



**ENVIRONMENTAL LAW
& POLICY CENTER**



openlands

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Illinois Environmental Protection Agency
Sabrina Bailey
Office of Community Relations
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Springfield, Illinois, 62794-9276,
Submitted electronically to sabrina.bailey@Illinois.gov.

Dear Sabrina Bailey:

Thank you for the opportunity to comment on the proposed renewal of the Water Pollution Control Permit (“Draft Permit”) for the U.S. Army Corps of Engineers (“Army Corps”), Chicago District, for the Calumet Harbor Confined Disposal Facility (“CDF”). The Environmental Law and Policy Center (“ELPC”), on behalf of itself, its members, the Alliance of the Southeast (“ASE”) and its members, and Friends of the Parks and its members; and Openlands, on behalf of itself and its members, respectfully submit these comments.

ASE is a multicultural, interfaith, and intergenerational alliance consisting of churches, schools, businesses, and community organizations that prioritize grassroots participation to address the challenges facing southeast Chicago neighborhoods. ASE’s mission is to build the capacity of leaders, organizers, and associations in order to carry out community and social change. ASE also coordinates the Coalition for a South Works CBA, coalition on Chicago’s southeast side that has been working to ensure area developments are healthy, environmentally sustainable, and benefit local residents with living/prevaling wage jobs, training opportunities, affordable housing, community input, and transparency.

Friends of the Parks (“FOTP”) is an Illinois not-for-profit organization founded in 1975 whose mission is to inspire, equip, and mobilize a diverse Chicago to ensure an equitable park system for a healthy Chicago.

ELPC is the Midwest’s leading public interest environmental legal advocacy organization and works to protect the environment and public health, through the combination of public interest litigation, strategic policy advocacy, sound science, and economic analysis.

Openlands is a 58-year-old conservation organization and land trust serving the Chicagoland region and advocating for clean water, healthy and resilient communities, and access to nature where people live.

We oppose the renewal of this permit because the IEPA lacks authority to issue this water pollution control permit, the draft permit is materially insufficient, and the public process was inadequate. The Illinois Environmental Protection Agency should deny the Army Corps permit application.

I. Background

In 1982, Illinois General Assembly granted permission to the U.S. Army Corps of Engineers to use public trust property located on the Lake Michigan shoreline to construct and operate the CDF, with the condition that once the CDF was full, it would be capped and handed over to the Chicago Park District for redevelopment—ultimately transforming the CDF into public recreational space. The CDF was then constructed by the Army Corps of Engineers, Chicago District, between 1982 and 1984. The approximately 45-acre facility is located south of the entrance channel for the Calumet River in Lake Michigan (Calumet Harbor). The Army Corps regularly dredges the Chicago area waterways to ensure navigability, and dumps the contaminated dredged material in the CDF. The dredged material includes numerous toxins and other pollutants, such as mercury and polychlorinated biphenyls (“PCBs”).

When the CDF was first built, the legislature intended that the property be turned into a park by 1994. The Army Corps failed to turn the facility over to the Chicago Park District at that time and continued to use the property to dump dredged material, promising that the CDF site would be reverted to the Park District to be converted to a park by 2022. Now the Army Corps is proposing to renege again, as the agency plans to expand the facility. In doing so, the Army Corps wants to extend the CDF's life by (1) seeking an interim permit extending the Corps authority to operate the CDF for another year and granting it the ability to not only conduct disposal operations but also stockpiling operations, and (2) later seeking a formal permit to transform the CDF into a Dredged Material Disposal Facility (“DMDF”) via a 22-foot vertical expansion. Based on information provided by the Army Corps, a majority of its initial operations for the CDF will **NOT** be focused on the confinement and/or disposal of the dredged material as required by the Illinois legislature. Rather the activities will focus on stockpiling the dredge material for use at a new DMDF. Indeed, as the IEPA stated at the October 5 public meeting, the Army Corps estimates that of the 45,000 cubic yards of dredge to be removed during the interim permit, only 15,000 cubic yards will be used to fill the CDF, with the remaining 30,000 cubic yards going into the drying/stockpiling for use as construction material for a yet unissued permit to construct the DMDF facility.¹

The CDF is located in an environmental justice community that is already disproportionately burdened by environmental degradation and pollution and faces higher cancer and asthma rates. *See* Attachment 15, Maps of the Southeast Side. Storing contaminated material in an environmental justice community and directly on Lake Michigan, the source of Chicago’s

¹ The document containing this information was not available to the public and still has not been made available to the public.

drinking water, presents significant water quality and air quality concerns. The activities contemplated in the interim permit continue to put the East Side, other environmental justice communities on the Southeast Side and South Chicago, and even wildlife at continued risk for exposure to the toxic dredge and pollutants. Unlike a properly permitted, lined, and monitored modern landfill, the CDF was designed to allow the waters of the Lake to flow in and out of it. The CDF effectively concentrates over a million cubic yards of toxic dredge in a sieve at one location directly upstream from Calumet Beach and adjacent to historic Calumet Park and the new Steelworkers Park in the 10th Ward. As these environmental justice communities have been environmentally taxed and overburdened for decades, they should not have to endure the continuation of this toxic development, nor any new toxic facility.

At the end of another 20 years, there would be a 25-foot hill of dredged material which would be then be turned over to the City of Chicago and the Chicago Park District to operate as a public park. Indeed, the Army Corps' Final Environmental Impact Statement clearly anticipates that Chicago taxpayers will then be on the hook for continued monitoring, stabilization, and ensuring that the CDF does not pollute the surrounding water. The action proposed under the interim permit would also violate major federal regulations, including but not limited to the National Environmental Policy Act.

II. IEPA Lacks the Authority to Issue This Draft Water Pollution Control Permit

A. IEPA Must Deny the Draft Permit Because the Army Corps Lacks a Valid Federal Permit for the Proposed Activity.

As stated at the October 5 public meeting, IEPA is considering two rationales for issuing the Draft Interim Water Pollution Control Permit ("Draft Permit"). IEPA first indicated that the CDF dredging operation falls within the exemption to federal permit requirements under § 404(r) of the Clean Water Act ("CWA").

This provision exempts the discharge of dredged or fill material from regulation under §§ 404, 301(a) and 402 of the Clean Water Act. However, the discharge must be: (1) part of the construction of a federal project, (2) specifically authorized by Congress, (3) with information about the discharge included in an environmental impact statement ("EIS") for the project, and (4) the EIS has been submitted to Congress, (5) before the actual discharge of dredged or fill material, and (6) prior to authorization of the project or appropriation of funds for construction. 33 U.S.C. § 1344(r).

There is nothing in the record to suggest that specific authorization from Congress has been obtained. Even assuming that the 2020 EIS has been submitted to Congress, that EIS only deals with the new DMDF expansion which has not been specifically authorized and is outside the scope of this Draft Permit. Furthermore, IEPA was very clear at the October 5 public meeting² that this Draft Permit only covers regular dredging activity for sediment management, *and not* construction

² IEPA hosted a virtual public meeting or "question and answer" session for the public about the CDF's permit renewal on October 5, 2021.

of the proposed expansion, which will be reviewed by IEPA at a later date. Therefore, **the discharge of dredged material proposed to be permitted under the Draft Permit does not meet the legal requirements of the § 404(r) exception.**

The second rationale, first raised by IEPA in response to questions about the 404(r) exception at the October 5 public meeting, is that the Army Corps is not required to obtain a § 404 or § 402 NPDES permit under a federal NPDES exclusion. This federal regulation excludes from the NPDES requirement “[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.” 40 C.F.R. 122.3(b). Therefore, the argument goes, a § 402 NPDES permit is not required for discharges of dredged or fill material regulated by the Army Corps under § 404. However, the discharges associated with the Army Corps’ dredging activities must be federally permitted. The plain text of the CWA makes this clear: “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a); *see also, Greenfield Mills, Inc. v. Macklin*, 361 F. 3d 934, 947 (7th Cir. 2004).

The discharges here must be in compliance with some section of the CWA, specifically either § 402 or § 404. To our knowledge, there has been no public notice of a § 404 permit for dredging operations associated with the CDF. “Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines.” 33 C.F.R. § 336.1(a). In the June 2020 Final EIS for the Dredged Material Management Plan, the Army Corps indicated that it does not issue permits for its own dredge and fill activities, but the project was determined to meet the § 404(b)(1) guidelines. The Army Corps further claimed that the expansion (technically the DMDF) would be covered under Nationwide Permit 16 (“NWP 16”), which has a general § 401 state water quality certification and meets technical requirements for a § 404 permit. IEPA issued the Army Corps a § 401 certification for NWP 16 on the special condition that applicants obtain a pollution control facility permit “for construction and operation of the upland contained disposal.”³ The Army Corps has not yet obtained this required permit.

Further, NWP 16 covers the discharge (return water) from an upland contained disposal area built of dredge spoil. The CDF is not an “upland” facility. Rather, it is an in-water facility that was designed to be hydraulically connected to the Lake. While routing its collected “return water” via pipe to an outfall on the River, the facility itself sits in the waters of the Lake where it is constantly releasing contaminants below the water line and contaminated runoff from above the water-line. Notably, even if NWP 16 did constitute a § 404 permit, 33 C.F.R. § 323.2(d)(2)(i) clarifies that the Army Corps must obtain a § 402 permit to process dredged material on the CDF site for use as cheap construction material for a new and different site. Thus, **NWP 16 does not cover these point source releases and, in any event, IEPA must require an individual NPDES permit application under § 402 of the CWA.**

³ IEPA Log No. C-0210-20: Attachment: Special Conditions for Illinois EPA 401 Water Quality Certifications of Certain Nationwide Permits Regarding Federal Register Proposal to Reissue and Modify Nationwide Permits dated September 15, 2020.

USEPA regulations further clarify that Army Corps' discharges must be regulated under a NPDES permit, defining "discharge of a pollutant" for purposes of the exclusion as "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

Id. Even if the exclusion did apply to the Army Corps' discharges of dredged or fill material, there is more being discharged from the CDF than just dredged or fill material. As explained in further detail below, the CDF is discharging pollutants into both Lake Michigan and the Calumet River, including contaminants from sediment and stormwater runoff. Moreover, the provision cited by IEPA *only* excludes discharges of dredged or fill material or related "return water." It does not exclude the point source discharge of contaminants from the CDF operations into the Calumet River or Lake Michigan.

State regulations make it clear that the Army Corps must obtain an NPDES permit for these point source discharges. "Permits may be required under either of two subparts—NPDES permits, Subpart A, which regulate discharges into navigable waters as defined in the CWA, or Other Permits Subpart B, which regulate certain structures and discharges therefrom *that are not required to have an NPDES Permit.*" 35 Ill. Adm. Code 309.101(a) (emphasis added). NPDES permits are further required for the discharge of any contaminant by any person into waters of the State from a point source. 35 Ill. Adm. Code 309.102(a).

B. IEPA Must Deny the Draft Permit Because It Lacks Authority to Grant Permits for Activities Not Authorized by Section 123 of Public Act 91-611, Including Preparation for Constructing a New DMDF

The Army Corps' prior Water Pollution Control Permit, which expired on May 31, 2021, was issued by the Illinois EPA for activities related to the existing CDF. The Army Corps constructed the existing CDF and maintains and operates it under the authority of Section 123 of Public Law 91-611, which was enacted in 1970 and is codified at 33 U.S.C. § 1293a. *See, e.g.*, Interim Permit Application, Enclosure 2, at 1. The Army Corps' activities at the site of the existing CDF can only proceed under that authority, because the Illinois General Assembly only authorized "the construction, use and maintenance upon such land of a contained spoil disposal facility as contemplated by Section 123 of Public Law 91-611." Public Act 82-770, art. I, § 1-1 (June 29, 1982).

Although the Army Corps sometimes refers to the proposed project as a "vertical expansion" of the existing CDF, it is in fact proposing to build a new, distinct Dredged Material Disposal Facility ("DMDF") under the authority of a different set of federal statutes, that are outside the scope of the State of Illinois' Public Act 82-770. *See* CAWS DMMP/EIS, at 1 (invoking

authority under 33 U.S.C. §§ 2326, 2326a, 2326b, 2326c). This confirmed by the Army Corps' numerous references to the DMDF as a new and distinct facility. For example, in its Environmental Impact Statement, the Army Corps explains: "The proposed plan considers all life cycles of the project, including construction of the new DMDF, operation of the Chicago Area CDF and the new DMDF, and closure of the Chicago Area CDF and the new DMDF." *Id.* at 140. The DMDF facility therefore requires a separate permit, and it would not be covered by the former Water Pollution Control Permit for the existing CDF site by a mere renewal of that permit, as IEPA contemplates.

The Army Corps' interim permit application, which requests permission to "continue to perform dredging and facility operations under the existing program," Interim Permit Application, Cover Letter, at 1, similarly asks the Illinois EPA to permit unauthorized activity. Section 123 states that the Army Corps "is authorized to construct, operate, and maintain . . . contained spoil disposal facilities of sufficient capacity for a period not to exceed ten years." 33 U.S.C. § 1293a (a). A later amendment increased this authority by adding that the Army Corps may "continue to deposit dredged materials into a contained spoil disposal facility constructed under this section until the Secretary determines that such facility is no longer needed for such purpose or that such facility is completely full." *Id.* § 1293 (j) (enacted by Pub. L. No. 100-676 § 24 (a), 102 Stat. 4012, 4027 (Nov. 17, 1988)). The Illinois General Assembly's reference to Section 123 does not incorporate later amendments.

However, even assuming it does, **the amended Section 123 only allows the Army Corps to "deposit dredged materials . . . until the Secretary determines . . . that such facility is completely full," *id.*, and there is no doubt that the facility is completely full.** The CDF was designed to hold 1.3 million cubic yards ("CY") of disposal dredged material, with an additional 0.3 million CY reserved for 3 feet of cover to cap off the CDF and convert it to a park. By the end of 2019, however, the Army Corps had already placed 1,728,795 CY of dredged material in the CDF. *See* U.S. Army Corps of Engineers, *Chicago Area Confined Disposal Facility Trend Analysis for 2015 to 2020*, at 10 (February 2021). At the October 5 public meeting, Illinois EPA indicated that even more material was placed in the CDF in the spring of 2020.⁴ Thus, at this point, the CDF is not only full for disposal purposes, but also has more than sufficient dredged material to cap off the CDF. Any additional disposal or use of this Public Trust property for a different purpose is not permitted by Section 123 or Illinois' limited authorization, and therefore cannot be covered by a CDF permit.

As an instrumentality of the State, the Illinois EPA should take these problems very seriously. The Illinois General Assembly only authorized a CDF to be constructed and temporarily operated under Section 123 of the federal Public Act 91-611, as that statute was written at the time. The legislature intended that the filling of the Lake Michigan lakebed would result in new park land within 10 years. Not only does the Army Corps' proposed DMDF project violate the letter and intent of Public Act 82-770 by constructing something other than a CDF 40 years later, but its immediate proposal—to use a completely full CDF as a materials manufacturing site to prepare for

⁴ *Public Meeting, Proposed Renewal of a Water Pollution Control Permit U.S. Army Corps of Engineers, Chicago District Calumet Harbor Dredged Material Disposal Facility*, 26:30 to 27:30 (October 5, 2021) (IEPA response to Alderwoman Sue Garza), available at <https://multimedia.illinois.gov/epa/EPA-Chicago-District-Calumet-Harbor-Dredged-Material-Disposal-Facility-211005.html>.

construction of the DMDF—is also not encompassed by the Army Corps’ CDF authority under Section 123 of the federal Public Act 91-611. It follows that these activities are not within the scope of a CDF permit. Accordingly, **the Illinois EPA should deny the interim permit or, at a minimum, explicitly prohibit the Army Corps from using this permit to stockpile and process construction materials in preparation for construction of the new, different, and currently unpermitted DMDF.**

III. IEPA Must Deny the Draft Permit Because It Is Materially Insufficient

IEPA may issue general permits for the construction, installation, or operation of categories of facilities for which permits are required, provided that such general permits are consistent with federal and State laws and regulations. 415 Ill. Comp. Stat. Ann. 5/39-10. Accordingly, IEPA must not grant a draft permit if the permit would violate the law. General permits must therefore meet the requirements of the Illinois Environmental Protection Act and associated regulations. The Illinois Environmental Protection Act prohibits the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources. 415 Ill. Comp. Stat. Ann. 5/12 (a). **Even if IEPA has the authority to grant the Draft Permit, that permit must ensure that the activities authorized thereunder will not violate the Illinois Environmental Protection Act and Pollution Control Board regulations.** Continuing to confine contaminated materials in an environmental justice community perpetuates the risk of the contamination. By failing to apply adequate monitoring requirements to ensure there is no risk to our waters and the surrounding communities, failing to include provisions to address the current and future impacts of climate change induced rising waters and severe storm events on the Lake Michigan shore at this precarious and sensitive location, and failing to apply the correct protective water quality standards required by Illinois regulations and the recent Lake Michigan TMDL for mercury and PCBs, this Draft Permit puts Lake Michigan and the Southeast Side and South Chicago at risk.

A. The Draft Permit’s Monitoring Requirements are Inadequate

The Army Corps built the CDF in an environmental justice community, in Lake Michigan water, and in close proximity to recreational beaches and parks where people fish and swim. Because of the surrounding community’s reliance on the surrounding waters, the community should have ample information about the toxins to which they are potentially being exposed. In light of the heightened environmental and environmental justice concerns, the draft permit is deficient in two respects. First, the IEPA should require more stringent monitoring to meet the Pollution Control Board’s Lake Michigan Basin Standards. Doing so would be in line with past practice at the CDF site, and also a required response to the evidence that the sediment and nearby aquatic life contain significant amounts of toxins and contaminants. Second, in an environmental justice community, special consideration should be given to the cumulative impact of contaminants to water, land, and air.

Both the former 2016 permit and the proposed “renewal” of that expired permit in the Draft Permit only require routine monitoring of the CDF on an annual basis and only for a limited number of contaminants. The Draft Permit requires sediment, effluent, groundwater, and surface water sampling during dredging events, but does not focus on the ongoing risk of releases of

contaminants from the CDF structure itself and from the dredge stockpiling and drying activities that take place every day thereafter. Prior to 1997, permits for the CDF required quarterly and even weekly monitoring for a much broader range of contaminants (including routine monitoring for toxics such as mercury, lead, cyanide, PCBs, chromium, copper, arsenic and cadmium) in the sediment, the groundwater, in the CDF itself, and in near shore surface waters directly adjacent to the CDF. *See e.g.*, Attachment 1, Chicago District Corps of Engineers, Chicago Area Confined Disposal Facility Water Pollution Control Permit, 1982-EA-9325 (1982). But beginning in 1997—the same year that the Pollution Control Board enacted the stringent Lake Michigan Basin standards—IEPA has acceded to the Army Corps’ entreaties to drastically scale water quality monitoring measures back. This includes eliminating monitoring for the toxics and bioaccumulating contaminants that are known to be concentrated in the dredge sediment, and due to which Lake Michigan, the Calumet River, and surrounding beaches are designated as impaired by USEPA under Section 309 of the Clean Water Act.

Even though the Army Corps cited a host of reasons such as vandalism, statistical variation, and missing seepage through the dike walls for changing the monitoring plan, it appears that IEPA has reduced monitoring of the CDF down to a minimum for cost-savings and the Army Corps’ convenience—even allowing groundwater monitoring to be foregone when the wells are no longer functioning. *See* Attachment 14, U.S. Army Corps of Engineers, *Water Quality Monitoring at the Chicago Area Confined Disposal Facility, Calumet Harbor, IL* (Feb. 6, 1997). If the Army Corps is concerned about and has seen seepage from the dikes, it should have *added* additional monitoring wells to have a full picture of the CDF’s impacts to our waters, rather than removing them. *See id.*

In relation to monitoring of the dike, IEPA explained in response to questions at the October 5 public meeting that placing the stations near-dike rather than in-dike would constitute a mixing zone allowance, as provided for in 40 C.F.R. § 131. IEPA accordingly incorporated the Water Quality Monitoring at the Chicago Area Confined Disposal Facility Plan by condition in the 1997 IEPA state permit and IEPA has kept the plan mostly the same since that time. However, Illinois Pollution Control Board regulations appear to contradict this determination. Under the rules,

Whenever a water quality standard is more restrictive than its corresponding effluent standard, or where there is no corresponding effluent specified at 35 Ill. Adm. Code 304, an opportunity shall be allowed for compliance with 35 Ill. Adm. Code 304.105 by mixture of an effluent with its receiving waters, provided the discharger has made every effort to comply with the requirements of 35 Ill. Adm. Code 304.102.

35 Ill. Adm. Code § 302.102(a). But “[n]o mixing is allowed when the water quality standard for the constituent in question is already violated in the receiving water.” Section 302.102(b)(9). The water quality standards are indeed already violated in the receiving waters here. For instance, the Lake Michigan Nearshore Watershed, which includes both the lakefront and the Calumet River before the O’Brien Lock has TMDLs for PCBs and mercury.

The contention that it is unnecessary to monitor for metals, PCBs, and mercury because they were not detected at elevated levels in the past is specious and risky. First, as stated, the sediment data

demonstrates that the material placed in the CDF, stockpiled, and then processed on its surface contains levels of PCBs and mercury far in excess of the Lake Michigan Basin Standards that both threaten wildlife and human health. Attachment 2, Compilation of Historic Sediment Data. Further, in 1994, the U.S. Department of the Interior reviewed a March 1994 “Final Report on PCB Cogener Sediment/ Fish Distribution in the Chicago Confined Disposal Facility” and found that the concentration of PCB in fillets of Black Bullheads was 0.597 mg/kg, exceeding the fish tissue standard of 0.1 mg/kg (now 0.06 mg/kg). The author also noted that “[a] 1986 study by the Illinois Natural History Survey determined that fish and crayfish collected from inside the CDF contained PCB levels which were in the approximate range of 2 to 15 times higher than those collected from Calumet Harbor.” Attachment 3, U.S. Department of the Interior, *Memorandum re Chicago Confined Disposal Facility* (Oct. 13 1994). Second, the water quality standards have changed since the era in which IEPA agreed to drop the monitoring for toxics in the CDF and surface water. In 1997, the IPCB adopted the very stringent Lake Michigan Basin water quality standards, which among other things require an anti-degradation demonstration for all bioaccumulating contaminants. Further, after designating Lake Michigan, the Calumet River, and surrounding beaches as impaired for PCB and mercury, USEPA adopted a Lake Michigan Nearshore Watershed See U.S. Env’t Prot. Agency, *Illinois Lake Michigan Nearshore Watershed PCB TMDL Report*, (April 2019), available at <https://perma.cc/SDC4-BYDE>; U.S. Env’t Prot. Agency, *Illinois Lake Michigan (nearshore) Mercury Final TMDL Report* (April 2019), available at <https://perma.cc/KCC7-7NZJ>. These standards are not addressed in the Draft Permit and compliance with these standards cannot be determined without requiring monitoring for these contaminants and an anti-degradation demonstration.

In its new permit application trend analysis report, the Army Corps describes the sampling locations.⁵ This data is not enough information for the public, especially given that this facility is in an already overburdened community surrounded by industry. For instance, the most recent posted water monitoring data (from 2016) has shown that phosphorus and total suspended solids levels are higher than background in the Lake just outside the CDF. This could indicate that CDF contaminants are leaking into Lake Michigan and we could be more certain of this with more frequent data points. See Attachment 4, Dept. of the Army, Chicago Dist. U.S. Army Corps of Engineers, *Water Quality Monitoring Report* (2016).

⁵ “Specifically, these locations are shown in Figure 3 and include the following: Three (3) CDF samples (CDF-001, CDF-002, and CDF-003) collected from the southern settling basin; three (3) near-dike composite samples (ND-COMP-001, ND-COMP-002, and NDCOMP-003), where each composite sample includes three (3) near-dike subsample locations, for a total of nine (9) near dike subsample locations; two (2) groundwater well samples (CH-18-81 and CH-19-81) collected from wells along the western side of the CDF adjacent to Iroquois Landing; three (3) background Calumet Harbor/Lake Michigan samples (BACK-001, BACK-002, and BACK-003); and three (3) Calumet River samples (RIV-001, RIV-002, and RIV-003). . . . Pre-1997 Location 1 was collected from within the CDF pond, similar to the CDF samples, CDF-001, CDF-002, and CDF-003 that are presently collected from the southern settling basin. The pre-1997 Locations 4(a) and 4(b) were collected from the Calumet River, similar to the samples presently acquired from the Calumet River locations, RIV-001, RIV-002, and RIV-003. The pre-1997 Locations 5, 6, and 7 were directly outside of the CDF in Lake Michigan, similar to the samples collected near the CDF dike at locations, ND-COMP-001, ND-COMP-002, and ND-COMP-003. The pre-1997 Locations 8(a) and 8(b) were further outside the CDF in Lake Michigan, similar to samples presently acquired at the background sample locations, BACK-001, BACK-002, and BACK-003. These pre-1997 data were collected during the dredging events that occurred in 1984, 1985, 1986, 1989, and 1994.” Enclosure 1 Chicago CDF Trend Analysis report at 8, 9.

The Army Corps has stated that the sediment is too contaminated “to be placed in open water or unconfined upland locations.” *See* Attachment 5, DMMP/EIS, Exec. Sum. at 2. However, this sediment still sits in Lake Michigan water, and is now concentrated, stockpiled, and processed on the shoreline close to beach, harbors, and vulnerable environmental justice community residents. People, especially those on the frontlines of environmental injustice deserve to know about exposures from nearby industry. As further discussed below, even though the CDF’s outfall discharges into the Calumet River, its foundation still sits in Lake Michigan and the water levels in the CDF correlate with those of the Lake. Attachment 5, DMMP/EIS at 82. There is an open question as to whether the contaminants from the CDF are leaking into Lake Michigan, and the community cannot be certain there is no contamination without adequate data. IEPA has a duty to require the highest level of monitoring, demonstrations, and assurance in this situation, not the minimal level provided in the Draft Permit.

The monitoring should include more frequent and more comprehensive monitoring of the effluent discharged and the groundwater, water in the CDF, and individual grab sampling at the nearby surface water at each of the nine monitoring “stations” outside of the CDF. The Draft Permit must account for the potential for run-off from imminent extreme weather events and leakage. IEPA should not assume that testing the dredge material prior to adding it to additional contaminant will represent an adequate picture of contamination in the water.⁶

When asked about water quality monitoring during the October 5 public meeting, IEPA explained that when it first evaluated the sediment when the CDF opened, it determined that heavy metals were not at issue and over time the sediment quality has improved. It appears that IEPA is relying upon outdated information. However, IEPA has not provided information to show that there is less contamination.⁷ The Draft Permit requires the Army Corps to test the sediment during the dredge events and IEPA made assumptions based on water quality data from a nearby dike. But, IEPA has not officially concluded whether continued dumping in the CDF will further degradation of water quality in the Calumet River, Calumet Harbor, and Lake Michigan. Commenters, therefore, request that IEPA make such determination before allowing the Army Corps to continue dumping in this environmental justice community. Granting the Draft Permit without this analysis runs the risk of violating the mandates of the Illinois Environmental Protection Act. *See* 415 Ill. Comp. Stat. Ann. 5/12 (a).

Because the Army Corps permit application (which apparently consists of just a cover letter and trend analysis) and the Draft Permit fail to ensure that the CDF is and will not adversely impact the waters of Lake Michigan, the Calumet River, and nearby beaches and does not and will not in the future violate Illinois and federal water quality standards, IEPA cannot legally issue this permit.

B. The Draft Permit Fails to Consider Erosion and Stormwater Data and Should Be Denied

⁶ As explained below, studies show that PCBs are in higher concentration in the CDF because there are high concentrations of the sediment. *See* Attachment 6, at 22-26, 98-140 (“The biota collected from within the Chicago Area CDF contained elevated PCB accumulation relative to Calumet Harbor.”).

⁷ Aside from references made during the public meeting, it is not immediately apparent what IEPA relied upon in evaluating this permit, because some documents referenced during the public meeting have not been made available in the record. Commenter sent an information request for all documents relied upon for the Draft Permit and did not receive any updated monitoring results.

Lake Michigan's shoreline is susceptible to the impacts of climate change. See, e.g., Dan Egan, *A Battle Between a Great City and a Great Lake*, N.Y. Times (July 7, 2021) available at <https://perma.cc/293U-VKDV>. Increased rainfall, storm intensity, and wave action can increase runoff of contaminated sediment from the CDF into Lake Michigan. Even as Commenters draft this letter, the Lake Michigan shoreline is being battered by waves up to 16 feet high. Kelly Bauer, *Lakefront Trail Closed As 16-Foot, 'Battering' Waves Expected To Hit Chicago*, Block Club Chicago (Oct. 25, 2021), available at <https://perma.cc/HDT9-D4UQ>; Diana Olick, *Rising Risks: Chicago in Danger Due to Rising Water in Lake Michigan*, CNBC TV (Oct. 25, 2021), available at <https://perma.cc/W73Q-HLMR>. The CDF could likely be inundated by storm surges, which are worse today than they have been for most of the life of the CDF.

The structural stability of the CDF also remains questionable. The shoreline's walls are made of sediment compared to the concrete walls on the northside of the Chicago, which were moved or washed out by wave action. Tony Briscoe & Chad Yoder, *What Does Your Lake Michigan Beach Look Like? The Tribune Checked Out Many in Chicago to See How They're Faring*, Chicago Tribune (Aug. 1, 2019), available at <https://perma.cc/R9RQ-5MQ4>. This is especially concerning because flooding is bad in the surrounding communities. Basements have been flooded in South Shore, and waves have covered the beach by the Calumet Park Beach House just south of the CDF.

These conditions raise questions about the structural stability of the CDF as our shoreline is shaped by climate change: Does IEPA have information about the status of the CDF's structural stability as it sits in Lake Michigan? Will this structure need to be reinforced in order to continue operations? To address these questions, IEPA should require submittal of the erosion study and erosion impacts on the CDF. IEPA should also consider the status of the CDF's structural integrity given the wave action and erosion that has occurred along the lakefront, including just north and south of the CDF. Furthermore, IEPA should require measures that ensure the stability of the existing CDF and the safe containment of dredge materials.

The structural stability and impact of erosion in the area was an open question that the Army Corps was supposed to investigate. The Army Corps was supposed to be completing a study of the Chicago lakefront for the Chicago Park District, but the Southeast Side community has not seen the results of this study. **Commenters want to know the status of this study, in particular the results for Rainbow Beach, Park 566, Steelworkers Park, and Calumet Park—all parks to the north and south of the CDF—and if this study has been a part of IEPA's analysis for the Draft Permit.** This information is critical to understanding the water quality impacts of the CDF and IEPA should not grant the Draft Permit without it.

It is important for IEPA to consider the impacts of climate in setting the standards for this facility based on historical studies of contamination. The Army Corps has made statements that pollution related to storms are a problem at the CDF. We also know there are higher concentrations of contaminants like PCBs in the CDF. See Attachment 6, John Dorkin *et al*, *Biological and Toxicological Investigations of Chicago Area Navigation Projects*, at 22-26, 98-140 ("The biota collected from within the Chicago Area CDF contained elevated PCB accumulation relative to Calumet Harbor. . . . Higher PCB levels in organisms inside the CDF appear to be related to higher

sediment concentrations of PCB.”). While the Dorkin study found the concentrations to be higher inside the CDF and concluded that it may not have affected the PCB burdens of the Calumet Harbor utilizing the outside CDF dike, this study still shows that PCBs are more concentrated in the CDF than the sediment sampled following dredging events. Given the changing conditions of Chicago’s lakefront, IEPA should require the Army Corps to better analyze the impact of storm surges, wave action, and erosion of the CDF.

The Draft Permit fails to provide measures to prevent leakage and runoff of the contaminated dredge material into Lake Michigan. It neither has a stormwater management plan nor takes into consideration the impacts of erosion. When asked about the impacts of erosion to the CDF at the October 5 public meeting, IEPA indicated that it was not aware of erosion issues because there had not been complaints about erosion. However, how can concerned neighbors complain about these concerns if they do not have access to the facility. The onus to determine whether the CDF is contaminating this environmental justice community should not be on the community.

When asked about the stormwater management plan during the October 5 public meeting, IEPA noted that a stormwater management plan is only needed for a NPDES permit. Even if a NPDES permit is not needed because this is dredged fill material being discharged into the waters of the United States regulated by section 404 of the Clean Water Act, IEPA is not prohibited from reviewing and regulating the impacts of stormwater and erosion, especially given the potential for additional pollution. There is no apparent regulation prohibiting IEPA from considering the effects of stormwater runoff, storm surges, and erosion on this facility. In fact, **the Illinois Environmental Protection Act prohibits one from causing or threatening or allowing the “discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources” 415 Ill. Comp. Stat. Ann. 5/12 (a).** Storm events could likely cause the leakage of contaminants from the CDF into Lake Michigan.

Because of the CDF’s location on Lake Michigan and its close proximity to beaches and harbors in an environmental justice community, **it is imperative that the CDF not discharge contaminated run-off and the Draft Permit must require consistent stormwater management in perpetuity.**

C. IEPA Should Deny The Draft Permit Because It Is Likely a Source of Contamination and IEPA Should Apply the Lakes Michigan Water Quality Standards.

Commenters also urge the Illinois EPA to apply the Lake Michigan Basin Water Quality Standards to the CDF. *See* 35 Ill. Admin. Code § 302.501 *et seq.*

i. The CDF is hydraulically connected to Lake Michigan

The CDF is hydraulically connected to two waters: the Calumet River and Lake Michigan. The CDF’s outfall discharges liquids from dewatering the contaminated sediment into the Calumet

River, but the base of its foundation *is* in Lake Michigan and the CDF's broadest side borders this drinking water resource. It is also important to protect the waters near the CDF because the surrounding community uses the waters to swim and play. The dredge material added to the CDF derives from sediment from the Calumet River and the Calumet Harbor/ Cal-Sag Channel. **The Army Corps has acknowledged that sediment contaminants include arsenic, barium, cadmium, chromium, copper, lead, manganese, mercury, nickel, zinc, and PCBs.** The Harbor sediment has also been tested for Semi-Volatile Organics ("SVOCs") in 2000 Attachment 5, DMMP/EIS at 29. In fact, the sediment is too contaminated "to be placed in open water or unconfined upland locations." Attachment 5 DMMP/EIS, Exec. Sum at 2. The CDF itself sits in Lake Michigan and is impacted by the ebb and flow of Lake Michigan. People are potentially being exposed to these toxins and should therefore be assured that the water quality is being held to the most stringent standards. **Given the connection to Lake Michigan, the water quality in and around the CDF should be measured by the Great Lakes Water Quality Standards.**

The Army Corps has also recognized the connection between the CDF and Lake Michigan water levels. Specifically, the Army Corps has acknowledged:

The existing Chicago Area CDF is slightly different because it was, at the time of its original construction, an in-water facility. First, the bottom of the existing CDF is the naturally occurring clay bottom "bed" material of Lake Michigan, rather than a constructed liner. Also, because the facility was built in the waters of Lake Michigan, the sediment was placed into water and remained under water until the facility became full enough to reach the surface. It did not start to "air dry" until the facility was nearly filled with sediment.

Attachment 5, DMMP/EIS at 82.

However, the Army Corps also states that by maintaining the water levels inside the CDF below the water levels outside the CDF, the Army Corps can create a pressure differential that prevents the effluent from leaving the facility. Nevertheless, despite this tactic, **when water levels in the CDF go up and down with Lake levels, as demonstrated in 1986, the waters are mixing and contaminated water is being released from the CDF to Lake Michigan. As such, more frequent monitoring must be completed based on the Lake Michigan Basin Water Quality Standards given the evident impacts to the Lake.**

IEPA has the authority to apply these standards to the CDF. When asked at the public meeting why IEPA did not apply the Lake Michigan Basin Water Quality Standards to the CDF's discharges, IEPA explained that under 35 Ill. Admin. Code § 303.443, the Illinois Pollution Control Board set exceptions in the definition of Lake Michigan Basin. The Lake Michigan Basin waters under Illinois jurisdiction do not include the Chicago River, the North Shore Channel, nor the Calumet River. 35 Ill. Admin. Code § 303.443. Despite this distinction in Illinois regulations, the Great Lakes Initiative ("GLI") regulations seem to draw this line differently. The regulations identify minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife. 40 C.F.R. § 132.1. The Great Lakes System includes "all the streams, rivers, lakes and other bodies of water within the drainage basin of the Great Lakes within the United States." 40 C.F.R. § 132.2.

This definition likely encompasses the area to which the CDF discharges. IEPA explained during the October 5 public meeting that the CDF's discharge pipe is on the Calumet River only approximately 1000 feet away from the facility near a railroad bridge crossing. The two bridges where this outfall likely discharges are notably north of the O'Brien Lock and Controlling Station, which control the flow of the Calumet River—meaning that the CDF's discharge, though in the Calumet River, still hydrologically flows in and out of Lake Michigan. The US EPA recognizes this in its mercury and PCB TMDLs for the Illinois Lake Michigan Nearshore Watershed. The TMDL extends from North Point Marina at the Wisconsin border down to the Calumet River up to the O'Brien Lock and includes the impaired Calumet Harbor and Calumet beaches. *See* U.S. Env't Prot. Agency, *Illinois Lake Michigan Nearshore Watershed PCB TMDL Report* at 198 (April 2019), available at <https://perma.cc/SDC4-BYDE>; U.S. Env't Prot. Agency, *Illinois Lake Michigan (Nearshore) Mercury Final TMDL Report* at 199 (April 2019), available at <https://perma.cc/KCC7-7NZJ>. The Army Corps seems to even recognize this given that its nine routine monitoring locations are in Lake Michigan and at the mouth of the River. *See supra*, n. 1. The waters of this segment of the Calumet River intermingle with the water of Lake Michigan, so the CDF is not only impacting the water quality of Lake Michigan via the siting of its foundation, but also through the flows between the Calumet River and Lake Michigan.

The CDF should not be exempt from standards meant to protect Lake Michigan based on a legal loophole. Rather, IEPA should protect Lake Michigan by recognizing the CDF's connection to the Lake.

ii. The CDF has a history of contamination in Lake Michigan

Even if IEPA chooses to strictly apply 35 Ill. Admin. Code § 303.443, IEPA should still be troubled by the standards used in this Draft Permit because the Illinois Environmental Protection Act prohibits “discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources.” 415 Ill. Comp. Stat. Ann. 5/12 (a).

As a bioaccumulating chemical of concern, the Board has set acute aquatic life standards for PCBs. 35 Ill. Admin. Code § 302.504. **The Illinois Pollution Control Board has also established specific Lake Michigan Basin standards for other pollutants, which include arsenic, barium, lead, manganese, and phosphorous—all contaminants identified in the sediment.** 35 Ill. Admin. Code § 302.501 *et seq.*

There is evidence of the CDF's deleterious impact on the surrounding waters by these contaminants. As also explained in the attached comments on the Environmental Impact Statement, it is assumed that contaminants are unlikely to reach Lake Michigan, but the Army Corps and its affiliates has completed studies that indicate otherwise. *See* Attachment 7, *ASE Comments*; Attachment 8, *FOTP Comments*; Attachment 9, *FOTP 2019 Comments*, Attachment 10, *Openlands and Sierra Club Comments*. The sediment contaminants likely include arsenic, barium, cadmium, chromium, copper, lead, manganese, mercury, nickel, zinc, PCBs, phosphorus, and SVOCs. *See* Attachment 11, *Sampling and Analysis at the Calumet Harbor* (Oct. 1991); Attachment 12, Trudy Estes and Joan Clarke, *CDF Characterization for Beneficial Reuse of Dredged Material* (May 2011). There has been evidence of high levels of PCBs and mercury in

fish in the CDF. See Attachment 6, John Dorkin et al, *Biological and Toxicological Investigations of Chicago Area Navigation Projects*, at 22-26, 98-140; Attachment 3, U.S. Department of Interior, Fish and Wildlife Service, *Chicago Confined Disposal Facility* (Oct. 13, 1994) (memorandum); Attachment 13, Army Corps of Engineers & U.S. Env't Protection Agency, *Great Lakes Confined Disposal Facilities* (Apr. 2003) ("PCBs and other hydrophobic organic contaminants will accumulate in the tissues of fish inside CDF ponds, and may be a significant source of contamination to animals that feed on them."). Despite this, in 1997, before the Lake Michigan Basin Water Quality Standards were implemented, IEPA allowed the Army Corps to cease monitoring for PCBs, mercury, arsenic, cadmium, cyanide, lead, and other toxic metal contaminants in the groundwater and surface water surrounding the CDF. Despite only occurring once a year, monitoring data has also demonstrated that pollution levels are high near the CDF in comparison to background levels. For instance, there is evidence that phosphorus and total suspended solids, among other contaminants, have been detected above background levels in Lake Michigan. See Attachment 4, Dept. of the Army, Chicago Dist. U.S. Army Corps of Engineers, *Water Quality Monitoring Report* (2016). Movement of each of these contaminants could potentially violate the Lake Michigan Water Quality Standards.

In its Draft Permit Application, the Army Corps fails to differentiate whether the sources of contamination present in water, sediment, and groundwater outside the CDF is from historical uses of the river and harbor, or if the CDF has released contaminants from the deposited dredge sediment. The record also fails to include any additional information that indicates otherwise. Commenters sent IEPA an information request about the materials relied upon in the permit application, which also failed to include this information. By failing to include this information, the public cannot be assured that the CDF is not contributing to the contamination of Lake Michigan near public spaces in an environmental justice community.

The standards applied to the CDF should also be more stringent due to the updated Calumet Harbor Total Maximum Daily Load ("TMDL"). The Calumet Harbor TMDLs for PCBs and mercury require that any future Clean Water Act permits for the Lake Michigan CDF site will have to contain a limit of *zero* for discharges of PCBs and mercury. 35 Ill. Adm. Code § 302.501 *et. seq.* Although the Draft Permit is a general permit from the Illinois EPA, as explained above, this facility is still discharging into Lake Michigan. A discharge is "limited to any spilling, leaking, pumping, pouring, emitting, emptying, or dumping." 40 C.F.R. § 113.3. **As demonstrated by the Army Corps' own studies, the CDF is likely leaking into Lake Michigan.**

Thus, given the admittedly unique nature of the CDF, **the IEPA should appropriately apply the Lake Michigan Basin Water Quality Standards to the CDF.** Without these standards in place, IEPA would be permitting the Army Corps to put Lake Michigan and the surrounding environmental justice community in harm's way.

IV. IEPA Should Deny the Draft Permit as the Public Participation Process Was Inadequate

Notice for public comment on this permit application was issued on, with comments due on July 30. Despite the fact that the CDF is in an environmental justice community, there was no environmental justice notification for the first notice.

Commenters were concerned about the timeline and limitations on the public to provide input, so Commenters met with IEPA on July 9, 2021 and requested an extension and a public hearing. The extension was granted and a new notice was issued on September 3, 2021. IEPA noted that it would offer a public meeting for the community to ask questions and answers. Commenters filed separate comment letters by the July 30 deadline, again renewing the request for a public hearing.

The ability to interact with IEPA on a permit of environmental justice concern, ask questions and have them answered before filing comments, is greatly appreciated. However, Commenters have concerns about how a hybrid meeting (in-person and virtual) compares with a traditional public meeting. While the public health considerations do limit the ability to participate in person, IEPA's policy not to consider public comments made during the meeting is concerning,⁸ especially because IEPA did not make this clear until the end of the hybrid meetings—after participants had left, or were leaving, the call. There were people who are likely unaware that the comments that made in the chat of the WebEx platform did not count. Commenters encourage IEPA to include these comments in the record.

The public also did not have the full record to appropriately comment on the Draft Permit. The Permit Application in IEPA's portal mostly consisted of materials to support permitting the DMDF. While there was a cover letter with four enclosures, one of which was a trend analysis study of the parameters tested, the other enclosures include studies, plans, and requests for permit modifications all related to the operation of the DMDF. Moreover, at the October 5 public meeting, the public asked IEPA about the location of documents they relied on concerning the Draft Permit. IEPA responded that documents had recently been posted on the Public Notice portal, to include "a lot of technical documents."⁹ Such an answer suggests to the public that IEPA made documents it considered or relied on available. However, approximately 15 minutes later, IEPA acknowledged they did not make documents it considered or reviewed publicly available. Specifically, when questioned about the amount of dredge material that was going to be used to fill the CDF and the amount used for the DMDF during this extension of the permit, IEPA provided answers based on documents authored by the Army Corps, which "were not publicly available at this time."¹⁰

To date, such documents have yet to be made public. Indeed, Commenters sent IEPA FOIA requests for all documents relied upon by IEPA and received no such documents. Two questions, thus, arise: (1) are there other documents the IEPA considered or relied on that were not made public; and (2) how can the public adequately prepare for a public meeting or a comment letter if they do not have access to the required information. Accordingly, Commenters, as well as other members of the public, do not have the ability to make sufficient comments concerning the Draft

⁸ In response to a question in the chat about the chat record at the end of the meeting, as people were logging off, IEPA told the public that the purpose of the meeting was to answer questions and that comments and the chat were not being considered at the meeting.

⁹ October 5 Public Meeting, at 1:29:27.

¹⁰ October 5 Public Meeting, at 1:43:40.

Permit. **The IEPA should not approve the Draft Permit until the public has the ability to review all related documents, and make full and complete comments.**

V. Conclusion

Accordingly, for the reasons stated above, IEPA should deny the Army Corps' permit application because IEPA lacks authority to issue this water pollution control permit, the draft permit is materially insufficient, and the public process was inadequate.

Thank you for your consideration of these comments.



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