Consol. Nos. 14-1776 & 14-1777

IN THE 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 No. 11-cv-08859 The Honorable George M. Marovich, Judge Presiding.

BRIEF AND REQUIRED SHORT APPENDIX
OF PLAINTIFFS-INTERVENORS-APPELLANTS

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June 19, 2014

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 14-1776 and 14-1777 (consolidated)

Short Caption: US v. MWRD

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. AP. 26.1.

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(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. AP. 26.1 by completing item #3):

Natural Resources Defense Council, Inc.

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Baker & McKenzie LLP

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i) Identify all of 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/ Ann Alexander Date: June 19, 2014

Attorney's Printed Name: Ann Alexander

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

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N/A

Attorney's Signature: s/ Douglas B. Sanders Date: June 19, 2014

Attorney's Printed Name: Douglas B. Sanders

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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N/A

Attorney's Signature: s/ David P. Hackett Date: June 19, 2014

Attorney's Printed Name: David P. Hackett

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

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Prairie Rivers Network

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N/A

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N/A

Attorney's Signature: s/ Kim Knowles Date: June 19, 2014

Attorney's Printed Name: Kim Knowles

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

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Alliance for the Great Lakes

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Jenner & Block LLP

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N/A

Attorney's Signature: s/ Gabrielle Sigel Date: June 19, 2014

Attorney's Printed Name: Gabrielle Sigel

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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N/A

Attorney's Signature: s/ Anthony B. Borich Date: June 19, 2014

Attorney's Printed Name: Anthony B. Borich

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

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N/A

Attorney's Signature: s/ Stephen H. Armstrong Date: June 19, 2014

Attorney's Printed Name: Stephen H. Armstrong

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

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N/A

Attorney's Signature: s/ Lyman C. Welch Date: June 19, 2014

Attorney's Printed Name: Lyman C. Welch

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

Address: Alliance for the Great Lakes, 150 N. Michigan Ave., Suite 700, Chicago, IL 60601

Phone Number: 312-445-9739 Fax Number: 312-840-7758

E-Mail Address: lwelch@greatlakes.org

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Sierra Club

Prairie Rivers Network

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Sierra Club – Albert Ettinger

Prairie Rivers Network – Albert Ettinger, Kim Knowles

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N/A

Attorney's Signature: s/ Albert F. Ettinger Date: June 19, 2014

Attorney's Printed Name: Albert F. Ettinger

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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Environmental Law & Policy Center

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N/A

Attorney's Signature: s/ Jessica Dexter Date: June 19, 2014

Attorney's Printed Name: Jessica Dexter

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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E-Mail Address: jdexter@elpc.org

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Attorney's Signature: s/ Michael C. McCutcheon Date: June 19, 2014

Attorney's Printed Name: Michael C. McCutcheon

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

Address: 300 E. Randolph Street, Chicago, IL 60601

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JURISDICTIONAL STATEMENT

The United States ("US"), on behalf of the US Environmental Protection Agency ("USEPA"), and the State of Illinois, on behalf of the Illinois EPA ("IEPA") (collectively, "the Government"), filed suit against defendant Metropolitan Water Reclamation District of Greater Chicago ("MWRD") under Sections 309(b) and 505(a) of the Clean Water Act, for which the District Court had jurisdiction under 33 U.S.C. §§ 1319(b) and 1365(a), and 28 U.S.C. §§ 1331, 1345, and 1355. (Dkt. 1 ID1-2.)[1] Alliance for the Great Lakes ("Alliance") and Environmental Law & Policy Center ("ELPC") (collectively, "the Alliance Group"), and Natural Resources Defense Council, Inc. ("NRDC"), Sierra Club ("SC"), and Prairie Rivers Network ("PRN") (collectively, "the NRDC Group") (both groups, collectively, "Intervenors") moved the District Court to intervene as a matter of right under the CWA, 33 U.S.C. § 1365(b)(1)(B), and Fed. R. Civ. P. 24(a)(1). (Dkts. 14, 17.) The District Court granted intervention as of right to all Intervenors. (Dkt. 47.) The Alliance Group and the NRDC Group subsequently filed their respective Complaints-in-Intervention, for which the District Court had jurisdiction under Section 505(a) of the CWA, 33 U.S.C. § 1365(a). (Dkts. 48, 49.)

This Court has jurisdiction under 28 U.S.C. § 1291 as an appeal from a final order. Through its order entering the Government's proposed Consent

[1] "Dkt. __ ID__" refers to the District Court docket number and, if not to the entire document, to the consecutive ID numbers listed at the top right corner of each page of documents included in the record on appeal. "7th Cir. Dkt. __" refers to the docket number in this consolidated appeal. "A__" refers to the page of the required short appendix bound with this brief. "SA__" refers to the page of the separate appendix filed with this brief.

Decree ("CD") on January 6, 2014, the District Court resolved all of the Government's claims against MWRD. (A1, A33; SA127, ¶ 79.) The District Court entered its Order and the Judgment in a Civil Case on February 14, 2014, dismissing Intervenors' Complaints with prejudice. (A34, A39.) At that point, the District Court had disposed of all claims of all parties, creating a final appealable order under 28 U.S.C. § 1291. Intervenors appeal both the February 14, 2014 final Order and the January 6, 2014 Order entering the CD.

This appeal is timely because Intervenors filed their notices of appeal on April 9, 2014, within 60 days after the February 14, 2014 entry of final judgment. (Dkts. 129, 131.) A 60-day period to file a notice of appeal is allowed when the US is a party to the litigation. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The law requires that a district court reviewing a consent decree determine whether it is fair, adequate, reasonable, and in the public interest. Did the District Court abuse its discretion by entering the CD between the Government and MWRD, when the CD is inadequate to bring MWRD into compliance with the law?

2. Intervenors, who filed Complaints in this lawsuit and were not parties to the CD, have the right to prosecute their claims because the CD will not end MWRD's violations of the Clean Water Act. Did the District Court commit legal error when, relying primarily on the principles of *res judicata,* it *sua sponte* dismissed Intervenors' complaints, despite there being a realistic

prospect that the CD's remedial projects will not end the Clean Water Act violations caused by MWRD's polluting discharges?

STATEMENT OF THE CASE

This case arises from years of MWRD's discharges of untreated sewage and stormwater into the Chicago Area Waterways System ("the Waterways")[2] and reversals of polluted water into Lake Michigan.

I. MWRD's Untreated Discharges Of Combined Sewage.

MWRD operates the sewage system for the City of Chicago and surrounding suburban areas. (A2.) MWRD's sewage system is a combined sewer system, conveying sanitary and industrial waste and stormwater ("combined sewage"). (A2.) Under optimal conditions, MWRD's combined system conveys this combined sewage to wastewater treatment plants so that MWRD can release it safely into the Waterways. (A2.) The Stickney, Calumet, and North Side water reclamation plants ("the Plants") are MWRD's major treatment plants for its combined sewer system. (A2.) During many rainstorms, however, MWRD lacks the capacity to handle all the combined sewage. When that occurs, MWRD discharges the combined sewage directly and without treatment into the Waterways, in a "combined sewer overflow" ("CSO"), via "CSO outfalls." (A2.)

[2] The Waterways include the Chicago River (including its North Branch and the South Fork of its South Branch), the Calumet River, the Grand and Little Calumet Rivers, the Calumet Sag Channel, the Chicago Sanitary and Ship Canal, the Des Plaines River, Salt Creek, Addison Creek, Midlothian Creek, and the North Shore Channel, for a total of more than 76 miles of waters in the Chicagoland area. (Dkt. 1 ID2; Dkt. 102-3 ID5334.)

The raw sewage that MWRD discharges through CSOs causes severe human health and environmental impacts. (Dkt. 102-4 ID5501-08.) CSO discharges contain human pathogens, including bacteria, viruses, and parasites. (Dkt. 102-3 ID5400.) The human excrement, kitchen waste, and industrial waste contained in the combined sewage can deplete oxygen in the receiving water, oxygen which aquatic organisms need to survive. (Dkt. 102-4 ID5504-05; Dkt. 103-05 ID6278-80.) CSO events have been shown to make oxygen levels drop dramatically, including down to zero. (Dkt. 102-2 ID5215-17.) Additionally, combined sewage can contain toxic pollutants, such as metals, hydrocarbons, and synthetic organic chemicals. (Dkt. 102-4 ID5506-07.) The combined sewage is also laden with waste euphemistically called "floatables," *i.e.*, solid debris that floats on the surface of the receiving water, such as "[s]treet litter, sewage-related items (condoms, tampons, applicators), medical items (*e.g.*, syringes), resin pellets, and other material from storm drains, ditches, or runoff." (Dkt. 102-3 ID5433-34.) Combined sewage also contains solids that sink to the bottom of the waterway, becoming sludge. (Dkt. 100-19 ID4272-73, at 301:3-302:1; Dkt. 102-3 ID5400.)

MWRD causes CSOs to be discharged into the Waterways many times every year. (Dkt. 101 ID5101; Dkt. 102-2 ID5251-70.) Additionally, once a year on average, the rain and runoff are sufficiently heavy that a waterway rises, submerging the connected CSO outfalls, threatening to cause back-ups in the system. (Dkt. 102-2 ID5249.) When that threat occurs, MWRD releases the

sewage-laden water in the waterway into Lake Michigan by opening the locks to the Lake. (SA146; Dkt. 102-2 ID5249; Dkt. 61-1 ID1666.)

II. The Clean Water Act's Regulation Of CSOs.

A. The CWA's basic requirements.

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, ("CWA") prohibits the "discharge of any pollutant" without a National Pollutant Discharge Elimination System ("NPDES") permit issued by the USEPA or an authorized state. 33 U.S.C. § 1311(a); 40 C.F.R. § 122.1. NPDES permits must, among other things, ensure that a point source's discharges do not cause or contribute to a violation of state-established water quality standards ("Standards"). 33 U.S.C. §§ 1311(b)(1)(C), 1312, 1342(a); 40 C.F.R § 122.44(d). Two types of water quality protections are at issue here. First, levels of dissolved oxygen must not drop below certain prescribed limits in the Waterways. 35 ILL. ADMIN. CODE §§ 302.206(b)(4), 302.405. Second, the Waterways must be protected from offensive conditions: "Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin," with a substantially identical provision applicable to Lake Michigan. 35 ILL. ADMIN. CODE §§ 302.203, 302.515[3] (collectively, "the Offensive Conditions Standards").

B. The CWA's CSO Control Policy.

To address the significant public health and environmental threat posed by CSO discharges, in 1994, USEPA promulgated its CSO Control Policy ("the

[3] The secondary contact portion of the Waterways has a similar standard. 35 ILL. ADMIN. CODE § 302.403.

Policy"). Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994) (hereinafter cited as "SA__, Policy § __"). The Policy makes clear that NPDES permittees are required to prevent CWA violations from their CSOs, like any other discharge, and defines concrete steps and requirements for developing and implementing a plan to control CSOs so that they comply with the law. (SA9, Policy § IV.A.)

In 2000, through the Wet Weather Water Quality Act, the Policy was incorporated in its entirety into § 402(q) of the CWA. 33 U.S.C. § 1342(q). Specifically, Section 402(q)(1) states: "*Each* permit, order, or *decree* issued pursuant to this chapter [the CWA] after December 21, 2000 *for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy* signed by the Administrator on April 11, 1994 . . . ." *Id.* (emphasis added). Thus, CSO consent decrees, such as the CD at issue here, must conform to the Policy, including that the permittee comply with the technology-based and water quality-based requirements of the CWA. (*See, e.g.*, SA3, Policy § I.A.)

The Policy imposes both immediate "minimum controls" and long-term obligations on permittees such as MWRD. (*See, e.g.*, SA5, Policy § II.A.) For purposes of this litigation, the relevant "minimum control" is that MWRD must demonstrate "[c]ontrol of solid and floatable materials in CSOs." (*Id.* § II.B.) With respect to long-term obligations, permittees "are responsible for developing and implementing long-term CSO control plans that will ultimately result in compliance with the requirements of the CWA." (*Id.* § II.C.)

In initially selecting a long-term control plan ("LTCP") to attempt to achieve such compliance, a permittee may use a "presumption" approach whereby a proposed LTCP is presumed to have "adequate level of control to meet the water quality-based requirements of the CWA," if it meets one of three substantive performance criteria. (SA6, Policy § II.C.4.a.)

III. MWRD's Attempts To Address CSOs.

A. The Tunnel and Reservoir Plan.

In 1972, MWRD announced its plan to address "the enormous pollution and flooding problems caused by CSOs in the Chicagoland area" – the Tunnel and Reservoir Plan ("TARP"), which is a series of deep underground tunnels and reservoirs intended to hold excess combined sewage in reserve until the rain stops and combined sewage can be pumped back to MWRD's Plants for treatment and discharge. (SA145-SA146, SA157.) TARP is designed to divert untreated combined sewage to tunnels and reservoirs through open "sluice gates" that connect MWRD's sewer pipes to "drop shafts," through which the mixture drops 150-300 feet into TARP's tunnels. (A26; SA146; Dkt. 102-3 ID5329.) The deep tunnels are intended to carry combined sewage to TARP's reservoirs. (SA146, SA161.) The excess sewage remains in the tunnels and reservoirs until it can be pumped out of TARP and treated by one of MWRD's Plants. (*Id.*) However, if the sluice gates are closed – which typically happens to prevent a destructive "Transient Event" (discussed *infra*) – the combined sewage is *not* diverted into TARP. Instead, the combined sewage can be discharged, untreated, into the Waterways through the CSO outfalls. (A26;

Dkt. 102-2 ID5302-03, 5304, at 131:14-132:11, 133:5-24; Dkt. 102-3 ID5455-56, at 199:9-24, 254:1-24; Dkt. 103-2 ID5700-01.)

TARP consists of three disconnected tunnel and reservoir systems that serve MWRD's entire service area: (i) the Mainstream/Lower Des Plaines System ("Mainstream System"); (ii) the Calumet System; and (iii) the Upper Des Plaines System. (SA146.) By far the largest system is the Mainstream System, which serves approximately 3 million people, including most of Chicago and the North Shore, including Evanston. This system is connected to the Stickney and North Side Plants. It has two main tunnels that merge at their base and will, in the future, connect to the McCook Reservoir. (SA148-SA153, SA160.) The Calumet System is used by the Calumet Plant, serves 510,000 people south of central Chicago, and has one main tunnel that will connect to the Thornton Reservoir, when it is completed. (SA154-SA157, SA160.) The completed Upper Des Plaines System, the smallest system, serves areas near O'Hare Airport and has one main tunnel that connects to the Majewski Reservoir. (SA147-SA148, SA160.)[4] Once all three systems are completed, TARP is designed to hold a total of 17.45 billion gallons in its tunnels and reservoirs. (SA157.)

TARP has been under construction since 1975. (Dkt. 61-1 ID1578.) In 1995, after the Policy was issued, IEPA issued to MWRD a brief letter stating:

> [T]he Agency agrees with [MWRD] that the Tunnel and Reservoir Project (TARP) meets the objectives of the 'Presumptive Approach' [sic]. . . . Furthermore, the Agency believes that the completion of

[4] The Upper Des Plaines System's plant and permit are not at issue in this litigation.

> TARP will be adequate to meet water quality standards and protect the designated uses of the receiving waters pursuant to Section I.C. . . . of the federal CSO Control Policy.

(Dkt. 61-8 ID2669.) IEPA provided no analysis to support its belief, and no indication of which of the three "presumption approach" performance criteria applied. (*See* SA6-SA7, Policy § II.C.4.a.)

Construction of TARP was once slated for completion by 1982, but the tunnel portion was not completed until 2006. (SA157; Dkt. 61-3 ID2010.) MWRD's construction of the Thornton and McCook reservoirs is ongoing and has suffered significant delays. The Thornton Reservoir, serving the Calumet Plant, is not expected to be completed until the end of 2015. (SA91, ¶ 16(d); Dkt. 102-2 ID5288-90.) The McCook Reservoir currently is scheduled to be completed at the end of 2029. (SA92, ¶ 17(f); Dkt. 102-2 ID5289.)[5]

Throughout TARP's construction, CSO problems have continued. Since 2006, when the tunnels were completed, more than 113 billion gallons of untreated combined sewage have been discharged into the Waterways. (Dkt. 102-2 ID5251-70; Dkt. 102-3 ID5446.) MWRD also reports that, since 1985, more than 31.72 billion gallons of flow, including untreated sewage, have been sent into Lake Michigan, with the largest reversals to date occurring in 2011 and 2013. (Dkt. 102-2 ID5247, 5249; Dkt. 103-1 ID5582-83.)

[5] The McCook Reservoir, the largest of TARP's three reservoirs, will be constructed in two stages. (Dkt. 61-1 ID1576-77.) Stage 1 currently is not scheduled to be completed until the end of 2017; completion of Stage 2 is scheduled for the end of 2029. (*Id.*)

B. MWRD's 2002 permits.

In 2002, IEPA issued permits to MWRD for its CSO and other discharges from its three Plants ("the 2002 Permits"). (Dkt. 61-3 ID1925-80, excerpted at SA36-SA61.) The 2002 Permits are the bases for the Government's and Intervenors' Complaints in this case.

The 2002 Permits provided TARP construction completion dates "for informational purposes." (SA43, SA51, SA60.) Those dates included completion of the Thornton Reservoir by December 31, 2014, completion of McCook Reservoir Stage 1 by December 31, 2009, and completion of the entire McCook Reservoir by December 31, 2015. (*Id.*)

The 2002 Permits have several provisions addressing CSOs, including conditions at issue in this lawsuit:

- Special Condition 5 ("effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standard");
- Special Condition 10.1 (MWRD must provide primary treatment and disinfection to a certain volume of flow before discharging from CSO outfalls);
- Special Condition 10.2 ("All CSO discharges . . . shall be treated . . . to the extent necessary to prevent accumulations of sludge deposits, floating debris and solids . . . and to prevent depression of oxygen levels below the applicable water quality standard"); and

- Special Condition 10.10 ("discharges from the [CSO] outfalls listed . . . shall not *cause or contribute* to violations of applicable water quality standards or cause use impairment in the receiving waters" (emphasis added)).

(SA37, SA39-SA41, SA46-SA49, SA54, SA56-SA58; Dkt. 1 ID10, ¶¶ 37, 38, 40, 62.) (Together, the permit conditions that MWRD is charged with violating are referred to herein as "Conditions.")

C. MWRD's pre-litigation control of "offensive conditions."

MWRD has attempted to deal with some of the surface pollution caused by CSOs with an after-the-discharge approach – using boats deployed after a storm ends to attempt to remove debris from the surface of the Waterways. (Dkt. 102-3 ID5334-35.) As described by MWRD in its most updated CSO Operational and Maintenance Plan (a draft 2007 document), "floatables" are addressed by two pontoon boats, which allow two laborers per boat to remove debris using nets attached to poles, primarily in the downtown Chicago area. (Dkt. 102-3 ID5334-37.) None of the boats travels into Lake Michigan to remove floatables. None of the boats addresses bottom deposits or sludge that does not float near the surface.

IV. Enforcement Actions Against MWRD's Continuing CSO Pollution.

A. The Government's Complaint.

On December 14, 2011, the Government filed in the U.S. District Court for the Northern District of Illinois a three-count Complaint alleging that MWRD violated the CWA through its frequent discharges of untreated sewage

and other pollutants through CSOs to the Waterways.[6] (Dkt. 1.) The Government alleged that MWRD has failed "at all times to properly collect and treat all combined sanitary sewage and wastewater from [its] sewage collection systems." (Dkt. 1 ID2, ¶ 1.) It alleged three claims for relief. First, the Government alleged that MWRD violated Special Conditions 10.2 and 10.10 of its 2002 Permits (the dissolved oxygen claim). (Dkt. 1 ID13-14.) Second, the Government alleged that MWRD's CSOs violated Special Conditions 5, 10.2, and 10.10 of its 2002 Permits because the CSOs caused the illegal accumulation of "sludge deposits, floating debris and solids" in the Waterways (the "floatables" claim). (Dkt. 1 ID14-15, ¶¶ 55-57.) Third, the US alleged that MWRD violated Special Condition 10.1 of the 2002 Permits, regarding adequate primary treatment and disinfection of certain flow volumes before discharging through CSOs. (Dkt. 1 ID15-18.) To remedy these violations, the Government sought injunctive relief and civil penalties. (Dkt. 1 ID18-19.)

[6] Previously, on May 3, 2011, the members of the NRDC Group had filed a CWA citizen suit in the same court against MWRD for violations of the 2002 Permits, which included, *inter alia*, allegations that its CSOs violated permit conditions regarding dissolved oxygen and offensive conditions. *Natural Resources Defense Council, Inc. v. Metropolitan Water Reclamation District of Greater Chicago*, No. 1:11-cv-0937 (MIS). That lawsuit remains pending before Judge Tharp and was not addressed by Judge Marovich in this litigation.

B. The consent decree.

On the same day that it filed its Complaint, the Government lodged with the District Court the proposed CD to settle its claims against MWRD. (Dkt. 3.)[7] The CD includes two principal components:

1. The Government's proclaimed "centerpiece" of the "remedial program" – an "enforceable schedule" for completion of TARP's remaining two reservoirs – Thornton and McCook. (SA90-SA91; Dkt. 61 ID1521.)

2. A Floatables Control Plan, Appendix B to the CD ("the Floatables Plan"), which, like MWRD's pre-litigation approach, consists primarily of using boats to pick up floating debris in the Waterways (but not Lake Michigan) after the untreated combined sewage is discharged.[8] (SA166.) Once TARP's remaining two reservoirs are built, MWRD is no longer required to comply with the CD's Floatables Plan. (SA90, ¶ 15.)[9]

The CD does not require MWRD to make any structural or engineering changes to TARP. It has a section called "Performance Criteria" to be met after

[7] The proposed CD is identical to the CD as entered by the District Court. The entered CD can be found at SA73-SA182, and the separate appendix cite will be used hereafter.

[8] The CD requires MWRD to purchase two new skimmer boats to replace its pontoon boats and requires extended months of the year in which the boats would operate, if weather allows. (SA166-SA169.)

[9] Although completion of TARP's two reservoirs by 2029 is the "centerpiece" of the CD's "remedial program" (Dkt. 61 ID1521), the CD also includes a $675,000 civil penalty (which can be increased if TARP's reservoirs are inexcusably delayed) (SA88, SA115, ¶¶ 9, 11, 51, 52)) and a "green infrastructure" program, which the court below described as no more than "a drop in the half-gallon jug." (A31; SA175-SA182.)

the reservoirs are completed, which requires MWRD to operate to non-quantitative limits. (SA99-SA104, ¶¶ 28-34.) The CD anticipates that there will be CSOs after the two reservoirs are completed, but does not limit their number or otherwise establish metrics defining proper performance. It allows MWRD to close TARP's sluice gates to prevent any "Transient Event" threatening the TARP tunnels, thereby allowing combined sewage to be discharged as CSOs. (SA99-SA102, ¶¶ 28(g), 29(g).) The CD does not limit the number of times discharges due to threatened Transient Events may occur and does not require MWRD to address the resulting pollution or prevent recurrence of such pollution, such as with additional engineered controls. The CD requires that a report be submitted to the Government when a Transient Event occurs, which report may suggest operational, but not structural, changes to MWRD's system. (SA111, ¶ 44(b)(i).)

Moreover, the completion deadlines for the McCook and Thornton Reservoirs, which are no earlier than those announced by MWRD before the start of litigation (Dkt. 102-2 ID5288-90), can be extended further by the terms of the CD's "Contingency Event," which is defined as a delay caused by private quarry operators in mining the reservoirs or by the Corps for its projects for the McCook Reservoir. (SA92-SA98, ¶¶ 19-27.)

When each of the Calumet and Mainstream Systems is completed, the CD requires that MWRD implement a system-specific post-construction monitoring plan. (SA104-SA106, ¶ 35.) However, the CD contains no specifics for the required contents of this plan, *e.g.*, it does not identify the pollutants to

be monitored, the sampling frequency, the monitoring methods, or the monitoring locations. If the monitoring results for this future plan show that MWRD continues to violate its NPDES permits, MWRD then must develop "a plan analyzing the range of alternatives available to come into compliance with such requirements and identifying the actions MWRD proposes to take to meet such requirements." (SA107-SA108, ¶ 36(b)-(c).) However, the CD does not specifically require that any of the "range of alternatives" be implemented. MWRD can move to terminate the CD once it has complied with the performance criteria, completed its post-construction monitoring obligations, and paid any penalties. (SA133-SA136, ¶¶ 94-95.) The District Court retains jurisdiction until the CD is terminated. (SA133, ¶ 91.)

C. Intervention.

On March 20, 2012, two groups of environmental organizations – the Alliance Group and the NRDC Group – filed motions to intervene in this lawsuit, pursuant to the CWA, 33 U.S.C. § 1365(b)(1)(B). (Dkts. 14, 17.) On August 7, 2012, the District Court granted the motions to intervene, as of right, under Fed. R. Civ. P. 24(a)(1). (SA62-SA72.) In its Memorandum Opinion, the District Court specifically found that Intervenors had standing under the CWA to address "the injuries . . . caused by defendant's untreated CSO discharges." (SA69.) In August 2012, the two groups of Intervenors each filed Complaints-in-Intervention (Dkts. 48, 49), and MWRD subsequently filed an Answer to each. (Dkts. 53, 54.)

The Alliance Group alleged past and continuing violations of MWRD's 2002 Permits as a result of MWRD's CSOs, including violations stemming from impacts to Lake Michigan. For example, the Alliance Group alleged that CSO discharges can occur directly into Lake Michigan or when MWRD reverses the rivers to flow into the Lake. (Dkt. 48 ID1109, ¶¶ 33, 34.) The Alliance Group also alleged that the CSO discharges not only violated Conditions relating to the Waterways, but also relating to Lake Michigan, particularly the Offensive Conditions Standard. (*Id.* ID1115-16, 1118, 1120-21, 1123, ¶¶ 61, 62, 71, 79-81, 92.) The Alliance Group's request for injunctive relief included that the District Court order MWRD to complete "TARP and/or such other [LTCP] activities which will lead to the control of MWRD's CSO discharges in compliance with the CWA." (*Id.* ID1124-25.)

The NRDC Group pled the same violations of MWRD's CWA permits as alleged by the Government and sought injunctive relief. (Dkt. 49 ID1186-88, ¶ 27.)

D. Motion to enter.

As required by 28 C.F.R. § 50.7, after lodging the proposed CD, the Government had solicited public comments on the proposed CD.[10] On June 7, 2013, the Government filed its motion to enter the proposed CD without any changes in response to the public comments. (Dkt. 60.) In support of its motion

[10] Intervenors had submitted comments on the proposed CD before moving for intervention. (Dkts. 61-2 ID1768-1834, 1868-1914.)

to enter, the Government filed a brief in support of its motion, including a response to public comments. (Dkts. 61, 61-1.)

At this lawsuit's first status hearing, on June 25, 2013, the District Court stated that the central issue of importance in deciding whether to enter the CD was whether the CD's remedy was effective. The District Court stated that it was "concerned that what it is that somebody proposes is going to work. I don't have any reason to believe that the [Government] is adverse to the aims and goals of the environmental people, but I am concerned that what it is that you are proposing does work." (Dkt. 86-1 ID3142, at 10:2-7.)

At the status hearing, Intervenors requested an opportunity to take discovery in response to the Government's motion to enter the CD. (*Id.* ID3139, at 7:11-21.) In response, the District Court referred the matter to a Magistrate Judge and required that all discovery activities conclude within six weeks. (Dkt. 70; Dkt. 86-1 ID3144, at 12:10-16.) A request by Alliance for further time for discovery on issues disclosed during a deposition in the last days of the discovery period was denied. (Dkts. 84-87.)

1. Intervenors presented evidence that the CD will not end MWRD's violations of the CWA.

In their oppositions to entry of the CD, Intervenors identified evidence demonstrating that the CD does not remedy the violations alleged in the Government's lawsuit. That evidence included:

a. The Government's and MWRD's admissions relating to continuing CWA violations.

The Government and MWRD admitted that MWRD may continue to discharge combined sewage after TARP's reservoirs are completed. (Dkt. 100-2 ID3560, at 95:18:-96:2; Dkt. 100-7 ID3899-3900; Dkt. 100-8 ID3943; Dkt. 100-10 ID3999-4000; Dkt. 100-19 ID4222, at 99:22-100:1; Dkt. 103-1 ID5687.) And, in a separate proceeding before a state agency, MWRD admitted that its post-TARP CSO discharges are likely to violate proposed water quality standards. (Dkt. 100-9 ID3986-87, at 11:1–12:24; Dkt. 100-09 ID3990-91, at 126:20–127:8; Dkt. 100-10 ID3999-4000; Dkt. 103-5 ID6183-84.)

b. MWRD studies showing that, due to the TARP tunnels' design, TARP's reservoirs cannot solve the CSO discharge problem.

MWRD's experts found that large CSO discharges will continue after TARP's reservoirs are completed, principally due to two design flaws in TARP's tunnels.

First, as designed, TARP's tunnels are susceptible to destructive hydraulic disruptions known as "Transient Events," caused by the explosive energy of MWRD's combined sewage. (SA17; Dkt. 103-2 ID5725-27; Dkt. 103-2 ID5777; Dkt. 103-2 ID5828-29; Dkt. 103-3 ID5845-59; Dkt. 103-4 ID6087-88; Dkt. 103-4 ID6122-30; Dkt. 103-5 ID6137.) MWRD's combined sewage falls up to 300 feet from MWRD's surface sewers into TARP's deep tunnels, resulting in destructive "geysers," "surges," and "shock waves." (*Id.*) To avoid Transient Events, MWRD closes TARP's sluice gates and shuts off the flow of combined sewage into TARP. (Dkt. 103-2 ID5729-30, 5732, 5763.) The CD allows MWRD

to shut off TARP anytime a Transient Event may occur. (SA87, SA100, SA102, ¶¶ 8(jj), 28(g), 29(g).) MWRD's existing procedures require MWRD to close TARP's gates when the Mainstream tunnel is only 50% full, and earlier during "extreme precipitation events." (Dkt. 103-2 ID5730.) *Second*, as designed, TARP's Mainstream tunnel has inadequate conveyance capacity – it is too small and too flat to convey combined sewage to TARP's reservoirs. (SA17, SA23; Dkt. 103-2 ID5697, 5706, 5726.)

TARP's reservoirs will not solve the tunnels' design flaws. MWRD's experts found that completion of "a reservoir at the downstream end of the tunnel would not reduce the hydraulic transient potential" in the Mainstream System. (SA32.) Indeed, "even with the reservoir, overflow occurs in all upper sections of the [Mainstream] system . . . due to limited conveyance to the reservoir." (SA22-SA24.) There is concern regarding the Calumet System, also. (Dkt. 103-2 ID5701-02.)

Because TARP's reservoirs will not solve the design flaws in TARP's tunnels, MWRD's experts found that TARP would not be able to capture billions of gallons of combined sewage after the reservoirs' completion. (SA25; Dkt. 103-2 ID5700-01.) For example, MWRD's 1994 study analyzed how the Mainstream System, with the McCook Reservoir completed, will perform in an only "moderately heavy" storm. (SA17, SA19-SA20; Dkt. 103-4 ID6130.) MWRD's experts calculated that a completed Mainstream System will capture no more than 33% of the storm event's volume. (SA20, SA25.) Thus, according to

MWRD's experts, for a moderately heavy storm, TARP will not capture at least 4 *billion* gallons of combined sewage.[11]

c. Corps and MWRD reports showing that the CD's reservoirs are too small.

Studies by the U.S. Army Corps of Engineers ("the Corps") showed that TARP's reservoirs are too small to accommodate the combined sewage likely to be generated during storm events. The Corps studied reservoirs planned for TARP as of 1975 and 1986 – reservoirs that were larger than the reservoir size ultimately selected by MWRD and approved in the CD – and found that those initially planned reservoirs would still be too small to eliminate MWRD's combined sewage discharges or MWRD's reversals to Lake Michigan. (*Compare* Dkt. 102-3 ID5356, 5358 *and* Dkt. 61-5 ID2082, 2084 *with* SA84 ¶ 8(q).) Later, MWRD's experts found that the Calumet reservoir required by the CD will "overflow" unless MWRD drains the reservoir at an elevated rate, but there is no evidence that MWRD can achieve the required rate. (Dkt. 103-4 ID6010.)

d. MWRD reports showing that additional projects can address CSO pollution discharges.

MWRD's experts identified a variety of projects that would address the design flaws in TARP's tunnels, including minimizing Transient Events and expanding the Mainstream tunnel's conveyance capacity. (SA32-SA34; Dkt.

[11] The studied storm generated a total volume of 822.1 million cubic feet in the Mainstream System. (SA20.) There are approximately 7.48 gallons in a cubic foot. Therefore, the storm volume in the Mainstream System is about 6.15 billion gallons, or the product of 822.1 million and 7.48. The 1994 study states that the Mainstream System, once completed, will only capture 33% of the combined sewage in the system for the analyzed storm. (SA25.) 66% of the 6.15 billion gallons of combined sewage in the system for that storm is approximately 4 billion gallons.

103-2 ID5834; Dkt. 103-3 ID5855-59; *see also* Dkt. 103-1 ID5642-55 (addressing end-of-pipe treatment alternatives).) The CD does not require MWRD to implement any of the structural fixes identified by MWRD's experts. (SA73-SA183.)

2. Intervenors' other challenges to the CD.

Intervenors' other challenges to the CD's entry included that: (1) the CD contains no meaningful performance criteria (Dkt. 100 ID3497-3500); (2) the CD provides no specific post-construction monitoring requirements (Dkt. 100 ID3502-06); and (3) the schedule for TARP's completion was too long, particularly because it contained no reliable completion date (since completion could readily be postponed in the case of "Contingency Events") (Dkt. 101 ID5128-34). Intervenors also presented evidence showing the CD's other projects are insufficient to remedy MWRD's permit violations. The CD's green infrastructure projects are tiny in comparison to MWRD's discharges. (Dkt. 101 ID5106.) The CD's Floatables Plan ignores sludge and feces and other pollution from MWRD's discharges that may not float. (Dkt. 101 ID5134-40.) Also, that plan does not require collection of floatables or other solids in Lake Michigan. (Dkt. 101 ID5136; SA166-SA169.)

On December 17, 2013, all parties presented oral argument regarding entry of the CD, with Intervenors opposing entry and the Government and MWRD supporting entry.[12] (Dkt. 120.)

[12] The District Court previously had denied Intervenors' request for an evidentiary hearing, including the opportunity to present expert testimony. (Dkts. 115, 117.)

E. The District Court enters the CD.

On January 6, 2014, the District Court issued a Memorandum Opinion and Order approving entry of the CD, and entered the CD. (A1-A32, A33; SA73-SA182.) While not disputing that Intervenors' evidence raised questions about TARP's efficacy, the District Court found that, rather than reject the CD for inadequately addressing a known deficiency, "[w]hat makes far more sense is for MWRD to wait until TARP is completed and then determine whether there are CSO outfalls that still have CSOs." (A24.) And, while recognizing as a "valid" point that "MWRD cannot show, today, that TARP will prevent CSOs in every future year" (A25), including due to TARP's capacity problems and the occurrence of Transient Events, the District Court found that those facts do not make the CD unreasonable, because "a consent decree, in order to be entered, need not be perfect" and CSOs "that comply with a permit do not violate the [CWA]." (A26-A27.) The District Court did not discuss MWRD's 1994 study (discussed *supra*), which showed that TARP's conveyance problems were severe. The District Court noted that it "takes great comfort in knowing that the consent decree requires MWRD to monitor TARP's performance once it is complete" and that, if MWRD is not in compliance with its permits upon TARP's completion, "MWRD must analyze alternatives for bringing its system into compliance . . . ." (A27.) However, the District Court noted that the CD did not expressly require that MWRD implement any such alternatives. (A29.)[13]

[13] The District Court also found that the CD's Floatables Plan was a "reasonable means of ameliorating floatables released during CSOs." (A31.)

F. The District Court dismisses Intervenors' Complaints.

The District Court's ruling on the CD did not address the status of Intervenors' Complaints pending before that court. On February 10, 2014, Intervenors filed a motion for a status conference regarding their Complaints. (Dkt. 124.) On February 14, 2014, the District Court denied Intervenors' motion for a status conference and, without any briefing or hearing, dismissed with prejudice Intervenors' Complaints. (A34-A38, A39.)

In its dismissal order, the District Court recognized that in its prior order entering the CD "the Court did not dismiss their claims," but then held that Intervenors' claims were either barred by 33 U.S.C. § 1365(b)(1)(B), which prohibits subsequently filed citizen suits when the Government is "diligently prosecuting" the case, or by *res judicata.* (A35.) To reach its *res judicata* decision, the District Court cited to this Court's decision in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743 (7th Cir. 2004) ("*Friends II*"), which held that a government consent decree could bar, as *res judicata*, a citizens' suit, but only if the government had diligently prosecuted its claims. (A37-A38.) Without conducting the "diligent prosecution" the inquiries required by this Court in *Friends II,* 382 F.3d at 764-65, *i.e.*, whether there is a "realistic prospect" that the CD's "remedial projects" will not permanently end the CWA violations within a reasonable timeframe, the District Court dismissed Intervenors' Complaints.

After the District Court entered its Judgment in a civil case on February 14, 2014 (A39), Intervenors filed their notices of appeal on April 9, 2014. (Dkts. 129, 131.)

SUMMARY OF ARGUMENT

The Entry Of An Inadequate CD Was An Abuse Of Discretion

The CD is not reasonable and therefore the District Court abused its discretion when it entered the CD. A court cannot enter a consent decree that is not reasonable. *See United States v. George A. Whiting Paper Co.,* 644 F.3d 368, 372 (7th Cir. 2011). To be reasonable, the CD must be technically adequate and effective in "cleansing the environment." *See, e.g.*, *United States v. Akzo Coatings of Am., Inc.,* 949 F.2d 1409, 1437 (6th Cir. 1991).

The District Court's decision was an abuse of discretion for three reasons. *First*, Intervenors showed that the CD, especially the completion of TARP's two remaining reservoirs, will not bring MWRD into compliance with the CWA. Despite this evidence, the District Court did not decide that MWRD's performance of actions required by the CD would lead to the end of the permit violations alleged in the Government's Complaint. *Second*, the District Court postponed actions needed to bring MWRD into compliance to some point in the distant future. *Third*, the District Court approved the CD despite the absence of identified monitoring and performance criteria upon which a future district court will determine the additional steps that will be needed to achieve compliance. Because the CD is patently unreasonable, the District Court's entry of the CD should be reversed.

The Dismissal Of Intervenors' Complaints Was Legal Error

This Court has established a particularized inquiry that a district court must undertake when determining whether a consent decree can bar a third party's claims. Pursuant to this Court's *Friends* series of cases,[14] if there is a "realistic prospect" that MWRD's violations will continue, despite implementation of the CD's "remedial projects," Intervenors' suits "may proceed." *Friends II,* 382 F.3d at 765.

Contrary to the legal requirements this Court established in *Friends II*, the District Court failed to determine that the CD's remedial projects, *i.e.*, completion of the two TARP reservoirs, the Floatables Plan, and the green infrastructure plan, will permanently end MWRD's CWA violations. Instead, the District Court *sua sponte* dismissed with prejudice Intervenors' complaints, finding that the Government's lawsuit leading to the CD's entry was a diligent prosecution that bars Intervenors' claims under principles of *res judicata.* (A38.) The District Court based its finding of "diligent prosecution" on language in the CD stating that it cannot be terminated until MWRD achieves compliance. (A37.) However, a consent decree cannot bar a citizens' suit based on the decree's bare language purporting to require future compliance. The trial court's *res judicata* analysis must look at whether the decree's "actions are

[14] The *Friends* series of cases are: *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, No. 02-C-0270, 2003 WL 23864869 (E.D. Wis. Sept. 29, 2003) ("*Friends I*"); on appeal, 382 F.3d 743 (7th Cir. 2004) ("*Friends II*"); after remand, No. 02-C-0270, 2007 WL 4410402 (E.D. Wis. Dec. 14, 2007) ("*Friends III*"); and on appeal a second time, 556 F.3d 603 (7th Cir. 2009) ("*Friends IV*"). All involve the application of *res judicata* to a CWA citizens' suit after a state trial court entered the settlement decree between the Wisconsin enforcement agency and Milwaukee's sewage treatment district.

calculated to eliminate the cause(s) of the violations," not whether the decree has language requiring compliance. *Friends II*, 382 F.3d at 760.

Based only on the record evidence to date, it is plain that there is more than a "realistic prospect" that MWRD's violations of the CWA will continue despite implementation of the CD's remedial projects. Therefore, the District Court's dismissal of Intervenors' complaints was contrary to both the law and the record evidence and should be reversed.

STANDARD OF REVIEW

This Court reviews the District Court's order entering the CD for an abuse of discretion. *Whiting*, 644 F.3d at 372. This Court reviews *de novo* the District Court's order dismissing Intervenors' Complaints on *res judicata* grounds. *Cole v. Bd. of Trs.*, 497 F.3d 770, 772 (7th Cir. 2007); *Friends II*, 382 F.3d at 751.[15]

ARGUMENT

I. The District Court Abused Its Discretion In Entering An Inadequate CD That Will Not Bring MWRD Into Compliance With The CWA.

The trial court's obligation when considering whether to enter a consent decree is to determine whether it is substantively fair, reasonable, adequate, and in the public interest. *Whiting,* 644 F.3d at 372; *Donovan v. Robbins*, 752

[15] Five years later, in *Friends IV*, this Court noted that while dismissals on *res judicata* grounds are typically reviewed *de novo*, there it applied a clear error standard of review to the District Court's factual findings and application of law to the facts because the lower court's ruling was on remand after a full evidentiary hearing. 556 F.3d at 609-10. Here, Intervenors were given no opportunity to present evidence at a *res judicata* hearing before the District Court. Thus, the *de novo* standard of review applies to the District Court's ruling below. However, even under a more deferential clear error standard, the District Court's dismissal order should be reversed.

F.2d 1170, 1177 (7th Cir. 1985); *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010). An abuse of discretion standard applies to appellate review of judicial approvals of consent decrees. *Whiting*, 644 F.3d at 372. "Abuse of discretion" means a serious error of judgment, such as reliance on a forbidden factor or failure to consider an important factor. *See Tolliver v. Northrop Corp.*, 786 F.2d 316, 318-19 (7th Cir. 1986).

Here, the District Court cited the standard explained in *Donovan* and stated that its evaluation of the CD would focus on determining whether the CD is reasonable. (A13-A14.) However, in performing that reasonableness determination, the District Court failed to determine whether the remedy embodied in the CD will likely be effective to end the environmental violations alleged in the Government's Complaint. *Akzo*, 949 F.2d at 1437. ("The most important of these 'reasonableness' factors [is] the decree's likely effectiveness as a vehicle for cleansing the [environment]."); *United States v. Cannons Eng'g, Corp.*, 899 F.2d 79, 89 (1st Cir. 1990) (a consent decree's "likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance" in judicial review).

The dispositive obligation to determine whether a consent decree is effective to achieve compliance is well-recognized. For example, in *United States v. City of Akron*, 794 F. Supp. 2d 782 (N.D. Ohio 2011), the district court rejected USEPA's proposed CSO consent decree upon finding the CSO remedy to be substantively inadequate. *Id.* at 804, 808. The *Akron* court declined to approve the parties' "agreement to agree" on a CSO remedy on the ground that

"[t]here is no way of knowing whether the Decree will be an effective tool for cleansing the environment"; and "[w]hile the Government's stated goal is to eliminate all overflows from Akron's CSOs, the parties' fruitless negotiations have shown that Akron has never been willing to share in this goal." *Id.* at 804, 808. Similarly, in *United States v. Telluride Co.*, 849 F. Supp. 1400 (D. Colo. 1994), the district court identified as a critical factor in reviewing the reasonableness of a CWA consent decree "whether the decree is technically adequate to accomplish the goal of cleaning the environment." *Id.* at 1402. In *Telluride*, the district court declined to enter a consent decree based on, *inter alia*, evidence that the remedy was inadequate, holding that USEPA insistence on judicial deference to a CD that required a remedy developed by the defendant "borders on the ludicrous." *Id.* at 1403-04. Additionally, the Southern District of Florida recently upheld the entry of a CWA consent decree found to "cure specific violations [of] the [CWA]." *United States v. Miami-Dade Cnty.*, No. 12-CV-24400, slip op. at 5 (S.D. Fla. Apr. 9, 2014). (A44.)

Determining whether the CD effectively leads to compliance with the law is a critically important consideration. Here, the District Court failed, in three primary respects, to conduct the necessary evaluation of the CD's adequacy, protection of public interest, and reasonableness:

1. The District Court approved the CD although its remedial projects will not end violations of the CWA as a result of MWRD's continuing large discharges of combined sewage;

2. The District Court reached its determination that the CD is reasonable only by postponing to future generations the task of assessing and addressing the remedy's inadequacy; and

3. The District Court did not insist upon clear performance standards by which the CD's adequacy could be measured, either now or in the future.

As a result, the District Court's decision to enter the CD was an abuse of discretion and should be reversed.

A. The CD does not require MWRD to take actions that will remedy the violations alleged in the Government's Complaint.

As discussed above, the District Court had both the power and the obligation to determine whether the CD would actually alleviate the violations alleged in the underlying action. At the District Court's first hearing, it characterized this obligation as questioning "will it work" – that is, will the CD effectively address MWRD's permit violations. (Dkt. 86-1 ID3142.) Yet in deciding to enter the CD, the District Court abandoned that focus on "will it work," and failed to confirm that the CD will implement a remedial program that will achieve compliance with the law.

Intervenors took seriously the District Court's question of "will it work" and, within the six-week discovery period granted to them, gathered evidence confirming that, in fact, the CD's remedial program will not work to end MRWD's CWA violations. Specifically, Intervenors showed, through four principal lines of evidence, that the CD will not work to stop CSOs that violate MWRD's Permit Conditions.

First, Intervenors relied on *MWRD's and the Government's own expert studies* to show that TARP will not stop MWRD's violations, even after TARP's reservoirs are completed. The key study upon which Intervenors relied was MWRD's own expert's 1994 study, which showed that in a moderately heavy storm, the large Mainstream System will only be able to convey and store about a third of the combined sewage generated during such a storm, even after TARP's reservoirs are completed. The remaining 4 billion gallons would not be able to be captured by TARP. The volume of combined sewage that TARP could not contain from a storm that size shows that the CSOs would, at a minimum, violate the Offensive Conditions Standards. Intervenors discussed this study and its importance in their briefing opposing entry of the CD and highlighted it for the District Court during oral argument contesting the CD's entry. (Dkt. 101 ID5119-23; 7th Cir. Dkt. 20, 12/17/2013 Tr. 26:13-21, 32:12-34:6, 36:5-10, 36:22-25, 37:6-8, 38:1-10, 40:11-41:2.) However, the District Court's opinion entering the CD disregarded this study entirely. (*See* A1-A32.)

Second, Intervenors showed that *MWRD had admitted* that TARP will not succeed in bringing the agency into compliance with the law. Intervenors introduced evidence that MWRD had appeared before the Illinois Pollution Control Board ("the Board"), which held hearings on future, more stringent standards for use of the Waterways. In those hearings, MWRD argued for less stringent standards than those proposed by IEPA precisely because TARP, once completed, will not work to eliminate the discharges that cause the violations of

water quality standards that were the basis of the Government's CWA Complaint in this lawsuit. Specifically, MWRD's expert testified as follows:

> Q. And now as we sit here today, you feel that they won't, water quality standards for DO [dissolved oxygen] will not be met by completion of TARP?
>
> A. *I'm saying that because TARP will not adequately control all CSO discharges* and these other wet weather sources which the data have shown can effect DO in the system even if CSO's are not discharging that it is appropriate if you're going to adopt what you believe to be the highest attainable use of this system *that a wet weather limited use* [*i.e.*, a variance from more stringent water quality standards] *would be needed*.

(Dkt. 100-9 ID3990-91, at 126:20-127:8 (emphasis added).) MWRD also filed papers with the Board stating that TARP alone cannot remedy violations of the dissolved oxygen standard:

> Accordingly, EPA's unsupported contention that CSOs into the [Waterways] can be remedied solely by the completion of TARP is actually contravened, rather than supported, by the record and EPA's own statements. Even with the improvements anticipated after the completion of TARP, the sources of pollution that prevent attainment of the CWA aquatic life goal in the [Waterways] may still remain.

(Dkt. 103-5 ID6183-84.) Thus, MWRD has admitted that continuing violations of the CWA will occur even after TARP's reservoirs are constructed. In its decision entering the CD, the District Court ignored MWRD's admissions. (A1-A32.)

Third, Intervenors further showed that the CD will not "work" to bring MWRD into compliance by *examining the decree itself*. The CD is structured to allow massive discharges of combined sewage to occur. In several provisions, the CD allows untreated discharges to occur when tunnels are full. (SA99,

SA101, ¶¶ 28(a), 29(a).) In addition, the CD provides that MWRD may allow untreated discharges to occur whenever an MWRD operator fears a Transient Event will occur within the system. (SA100, SA102, ¶¶ 28(g), 29(g).) Because Transient Events occur when there is a heavy rainstorm, the CSOs that result will be massive too, discharging pollution violating CWA Conditions into the Waterways. The CD allows those Transient Event discharges to occur, including after TARP's reservoirs are in operation.

Fourth, the CD does not "work" to stop CWA violations because it does not solve MWRD's continuing inability to "control[] solid and floatable materials in CSOs," an obligation that the Policy has imposed on MWRD at least since the Policy was issued in 1994. (SA5, Policy § II.B.) The inadequacy of MWRD's approach to controlling floatables was one of the bases for the Government's claims in this lawsuit. (Dkt. 1 ID14-15.) Moreover, the "floatables" problem will continue, if not be worse, after TARP's two reservoirs are completed, because the CD does not require MWRD to continue implementing the Floatables Plan after those reservoirs are constructed. (SA90, ¶ 15.) As is obvious to anyone who has seen the Chicago River or Lake Michigan after a heavy storm, MWRD's chase-the-debris approach is inadequate, regardless of whether it uses two boats or three. Not only does MWRD not "control" solid and floatable materials on the Waterways' surface, its post-storm cleanup does not address other solids, including sludge and bottom deposits and completely ignores offensive conditions in Lake Michigan.

The District Court did not address much of Intervenors' compelling evidence that TARP's reservoirs, and the CD's other, even less effective measures,[16] will not end MWRD's violations. The District Court's opinion approving entry of the CD never once mentioned MWRD's 1994 study showing that the completed Mainstream System will not capture 4 billion gallons of combined sewage during just a moderately heavy storm. The District Court also never mentioned MWRD's testimony admitting that its post-TARP CSOs would violate proposed water quality standards. Nor did the District Court address the fact that the Floatables Plan does nothing to clean up floatables in Lake Michigan or to address sludge and bottom deposits in the Waterways or the lake.

The District Court misconstrued Intervenors' evidence about the problems caused by Transient Events and the devastating and illegal impact of CSOs on the Waterways that result from the hydraulic problems endemic to TARP's design. The District Court stated that leaving the sluice gates open during Transient Events, potentially damaging TARP's components, is not a viable option. (A27.) No one, including Intervenors, ever suggested that that option be pursued. (Dkt. 101 ID5127 (acknowledging that "it is appropriate that MWRD take action to avoid the damage that can be caused by Transient Events.").) Intervenors stated instead that the District Court should reject as inadequate any CD that does not require MWRD to develop a solution to the

[16] The CD's green infrastructure program is miniscule compared to the size of MWRD's discharges; the District Court characterized it as a "drop in a half-gallon jug." (A31; Dkt. 101 ID5106.)

pollution caused by Transient Event CSOs. (*Id.*) Put another way, MWRD should improve its control of combined sewage flow so that MWRD is not forced at times to choose between causing massive property damage or massive water pollution violating the law.

The District Court also attempted to minimize Intervenors' objections, saying that they wanted a "perfect" consent decree or to unrealistically "stop all future CSOs." (A26-A27.) However, Intervenors never made those arguments. They instead asked the District Court to reject the CD as inadequate (not imperfect), because it does not "stop all future CSOs" *that violate the CWA, including MWRD's permit Conditions*. (Dkt. 101 ID5109-27, 5145.)

In sum, we know today that the CD will not remedy MWRD's CWA violations, because the CD does not change MWRD's singular reliance on TARP as currently designed. TARP does not work now and, by itself, TARP will not end MWRD's CWA violations in the future. The District Court's entry of the CD despite this fundamental inadequacy was an abuse of its discretion.

B. The District Court postponed the determination of the CD's legal adequacy.

Despite attempting to minimize Intervenors' challenges to the CD's adequacy, the District Court recognized the strength of their objections. Indeed, the District Court recognized the "valid" point that "MWRD cannot show, today, that TARP will prevent CSOs in every future year" (A25); that additional technology may be needed in the future (A24); that "TARP may not have sufficient capacity for every future rain storm" (A26); and that "transient events will likely cause future CSOs . . . ." (A26.) However, the District Court did not

address those substantial defects in the CD by rejecting it as inadequate and ineffective, consistent with the legal standard followed by the *Telluride*, *Akzo*, *Cannons*, *Akron*, and *Miami-Dade* courts. Instead, the District Court postponed until an undetermined point in the future the requirement that MWRD comply with the CWA: "What makes far more sense is for MWRD to wait until TARP is completed and then determine whether there are CSO outfalls that still have CSOs." (A24.) Similarly, the District Court left until "after the [CD] is entered," MWRD's determination on how to monitor for TARP's performance (A28), thereby abdicating its ability to review the criteria by which MWRD proposed to measure its own compliance with the law.

The District Court concluded its analysis of TARP's efficacy (and lack thereof) by postponing the determination of MWRD's compliance and how to fix non-compliance:

> Finally, the Court takes great comfort in knowing that the consent decree requires MWRD to monitor TARP's performance once it is complete. If, upon completion, the TARP system has not brought MWRD into compliance with the three permits at issue in this case, MWRD must analyze alternatives for bringing its system into compliance, select among them and schedule their implementation.

(A27.) However, given that MWRD has been constructing its LTCP for 40 years – an LTCP that the evidence shows *today* is deficient – waiting at least 15 more years to complete a defective system, and only *then* identifying "alternatives for bringing its system into compliance" with the law, simply perpetuates MWRD's violations of the CWA. (A27.) Moreover, the CD does not contain any requirement that MWRD actually *implement* any additional "alternatives."

During TARP's construction, the public has been and will be subjected to combined sewage discharges in violation of the CWA. Contrary to the District Court's view that it would be a "waste of resources" to start addressing TARP's problems now (A24), it is a "waste of resources," including our precious water resources, to build a known inadequate system without taking steps now to correct those inadequacies and stop the illegal pollution. While the CD "need not be perfect" (A27), it must be effective to remedy MWRD's violations. The CD allows MWRD's violations to continue for years, without requiring that MWRD begin work today on an effective solution to CSO pollution. The District Court's decision to postpone the identification and implementation of projects needed to bring MWRD into compliance is an abuse of discretion.

C. The District Court improperly found the CD reasonable despite its lack of identified criteria for determining satisfactory compliance.

The third principal reason that the CD is inadequate is that it imposes no criteria for measuring or requiring effective performance. In this manner, it departs from other USEPA CSO consent decrees.

Importantly, the CD does not include a monitoring plan specifying the essential requirements for post-construction monitoring, such as which pollutants will be monitored, at which locations, how frequently, or by what method. The District Court excuses the absence of a plan by pronouncing, without elaboration, that it is reasonable to allow MWRD and the Government to decide on the elements of performance monitoring after the CD is entered. (A28.) The District Court fails to address the fact that other USEPA CSO

consent decrees do contain a monitoring plan with all of the information referenced above described in detail, as integral parts of the decree. (Dkt. 100 ID3506.)[17]

The CD also has no stated performance criteria for judging whether the CD is working effectively. The purported "performance criteria" in the CD are illusory, because they allow an unlimited number of Transient Events and CSO discharges whenever the tunnels are "full." (SA99-SA101, ¶¶ 28(a), 29(a).) This stands in contrast, once again, with other CSO consent decrees entered into by USEPA, which contain detailed quantitative criteria for assessing system performance, such as allowable frequency of CSO events (stated as a maximum average annual frequency) or percent capture of combined sewage. (*See* Dkt. 100 ID3501 (collecting quantitative criteria from other cities' consent decrees).)

Finally, the CD does not specifically require that MWRD complete additional projects when it is determined that the CD has failed to end MWRD's violations. The District Court acknowledged that the CD "does not explicitly require MWRD to *complete*" any additional measures that will be required to bring MWRD into compliance once TARP is completed. (A29.) To resolve this glaring hole in the remedial scheme, the District Court interpreted the CD to mean that the CD cannot be terminated until the District Court finds that

[17] In briefing below, the Government noted that the Metropolitan St. Louis Sewer District consent decree allowed the district to submit a post-construction monitoring plan to the government for approval. (Dkt. 110 ID6374.) However, in contrast to the few broad references to post-construction monitoring in the MWRD CD (SA104-SA106, ¶ 35), the St. Louis consent decree included a detailed five-page appendix that specified the elements of the monitoring program, including, *e.g.*, the scope of the required monitoring quality control procedures, criteria for selecting monitoring locations, and reporting requirements. (Dkt. 100-26 ID4742-47.)

MWRD has had "satisfactory compliance," "to the court's satisfaction," with its permits for one year. (A29.) However, the District Court failed to consider that the CD has no metrics for any future judge to determine "satisfactory compliance."

The Government's endorsement of a CD without quantitative assessment criteria contradicts USEPA's own guidance, which requires that consent decrees include "quantified performance criteria." (Dkt. 61-7 ID2620.) The District Court dismissed the Government's inconsistency with its own requirements, saying that a guidance document "lacks the force of law." (A29-A30.) The District Court did not, however, consider that the law makes suspect federal agency action that is inconsistent with its own policy. *See Bd. of Trs. of Knox Cnty. Hosp. v. Shalala*, 135 F.3d 493, 501-02 (7th Cir. 1998) ("[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991))); *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 748-51 (6th Cir. 2012) (USEPA's Clean Air Act interpretation was unreasonable in part because the agency's determination was "patently inconsistent" with its own guidance); *United States v. City of Akron*, No. 5:09CV272, 2013 WL 999909, at *2 (N.D. Ohio Mar. 13, 2013) (USEPA's inconsistency with its own guidance was one reason the court gave less deference to the agency's consent decree). Further, the District Court provided no reason why performance under the CD for Chicago's Waterways does not

deserve to be judged by quantitative criteria, just like other communities' decrees.

In sum, rather than assessing all of the evidence and deciding whether compliance would be achieved, the District Court erroneously disregarded key evidence demonstrating TARP's inherent defects and instead deferred action needed to bring MWRD into compliance until TARP's completion in 2029 (at the earliest). The District Court's decision also gave short shrift to the undeniable evidence of continuing violations and the need for additional actions to control solids and floatables during the next 15-plus years of TARP construction. By foregoing its core responsibility to assure the CD's adequacy, the District Court leaves the Chicago area with the prospect of continuing CWA violations featuring massive discharges of untreated sewage into its Waterways for decades to come. Therefore, the District Court's decision to enter the CD constitutes an abuse of discretion and requires reversal.

II. Intervenors Can Pursue Their Claims Against MWRD Because There Is A Realistic Prospect That The CD's Remedial Projects Will Not End MWRD's Violations Of The CWA.

While this Court may favor consent decrees, it does not favor summary dismissals of valid complaints just because a consent decree has been entered. This Court's ruling in *Friends II* establishes that a district court cannot use a consent decree to bar, as *res judicata*, a citizens' suit if there is a "realistic prospect" that the discharger's "violations will continue notwithstanding the

polluter's settlement with the government." *See* 382 F.3d at 764-65.[18] The legal inquiry in which the trial court must engage to make this "realistic prospect" determination is not the same as the evaluation of whether to approve a government settlement. Instead, the district court must conduct a rigorous evaluation of whether the consent decree's remedial projects will permanently stop – not just decrease the extent of – violations. *Id.* The District Court failed to conduct the "detailed examination" required by this Court in *Friends II*. *Id.* at 765. The record evidence shows at least a "realistic prospect" that MWRD's violations will continue after the CD's entry. Accordingly, the District Court erred when it dismissed, *sua sponte*, Intervenors' Complaints based on *res judicata*.

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[18] This Court has not previously addressed whether *res judicata* can be applied to an intervenor's pending claims that are filed in the same lawsuit as the consent decree, rather than in a separately filed lawsuit like in *Friends*. *Cf. Robinson v. City of Harvey*, 617 F.3d 915, 916 (7th Cir. 2010) ("[I]ssue and claim preclusion concern the effect of one suit on a later suit and have nothing to do with how issues are resolved within a single case."); *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155, 160 (7th Cir. 1995) ("A final judgment by a district court has preclusive effect even though the judgment is pending on appeal. But of course the only preclusion is of other suits, or of specific issues in other suits . . . ."). The sole authority cited by the District Court for its decision to apply *res judicata* was an Eighth Circuit decision in *United States v. Metropolitan St. Louis Sewer District*, 952 F.2d 1040 (8th Cir. 1992). (A35-36.) *St. Louis* is a CWA case in which the Eight Circuit applied *res judicata* to bar intervenors' claims, relying on *U.S. EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), a case in which the Eighth Circuit had applied *res judicata* to citizens' claims in a *separate* lawsuit. *Id.* at 1045. In contrast, in *NRDC v. Whitman*, No. C 99-03701 WHA, 2001 WL 1221774 (N.D. Cal. Sept. 24, 2001), the court, without discussion of the applicability of *res judicata*, dismissed intervenors' claims based on mootness. *Id.* at *1, *21. If mootness, rather than *res judicata,* applies here, the District Court cannot dismiss Intervenors' complaints unless MWRD meets the "heavy" burden of proving that "*it is impossible for a court to grant any effectual relief whatever to the [Intervenors].*" *Killian v. Concert Health Plan*, 742 F.3d 651, 660 (7th Cir. 2013). Given that there is, at a minimum, a "realistic prospect" that the CD will not result in CWA compliance, MWRD also cannot show that it would be "impossible" for the District Court to grant Intervenors' relief on their claims.

A. The District Court erred in applying CWA's statutory bar to dismiss Intervenors' Complaints.

The District Court based its dismissal of Intervenors' Complaints on two alternative legal theories: (1) the CWA statutory bar in 33 U.S.C. § 1365(b)(1)(B); and (2) *res judicata*. (A35.)

The District Court's threshold legal error was its reliance on CWA's statutory bar as a basis for dismissal. As a matter of plain statutory language, 33 U.S.C. § 1365(b)(1)(B) – CWA's statutory bar of a subsequently filed citizens' suit – does not apply to complaints in intervention. The statutory bar expressly carves out an exception for intervention suits, stating that "any citizen may intervene as a matter of right" in any lawsuit in federal court. 33 U.S.C. § 1365(b)(1)(B). Therefore, the District Court's finding that the statutory bar in 33 U.S.C. § 1365(b)(1)(B) can also bar an intervenor's lawsuit contradicts the statute. The District Court cited no authority for applying the CWA statutory bar to the complaints of intervenors as of right, and there is none. (*See* A35, A38.)

B. Based on this Court's legal standard in *Friends II*, Intervenors' Complaints were not barred by *res judicata*.

The District Court also erroneously applied *res judicata* as an alternative basis for dismissal. A consent decree can be the basis for barring another party's identical claims when the parties are in privity. *Green Forest*, 921 F.2d at 1403; *see Friends II*, 382 F.3d at 757.[19] The Government can only be in

[19] Federal law is the same as Wisconsin law regarding the elements of *res judicata*. *See Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1088 (W.D. Wis. 2001).

privity with Intervenors if the Government was diligently prosecuting the lawsuit resulting in the decree. *Friends II*, 382 F.3d at 759. If, as here, there is a "realistic prospect" that the consent decree's required remedial projects will not permanently end the CWA violations, there is no diligent prosecution and *res judicata* cannot bar Intervenors' claims. *Id.* at 764-65.

1. This Court's *Friends II* decision sets clear parameters for the diligent prosecution inquiry.

In *Friends I*, the district court in Wisconsin dismissed a CWA citizens' suit relating to sanitary sewer overflows discharged by the Milwaukee Metropolitan Sewerage District ("MMSD") after a stipulation between Wisconsin and MMSD was entered in a subsequent state court action. Like here, the lower court's bases for dismissing the citizen suit were 33 U.S.C. § 1365(b)(1)(B) and *res judicata*. 2003 WL 23864869, at *8, *12. Like here, the lower court had not conducted an evidentiary hearing to determine if *res judicata* barred the citizens' claims.

On appeal of *Friends I*, this Court reversed the district court's § 1365(b)(1)(B) determination because the citizens' suit was found to be a timely prior-filed lawsuit, which, by statute, a subsequent government lawsuit cannot bar. *Friends II*, 382 F.3d at 757. This Court found, however, that the court-entered stipulation between Wisconsin and MMSD could potentially constitute *res judicata* for the citizens' suit because the State can be in privity with citizens when it acts in its *parens patriae* role. *Friends II*, 382 F.3d at 759. But, for the government to be in privity with citizens for *res judicata* purposes, the "government action must be a diligent prosecution." *Id.*

Although this Court found, generally, that "if the judicial action is 'capable of requiring compliance' . . . and is 'calculated to do so,' the citizens' suit" is barred, it established several specific inquiries necessary to determine if this standard is met. *Id.* This Court ruled that a "diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of [the government] and the violator . . . regarding their intent with respect to the effect of the settlement." *Id.* at 760. This Court required the district court to "determine whether the systemic inadequacies of MMSD's sewerage facilities will be sufficiently ameliorated by the proposed remedial projects to result in compliance." *Id.* at 765. Although the district court was to give "some deference to the judgment of the State," it was to determine if there is a "realistic prospect that violations due to the same underlying causes purportedly addressed by the [stipulation] will continue after the remedial projects are completed . . . ." *Id.* If such a "realistic prospect" exists, the citizens' suit "may proceed." *Id.*[20]

This Court's decision in *Friends II* provides clear instruction as to the type of issues a district court must examine to determine if the "realistic prospect" exists. *First*, the district court's analysis must focus on whether the "remedial projects" in the consent decree "may not in fact result in [the

[20] Upon remand, the *Friends* district court held an evidentiary hearing and post-hearing briefing. *Friends III*, 2007 WL 4410402, at *1. The district court ultimately found that the stipulated judgment is "capable of requiring compliance with the [CWA] and is in good faith calculated to do so," and dismissed the citizens' suit based on *res judicata*. *Id.* at *11. On appeal a second time, plaintiffs did not challenge the sufficiency of the evidence supporting the district court's decision. *Friends IV*, 556 F.3d at 609. This Court affirmed the district court's decision dismissing the complaint based on *res judicata*. *Id.* at 616.

permittee's] eventual compliance with the [CWA] and its permit." *Id.* at 763. Thus, one required focus for a diligent prosecution evaluation is on the "proposed remedial projects" in the consent decree and whether the projects will bring about compliance. *Id.* at 765.

Second, before allowing a *res judicata* dismissal of a separate party's complaint, this Court required a district court to analyze whether the consent decree's projects, once completed, will achieve compliance. "Compliance means an *end* to violations, not merely a reduction in the number or size of them." *Id.* at 764. This Court further instructed that it is the trial court's role to determine "whether the alleged diligent prosecution achieves a *permanent* solution or whether violations will continue notwithstanding the polluter's settlement with the government." *Id.* (emphasis added). This Court pegs diligent prosecution for *res judicata* purposes to whether the consent decree "will indeed result in *elimination of the root causes* underlying the large-scale violations alleged by the plaintiffs, regardless of the [government's and permittee's] self-serving statements that it intended to do so." *Id.* (emphasis added).

Third, this Court directed that the lower court consider the length of time before completion of the proposed remedial projects. This Court expressed concern that MMSD's "remedial projects may, after their completion, nonetheless turn out to be too little, too late." *Id.* at 764 n.15. This Court's concern was triggered by the fact that under the Wisconsin stipulation,

MMSD's remedial work, which would take an additional eight years to complete, was "a stalling tactic rather than a compliance strategy." *Id.* at 764.

In sum, when considering whether a consent decree constitutes *res judicata*, the district court is to conduct "a detailed examination" of the decree, focusing on: (1) its planned, concrete remedial actions; (2) whether those actions will eliminate the root causes of the violations; and (3) whether those actions will end the violations within a reasonable time period. If plaintiffs can show that there is a "realistic prospect" that the remedial actions will not achieve a permanent end to violations, "the plaintiffs' suit may proceed." *Id.* at 764-65.

As shown below, applying this Court's legal standard and evidentiary concerns in *Friends II* to Intervenors' claims here, Intervenors have a clear right to proceed on their claims.

2. The District Court failed to apply correctly this Court's legal standard, as articulated in *Friends II*, to the record below.

Based on *Friends II*, the District Court should have analyzed, but did not analyze, whether there is a "realistic prospect" that the MWRD's alleged violations of its permit conditions will continue after the completion of the CD's "remedial projects," *i.e.*, TARP's reservoirs. Indeed, the District Court's dismissal decision never mentioned the phrase "realistic prospect" or any of the other legally-required inquiries for an evaluation of diligent prosecution, such as whether, within a reasonable time period, the "remedial projects" are

sufficient to "end" the "root causes" of the CSO discharges that violate MWRD's Permit Conditions.

Rather than analyzing whether there was a "realistic prospect" that the CD's "remedial projects" would fail to "end the violations," the lower court here found a "diligent prosecution" based on the CD's general language that the CD cannot be terminated before compliance occurs. (A37.) Specifically, the District Court found that in its prior order entering the CD, it had "already considered whether the [CD] requires compliance with the [CWA]" because "the [CD], by its terms, could not be terminated until MWRD achieves compliance with the three NPDES permits at issue in this case." (A37.) Thus, the District Court erroneously conflated its decision approving entry of the Consent Decree with the separate analysis of whether it can dismiss Intervenors' Complaints.

In *Friends II*, this Court found that general statements about future compliance in a settlement decree are insufficient to bring about compliance. Rather, "the focus of the diligent prosecution inquiry should be on whether the actions are calculated to eliminate the cause(s) of the violations . . . . [T]he addition of compliance language . . . is unnecessary and would not bring about compliance any faster or more efficiently." *Friends II*, 382 F.3d at 760. Therefore, this Court requires actions, not words. Yet, the foundation of this District Court's "diligent prosecution" analysis was the CD's "compliance language," not the CD's "actions" – the exact opposite of this Court's instructions in *Friends II*. The District Court never determined that TARP's reservoirs would bring about a "permanent end" to CSOs violating MWRD's

Permit Conditions, and instead relied on a future obligation to comply with future permits. (A37.)

Moreover, the District Court ignored the CD's language discounting the decree's ability to ensure compliance. In the CD, MWRD and the Government agreed that the Government "do[es] not, by [its] consent to the entry of this [CD], warrant or aver in any manner that MWRD's compliance with any aspect of this [CD] will result in compliance with [the CWA], or with any other provisions of federal, State, or local laws, regulations, or permits." (SA128, ¶ 82.) Thus, while the District Court may "take[] great comfort" (A27) that the CD cannot be terminated short of compliance (even though the CD does not specify any post-TARP projects, let alone require their implementation), *the Government expressly disclaims that the CD will result in compliance*. (SA128, ¶ 82.) Thus, the CD's future compliance language cannot, by its own terms, demonstrate that MWRD's planned remedial program will achieve compliance with the CWA.

Like in *Friends II*, the District Court should have been "concerned that [MWRD's] remedial projects may, after their completion, nonetheless turn out to be too little, too late." 382 F.3d at 764 n.15. Here, the District Court had concluded in its January 2014 Order that "the completion of TARP and the entry of the [CD] will *not* stop all future CSOs" and never determined that those future discharges would comply with the CWA. (A26 (emphasis added).) Because "[c]ompliance means" that the decree's remedial projects result in "an *end* to violations," *Friends II*, 382 F.3d at 764, the District Court's

postponement of the determination of MWRD's compliance contravenes that court's obligation to judge the remedial projects' efficacy now. If there is a "realistic prospect" that MWRD's violations will not *end* when TARP is completed, the CD's entry cannot bar Intervenors' citizens' suits.

In sum, the District Court never engaged in the required diligent prosecution analysis, including whether TARP's reservoirs will bring about a permanent "elimination of the root causes" underlying the large-scale violations alleged in Intervenors' Complaints. *Id.* at 764. The District Court's dismissal order does not analyze the efficacy of a single CD-required action for either the short-term (the Floatables Plan) or the long-term (TARP) projects. (*See* A34-38.) Like in *Friends II*, this Court should reverse the District Court's dismissal ruling here, because it did not evaluate the required elements of a diligent prosecution.

3. The record evidence shows at least a "realistic prospect" that violations of the law will continue after the CD's entry.

The record to date shows that there is at least a "realistic prospect," if not certainty, that MWRD's violations of its permits' Conditions will continue after TARP's reservoirs are constructed and that MWRD's control of solids and floatables, as required by the Policy, is not compliant with the law. Although the District Court did not allow any presentation of evidence or law regarding the "diligent prosecution" issue, during their oppositions to the CD's entry, Intervenors presented evidence that shows that there is a "realistic prospect" that MWRD's violations will continue. Such evidence is discussed *supra*, and

includes: (a) MWRD's and the Government's admissions of post-TARP discharges and non-compliance (pp. 18, 30-31); (b) MWRD studies showing that TARP's tunnels are undersized and too flat, risking catastrophic conveyance failures (pp. 18-20, 30); (c) Corps and MWRD studies showing that TARP's reservoirs are too small (p. 20); (d) the language of the CD (pp. 13-15, 31-32); (e) the failure of the CD's Floatables Plan to adequately address the CSO pollution before and after TARP's reservoirs are completed (pp. 21, 32); and (f) MWRD's refusal to start now to address each of those known problems (pp. 20-21).

Other courts that have applied a realistic prospect evaluation have held that even "significant steps to *reduce*" violations cannot be a basis for dismissing a citizens' suit post-decree if the ongoing remedial measures result only "in a downward trend of [the violations], not a fix beyond reasonable probability." *St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*, Nos. 3:07-cv-739-J-34TEM, 3:07-cv-747-J-34MCR, 2010 WL 745494, at *7 (M.D. Fla. Mar. 1, 2010). According to another court, there is a realistic prospect of continuing violations even if only "small or isolated" violations continue because "marginal noncompliance is still noncompliance." *Borough of Upper Saddle River v. Rockland Cnty. Sewer Dist. #1*, No. 07 Civ. 00109(ER), 2014 WL 1621292, at *23 (S.D.N.Y. Apr. 22, 2014); *see also Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 910 (S.D. W.Va. 2010) (no post-decree dismissal of citizen suit if the proponents of the consent decree cannot assure the court that they have identified a treatment technology that will lead to

compliance "by a date certain.").[21] The question for lower courts, consistent with *Friends II*, is whether, "based on the information available at a set point in the case, subsequent agency . . . action has eliminated the realistic prospect of non-compliance." *Ohio Valley*, 723 F. Supp. 2d at 911 n.11.

The evidence here establishes a "realistic prospect" that the CD's "remedial projects" will not mean a permanent "*end* to violations," much less to the "root cause" of MWRD's violations. *See Friends II*, 382 F.3d at 764-65. Therefore, the Government's action cannot be *res judicata* for Intervenors' Complaints because it is not the result of a "diligent prosecution" as defined by this Court.

Based on the record now before this Court, Intervenors respectfully submit that this Court can, and should, determine that *res judicata* cannot be applied and that Intervenors should be allowed to pursue the claims in their Complaints. However, should this Court choose to remand for further proceedings on the *res judicata* issue, Intervenors should be given an opportunity to discover and present evidence on the "realistic prospect" standard for establishing a diligent prosecution. This Court's prior rulings, the

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[21] *St. Johns, Upper Saddle,* and *Ohio Valley* conducted their evaluation in a mootness context after entry of a consent decree, not for *res judicata* purposes. However, those courts used the same analysis of whether "the polluter will continue to pollute" and whether there exists a "realistic prospect of continuing violations." *See also Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) ("[The citizen group's] claims for relief are moot unless . . . there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree."); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (holding that a citizen group's claims are moot "unless there is a realistic prospect that the violations alleged in [the citizen group's] complaint will continue notwithstanding the settlement").

CWA, and the public's interests in a protected Lake Michigan and Waterways, require no less.

CONCLUSION

For the foregoing reasons, this Court should: (a) reverse and remand the District Court's ruling entering the CD; and (b) reverse the District Court's ruling dismissing Intervenors' Complaints and remand for further proceedings.

Dated: June 19, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, according to the word count function of Microsoft Word 2007, the Brief contains 13,221 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: June 19, 2014

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Gabrielle Sigel, an attorney, certify that all materials required by Circuit Rule 30(a) are included in the appendix bound with this brief. I further certify that all material required by Circuit Rule 30(b) are included in Appellants' Separate Appendix filed with this brief.

Dated: June 19, 2014

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CERTIFICATE OF SERVICE

I, Gabrielle Sigel, an attorney, hereby certify that on June 19, 2014, I caused the foregoing **Brief and Required Short Appendix of Plaintiffs-Intervenors-Appellants** and accompanying **Separate Appendix** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief and Required Short Appendix of Plaintiffs-Intervenors-Appellants** and 10 copies of the **Separate Appendix** to be transmitted to the Court via hand delivery and 2 copies of the above named filings to be served upon the parties listed below via UPS overnight delivery within 7 days of that notice date.

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INDEX TO REQUIRED SHORT APPENDIX

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Addendum

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, and STATE OF ILLINOIS,	)	
Plaintiffs,	)	No. 11 C 8859
v.	)	Judge George M. Marovich
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On the same day that the United States of America ("US" or the "government") and the State of Illinois ("Illinois") filed suit against the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") for alleged violations of the Clean Water Act, the plaintiffs filed a proposed consent decree. After the deadline for public comment had passed and after the governments considered the public comments, the plaintiffs filed a motion for entry of the consent decree. Defendant MWRD also supports entry of the consent decree. Two sets of intervenors [(1) the "Alliance Group," which consists of the Alliance for the Great Lakes and the Environmental Law & Policy Center and (2) the "NRDC Group," which consists of the Natural Resources Defense Council, Sierra Club and Prairie Rivers Network] oppose entry of the consent decree. The parties have filed voluminous briefs and reams of exhibits, including deposition transcripts. The Court has held oral argument. For the reasons set forth below, the Court approves the consent decree.

I. Background

In most parts of the country, municipalities use separate sewer systems--one for storm water, one for sanitary waste water--to convey different types of waste water to treatment plants. The City of Chicago is different. Here, sanitary waste water, storm water and industrial waste water are all conveyed via one sewer system (a "combined sewer system") to sewage treatment plants where the water is treated (in theory, anyway) before being released into a water body.

A problem that a combined sewer system can face is insufficient capacity. Even if a combined sewer system has sufficient capacity to convey waste water in dry weather or during rain storms with an average amount of precipitation, it may not have sufficient capacity to convey waste water in the event of above-average precipitation. The water, however, must go somewhere. If it cannot flow into the sewers, it will remain on the streets and sidewalks or back up into basements, neither of which is desirable. Accordingly, combined sewer systems are designed to overflow (a process that is called "combined sewer overflow" or "CSO"). The combined sewer systems are designed to overflow at points along water bodies (called "CSO outfalls") so that the water has a place to go other than basements and streets.

Defendant Metropolitan Water Reclamation District of Greater Chicago ("MWRD") is the entity responsible for operating the waste water sewer system and the seven treatment plants that serve Chicago and the surrounding areas. MWRD serves an area of approximately 883 square miles, including the City of Chicago and 128 surrounding municipalities. A portion of that area uses combined sewer systems. For example, MWRD's three largest water treatment plants--the North Side water reclamation plant, the Calumet water reclamation plant and the Stickney water reclamation plant--receive water from combined sewer systems. (This case

involves only those three plants.) These combined sewers lead to CSO outfalls where, during periods of time in which the combination of storm water and sanitary waste exceeds capacity, CSOs occur.[1] MWRD's CSO outfalls are located such that they release water into canals, channels, creeks or rivers ("Chicago Area Waterways"). None of MWRD's CSO outfalls discharge directly into Lake Michigan. Sometimes, however, the water levels in the Chicago Area Waterways become too high (which threatens flooding), so the gates between the Chicago River and Lake Michigan and/or the gates between the Calumet River and Lake Michigan are opened and water backflows into Lake Michigan. That happens, on average, once per year.

The history of the tunnel and reservoir plan

The capacity problem associated with combined sewer systems, which was exacerbated by post-World War II development, is not recent news to the City of Chicago. In the late 1960's, officials from the City of Chicago, together with officials from Cook County, the State of Illinois and the Metropolitan Sanitary District of Greater Chicago (as MWRD was then known) formed a Flood Control Coordinating Committee to study options for ameliorating flooding and the waste water discharge problems caused by the combined sewer system. The committee considered 23 alternatives and ultimately, in December 1972, recommended a system of tunnels and reservoirs that is now known as the Tunnel and Reservoir Plan ("TARP").

TARP is a system of tunnels and reservoirs that are designed to capture and store the combined sewer flow so that it is not released as CSOs at CSO outfalls. The idea is that when an excess quantity of combined sewer waste (excess in that it is greater than the capacity of the

[1]For example, CSOs occurred 21 times in MWRD's service area during the first six months of 2013.

water reclamation plants) flows into the system, it flows into tunnels that lead to reservoirs that can store the excess flow until the water reclamation plants have capacity to treat the waste water. Once the nearby water reclamation plant has available capacity, the waste water is pumped from the reservoir to the water reclamation plant, where the waste water can be treated and safely released.

TARP includes 109.4 miles of tunnels in four separate systems: the Upper Des Plaines tunnel system, the Mainstream tunnel system, the Lower Des Plaines tunnel system and the Calumet tunnel system. Each tunnel system, in turn, leads (or will one day lead) to one of three reservoirs: the Gloria Majewski Reservoir ("Majewski"), the Thornton Composite Reservoir or the McCook Reservoir. These components of TARP are in various stages of completion.

The Upper Des Plaines tunnel system, which consists of 6.6 miles of tunnels with the capacity to store 71,000,000 gallons of waste water, is complete. That tunnel system leads to the Majewski Reservoir, which was completed in 1998. The Majewski Reservoir has the capacity to store 350,000,000 gallons of waste water.

The Mainstream tunnel system (which consists of 40.5 miles of tunnels that were finished in 1998) and the Lower Des Plaines tunnel system (which consists of 25.6 miles of tunnels that were completed in 2001) lead to the Stickney water reclamation plant. The tunnels, themselves, have combined storage capacity of 1,605,000,000 gallons. Ultimately, the Mainstream tunnels and the Lower Des Plaines tunnels will connect to the McCook Reservoir. The McCook Reservoir is not finished; but, when it is, it will have capacity to store 10,000,000,000 gallons of waste water until the water can be treated.

Finally, the Calumet tunnel system (which consists of 36.7 miles of tunnels that were finished in 2006) leads to the Calumet water reclamation plant. The tunnels, themselves, have storage capacity of 630,000,000 gallons. Ultimately, the tunnels will connect to the Thornton Composite Reservoir, where waste water can be stored until it can be pumped into the Calumet water reclamation plant for treatment. The Thornton Composite Reservoir is not finished; but, when it is, it will have the capacity to store 4,800,000,000 gallons of waste water.

Construction of the various TARP components began in 1975. Thus far, construction has cost more than $3,000,000,000.00. Of that, MWRD has spent approximately $1,400,000,000.00. The rest of the money came from EPA construction grants and the Army Corps of Engineers.

It will be some time before the Thornton Reservoir and the McCook Reservoir are completed. Currently, the MWRD is having limestone mined from the sites to create rough holes, within which MWRD will construct the reservoirs. In the meantime, according to the complaint filed by the government, the MWRD continues to discharge CSOs in violation of its permits.

The governments' complaint

The Clean Water Act ("CWA") prohibits the "discharge of any pollutant" *except* in a manner that complies with provisions of the CWA. 33 U.S.C. § 1311(a). One of those exceptions is a discharge of pollutants in navigable waters in compliance with a permit issued under §402 of the Clean Water Act, 33 U.S.C. § 1342. That section "established the National Pollutant Discharge Elimination System ('NPDES'), and requires dischargers to obtain a permit from the Environmental Protection Agency or an authorized state." *Texas Ind. Prod. & Royalty Owners Assoc. v. EPA*, 410 F.3d 964, 967 (7th Cir. 2005) (citing 33 U.S.C. § 1342(a)(1), (b)).

MWRD holds an NPDES permit (the "Calumet Permit") for its Calumet water reclamation plant, one (the "North Side Permit") for its North Side water reclamation plant and one (the "Stickney Permit") for its Stickney water reclamation plant. Each of these NPDES permits was issued on January 22, 2002 and took effect on March 1, 2002. The permits state that they expire on February 28, 2007, but the parties agree that the permits are still in effect, pursuant to Illinois law (5 ILCS 100/10-65(b)), until IEPA's final decision on new permits.

The Calumet Permit authorizes MWRD to discharge from 13 specified CSO outfalls, provided that MWRD meets certain terms and conditions. (Calumet Permit at 8-9). Similarly, the Stickney Permit authorizes MWRD to discharge from 15 specified CSO outfalls and the North Side Permit authorizes MWRD to discharge from 9 specified CSO outfalls, provided that it meets certain terms and conditions. (Stickney Permit at 8-9; North Side Permit at 9).

This case began when the United States and the State of Illinois filed a complaint alleging that MWRD had violated these three permits. In Count I (which plaintiffs label "Dissolved Oxygen"), plaintiffs allege that MWRD violated the terms of the Stickney Permit, the Calumet Permit and the North Side Permit with respect to dissolved oxygen. The Stickney Permit, the Calumet Permit and the North Side Permit authorize CSO discharges, but the discharges must "be treated . . . to prevent depression of oxygen levels below the applicable water quality standard." (North Side Permit at 9; Calumet Permit at 9; Stickney Permit at 9). In Count II (which plaintiffs label "Floatables"), plaintiffs allege that MWRD violated the terms of the Stickney Permit, the Calumet Permit and the North Side Permit by failing to treat the CSOs in a manner that would prevent the accumulation of sludge deposits, floating debris and solids. Those permits authorize CSO discharges, but the discharges must "be treated . . . to the extent

necessary to prevent accumulations of sludge deposits, floating debris and solids . . ." (North Side Permit at 9; Calumet Permit at 9; Stickney Permit at 9).

Count III (which plaintiffs label "Permit Condition 10.1"), too, involves alleged violations of these three permits. The Stickney Permit, the North Side Permit and the Calumet Permit each states, as a condition of the authorization of the CSOs:

> All combined sewer overflows and treatment plant bypasses shall be given sufficient treatment to prevent pollution and the violation of applicable water quality standards. Sufficient treatment shall consist of the following:
> All dry weather flows and the first flush of storm flows shall be transported to the main STP and shall meet all applicable effluent standards and the effluent limitations required from the main STP outfall. Additional flows, but not less than ten times the average dry weather flow for the design year, shall receive the equivalent of primary treatment and disinfection with adequate retention time.

(Special Condition 10.1/Calumet Permit at 9; Stickney Permit at 9; North Side Permit at 9). In Count III, the plaintiffs allege that MWRD violated Special Condition 10.1 of each permit by failing to provide treatment to and disinfection of a sufficient quantity of flows.

The proposed consent decree

The plaintiffs and the defendant have reached an agreement to settle this case with the entry of a proposed consent decree. The proposed consent decree outlines a number of obligations and projects MWRD has agreed to undertake.

Fine

First, MWRD has agreed to pay a penalty to both plaintiffs. If the consent decree is approved and entered by this Court, MWRD will pay the United States Department of Justice $350,000.00. MWRD will pay the State of Illinois $325,000.00. Thus, MWRD will pay a combined civil penalty of $675,000.00.

TARP deadlines

Next, the proposed consent decree sets out the deadlines by which MWRD must complete TARP's final stages, which are the Thornton Composite Reservoir and the McCook Reservoir. Under the terms of the proposed consent decree, MWRD is to complete the mining for the Thornton Composite Reservoir by December 31, 2013. Before the Thornton Reservoir can become operational, MWRD must complete certain other projects. Those projects must be completed by December 31, 2015, and the Thornton Composite Reservoir must be operational by December 31, 2015.

The McCook Reservoir will be completed in two stages. MWRD is to complete the mining of Stage One (which will have capacity to store 3,500,000,000 gallons of water) by December 31, 2016 and have Stage One operational by December 31, 2017. As for Stage Two (which will have capacity to store 6,500,000,000 gallons of water), MWRD is to have the mining completed by December 31, 2028. The consent decree requires MWRD to have Stage Two of the McCook Reservoir operational by December 31, 2029.

MWRD has contracted with third parties to mine the limestone from the sites that will become the Thornton Composite Reservoir and the McCook Reservoir. Because third parties are doing the mining, it is possible that events beyond the control of MWRD could cause delays of the mining and that those delays could cause the MWRD to miss one or more of the deadlines (for completing the Thornton Composite Reservoir or the McCook Reservoir) set out in the consent decree. The consent decree calls any excavation delay beyond the deadlines in the consent decree a "contingency event" and sets out a process for how the parties to the consent decree would handle such an event, should it occur.

Apart from contingency events, the consent decree sets penalties that will be assessed if MWRD fails to meet the deadlines for operation of the Thornton Composite Reservoir and/or the McCook Reservoir. Those penalties are $1,000.00 per day for the first through 30th day; $2,000.00 per day for the next 30 days; and $5,000.00 per day for each subsequent day.

Post-construction performance

The consent decree sets out operational standards that will apply to the two reservoirs (and their respective tunnel system(s)) after the reservoirs are operational.

For example, once the Thornton Composite Reservoir is operational, the Calumet water reclamation plant is required to provide full treatment to the Maximum Practical Flow (which the consent decree defines as "the maximum flow accounting for all hydraulic and hydrologic factors that can pass through the Calumet WRP, North Side WRP or Stickney WRP within the then existing capacity constraints of the applicable WRP and receive full treatment in compliance with the NPDES Permit(s) for the WRP(s) receiving the flow."). (Consent Decree at 10). The consent decree also requires that all flows that enter the Calumet TARP tunnels be conveyed to the Calumet water reclamation plant and be treated before being released (although the consent decree allows CSOs at one particular CSO outfall if the Cal Sag Tunnel is full). The consent decree sets out the same standards for the Mainstream/Lower Des Plaines Tunnels and the McCook Reservoir once it becomes operational (with exceptions allowing for CSOs at three particular CSO outfalls should particular tunnels be full).

Monitoring

The consent decree also requires MWRD to develop a plan for post-construction monitoring of TARP. Within one year after the entry of the consent decree, MWRD must

develop and provide to EPA and IEPA (for their approval) a plan for monitoring CSO discharges in the Calumet tunnel and reservoir system (the system that leads to the Thornton Composite Reservoir). Among other things, the monitoring must determine whether MWRD's CSOs are in compliance with the Calumet NPDES Permit in effect at the time. Within five years after the entry of the consent decree, MWRD must develop and provide to EPA and IEPA (for their approval) a plan for monitoring CSO discharges in the Mainstream and Lower Des Plaines tunnel and reservoir systems (i.e., the systems that lead to the McCook Reservoir). The monitoring must determine whether MWRD's CSOs are in compliance with the North Side and Stickney NPDES Permits in effect at the time.

If, once TARP is finished and the monitoring program is in effect, MWRD's CSOs are not in compliance with the relevant permits, then MWRD must do more. Specifically, MWRD is required, under the terms of the proposed consent decree, to submit to EPA and IEPA a plan in which MWRD analyzes alternatives for bringing the CSOs into compliance with the permits. MWRD must also inform EPA and IEPA which of the alternatives it will undertake and the time frame in which it will complete the alternatives.

Floatables

Next, the consent decree requires MWRD to implement a "floatables control" program within 30 days after the entry of the consent decree. Floatables include such things as street litter (which can be swept into the sewers during rain storms) and sanitary items (which are flushed into toilets). The purpose of the floatables control plan is to capture those materials if they are released during a CSO.

The floatables plan first requires MWRD to continue what it currently does with respect to floatables. Currently, MWRD uses two pontoon boats to collect floatables. The pontoons patrol Chicago Area Waterways during six months (mid-April through mid-October) of the year. The consent decree requires MWRD to continue these operations (although it is allowed to use different boats). It also requires MWRD to purchase two skimmer boats, which are boats specifically designed to capture floatables and litter from water.

In addition, the consent decree requires MWRD to engage in "response activities" after a CSO. Specifically, within 24 hours after a CSO, MWRD must dispatch boats (including the two new skimmer boats) to affected areas. The boats are required to collect floatables at a specific list of "hot spots," i.e., places where floatables have been found regularly in the past. These response activities will occur year-round, "unless these waterborne operations are unsafe or infeasible for reasons including but not limited to the presence of fog, ice, equipment icing, wind or limited visibility." (Consent Decree Appendix B at 1).

Finally, the floatables control plan requires MWRD to install a containment boom at one particular CSO outfall.

Green infrastructure

The consent decree also requires MWRD to implement what the parties call a "green infrastructure" program. The goal of the program is to reduce the amount of storm water that flows into the sewer system after a storm. As used in the consent decree, "green infrastructure" includes: items (such as rain barrels) that capture the water for reuse; green rooftops; permeable pavement; special landscaping; and other means of absorbing rain water so that it does not flow into a sewer.

The green infrastructure program set out in the consent decree has a number of specific deadlines MWRD must meet. Among the deadlines is a requirement that MWRD distribute 15,000 low-or-no-cost rain barrels within five years (10,000 of which rain barrels must be distributed within three years). The maximum combined capacity of those rain barrels is 825,000 gallons. In addition to the rain barrels, MWRD is required to have implemented sufficient green infrastructure projects to retain (per storm) 2,000,000 gallons of water within five years, 5,000,000 gallons within ten years and 10,000,000 gallons within fifteen years.

The consent decree requires additional green infrastructure projects to be implemented in the event MWRD has to report a contingency event (i.e., a delay in mining that is caused by something out of MWRD's control). As penalty for reporting a contingency event that delays mining at Thornton Composite Reservoir or Stage One of the McCook Reservoir, MWRD is required to implement green infrastructure projects that retain an additional 250,000 gallons of water. For every contingency event that delays Stage Two of the McCook Reservoir, MWRD is required to implement projects that retain an additional 250,000 gallons of water.

Termination of consent decree

Finally, the consent decree sets out the criteria for terminating the consent decree. Different parts of the consent decree (according to its terms) can by terminated at different times. For example, the portions related to the Thornton Composite Reservoir can be terminated once MWRD has complied with the post-construction performance standards for one year and has completed the post-construction monitoring plan. The portions that relate to the McCook Reservoir can be terminated once MWRD has complied with the post-construction performance

standards for one year and has completed the post-construction monitoring plan. In the meantime, the Court would retain jurisdiction to enforce the terms of the consent decree.

Intervenors

The intervenors oppose the consent decree. The intervenors are groups made up of concerned citizens who use the waterways and Lake Michigan for kayaking and sailing and/or the areas adjacent to the waterways for hiking or biking. Among the members of the intervenors are: an individual who has gotten sick after her kayak capsized in the Chicago River; individuals who smelled raw sewage in waterways; and individuals who have seen raw sewage and dead rats in waterways. Not surprisingly, the intervenors and their members want the waterways kept free from untreated wastewater.

The Court appreciates the intervenors' efforts in looking out for the interests of those members of the public who use the waterways for recreation.

II. Discussion

Before signing a consent decree, the Court must satisfy itself that the decree is reasonable. *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985). In *Donovan*, the Seventh Circuit explained:

> A federal judge has the full powers of an equity judge. So if third parties complain to him that the decree will be inequitable because it will harm them unjustly, he cannot just brush their complaints aside. Even if no third party complains, the judge has to consider whether the decree he is being asked to sign is lawful and reasonable, as every judicial act must be.
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> * * *
>
> 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, 752 F.2d at 1177 (internal citations omitted).[2] 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.

We are not building a separate sewer system.

Let us begin with what no one is suggesting. No one is suggesting that the MWRD be required to build a separate sewer system for storm water. The option was considered and quickly rejected in 1972, when the Flood Control Coordinating Committee recommended TARP. The Flood Control Coordinating Committee dropped the idea of separate storm sewers, because

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[2]The parties debate the degree to which the Court should defer to the expertise of the EPA. Although there is certainly support for the premise that a court should defer to the expertise of an agency [*United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011) ("First, the trial court must defer to the expertise of the agency *and to the federal policy encouraging settlement*.") (emphasis added), which cites *In re Tutu Water Wells CERCLA Lit'n*, 326 F.3d 201, 207 (3d Cir. 2003), which cites *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 90 (1st Cir. 1990), which cites *Federal Trade Comm'n v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987)], if one follows the line of authority toward its origin, one finds the same standard as applies to all consent decrees. *See Federal Trade Comm'n v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) ("When a public agency requests that a judicial stamp of approval be placed on a negotiated consent decree, the court has the duty to approve the decree unless it is 'unfair, inadequate or unreasonable.'"). This Court agrees that "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." *Standard Fin. Mgt.*, 830 F.2d at 408.

of the massive cost (estimated, then, at more than $4,000,000,000.00, which would be more than $22,000,000,000.00 today) and the massive disruption to the public streets. The biggest problem, though, was that a separate storm sewer system would have provided no flood control. Neither the original parties nor the intervenors take issue with the decision not to construct a separate sewer system.

We are not starting over.

Nor are we reconsidering the merits of TARP. For the most part, the intervenors take TARP as a given. *See* NRDC Brief at 3 ("NRDC Group does not take the position that TARP should be scrapped and the parties should go back to the drawing board. After 40 years of TARP implementation, it is too late for that."). Still, the NRDC Group wants a do-over with respect to two aspects of TARP. First, the NRDC Group asks the Court "not to enter the [consent decree] until and unless the Governments comply with CSO Control Policy planning requirements." (NRDC Brief at 43-44). Second, the NRDC complains that TARP does not comply with the CSO Control Policy's "Presumption Approach."

The CSO Control Policy (whose planning requirements NRDC now wants the Court to enforce against MWRD) was published in the Federal Register in April 1994, long after MWRD began implementing TARP. Congress essentially codified it in 2000. 33 U.S.C. § 1342(q)(1) ("Each permit, order, or decree issued pursuant to this chapter after the date of enactment of this subsection for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the 'CSO Control Policy')."). According to its own terms, the CSO Control 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 the appropriate health and environmental objectives and requirements.

59 Fed.Reg. 18,689 (April 19, 1994). The CSO Control Policy explicitly recognized that, as of the time it was issued, some municipalities had already begun projects for the long-term control of CSOs. Therefore, the CSO Policy provided:

> [P]ortions of this Policy may not apply, *as determined by the permitting authority* on a case-by-case basis, under the following circumstances:
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> * * *
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> 2. Any permittee that, on the date of publication of this final Policy, has substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, *and such program is considered by the NPDES permitting authority to be adequate* to meet [water quality standards] and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, *should complete those facilities without further planning activities* otherwise expected by the Policy. Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.

CSO Control Policy at I.C.2, 59 Fed.Reg. 18,690 (emphasis added). Thus, the CSO Control Policy allows a permitting authority to exempt a permittee from the CSO Control Policy's planning requirements. IEPA (the permitting authority for MWRD) did just that via a 1995 letter and in the 2002 NPDES Permits (i.e., the Calumet Permit, the Stickney Permit and the North Side Permit) at issue in this case. (More on that below.)

NRDC's second problem with TARP is that NRDC does not believe TARP should have been approved under the "Presumption Approach." The CSO Control Policy makes "[p]ermittees with CSOs" responsible "for developing and implementing long-term CSO control plans that will ultimately result in compliance with the requirements of the [Clean Water Act]." 59 Fed.Reg. 18691. The CSO Policy states that "the long-term CSO control plan should adopt

one of the following approaches:" the Presumption Approach or the Demonstration Approach. CSO Control Policy at II.C.4, 59 Fed.Reg. 18692. As to the Presumption Approach, the CSO Control Policy states:

> A program that meets any of the criteria listed below would be presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, *provided the permitting authority determines that such presumption is reasonable* in light of the data and analysis conducted in the characterization, monitoring, and modeling of the system and the consideration of sensitive areas described above. These criteria are provided because data and modeling of wet weather events often do not give a clear picture of the level of CSO controls necessary to protect [water quality standards].

CSO Control Policy II.C.4.a., 59 Fed.Reg. 18692-93 (emphasis added). Thus, the CSO Control Policy allows the permitting authority (here, IEPA) to determine whether the Presumption Approach applies. The IEPA did so in a 1995 letter and in the 2002 NPDES Permits at issue in this case.

Specifically, on June 28, 1995, the IEPA sent a letter to the MWRD. In the letter, IEPA stated, in relevant part:

> [T]he Agency agrees with the District that the *Tunnel and Reservoir Project (TARP) meets the objectives of the 'Presumptive Approach'* as described in the federal CSO Control Policy (published in the *Federal Register* on April 19, 1994). Furthermore, the Agency believes that the completion of TARP will be adequate to meet water quality standards and protect the designated uses of the receiving waters pursuant to Section I.C. (titled 'Effect on Current CSO Control Efforts') of the federal CSO Control Policy. This section *specifically exempts the District from planning requirements* otherwise expected under the federal policy. Verification of compliance with water quality standards will still be required when TARP is completed.

(EPA/MWRD Responsiveness Summary Exhibit 33) (emphasis added). Thus, the IEPA determined (and informed MWRD) that: (1) TARP meets the objectives of the Presumption Approach; and (2) MWRD was exempt from the CSO Control Policy's planning activities.

IEPA's determinations were also explicitly stated in the three NPDES permits at issue in this case, each of which permits was issued on January 22, 2002 and made effective March 1, 2002. The Stickney Permit, the North Side Permit and the Calumet Permit say, in relevant part:

> In 1995, *IEPA confirmed that TARP met the 'presumption' approach* requirements of the 1994 CSO Policy. IEPA and USEPA have determined, consistent with Section 1.C.2. of the CSO Policy, that *the completion of TARP without further planning* would fulfill the obligations of the CSO Policy, since it is believed that upon completion of the reservoirs, CSOs will no longer cause or contribute to violations of water quality standards or use impairment.

(Stickney NPDES Permit at 16; North Side NPDES Permit at 16; Calumet NPDES Permit at 16) (emphasis added).

Notwithstanding these facts, the NRDC Group (a) wants MWRD to engage in planning activities and (b) questions whether TARP satisfies the Presumption Approach. Intervenors do not explain why they have a private right of action to challenge IEPA's determinations with respect to planning activities and the Presumption Approach. Nor do they explain why this Court would have jurisdiction to hear such a challenge. Perhaps, long ago (when the permits were issued), the intervenors had the right to make such a challenge, but they never had the right to make such a challenge in a United States District Court. 415 ILCS 5/40(e)(1) ("If the Agency grants or denies a[n NPDES permit], a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency"); 415 ILCS 5/41(a) (allowing judicial review of the Board's decision within 35 days) & 5/41(c) (prohibiting review of a permit in an enforcement proceeding); 33 U.S.C. § 1369(b)(1)(F) (allowing judicial review of an EPA decision granting or denying a permit in the Circuit Court of Appeals within 120 days of the decision) & 1369(b)(2) (prohibiting review of such decisions in enforcement actions). This

Court will not hear intervenors' challenge to the IEPA's determinations that TARP meets the Presumption Approach requirements and requires no further planning.

We are considering whether the consent decree is reasonable.

The question for this Court is not whether TARP was the right choice or even a good choice, but whether this consent decree is reasonable. In considering the consent decree, the Court will consider whether it is in the public's best interest. On that front, the Court notes that the public has more than one interest. The Court agrees with intervenors that the public has an interest in keeping its waterways free from sludge, floating debris, feces and other waste. Those things are, in a word, disgusting. Some members of the public (including the intervenors) have a greater interest (than has the general public) in keeping the waterways clean, because they use the waterways for recreation. The public, however, includes more than just the people who sail on Lake Michigan or kayak in the Chicago River. The public includes the people who walk on the sidewalks and drive/bike on the streets and, therefore, have an interest in keeping sidewalks and streets free of water during storms. The public includes businesses and homeowners with basements, all of whom have an interest in keeping waste water out of their property. The public also includes the taxpayers who pay for the sewer system and TARP and, therefore, have an interest in this project's being completed at a reasonable cost. The Court will consider all of these interests, including (but not limited to) the interests of the intervenors, when evaluating the reasonableness of the proposed consent decree.

The intervenors point out a number of respects in which they think the consent decree is unreasonable, and the Court will now consider those in turn.

Duration

The Alliance Group objects to the duration of the consent decree. The Alliance Group believes that the consent decree is unreasonable, because it allows MWRD too much time to complete TARP.

A public-works project that takes decades to complete is not inherently unreasonable. In a world of on-demand movies and text messages, it might seem unreasonable to wait until 2029 for the completion of TARP, but the project is huge and, like Rome, cannot be built in a day. Other courts have approved similarly-long time frames for the completion of these types of public-works projects. *See United States v. City of Welch, WV*, Case No. 1:11-00647, 2012 WL 385489 (S.D.W.V. Feb. 6, 2012) (approving consent decree with respect to long term control plan for CSOs that will take until December 31, 2027 to complete); *United States v. City of Evansville, IN*, Case No. 3:09-cv-128, 2011 WL 2470670 (S.D.Ind. June 20, 2011) (approving consent decree with respect to overflow control plan that will take until 2032 to complete). Tremendous public-works projects can take a significant amount of time--even decades--to complete. TARP is no small project. It has involved creating more than 100 miles of tunnels and mining rough holes that will eventually be large enough to hold 17.5 billion gallons of water. By the time TARP is finished, MWRD will have added an average of 323,000,000 gallons of storage capacity per year, which is an average of 885,000 gallons per day of additional storage capacity. That is impressive, not unreasonable.

Several portions of TARP will be completed long before 2029. Specifically, the Thornton Composite Reservoir must be completed and operational by December 31, 2015. It will add 4,800,000,000 gallons of waste-water storage capacity. By December 31, 2017, Stage One of the McCook Reservoir must be operational. It will add 3,500,000,000 gallons of storage

capacity. Thus, within four years, MWRD will have added 8.3 billion gallons of storage capacity. Intervenors do not seem to be objecting to the amount of time it will take to complete the Thornton Composite Reservoir or Stage One of the McCook Reservoir, i.e., the first 8,300,000,000 gallons of storage capacity.

Instead, the Alliance Group objects to the amount of time it will take until the final 6,500,000,000 gallons of storage capacity (i.e., Stage Two of McCook) is operational. The Alliance Group's main complaint on this front is that it believes MWRD could mine the rough hole at McCook faster were it not for a mining contract with a commercial mining company (Vulcan Construction Materials, LP ("Vulcan")) that, in intervenors' words, "puts the pace of construction subject to Vulcan's whims and the vagaries of the market for rock." (Alliance Group brief at 34).

The contract about which intervenors complain is between MWRD and Vulcan. Vulcan owns a quarry nearly adjacent (it is separated by a river and an interstate highway) to the McCook Reservoir. Vulcan transports rock from McCook to its nearby quarry via conveyor belt. Under the terms of the contract, Vulcan mines limestone from the land owned by MWRD, and MWRD pays Vulcan the difference between what it costs Vulcan to mine at its own quarry and what it costs to mine at McCook. Vulcan sells the mined limestone and pays MWRD a royalty of 4%.

The Alliance Group believes that Vulcan is taking too long to mine at McCook. As intervenors point out, between March 2008 (when Vulcan began mining at McCook) and April 2012, Vulcan mined at a pace of 380,000 tons per month. At that pace, it would take until 2033 to complete the mining at McCook. The slower pace is not surprising: those years were marked

by a housing and construction bust that decreased the demand for limestone. Still, even if the mining took until 2033, that length of time is not inherently unreasonable, considering the vast quantity of limestone to be mined.

The Alliance Group believes the limestone could be mined more quickly, if MWRD waived the 4% royalty fee or sold the limestone at a discount. Neither of these options is in the public interest. The public, remember, is interested in getting this project done economically. Intervenors do not say how much their alternative solutions would cost. Nor have they shown the Court that reducing the price of limestone would cause an increase in the rate of mining. According to the governments' expert, the demand for limestone is inelastic. The cost of the limestone itself is a small portion of the cost to the limestone's end user, who must also pay the costs of labor and transportation (which are more expensive). Those facts, combined with the difficulty of storing the mined limestone, means that end users buy the limestone when they need it; end users do not purchase extra limestone when it is discounted and then store it for later. Discounting the limestone (or waiving the royalty) would serve only to make TARP more expensive, which is not in the public interest.

The Alliance Group argues that the consent decree should not be entered until the governments have considered other means to mine McCook more quickly. The governments considered and rightly rejected other alternatives, such as paying someone to remove the limestone more quickly and then either storing it or dumping it in a landfill. When they received public comments making these suggestions, the governments determined that doing so would require either: (a) making a very expensive 35-foot-high pile of limestone at a storage facility that would cover an area the equivalent of the area of Chicago from the lakefront to the South

Branch of the Chicago River and from Roosevelt Road to the Chicago River; or (b) throwing away $1,000,000,000.00 worth of limestone. These alternatives are not reasonable. What is reasonable is MWRD's decision to use Vulcan to mine the McCook Reservoir.

Related to the Vulcan contract and the pace of excavation, the Alliance Group also takes issue with the portion of the consent decree that sets out a process for dealing with mining delays, which the consent decree calls "contingency events." Under the consent decree, contingency events are mining delays beyond the control of MWRD that cause MWRD to miss the excavation deadlines set out in the consent decree. The consent decree sets out a process, whereby the MWRD, when faced with a contingency event, can consult EPA, which has the power to extend the deadlines. The Alliance Group believes this clause makes all of the deadlines illusory, but the Court disagrees. All the contingency event provision means is that the MWRD will not be held accountable for things that are outside of its control. That is reasonable. Punishing someone for something out of his/her control has no deterrent effect.

End-of-pipe solutions

Another problem that intervenors have with the consent decree is that it does not require MWRD to build treatment plants at CSO outfalls. Intervenors call such plants "end-of-pipe" technologies. According to intervenors, MWRD's service area includes 372 CSO outfalls. (Of course, only 37 CSO outfalls are at issue in this case, and only those 37 CSO outfalls are relevant to the Court's consideration of the reasonableness of the consent decree.) Intervenors point out that MWRD conducted a survey of 170 of its CSO outfalls and determined that sufficient land was available to build treatment plants at 105 of those CSO outfalls. Intervenors believe MWRD

should be required to build treatment plants at those CSO outfalls so that, in times of excess rain, the CSOs can be treated at those end-of-pipe treatment plants before being released.

Once again, intervenors do not say how much this would cost or how it would be paid for. The plaintiffs say it would cost $966,000,000.00. At any price, these end-of-pipe treatments strike the Court as fiscally irresponsible. In essence, the end-of-pipe treatments would duplicate the TARP system's task, which is to allow the treatment of all waste water before it is released. Suppose MWRD built water reclamation plants at each of the 105 CSO outfalls with respect to which intervenors say enough land exists for such plants. Once the relevant TARP reservoirs are available for storage, many (if not all) of the end-of-pipe treatment plants would be obsolete. The waste water would be captured, diverted and stored before it ever reached the CSO outfalls. All the money MWRD would have spent acquiring land and building treatment plants at the CSO outfalls would have been wasted. What makes far more sense is for MWRD to wait until TARP is completed and then determine whether there are CSO outfalls that still have CSOs. At that point, it would be reasonable for MWRD to consider end-of-pipe treatment plants at those CSO outfalls that still suffer CSOs. It would be a waste of resources to do so now.

The fact that the consent decree does not require MWRD to build end-of-pipe treatment plants now does not render the consent decree unreasonable.

Efficacy

Next, the intervenors object to the consent decree on the grounds that CSOs may still occur after TARP is completed and operational. They argue that CSOs will continue both

because TARP is too small to avoid all CSOs in the future and because "transient events" will cause CSOs in the future.

In support of their argument, intervenors point to studies that suggest TARP is too small to prevent all CSOs in the future. Intervenors point to a study, conducted by the Army Corps of Engineers in 1986, that suggests reversals to Lake Michigan will occur about once per decade even after TARP is completed. According to the Alliance Group, the Corps concluded that even after the completion of the McCook Reservoir, the Chicago area would continue to experience rain storms of a magnitude that would threaten flooding and require reversals into Lake Michigan. According to the study, such reversals would occur every 8-9 years at one location and every 12-13 years at another location. Compared to the current average rate of one reversal into Lake Michigan per year, the rate after TARP is completed strikes this Court as quite an improvement.

Intervenors also point to a study conducted in 2009 by the MWRD. In the study, MWRD modeled the rainfall that occurred in the year 2006 to see if a fully-functioning TARP could have handled the waste-water load. Although MWRD found that TARP could have handled the 2006 flow, the Alliance Group complains (oxymoronically) that the 2006 flow was "uncharacteristically moderate." In other words, some years might bring more rain to the Chicago area than it experienced in 2006. The Alliance Group's point (and it is a valid one) is that MWRD cannot show, today, that TARP will prevent CSOs in every future year. Of course it cannot. MWRD cannot predict future weather patterns or the size of every future rain storm, and one cannot know with certainty how TARP will perform until it is finished.

Intervenors also point out that certain "hydraulic" events (which the consent decree calls "transient events"[3]) will occur and that those events will cause CSOs. In a nutshell, the waste water reaches the deep tunnels of TARP by falling through drop shafts. Sometimes, the force at which the waste water falls is so strong that it can damage the TARP tunnels. When that happens, MWRD closes the relevant sluice gate (to prevent waste water from flowing into the deep tunnel). The closing of the sluice gate can result in a CSO (depending on the quantity of flow). The consent decree explicitly allows MWRD to "close the minimum number of sluice gates necessary in the exercise of reasonable judgment by a trained operator in possession of the information available to the MWRD operator at the time to avoid or minimize Transient Events." (Consent Decree at 25, 27). If a CSO results, MWRD must report it to EPA and IEPA.

To the intervenors point, the Court agrees that the completion of TARP and the entry of the consent decree will not stop all future CSOs. While the Court appreciates intervenors' concerns that TARP may not have sufficient capacity for every future rain storm and that transient events will likely cause future CSOs, the Court does not think those facts make the consent decree unreasonable. Intervenors' argument rests on a fundamental fallacy, which is that all CSOs violate the Clean Water Act. That is not correct. Discharges *without* a permit violate the Clean Water Act. CSOs that comply with a permit do not violate the Clean Water Act.

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[3]The consent decree defines a transient event as "a pressure differential in a TARP tunnel that necessitates closure or partial closure of one or more sluice gates prior to TARP reaching full capacity, in order to prevent harm to people, property, or MWRD facilities. Transient Events can result from uneven filling, significant hydraulic head differential, wave action, valve closures or openings, backflow, water dams or water hammer, and variations in tunnel geometry, including without limitation a bifurcation, variation in diameter or tunnel end." (Consent Decree at 12).

Furthermore, 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. Reasonableness does not require sufficient capacity to prevent CSOs every year or even in 99 years out of 100. A lower threshold is reasonable. Nor is it reasonable to require MWRD to keep sluice gates open during transient events. The reason the consent decree allows the sluice gates to close is to prevent harm to people or property. Taxpayers have already spent more than $3,000,000,000.00 on TARP, and their interests would not be well-served by allowing transient events to damage TARP's components.

Finally, the Court takes great comfort in knowing that the consent decree requires MWRD to monitor TARP's performance once it is complete. If, upon completion, the TARP system has not brought MWRD into compliance with the three permits at issue in this case, MWRD must analyze alternatives for bringing its system into compliance, select among them and schedule their implementation.

Performance evaluation and monitoring plan

Intervenors believe the consent decree contains inadequate provisions with respect to the manner in which TARP's performance will be evaluated and monitored after its completion.

The parties agree that the CSO Control Policy requires long-term CSO control plans to include post-construction monitoring plans. Specifically, the CSO Control Policy states, in relevant part:

> The selected CSO controls should include a post-construction water quality monitoring program adequate to verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of CSO controls. This water quality compliance monitoring program should include a

> plan *to be approved by the NPDES authority* that details the monitoring protocols to be followed, including the necessary effluent and ambient monitoring and, where appropriate, other monitoring protocols such as biological assessments, whole effluent toxicity testing, and sediment sampling.

(CSO Control Policy II.C.9, 59 Fed.Reg. 18694) (emphasis added).

The NRDC Group takes issue with the fact that the monitoring plans themselves are not set out in the consent decree. Instead, the consent decree sets deadlines for when the monitoring plans must be submitted to EPA and IEPA for their approval. For example, MWRD must submit its proposed monitoring plan for the Calumet system (that leads to Thornton Composite Reservoir) within one year and the proposed monitoring plan for the Mainstream/Lower Des Plaines system (that leads to the McCook Reservoir) within five years. The consent decree also sets out certain components that must be a part of each monitoring plan. For example, the consent decree states that each monitoring plan must evaluate the water quality both at CSO outfalls and in stream and must also be sufficient to determine whether the CSOs are in compliance with the NPDES permits in effect at the time. Given that the monitoring plans cannot be put into effect until the relevant reservoirs are complete and operational, the Court concludes that it is reasonable for the parties to work out the details of the monitoring plans after the consent decree is entered. Nor is it unreasonable that the monitoring plans will test compliance with the permits in existence at the time the monitoring plan is implemented (as opposed to the permits that are in existence now, as intervenors seem to prefer). This is merely a realistic nod to the Clean Water Act, which requires compliance with permits in effect at any given moment, not compliance with permits that were previously (but are no longer) in effect.

The NRDC Group also complains that the consent decree allows itself to be terminated before the TARP systems are in compliance with the then-existing permits. As the NRDC

Group points out, ¶ 36 sets out steps MWRD must take if, during post-construction monitoring, it is determined that MWRD is failing to comply with the Calumet, Stickney or North Side NPDES permits. Those steps include planning and *scheduling* additional measures MWRD will take to bring itself into compliance, but the consent decree does not explicitly require MWRD to *complete* the additional measures. Nonetheless, the consent decree requires MWRD to comply with the NPDES permits before the consent decree may be terminated. Specifically, termination of the consent decree requires "satisfactory compliance with Section VIII" (which includes ¶ 34) of the consent decree for a period of one year. (Consent Decree at ¶ 94(b), 95(b)). Paragraph 34, in turn, provides that once the Calumet system and the Mainstream/Lower Des Plaines system are operational, the CSOs must comply with the Calumet, North Side or Stickney NPDES permits in effect at the time. Thus, before the consent decree may be terminated, MWRD must achieve "satisfactory compliance" with the permits for a period of one year. The Court reads "satisfactory compliance" to mean compliance to the Court's satisfaction. Accordingly, the consent decree cannot be terminated until MWRD has complied (to the Court's satisfaction) with the NPDES permits for a period of one year. That is reasonable.

Finally, in their brief, the NRDC group argues that the performance criteria set out in the consent decree is insufficient, because it fails to comply with an EPA interoffice memorandum. Specifically, the NRDC group argues that the consent decree should be rejected by the Court, because the consent decree sets out what NRDC describes as "qualitative" criteria for evaluating TARP despite the fact that a 2003 EPA interoffice memorandum suggested that consent decrees include "quantified performance criteria." The Court rejects this argument. Putting aside the fact that the Court disagrees with intervenors' characterization of the criteria as "qualitative," the

Court finds this argument unpersuasive. An interoffice memorandum is not a statute; it lacks the force of law. The Court will not judge the consent decree by whether it complies with an EPA memo.

The consent decree is not rendered unreasonable by the provisions for evaluating and monitoring TARP's performance once it is completed.

Floatables

In the meantime, the consent decree requires MWRD to take certain actions--including controlling floatables--to ameliorate the effects of CSOs. The intervenors (particularly the Alliance Group) take issue with the floatables control plan, which they view as inadequate.

While acknowledging that the consent decree requires skimmer boats to capture floatables year-round (as opposed to half the year, as the MWRD is currently doing), the intervenors object because the boats are not required to capture floatables during periods of fog, ice and limited visibility. This objection lacks merit. It is not reasonable to send out boats when it is dangerous to do so. One would be a poor steward of public resources to send out a boat when the boat is likely to become damaged and, therefore, unavailable for future use.

Intervenors also believe that requiring MWRD to purchase two skimmer boats is insufficient. On this front, intervenors point to an EPA analysis which suggested that the MWRD needs three boats in order to capture floatables adequately during one daytime shift. Accordingly, intervenors believe the plaintiffs should have insisted that MWRD purchase three skimmer boats, rather than two. The consent decree, though, is a product of negotiation, and one cannot expect to get everything one wants during a negotiation. In any case, the consent decree

requires the MWRD to have *all* of its available boats, not just the two skimmer boats, available to respond to CSOs.

In short, the floatables plan, far from rendering the consent decree unreasonable, is a reasonable means of ameliorating floatables released during CSOs.

Green infrastructure

The Alliance Group objects to the consent decree on the grounds that it does not address the quantity of water flowing into the sewer system. The Alliance Group does not say what it would like the parties to do on this front, but the Court notes that the criticism is false. The consent decree does, in fact, require MWRD to take action to limit the amount of water flowing into the sewers after a rain event. Specifically, the consent decree requires what the parties call "green infrastructure" programs, i.e., programs that will, as they are implemented, capture or absorb water during storms to prevent the water from flowing immediately into the storm sewers. In all, the green infrastructure plan requires MWRD to implement projects that retain nearly 11,000,000 gallons of water.

The NRDC Group objects to the green infrastructure plan as "meager." They call it "a drop in the bucket," which is a fair analogy (although "a drop in the half-gallon jug" might be more accurate), considering that TARP itself will hold 17,450,000,000 gallons. That the green infrastructure program is small, however, does not make it unreasonable. The green infrastructure projects are not mandated as part of the TARP plan and are not required by any law. The green infrastructure plan is icing on the TARP cake, a bonus.

The intervenors have not convinced the Court that the inclusion of the green infrastructure plan renders the consent decree unreasonable.

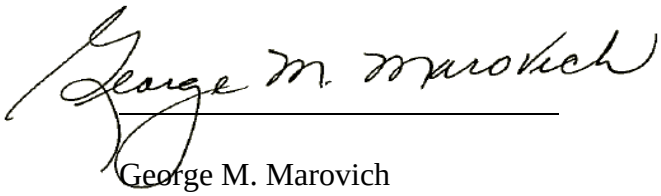
Hard bargain

Finally, intervenors argue that the Court should reject the consent decree, because it was not the result of a "hard bargain." The Court judges a consent decree not by the length or difficulty of the negotiations but by the reasonableness of the resulting agreement. For all the reasons set forth above, the Court concludes that the proposed consent decree is reasonable.

IV. Conclusion

Because it is reasonable, fair and adequate, the Court approves the consent decree and grants the motion for entry of the consent decree.

ENTER:



George M. Marovich
United States District Judge

DATED: January 6, 2014

JH

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

United States of America, et al. Plaintiff	)	
v.	)	Case No. 11 C 8859
Metropolitan Water Reclamation District of Greater Chicago Defendant	)	Judge William T. Hart

ORDER

Enter Consent Decree.

Date: 1/6/2014

/s/ Judge George M. Marovich

Rev. 10/2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, and STATE OF ILLINOIS,	)	
Plaintiffs,	)	No. 11 C 8859
v.	)	Judge George M. Marovich
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Defendant.	)	

ORDER

The United States of America ("United States" or the "government") and the State of Illinois ("Illinois") filed this suit against Metropolitan Water Reclamation District of Greater Chicago ("MWRD") to correct violations of the Clean Water Act. The Court allowed several parties (Alliance for the Great Lakes, Environmental Law & Policy Center, Natural Resources Defense Council, Sierra Club and Prairie Rivers Network) to intervene pursuant to 33 U.S.C. § 1365(b)(1)(B), which bars citizen suits if the government has filed suit but allows citizens to intervene. 33 U.S.C. § 1365(b)(1)(B) (barring claims "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.") The intervenors divided themselves into two groups, the "Alliance Group" (which consists of Alliance for the Great Lakes and Environmental Law & Policy Center) and the "NRDC Group" (which consists

of Natural Resources Defense Council, Sierra Club and Prairie Rivers Network), and each group filed a complaint in intervention.

The United States, Illinois and MWRD reached an agreement and proposed a consent decree, to which the intervenors objected. The Court, after allowing a brief period for discovery, allowed all parties (including the intervenors) to file briefs (and supporting documentation) in favor of or in opposition to the proposed consent decree. The Court also heard oral argument. On January 6, 2014, the Court approved and entered the consent decree, bringing this litigation to an end. (Familiarity with that opinion is assumed.)

The Intervenors have now filed a motion to set a status hearing. They seem to believe that their claims are still pending. Although it is true that the Court did not dismiss their claims (which the Court will do now), the intervenors' claims are barred by 33 U.S.C. § 1365(b)(1)(B), so long as the governments diligently prosecuted this case. (More on diligent prosecution in a moment.)

Alternatively, the intervenors' claims are barred by *res judicata*. *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1045 (8th Cir. 1992). In *United States v. Metropolitan St. Louis Sewer Dist.*, the Eighth Circuit Court of Appeals considered a case nearly identical to this one. There, the EPA had filed suit against the sewer district for violations of the Clean Water Act. The EPA reached an agreement with the sewer district and proposed entry of a consent decree, pursuant to which the sewer district agreed to construct improvements over a period of years. A few concerned citizens had intervened, and their complaints in intervention largely mirrored the EPA's complaint. The district court approved the consent decree (over the objections of the intervenors) and dismissed the intervenors' claims. On appeal, the Eighth

Circuit affirmed dismissal of all but one of intervenors' claims, saying that the claims were precluded. *Metropolitan St. Louis Sewer Dist.* 952 F.2d at 1045 (citing *United States EPA v. City of Green Forest, Arkansas*, 921 F.2d 1394 (8th Cir. 1990) (res judicata effect of consent decrees)). The only claim the Eighth Circuit excepted from its preclusion ruling was intervenors' claim against the EPA and the state under 33 U.S.C. § 1251(e), a claim which intervenors did not make here.

Likewise, the intervenors' claims in this case are barred by *res judicata*. When one party has already obtained a judgment, another party in privity with that party is barred by *res judicata* from bringing the same claims against the same defendants. *Ross v. Board of Education of Township High School Dist. 211*, 486 F.3d 279, 283 (7th Cir. 2007). A consent decree suffices. *See Metropolitan St. Louis Sewer Dist.* 952 F.2d at 1045; *Green Forest*, 921 F.2d 1394.

Here, the intervenors' claims are the same as the claims brought by the United States and the State of Illinois. All three complaints--the governments' original complaint, the Alliance Group's complaint in intervention and the NRDC Group's complaint in intervention--alleged that MWRD had violated and was continuing to violate three of its National Pollutant Discharge Elimination System ("NPDES") permits, namely the permit (the "Calumet Permit") for its Calumet water reclamation plant, the permit (the "North Side Permit") for its North Side water reclamation plant and the permit (the "Stickney Permit") for its Stickney water reclamation plant. Each of the three complaints alleged that MWRD was violating those three permits in the same specific ways, namely with respect to dissolved oxygen, with respect to sludge deposits, floating debris and solids and with respect to Special Condition 10. Because the claims are the same, intervenors' claims are barred if they are in privity with the governments who brought the suits.

The Clean Water Act is enforced primarily by the government, and when the government enforces that statute, it is, in effect, enforcing on behalf of all citizens. "[O]nce a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights." *See Green Forest*, 921 F.2d at 1404 (quoting *United States v. Olin Corp.*, 606 F. Supp. 1301, 1304 (N.D. Ala. 1985)). Thus, the Seventh Circuit has stated that, for purposes of *res judicata*, citizens are in privity with governments who settled claims under the Clean Water Act so long as the governments prosecuted the claims diligently. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004). The Seventh Circuit went on to say that diligent prosecution means that the government obtained a consent decree that "is capable of requiring compliance." *Id.* ("Thus, if the judicial action is 'capable of requiring compliance' with the Act and is 'calculated to do so,' the citizens' suit will be barred.")

The Court has already considered whether the Consent Decree requires compliance with the Clean Water Act. The intervenors, in objecting to the Consent Decree, had argued that it did not, in fact, require compliance. This Court disagreed and concluded that the consent decree, by its terms, could not be terminated until MWRD achieves compliance with the three NPDES permits at issue in this case. (January 6, 2014 Memorandum Opinion at 28-29). Of course, the consent decree does not require compliance immediately. The cornerstone of the consent decree is the tunnel and reservoir plan (TARP), a massive public-works project that cannot be completed instantaneously. Portions are already completed, and portions will be completed soon. For example, the Thornton Composite Reservoir (with its 4,800,000,000 gallons of storage) will be completed next year, and the first phase of the McCook Reservoir (with its 3,500,000,000

gallons of storage) will be completed within three years. All told, MWRD has been adding an average of 323,000,000 gallons of storage capacity each year. Given the circumstances, the fact that TARP will be completed over time does not indicate a lack of diligence on the governments' part. *See Friends of Milwaukee's Rivers*, 382 F.3d at 761 ("We conclude that the construction deadlines incorporated in the 2002 Stipulation are not so lengthy as to indicate a lack of diligence.").

Thus, the Court concludes that the governments diligently prosecuted this case. Whether one considers intervenors' claims barred by §1365(b)(1)(B) or by *res judicata*, the result is the same: intervenors' claims are barred. The Court hereby dismisses with prejudice the intervenors' complaints in intervention. The Court denies intervenors' motion [124] for status hearing. Civil case terminated.

ENTER:

George M. Marovich

George M. Marovich
United States District Judge

DATED: February 14, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

United States of America, et al.
Plaintiff(s)

v.

Metropolitan Water Reclamation District of Greater Chicago **, et al.**
Defendant(s)

Case No. 11 C 8859

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)
.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: The Court dismisses with prejudice the intervenors' complaints in intervention

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This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge George M. Marovich.

Date: 2/14/2014

Thomas G. Bruton, Clerk of Court

Carol Wing, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 12-24400-CIV-MORENO

UNITED STATES OF AMERICA, STATE OF FLORIDA, and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiffs,

vs.

MIAMI-DADE COUNTY, FLORIDA,

Defendant.
_____/

ORDER GRANTING MOTION TO ENTER CONSENT DECREE

The United States, the State of Florida, and Miami-Dade County engaged in extensive negotiations to arrive at the Consent Decree presented to this Court for approval. The three governmental agencies are intent on the Consent Decree's success in resolving the sewer issues threatening Biscayne Bay National Park. On February 10, 2014, the Court held a hearing on the proposed Consent Decree, where the parties and the Court engaged in a frank discussion on its potential pitfalls and virtues. The Biscayne Bay Waterkeeper, an environmental group intervening in this action, filed a litany of objections to the proposed Consent Decree. This Court overruled the majority of those objections in a Court notice dated March 7, 2014. In that notice, this Court reiterated some of the concerns expressed at the hearing. Namely, the Court believed the Consent Decree could be improved if the County's noncompliance was met with stiffer penalties and by the appointment of a Special Master to oversee implementation of the Consent Decree projects and to ensure the County did not divert funds to other governmental purposes. The Court invited the parties

to respond in writing. After reviewing the responses, the Court approves the Consent Decree, as amended to include an increase in the stipulated penalties for noncompliance. Additionally, the Court reserves the right to appoint a Special Master, if the Court deems it necessary at a later juncture. In lieu of the appointment of a Special Master at this time, the Court is entering a supplemental Order Requiring Status Reports.

THIS CAUSE came before the Court upon Plaintiffs' Motion to Enter Consent Decree **(D.E. No. 86)**, filed on **November 26, 2013**.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. All other motions are DENIED as moot.

I. Background

Plaintiffs, the United States of America and the State of Florida Department of Environmental Protection filed this case asserting claims against Defendant Miami-Dade County under the Clean Water Act and the Florida Statutes for illegal discharges of pollutants into navigable waters. The case also claims violations of National Pollutant Discharge Eliminations System permits issued by the Environmental Protection Agency and the Florida Department of Environmental Protection. Plaintiffs seek the imposition of a civil penalty and injunctive relief to address the endangerment to public health and welfare presented by sanitary sewer overflows ("SSOs") of untreated wastewater, the aged and deteriorated condition of force mains within the Miami-Dade wastewater collection, transmission, and treatment system, including the 54-inch force main that conveys untreated wastewater from the City of Miami Beach under Biscayne Bay to the Central District Wastewater Treatment Plant.

Between 2008 and 2012, there have been 177 overflows of sewage to land and waters totaling over 50 million gallons. Miami-Dade County has also exceeded the permit limits on at least 31 occasions since 2008.

The proposed Consent Decree is intended to supercede the First Partial Consent Decree and the Second and Final Partial Consent Decree entered by the Court in earlier litigation. The proposed Consent Decree includes $1.6 billion of new infrastructure with the bulk of the capital projects (over $1 billion) intended to rebuild and rehabilitate Miami-Dade County's three coastal wastewater treatment plants. The decree also provides for a civil penalty, to be divided between the federal and state governments. It provides for stipulated penalties in the event of noncompliance with the decree's requirements. After the Court's March 7, 2014 notice to the parties, the parties agreed to increase the stipulated penalties for noncompliance.

As noted, the decree provides for capital improvement projects for Miami-Dade's three existing Wastewater Treatment Plants. It also provides for improvements to Capacity, Management, Operation and Maintenance requirements, which the parties agree is necessary to achieve compliance with the Clean Water Act.

II. Discussion

Entry of a settlement agreement is a judicial act requiring the Court's approval. A court, however, does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. *Williams v. City of New Orleans*, 694 F.2d 987, 993 (5th Cir. 1982) ("In determining whether to approve or reject a proposed [consent] decree, the district court's function is not to tailor the relief to what it considers necessary, as it might when fashioning relief itself after trial on the merits.").

Courts have delineated the standard of review for agreements settling litigation brought by the United States. "In this Circuit the Court's role is limited at this juncture to determining whether the terms of the consent decree 'are not unlawful, unreasonable, or inequitable.'" *United States v. City of Fort Lauderdale*, 81 F. Supp. 2d 1348, 1350 (S.D. Fla. 1999).

There is a strong presumption in favor of approval of a Consent Decree proposed by the United States, when the Department of Justice and the Environmental Protection Agency have negotiated the terms, since the agencies are equipped, trained, and oriented in the field. *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989); *United States v. Bay Area Battery*, 895 F. Supp. 1524, 1528 (N.D. Fla. 1995). Any party objecting to a decree has the heavy burden of demonstrating the decree is unreasonable. *United States v. Chevron, USA*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005).

Courts reviewing consent decrees to which the United States is a party under environmental laws, have generally limited their role to ensuring there was no evidence of collusion, that all interested persons have reviewed and commented on the proposal, that the governmental agencies have considered and evaluated comments and alternatives, and that the end result appears to be a balanced and workable compromise. *United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d
410, 411-12 (2d Cir. 1985); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001) (detailing comments received by the government and indicating that court must determine there is no collusion). The United States, in this case, received approximately seventy-five comments to the Consent Decree, totaling approximately 1,800 pages including exhibits.

Mindful of these principles, the Court finds the proposed Consent Decree is fair, reasonable, and consistent with the Clean Water Act. To determine the agreement's fairness, the Court must weigh factors such as the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in litigation if the settlement is not approved. *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1989). The Biscayne Bay Waterkeeper has not provided evidence of bad faith. Rather, experienced and well-intentioned environmental attorneys negotiated the Consent Decree, with the assistance of engineers and other professionals with expertise in wastewater collection, transmission, and treatment. Without doubt, litigation would consume considerable resources that could delay implementation of a compliant sewer system and would require the Court to craft a similar remedial plan to that which is already presented in the Consent Decree.

The Consent Decree's reasonableness and consistency with the Clean Water Act is also a factor the Court must consider in granting approval. The Court must decide whether the settlement is in the public interest in evaluating its reasonableness. *Rohm & Haas*, 721 F. Supp. at 687. The Consent Decree's remedy requires the United States Environmental Protection Agency and the Florida Department of Environmental Protection to oversee the County's measures to cure specific violations to the Clean Water Act. Moreover, the Court is entering an additional order requiring status reports to ensure the County is meeting its Consent Decree obligations and the public health and environment are being protected. The decree's remedial scheme is also intended to protect the public health and Biscayne Bay's environment by implementing Capacity, Management, Operation and Maintenance requirements, which the parties agree are necessary to achieve compliance with the Clean Water Act by certain deadlines.

The Consent Decree also contains a list of capital projects, with detailed schedules to address deficiencies in Miami-Dade's sewer system and treatment plants. The Consent Decree's projects are frontloaded to prevent urgent problems threatening Biscayne Bay, but the ultimate completion date is in fifteen years, which is a feasible timeframe for completion. After reviewing the Consent Decree's remedial scheme, the Court agrees it is reasonable and likely to lead to compliance with the Clean Water Act. The Court approves the Consent Decree and in doing so, relies on the government parties to ensure improvement in water quality, consistent with the goals of the Clean Water Act.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of April, 2014.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record