101(a)(2) of the CWA. Consequently, Illinois’ adoption of the Primary Contact Recreation use designation for the five segments of the CAWS listed above is consistent with the requirements of the CWA for purposes of 40 CFR §131.5(a)(1).

**B. Whether the State has adopted criteria that protect the designated water uses.**

This factor is not relevant to today’s action because Illinois’ new and revised water quality standards consist of new and revised recreational use designations, not new or revised criteria.

On May 11, 2011 the EPA determined in accordance with section 303(c)(4)(B) of the CWA that criteria necessary to protect recreation in and on the water are necessary for the segments of the CAWS that are the subject of today’s action. The IPCB is



considering adoption of such criteria in IPCB Docket Number R2008-009(B). Information pertaining to that docket is available at <http://www.ipcb.state.il.us/COOL/external/PendingRulemakings.aspx>. If Illinois fails to adopt criteria to protect the Primary Contact Recreation use designation, the EPA will take action in accordance with section 303(c)(4) of the CWA and the EPA's May 11, 2011 determination letter to propose such criteria for the segments of the CAWS that are the subject of today's action.

**C. Whether the State has followed its legal procedures for revising or adopting standards.**

As described in the Illinois Attorney General's October 26, 2011 certification, Illinois followed its legal procedures in adopting the new and revised water quality standards that are the subject of today's action.

**D. 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.**

This factor is not relevant to today's action because Illinois' Primary Contact Recreation use designation is consistent with the "recreation in and on the water" use specified in section 101(a)(2) of the CWA.

**E. Whether the State submission meets the requirements included in §131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as described in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR Part 132.**

As described below, Illinois' submission meets each of the requirements included in 40 CFR §131.6 relevant to today's action, and the requirements of 40 CFR Part 132 are not applicable with respect to this action because the water bodies addressed by today's action are not in the Great Lakes System.

**1. Requirements included in §131.6.**

40 CFR §131.6 specifies six elements States must include when submitting water quality standards to the EPA for review.

**a. Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.**

As described above, the Primary Contact Recreation use designation for the five segments of the CAWS listed above is consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the CWA. Consequently, Illinois' submission meets the requirements of 40 CFR §131.6(a).



**b. Methods used and analyses conducted to support water quality standards revisions.**

As described above, the IEPA submitted the extensive administrative record that documents the methods used and analyses conducted to support Illinois' decision to adopt the Primary Contact Recreation use designation for the five segments of the CAWS that are the subject of today's action. That record includes the IPCB's June 16, 2011 "Proposed Rule, Second Notice Opinion and Order," and August 18, 2011 "Adopted Rule, Final Notice Opinion and Order;" and those opinions and orders thoroughly summarize the IPCB's record, set forth the IPCB's reasoning for deciding to adopt the Primary Contact Recreation use designation for the five segments of the CAWS that are the subject of today's action, and respond to public comments that were raised regarding that decision. Consequently, Illinois' submission meets the requirements of 40 CFR §131.6(b).

**c. Water quality criteria sufficient to protect the designated uses.**

As described above, this element is not relevant to today's action because the new and revised water quality standards that Illinois submitted and the EPA is approving pertain solely to changes to Illinois' recreational use designations, not changes to Illinois' criteria.

**d. An antidegradation policy consistent with § 131.12.**

This element is not relevant to today's action because the new and revised water quality standards that Illinois submitted and the EPA is approving pertain solely to changes to Illinois' recreational use designations, not changes to Illinois' antidegradation policy.

**e. Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.**

The Illinois Attorney General's Office submitted the required certification to the EPA on October 26, 2011. Consequently, Illinois' submission meets the requirements of 40 CFR §131.6(e).

**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.**

The first part of this element is not relevant to today's action because, as described above, Illinois' Primary Contact Recreation use designation is



consistent with the “recreation in and on the water” use specified in section 101(a)(2) of the CWA. With regard to the second part of this element, Illinois did not submit information on general policies applicable to State standards which may affect application and implementation of the Primary Contact Recreation use designation. However, 40 CFR 131.6(f) only requires submission of such information where such policies actually exist. The EPA is unaware of any such policies, and so Illinois’ failure to include any such information is not inconsistent with 40 CFR 131.6(f).

## **2. Requirements of 40 CFR Part 132**

The requirements of 40 CFR Part 132 apply with respect to waters in the Great Lakes System. 40 CFR §132.1(c). The Great Lakes System is defined as “all streams, rivers, lakes and other bodies of water within the drainage basin of the Great Lakes within the United States.” 40 CFR § 132.2. The CAWS is not within the drainage basin of the Great Lakes System. Consequently, Illinois was not required to include information in its submission pertaining to the requirements of 40 CFR Part 132.

## **III. ENDANGERED SPECIES ACT (ESA)**

The EPA’s approval of water quality standards is considered a federal action that may be subject to the section 7(a)(2) consultation requirements of the ESA. Section 7(a)(2) of the ESA states that “[e]ach 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 Federal involvement or control.”

As described above, the new and revised standards at issue in this action pertain solely to the “recreation in and on the water” use specified in section 101(a)(2) of the CWA, and do not pertain in any way to the “protection and propagation of fish, shellfish, and wildlife” uses specified in section 101(a)(2) of the CWA. In taking action on water quality standards that pertain solely to human recreational activities, the EPA does not have the control or discretion under the CWA to modify its action on any human health water quality standard based on endpoints such as threatened or endangered species (T&E species), nor can EPA’s action on a human health water quality standard be modified to protect a T&E species or the habitat upon which they depend. Rather, states would protect a T&E species or the habitat upon which they depend through the adoption of appropriate non-human health-related designated uses (e.g., aquatic life protection) and related water quality criteria. Under ESA implementing regulations (50 CFR 402.03), section 7 requirements are thus inapplicable to EPA’s action on these human health provisions.

#### **IV. STATE REGULATORY PROVISIONS ADDRESSED BY TODAY'S ACTION**

The following is the complete text of Illinois' regulatory provisions that are the subject of today's action.

##### **Section 301.282 Incidental Contact Recreation**

"Incidental Contact Recreation" means 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.

##### **Section 301.323 Primary Contact Recreation**

"Primary Contact Recreation" means any recreational activity in which human contact consists of full body contact with the waters, such as swimming, diving or jumping, and includes all Incidental Contact Recreation.

##### **Section 303.220 Primary Contact Recreation Waters**

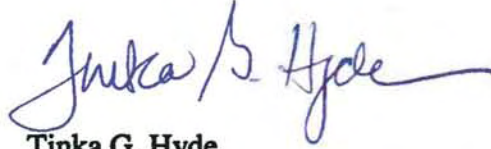
The following waters are designated as Primary Contact Recreation Waters and must be protected for Primary Contact Recreation uses as defined in 35 Ill. Adm. Code 301.323.

- a) Lower North Shore Channel from North Side Water Reclamation Plant to confluence with North Branch of the Chicago River;
- b) 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;
- .....
- d) South Branch of the Chicago River;
- e) Little Calumet River from its confluence with Calumet River and Grand Calumet River to its confluence with Calumet-Sag Channel; and
- f) Calumet-Sag Channel.



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

Sincerely,

A handwritten signature in blue ink that reads "Tinka G. Hyde". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

**Tinka G. Hyde**  
**Director, Water Division**

Enclosure