Consol. Nos. 14-1776 & 14-1777

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA and
STATE OF ILLINOIS,

Plaintiffs-Appellees,

and

ALLIANCE FOR THE GREAT LAKES, ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, and PRAIRIE RIVERS NETWORK,

Plaintiffs-Intervenors-Appellants,

v.

METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO,

Defendant-Appellee

Appeal From The United States District Court
For the Northern District of Illinois
Case No. 11-cv-08859
The Honorable George M. Marovich, Judge Presiding

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AS AMICUS CURIAE IN SUPPORT OF THE MWRD FOR AFFIRMANCE OF THE CONSENT DECREE ENTRY

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The National Association of Clean Water Agencies ("NACWA"), pursuant to Federal Rule of Appellate Procedure 29, moves the Court for leave to file a brief as an *amicus curiae* in support of Defendant-Appellee the Metropolitan Water Reclamation District of Greater Chicago ("MWRD").

1. On December 4, 2014, Plaintiff-Appellees the United States and the State of Illinois filed their Answering Brief in this matter, and on December 5, 2014, Defendant-Appellee MWRD filed its Answering Brief. Both Answering Briefs argue that the District Court's order entering the Consent Decree between Plaintiffs and Defendant was correct and should be affirmed.

2. Because of NACWA's unique interest in this case, it requests that it be allowed leave to file a brief as an *amicus curiae* in support of the MWRD. Pursuant to Federal Rule of Appellant Procedure 29(b), NACWA's proposed brief is being filed concurrently herewith.

3. Consent for NACWA to file its brief as an *amicus curiae* was obtained from Plaintiff-Appellees the United States and the State of Illinois and from Defendant-Appellee MWRD. Consent was not obtained from Intervenors-Appellants, necessitating the filing of this Motion.

4. NACWA is a voluntary, non-profit trade association representing the interests of the nation's publicly owned wastewater and stormwater utilities. NACWA's members include nearly 300 of the nation's municipal clean water

agencies, including the Defendant-Appellant in this case, the MWRD. NACWA's membership includes numerous municipalities and municipal entities that manage publicly owned treatment works (POTWs), sanitary and stormwater sewer systems, water reclamation districts, and all aspects of water collection, treatment, and discharge.

5. Many NACWA members experience combined sewer overflows (CSOs) and/or sanitary sewer overflows (SSOs) within their sewer systems and are currently or may soon be negotiating Consent Decrees with the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of Justice ("DOJ") related to these sewer overflow events and alleged violations of NPDES permits. In fact, nearly 100 of NACWA's public utility members are under some form of consent decree or judicial order related to CSOs or SSOs. There are many significant financial and technical impacts to NACWA's members arising from the terms of such consent decrees. The negotiation and ultimate terms of consent decrees with governmental agencies, including EPA, has been a key focus of NACWA for many years.

6. An important issue in this appeal is the proper standard of review and level of deference the judicial branch affords consent decrees negotiated by the United States, states, and regulated municipalities.

7. Accordingly, NACWA and its members have a substantial interest in this case wherein the Court will determine whether the District Court properly evaluated the negotiated settlement between the state and federal governments and the MWRD and properly entered the MWRD Consent Decree. The Court's decision on the issues presented in this matter will directly affect a substantial number of NACWA's members including those municipalities that are currently negotiating CSO consent decrees or those that may do so in the future. NACWA can provide information on this issue in an *amicus curiae* brief that can assist the Court beyond that which the parties are able to provide.

WHEREFORE, the National Association of Clean Water Agencies respectfully requests that the Court grant it leave to file a brief as an *amicus curiae*, as filed herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed this December 12, 2014, using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and service upon them will be accomplished through the CM/ECF system.

/s/ Fredric P. Andes

Fredric P. Andes

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1776 and 14-777

Short Caption: U.S. v. Metropolitan Water Reclamation District of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Association of Clean Water Agencies

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Barnes & Thornburg LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Fredric P. Andes Date: December 12, 2014

Attorney's Printed Name: Fredric P. Andes

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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INTEREST OF AMICUS CURIAE

The National Association of Clean Water Agencies ("NACWA") is a voluntary, non-profit trade association representing the interests of the nation's publicly owned wastewater and stormwater utilities. NACWA's members include nearly 300 of the nation's municipal clean water agencies, including the Appellant in this case, the Metropolitan Water Reclamation District of Greater Chicago ("MWRD"). NACWA's membership includes numerous municipalities and municipal entities which manage publicly owned treatment works (POTWs), sanitary and stormwater sewer systems, water reclamation districts, and all aspects of water collection, treatment, and discharge.

Many NACWA members experience combined sewer overflows (CSOs) and/or sanitary sewer overflows (SSOs) within their sewer systems and are currently or may soon be negotiating Consent Decrees with the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of Justice ("DOJ") related to these sewer overflow events and alleged violations of National Pollutant Discharge Elimination System (NPDES) permits. There are many significant financial, technical and legal impacts to NACWA's members arising from the terms of such consent decrees. The negotiation and ultimate terms of consent decrees with governmental agencies, including EPA, has been a key focus of NACWA's advocacy for many years. Accordingly, NACWA and its members

have a substantial interest in this case wherein the Court will determine whether the District Court properly evaluated the negotiated settlement between the state and federal governments and the MWRD and properly entered the MWRD Consent Decree. The Court's decision on the issues presented in this matter will directly affect a substantial number of NACWA's members across the nation, including those municipalities that are currently negotiating CSO consent decrees or those that may do so in the future. Therefore, NACWA respectfully submits this brief, in support of the position advanced by Plaintiffs-Appellees United States and State of Illinois and Defendant-Appellee MWRD, to facilitate the Court's decision.

Consent for NACWA to file this Brief was received from Plaintiffs-Appellees United States and State of Illinois and Defendant-Appellee MWRD, but was not received from Intervenors-Appellants. Therefore, permission to file this Brief is being sought through an accompanying Motion filed pursuant to Federal Rule of Appellate Procedure 29.

SUMMARY OF ARGUMENT

The MWRD Consent Decree was the product of negotiations between both the federal and state government and the MWRD. EPA and Illinois EPA have the national and local expertise to understand the complex issues associated with CSOs and can represent the public interest in negotiating a consent decree to address

them. As such, there is a strong presumption in favor of courts approving consent decrees. Here, the District Court reviewed the MWRD Consent Decree and determined that it was reasonable and protective of the public interest. A ruling by this Court that the lower court abused its discretion by entering a consent decree negotiated by parties with the requisite expertise in these highly technical matters would have negative repercussions for communities all across the country. Enforcement cases involving CSOs will continue to happen nationwide and not allowing the entry of this decree to stand would discourage other parties from trying to settle these matters and unnecessarily increase the cost and complexity of the consent decree process by encouraging the parties to litigate and have a court decide the issues in the first instance.

ARGUMENT

I. The District Court properly applied the presumption in favor of approval to the MWRD Consent Decree that was negotiated with the national and local expertise of the EPA, the State of Illinois, and the MWRD.

A. The Consent Decree is entitled to a strong presumption in favor of approval.

In the Seventh Circuit, there is a presumption in favor of approving consent decrees:

> A federal judge …has to consider whether the decree he is being asked to sign is lawful and reasonable, as every judicial act must be…. Although a judge thus must, before signing an equity decree that

> either affects third parties or imposes continuing duties on him, satisfy himself that the decree is reasonable ('fair, reasonable and adequate,' in the usual formulation, but we think 'reasonable' sums it up fairly and adequately) how deeply the judge must inquire, what factors he must take into account, and what weight he should give the settling parties' desires will vary with the circumstances. The flexible character of the decision makes generalization difficult; but it is safe to suggest that the limitations of judicial competence and the desirability of encouraging out-of-court settlements in order to lighten the judicial caseload create a presumption in favor of approving the settlement."

Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985) (emphasis added). Other circuits are in accord. *See, e.g.*, *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 462 (2d Cir. 1974) ("The court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case."); *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1408, 1436 (6th Cir. 1991) (the "presumption [of validity] is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA, which enjoys substantial expertise in the environmental field.").

The District Court recognized this presumption in favor of approving settlements along with its core task of determining whether the Consent Decree is reasonable. Dkt. #27, Op. at 14 (*quoting Donovan*, 752 F.3d at 1177). The District Court also agreed that EPA is entitled to deference: "the true measure of

the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances." Dkt. #27, Op. at n.2 (*quoting Federal Trade Comm'n v. Standard Fin. Mgt. Corp.*; 830 F.2d 404, 408 (1st Cir. 1987). The court looked to the contents of the MWRD Consent Decree, including "practical considerations" and "attendant circumstances" encompassed therein, in a manner which deferred to the expertise of the parties – including EPA and the State – on such issues and the negotiation process by which complex CSO matters are resolved.

There is no question that EPA has the requisite expertise concerning the subject matter at issue in the MWRD Consent Decree. EPA's "Combined Sewer Overflow Control Policy" is a national framework for control of CSOs through the NPDES permitting program. *See* 59 Fed. Reg. 18688 (Apr. 19, 1994). This "CSO Policy" resulted from negotiations among municipal organizations, environmental groups, and State agencies. It provides guidance to municipalities and State and Federal permitting authorities on how to meet the Clean Water Act's pollution control goals as flexibly and cost-effectively as possible. EPA continues to develop guidance and information to foster implementation of the CSO Policy. State and EPA NPDES permitting authorities are working with permittees to

incorporate CSO conditions into NPDES permits and other enforceable mechanisms, such as administrative or judicial orders.[1]

Demonstrative of both the complexity of the issues underlying the CSO Control Policy and EPA's expertise in the field are the numerous "Principal Guidance Documents" EPA has developed. These materials explain the technical, financial, and permitting issues underlying implementation of the CSO Control Policy and include such guidance documents as: *Combined Sewer Overflows Guidance For Long-Term Control Plan*; *Combined Sewer Overflows Guidance For Monitoring and Modeling*; *Combined Sewer Overflows Guidance for Financial Capability Assessment and Schedule Development*; and *Combined Sewer Overflows Guidance For Permit Writers*, among others.[2] The quantity, breadth, and subject matter of these materials make clear that EPA has taken its charge to address CSOs seriously and has developed detailed analytical frameworks through which to review and implement the technical, financial, and other elements of the CSO Control Policy. In addition, these materials provide guidance and predictability to the regulated community.

[1] EPA, NPDES, Combined Sewer Overflows CSO Control Policy, at: http://water.epa.gov/polwaste/npdes/cso/CSO-Control-Policy.cfm (last visited, December 9, 2014) (quotation marks omitted).

[2] EPA, NPDES, CSOs Principal Guidance Documents, at: http://water.epa.gov/polwaste/npdes/cso/Guidance-Documents.cfm (last visited December 9, 2014).

Moreover, EPA has been part of negotiating scores of consent decrees. EPA's fiscal year 2013 data shows that 164 CSO systems out of a universe of 213 Combined Sewer Systems serving a population greater than 50,000 have been addressed by either a consent decree or a long-term control plan, with an additional 14 more the subject of current enforcement action by the EPA and/or a state.[3] There is no doubt EPA has not only the expertise but also the practical experience of negotiating consent decrees for complex systems throughout the country.

Here, the state is also a Plaintiff, which adds another layer of expertise and practicality on which the MWRD consent decree was negotiated. As stated by the EPA:[4]

> State participation as a co-plaintiff in federal enforcement actions yields particularly significant benefits in CSO/SSO cases. EPA and the state can collaborate in determining appropriate injunctive relief, which capitalizes on EPA's national expertise and the state's in-depth knowledge of local issues. Such collaboration helps to ensure that comprehensive and complete injunctive relief is obtained, and that compliance is ultimately achieved.

[3] EPA, National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters, at: http://www2.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our (last visited December 9, 2014).

[4] EPA, Guidelines for Federal Enforcement in CSO/SSO cases, April 10, 2005, at: http://www2.epa.gov/enforcement/guidelines-federal-enforcement-csosso-cases-april-10-2005 (last visited December 9, 2014).

Moreover, Defendant-Appellee MWRD has been managing water and waterways in the Greater Chicago Area since 1889.[5] It committed to the Tunnel and Reservoir Plan ("TARP") shortly after the passage of the Clean Water Act in 1972 and began TARP construction in 1975. Dkt. # 44 at p. 5-6. As stated by the MWRD:[6]

> The District serves an area of 883 square miles which includes the City of Chicago and 125 suburban communities. The District serves an equivalent population of 10.35 million people; 5.25 million real people, a commercial and industrial equivalent of 4.5 million people, and a combined sewer overflow equivalent of 0.6 million people. The District's 554 miles of intercepting sewers and force mains range in size from 12 inches to 27 feet in diameter, and are fed by approximately 10,000 local sewer system connections.

The MWRD is a sophisticated party that has well over one hundred years of experience in managing the unique, complex systems involved here, and with managing the tax-payer dollars that fund its operations.

There is no reason to go against the "presumption in favor of approving the settlement" with this Consent Decree that was the product of negotiation in which both EPA and the state were involved on one side and a sophisticated municipal entity on the other.

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[5] "The District and Its History," at: https://www.mwrd.org/irj/portal/anonymous?NavigationTarget=navurl://138bf9fb3cd95634e37c28ef50eccef1 (last visited December 8, 2014).

[6] "Facilities" at: https://www.mwrd.org/irj/portal/anonymous?NavigationTarget=navurl://ac86fd166ae2f8997581bde33ae1034a (last accessed December 8, 2014).

B. The District Court found the Consent Decree reasonable and properly applied the presumption in favor of approval.

As stated above, the District Court reviewed the "practical considerations" and the "attendant circumstances," when exercising deference to the EPA and the State in approving the settlement they reached with MWRD. Dkt. #27, Op. at n.2 (*quoting Standard Fin. Mgt.*, 830 F.2d at 408). The District Court recognized its appropriate role in reviewing the decree by starting from the proper standard, which calls for deference to the governmental agencies that negotiated the Consent Decree and a presumption in favor of voluntary settlement:

> A consent decree is the product of parties' agreement to settle, but the Court's right to approve or reject that settlement "does not authorize the court to require the parties to accept a settlement to which they have not agreed." *See Evans v. Jeff D.*, 475 U.S. 717, 726 (1985). The Court will either approve the consent decree as reasonable or reject the consent decree as unreasonable. It will not revise the consent decree that the parties have negotiated.

Dkt. #27, Op. at 14.

The court's analysis relied on the relevant legal factors—fairness, adequacy, reasonableness, and consistency with the public interest. The terms of the MWRD Consent Decree are consistent with EPA's flexible approach for addressing CSO issues. As stated in §I.A., *supra*, EPA has been involved with negotiating consent decrees all across the country. EPA's flexible approach is particularly effective here where the State of Illinois was also involved, allowing the local perspective

on the over 40-year history of the TARP development to be properly considered. The District Court opinion reflects the reasonableness of the negotiated terms reached by the parties. Accordingly, the Consent Decree was properly entered by the District Court.

II. The District Court's determination that the MWRD Consent Decree was reasonable supports EPA's flexible settlement policy.

A. The MWRD Consent Decree is reasonable.

The District Court applied the correct standard and reviewed whether the MWRD Consent Decree was "reasonable." In doing so, it recognized:

> A consent decree, in order to be entered, need not be perfect. It must be reasonable. In developing a long term plan to control CSOs, a reasonable person must make tradeoffs between price and time on the one hand and water storage capacity on the other.

Dkt. #27, Op. at 27. The court's main consideration in determining reasonableness was "whether it was in the public's best interest," and not whether the chosen course of action "was the right choice." Dkt. #27, Op. at 19.

In assessing the public's best interest, the District Court wisely and correctly recognized that "the public has more than one interest," such as keeping its waters clean, keeping streets and sidewalks and properties clean and free from waste water during storms, and conducting activities with taxpayer money at reasonable cost. Dkt. #27, Op. at 19. The court analyzed, in-turn, issues raised by Petitioners/Intervenors related to the TARP's timing for completion, requested

end-of-pipe treatment plants, the efficacy of TARP at stopping CSO events, the evaluation and monitoring of consent decree performance, and the handling of specific issues (e.g. floatables and the incorporation of green infrastructure). Dkt. #27, Op. at 20-32. In each instance, the court considered the "practical considerations" and "attendant circumstances" and determined the MWRD Consent Decree was in the public's interest and "reasonable."

Petitioners argue that the MWRD could take other, largely undefined actions that in Petitioners' view would be more effective in achieving CWA compliance, but the court's review does not deal in hypotheticals. The District Court must only determine whether the consent decree is reasonable. It is "a product of negotiation and one cannot expect to get everything one wants during a negotiation." Dkt. #27, Op. at 30. This Court's review of the lower court's decision certainly should not find this reasonableness determination was an abuse of the court's discretion.

B. The District Court is properly supportive of EPA's policy of flexibility in resolving CSO problems.

EPA's CSO Policy and guidance documents allow EPA, when working in conjunction with a local utility that best knows the needs of its community and wastewater system, to exercise a high degree of flexibility and case-specific analysis in determining what resolution will achieve the most desirable outcomes for a particular CSO community. A hallmark of EPA's CSO Policy and

enforcement process is the utilization of flexible approaches to solve CSO problems based on community-specific circumstances:

> The CSO Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Major elements of the Policy ensure that CSO controls are cost effective and meet the objectives and requirements of the CWA.

59 Fed. Reg. 18688 (Tuesday, April 19, 1994); *see also* 59 Fed. Reg. 18689 (listing "providing sufficient flexibility to municipalities" as one of the key principles of the CSO policy that would allow communities "to consider the site-specific nature of CSOs and to determine the most cost-effective means of reducing pollutants and meeting CWA objectives and requirements.").

The MWRD Consent Decree certainly supports the use of this flexible approach combined with local expertise. The particular combined sewer overflow challenges faced by the 883 square miles and 129 municipalities, including the City of Chicago, served by the MWRD are unlike any other in the country. Likewise the TARP, first recommended over forty-two years ago, is unique in its duration, size, and scope – when it is completed it will provide almost an additional 17.5 ***billion*** gallons of water storage capacity and has already cost taxpayers over $3 ***billion***.

No two systems are alike, and there is no reason that consent decrees for different systems should be alike in all respects either. That some other decrees contain terms not found in the MWRD Consent Decree is of no consequence. The flexible policy allows negotiation of a consent decree that considers the MWRD's unique circumstances. Likewise, consent decrees for other communities must be afforded the same flexibility in fashioning a settlement that is in the public interest for each particular situation.

It is essential that a reviewing court defer both to the parties' expertise in evaluating financial and technical matters and respect EPA's longstanding approach of being flexible in its CSO enforcement efforts. This is especially true where the state is also involved as a plaintiff and can bring to bear in the negotiation specialized knowledge attributable to the affected area, such as the Illinois EPA and the extremely complex CSO issues associated with the greater Chicago area that are handled by the MWRD.

III. The District Court's approach upholds public policy in favor of voluntary settlements and recognizes the benefits of negotiating CSO consent decrees.

A. The need for workable and enforceable CSO consent decrees will continue to increase.

Combined sewer systems serve roughly 772 communities containing about 46 million people in 32 states (including the District of Columbia).[7] CSO

[7] EPA, Combined Sewer Overflows FAQs, at: http://water.epa.gov/polwaste/npdes/cso/CSO-FAQs.cfm (last visited December 9, 2014) (quotation marks omitted).

communities are in various stages of developing and completing their long-term control plans, monitoring the impacts of CSOs on waterways and discussing water quality and CSO control plans with permitting authorities.[8] Many CSO municipalities, including NACWA members, are in the process of negotiating consent decrees or expect to be subject to consent decrees in the future, or are currently subject to consent decrees that may have to be modified during implementation.

Indeed, CSOs and SSOs have been, and remain, a top enforcement priority for EPA. Reduction of CSOs was identified by EPA as a "National Enforcement Initiative" for Fiscal Years 2008-2010 during which EPA focused on (i) ensuring that communities with significant population centers were making appropriate progress towards addressing their CSO problems and violations, and (ii) directing federal attention to communities in non-compliance and causing environmental or human health risks. Importantly, the CSO and SSO reduction initiative was extended as an EPA National Enforcement Initiative for Fiscal Years 2011-2013 and again for 2014-2016.[9] There is no doubt that enforcement actions in CSO communities will remain a top priority for EPA for the foreseeable future.

Accordingly, many more CSO consent decrees between municipalities and federal and state governments are on the horizon. These agreements are painstakingly negotiated and drafted by federal and state governmental officials

[8] EPA, NPDES, Combined Sewer Overflows CSO Control Policy, at: http://water.epa.gov/polwaste/npdes/cso/CSO-Control-Policy.cfm (last visited December 9, 2014) (quotation marks omitted).

[9] EPA, National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters, at: http://www2.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our (last visited December 9, 2014).

with expertise in CSO control as well as local municipal entities with detailed knowledge about their CSO issues and financial capabilities and limitations. The parties are typically represented by counsel. Complex issues are tackled such as engineering designs necessary to address the CSOs and the financial capability assessments required to evaluate the implementation and timing of the CSO controls. Consistent with DOJ regulations (28 C.F.R. § 50.7), public comments are solicited for a proposed consent decree before seeking judicial approval. In sum, there is a comprehensive and deliberative process by which the interested parties negotiate the terms of a CSO Consent Decree.

This is why there is such a strong presumption in favor or approving consent decrees in cases such as this one. Federal, state and local agencies with the requisite expertise have, through the deliberative process, arrived at a negotiated solution that has now been reviewed by the District Court and found to be reasonable and in the public interest. As stated below, if the Seventh Circuit now were to find that the entry of the MWRD Consent Decree was an abuse of discretion just because Petitioners think something else could have been included, this will discourage parties from settling these matters and have a dramatic chilling effect on the entire consent decree process nationwide. Instead, it will encourage municipalities to not waste their limited financial resources on a negotiating process and instead litigate in the first instance, increasing the cost and complexity

of the process and making courts determine issues that would otherwise be in the hands of the governmental agencies with the best expertise to evaluate them.

B. The District Court's approach provides incentives to negotiate a CSO consent decree.

The District Court's deference to the deliberative process in favor of the technical and financial analysis of these complex, multi-faceted CSO issues supports and encourages this method of dispute resolution and the use of consent decrees as a tool for advancing CSO control across the country. Negotiating a CSO Consent Decree is an arduous process requiring significant commitments of time, money, and intellectual resources. The parties involved are sufficiently sophisticated to protect their respective interests and that of the public. However, incentives for municipalities with limited resources, and for that matter, federal and state governmental agencies, to participate in this comprehensive negotiation process significantly diminishes if their agreements can be upended by courts performing their own technical and financial analyses under the guise of the "fair, adequate, reasonable, and consistent with public interest" standards. Those standards should not be contorted to allow the court to upset an extensively negotiated settlement in favor of a largely hypothetical alternative.

NACWA does not argue that a court should "rubber stamp" CSO Consent Decrees. *See, e.g.*, *Azko*, 949 F. 2d at 1435 (citation omitted). However, the

threshold for disapproval under the "fair, adequate, reasonable, and consistent with public interest" criteria should be high due to the presumption in favor of voluntary settlements and the parties' expertise in this field. The matters at issue in such decrees are highly technical, fact specific, and sensitive to the financial and technical capabilities of the municipality. The consent decree negotiation process, on a national scale, will be significantly disrupted if the hard work of the parties can easily be swept aside based on unsubstantiated concerns of outside interest groups.

CONCLUSION

EPA and Illinois EPA negotiated with the MWRD to reach a settlement that accounts for the technical, practical, financial, and other unique facts and circumstances that come with developing a program to address CSO issues for the Greater Chicago area. The negotiated terms of the MWRD Consent Decree are consistent with EPA's flexible approach to work with impacted communities when addressing CSO issues. Moreover, the District Court reviewed the Consent Decree for fairness, adequacy, reasonableness, and consistency with the public interest and determined that the Consent Decree should be entered. To overturn the entry of a Consent Decree based on Petitioners unsubstantiated concerns would only serve to quell parties from resolving these issues through settlement in a manner that

achieves the best outcome for the public and the environment. Therefore, NACWA urges the Court to uphold the District Court's entry of the Consent Decree.

Respectfully submitted,

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CERTIFICATE OF FED. R. APP. P. 32(A) COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and as counted by Microsoft Office Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 point type.

/s/ Fredric P. Andes

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed this December 12, 2014, using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and service upon them will be accomplished through the CM/ECF system.

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