Consol. Nos. 14-1776 & 14-1777

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA and
STATE OF ILLINOIS,

Plaintiffs-Appellees,

and

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

Plaintiffs-Intervenors-Appellants,

v.

METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO,

Defendant-Appellee

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

ANSWERING BRIEF OF DEFENDANT-APPELLEE

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December 5, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1776 and 14-1777

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

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N/A

Attorney's Signature: /s/ Gary J. Smith Date: December 5, 2014

Attorney's Printed Name: Gary J. Smith

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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JURISDICTIONAL STATEMENT

The jurisdictional statement by Appellants-Intervenors Alliance for the Great Lakes, Environmental Law & Policy Center, Natural Resources Defense Council, Inc., Sierra Club, and Prairie Rivers Networks (collectively "Intervenors") is not complete and correct. Defendant-Appellant Metropolitan Water Reclamation District of Greater Chicago (hereafter "the District" or "MWRD") provides the following complete statement of jurisdiction.

The United States ("US"), on behalf of the U.S. Environmental Protection Agency ("EPA"), and the State of Illinois, on behalf of the Illinois Environmental Protection Agency ("IEPA") (collectively, "the Governments"), filed suit against the District under Sections 309(b) and 505(a) of the Clean Water Act ("CWA"), 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] Intervenors moved 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 allowed Intervenors to intervene as of right but limited the scope of intervention to filing briefs in support of or opposition to any motion to enter a consent decree, to conducting discovery, and to presenting oral argument on the motion to enter the Consent Decree. JA026i; JA322-25; JA312. Intervenors

[1] The District will follow the citation convention of Intervenors' Opening Brief: "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. "A__" refers to the page of the short appendix bound with Intervenors' Opening Brief. "SA__" refers to the page of the separate appendix filed with Intervenors' Opening Brief. Similarly, "JA__" refers to the page of the joint appendix filed with the Governments' Answering Brief. Transcripts of hearings in the District Court are identified by date and transcript page: yyyy/mm/dd Tr. __.

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 decision. On January 6, 2014, the District Court granted the Governments' motion to enter the proposed Consent Decree and ordered entry of the Consent Decree. A1, A33; SA127 (¶ 79). On February 14, 2014, the District Court entered an Order and a Judgment dismissing with prejudice Intervenors' Complaints-in-Intervention. A34, A39. Intervenors appeal both the February 14, 2014 Order and Judgment and the January 6, 2014 Order entering the Consent Decree.

This appeal is timely because Intervenors filed their notices of appeal on April 9, 2014, within 60 days after the February 14, 2014 Order and 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

The District joins in the Statement of The Issues of Plaintiffs-Appellees the United States of America and the State of Illinois (collectively "the Governments").

STATEMENT OF THE CASE

The District joins in the Governments' Statement of the Case and supplements Intervenors' Statement of the Case as follows.

The District Court allowed Intervenors to intervene as a matter of right but limited the scope of intervention. Initially the Court granted Intervenors the right to file briefs in support of or opposition to any motion to enter a consent decree and permitted them to seek further involvement at a later point. JA026i. Intervenors later sought and were granted the right to conduct discovery. JA322-25. Intervenors' subsequent request to conduct further discovery was denied. Dkt. 87. Thereafter, the District Court granted Intervenors the right to present oral argument on the motion to enter the Consent Decree but denied their request for an evidentiary hearing. JA312. In denying the request for an evidentiary hearing the Court stated: "The intervenors filed two 50-page briefs and reams of exhibits, including deposition transcripts. The time for introducing new evidence has passed." *Id.*

SUMMARY OF ARGUMENT

The District joins in the Governments' arguments in favor of upholding the District Court's approval of the Consent Decree. The Consent Decree is "reasonable, consistent with [the CWA's] goals, and substantively and procedurally fair" and the District Court's decision to approve the Decree was a reasonable exercise of discretion that this Court should affirm. *See United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011).

The District writes separately to emphasize three points. First, the long history of the Tunnel and Reservoir Plan ("TARP") reflects the District's unswerving commitment to Combined Sewer Overflow ("CSO") control and CWA compliance; that history provides ample grounds for the District Court's

confidence that the District will be nimble and resourceful in completing TARP, and in implementing additional measures if post-construction monitoring shows them to be necessary, in order to achieve CWA compliance and to satisfy the requirements of the Consent Decree.

Second, Intervenors' claim to have proven that the Consent Decree will not result in compliance with the CWA both misrepresents what constitutes compliance and vests with unmerited dignity the collage of historical snippets that they call proof. The CWA does not mandate elimination of all CSOs and it is not a flaw of the Consent Decree that it does not seek to achieve that end. Nor can excerpts of analytical reports, some more than 40 years old, speak for themselves about the future performance of TARP. Intervenors offered no expert to explain these dated reports or to show that it would somehow be possible to use them to forecast the performance of TARP as it is currently designed and being built. Absent such expert guidance, the technical documentation is only a confusing jumble.

Third, the Consent Decree's reliance on post-construction monitoring and the District's implementation of additional measures as necessary to achieve compliance is completely reasonable. It is faithful to EPA's CSO Control Policy and represents the only practical approach to evaluating and, if necessary, improving upon the vast, complex, engineering marvel that is TARP.

In addition to these arguments for upholding the District Court's approval of the Consent Decree, the District will demonstrate that the District Court's dismissal of Intervenors' complaints was proper for the same reason

that the approval of the Consent Decree was proper: the Consent Decree will achieve CWA compliance.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPROVED THE CONSENT DECREE

A. Standard of Review

The parties agree that the District Court's order approving the Consent Decree is reviewed for abuse of discretion. Appellants' Opening Brief (AOB) at 26.

B. The history of TARP shows the District's commitment to CSO control and CWA compliance.

The District has a history of great engineering achievements. The waterways into which the District's systems discharge were largely constructed by the District in the 1900s to convey wastewater away from the City and to drain potential floodwaters from its service area. The 28-mile Chicago Sanitary and Ship Canal ("CSSC"), the 8-mile North Shore Channel, and the Calumet-Sag Channel connecting the Little Calumet River to the CSSC all were projects constructed by the District to accomplish the historic reversal of the Chicago River that to this day continues to protect the water quality of Lake Michigan. Encyclopedia Britannica, Chicago Sanitary and Ship Canal, *available at* http://www.britannica.com/EBchecked/topic/110497/Chicago-Sanitary-and-Ship-Canal (last visited Dec. 3, 2014).

The District committed early to TARP, within weeks of passage of the CWA in 1972. JA037. It was not until more than two decades later that EPA

published its 1994 CSO Control Policy setting out a national strategy for addressing CSOs and requiring municipalities with combined sewer systems (CSS) to develop and implement Long Term CSO Control Plans (LTCP). 59 Fed. Reg. 18688 (Apr. 19, 1994). The District began construction of TARP in 1975, decades before most municipalities. JA081.

TARP is far larger than other LTCP systems in terms of storage volume and geographic service area. TARP is more than 30 times the size of the Milwaukee system, the next largest in storage volume after TARP. *Id.* The McCook Reservoir alone will be the largest reservoir of its kind in the country. JA058.

The District has made an enormous financial investment in TARP. Over $3 billion has been spent on TARP since its inception ($1.4 billion by the District and the remainder obtained through the Construction Grants Program and from the U.S. Army Corps of Engineers). This is the equivalent of $9.8 billion in 2012 dollars, $4.3 billion of which was the District's share. JA036. Completing the Thornton Composite and McCook Reservoirs is expected to add $350 million to the total. *Id.*

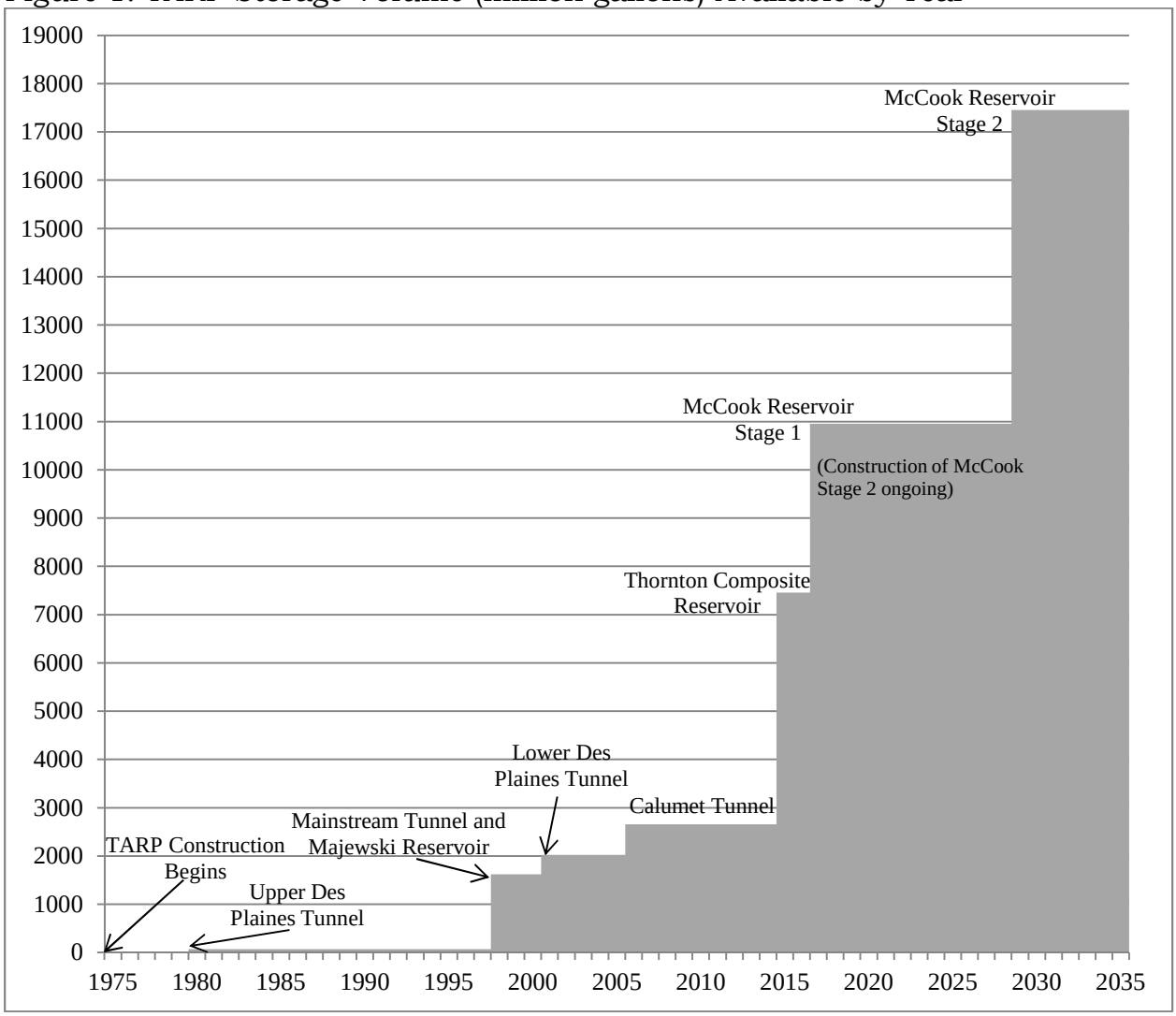
The District has repeatedly stepped in to keep TARP moving forward when its federal government partners changed course or faced funding shortfalls. The first time was when EPA decided in 1975 that the TARP reservoirs served primarily flood control purposes and were ineligible for pollution control grant funding. SA145. The District turned to the U.S. Army Corps of Engineers to help fund and manage construction of important

elements of TARP's reservoir components pursuant to the Corps' mandate to help communities control flooding. *See* Dkt. 61-6 ID2468-92; Dkt. 61-5 ID2170-73 (providing the history of the federal approval and funding for TARP); Dkt. 61-5 ID2143-44 (describing the federal interest in completing TARP and recommending that the reservoirs be constructed under the Corps' flood control program). When Congressional funding shortfalls prevented the Corps from honoring its contractual commitment to pay 75 percent of the design and construction cost of the Thornton Combined Reservoir, the District stepped up with $385 million to cover the entire cost. Metropolitan Water Reclamation District of Greater Chicago, Finance Department, Comprehensive Annual Financial Report for 2013, 20 (2014), https://www.mwrd.org/irj/go/km/docs/documents/MWRD/internet/Departments/Finance/docs/CAFR/CAFR2013.pdf (last visited Dec. 3, 2014). The District was able to significantly reduce the construction costs by securing the mining expertise of two world-class quarry operators in the Chicago area to excavate rock for sale from the sites that will become the Thornton Composite Reservoir and the McCook Reservoir. JA058.

Despite its enormous size and complexity, TARP is on track to meet the schedule for completion set out in the Consent Decree and all but the last reservoir stage will be operational within the next three years. The Upper Des Plaines portion of the system was completed in 1998. SA147. The entire 109.4 mile, 2.3 billion gallon first phase tunnel system was completed and in service by 2006. JA175. The rough hole for the Thornton Composite Reservoir was

substantially completed on September 23, 2013. JA298-300. The Thornton Composite Reservoir is on schedule to be operational by December 31, 2015. JA034. It will add 4.8 billion gallons of storage capacity to the system. *Id.* Although political opposition required a relocation of the planned McCook Reservoir in 1995, the rough hole for Stage 1 of the reservoir was 50 percent mined as of the end of 2012. JA035, 039-42. Completion of that portion of the system, with its 3.5 billion gallons of storage capacity, is expected by the end of 2017, with completion of the Second Stage on track to occur in 2029, adding 6.5 billion gallons of capacity. JA035-36; *see also* Figure 1 (Dkt. 111 ID6441).

Figure 1: TARP Storage Volume (million gallons) Available by Year



The District has built TARP at a faster rate than other, much smaller systems. When construction concludes in 2029, on average the District will have constructed 323 million gallons of storage volume each year. By comparison, the Cleveland and Milwaukee systems constructed on average only 11.3 and 15.8 million gallons of storage per year. JA122.

The early start, long duration, vast scope, and enormous capital cost of TARP evidence the District's commitment to CSO control and compliance with

the CWA. With this commitment as a foundation, it was entirely reasonable for the District Court to

> take[] 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.

C. The Consent Decree will achieve compliance with the CWA

1. The Consent Decree mandates that the District achieve compliance.

The Consent Decree requires the District to achieve compliance with its permits and the CWA before the Consent Decree can be terminated. If TARP by itself is insufficient to eliminate water quality violations, the Consent Decree mandates that the District take whatever additional measures are necessary to achieve compliance. As explained below, this mandate operates through the interaction of the Consent Decree's Post Construction Monitoring requirement and the requirement that the District maintain compliance with the TARP System Performance Criteria for one year before the Consent Decree can be terminated.

In order to seek termination of the Consent Decree, the District must demonstrate, among other things, that it "has maintained satisfactory compliance with Section VIII (TARP System Performance Criteria; for [Calumet and Mainstream/Lower Des Plains] TARP System) for one year" and "has

completed the requirements of Paragraph 36 (Post Construction Monitoring) . . . ." SA134, SA135-36 (¶¶ 94b, 95b).[2] The TARP System Performance Criteria, in turn, require, among other things, that

> [u]pon initiating full operation of the Calumet TARP System and the Mainstream/Lower Des Plaines TARP System . . . , any CSO discharges shall comply with the CSO requirements of the then-effective Calumet, North Side, or Stickney NPDES Permit, as applicable, including all applicable water quality standards requirements incorporated therein.

SA104 (¶ 34).

The Post Construction Monitoring provisions of the Decree require the District to develop and submit to the Governments for approval monitoring plans to evaluate discharges from the CSO Outfalls. SA104-06 (¶¶ 35a, 35b). The District must implement the approved monitoring plans after it commences full operation of the reservoirs in each system. SA106 (¶ 35d). Upon completion of the monitoring, the District must submit monitoring reports to the Governments. SA106 (¶ 36a). If, upon review of the reports, EPA or IEPA finds that discharges from either system are violating the CSO requirements of the District's permits, EPA will convey that finding to the District. SA107 (¶ 36b). The District then must submit to the Governments a plan analyzing the range of alternatives available for achieving compliance, the actions the District proposes to take to meet the permit requirements, and a

[2] Consent Decree paragraphs 94b and 95b, respectively, separately address the Calumet and Mainstream/Lower Des Plaines systems in identical terms insofar as is relevant here.

timetable for implementation of the actions. SA107-08 (¶ 36c). EPA, after consultation with IEPA, will approve or disapprove the plan. *Id.*

As is apparent, although not stated explicitly, by requiring the District to achieve compliance with its permits, the Consent Decree effectively mandates that the District obtain EPA's approval and implement the approved plan for additional measures that will achieve full permit compliance. As the history recited above shows, the District fully embraces that obligation.

2. TARP's performance to date predicts that the District will achieve compliance.

TARP's performance to date is strong evidence that it will successfully manage CSOs to the extent required by the CWA and the District's permits. As early as 2002, in issuing the District's existing permits, the IEPA lauded the facilities constructed to date, stating that these facilities "have resulted in a dramatic improvement in water quality in the Calumet, Chicago and Des Plaines River systems and the return of over 50 species of fish to these river systems." JA178.

The Upper Des Plaines system was completed in 1998. From 2005 through 2012, including years that were some of the wettest on record, the capture percentage for the Upper Des Plaines system, meaning the portion of the annual average volume of flow captured and treated by the system, has ranged from a low of 89.6% to a high of 100%, with an 8-year average capture of 98.0%. JA304. Under the "presumption" approach for evaluating proposed LTCPs, EPA's CSO Control Policy presumes that a system designed to capture no less than 85% by volume on an annual average basis will "provide an

adequate level of control to meet the water quality-based requirements of the CWA . . . ." SA6. The Upper Des Plaines system has performed so well since it was completed that neither the Governments nor the Intervenors have made it the subject of any claims.

For the years 2005-2009, the Calumet system, even without benefit of the soon-to-be-completed Thornton Composite Reservoir, achieved an 85% capture rate for all CSOs in that system. JA302.

In 2009, EPA studied how the Calumet and Mainstream Systems would have performed in 2006 if both the Thornton Composite Reservoir and the McCook Reservoir had been fully operational in their finally design configurations. JA246-48. Based on data from the airport in each watershed area, "2006 was the wettest year for the Calumet watershed area between 1996 and 2006 and the second wettest year for the McCook/Mainstream watershed area during this same time period." JA247. Further, EPA's analysis employed the "very conservative assumption" that all precipitation would flow to TARP and the reservoir systems in each watershed and that none would fall on water, be absorbed by yards, parks, grasslands, or trees, evaporate, or infiltrate to groundwater. *Id.* EPA concluded that, had the Thornton and McCook Reservoirs been fully operational in 2006, the systems would have had adequate capacity to capture all flows in the Calumet and Mainstream Systems. JA247-48.

Similarly, a 2009 University of Illinois study that modeled the performance of the Calumet System concluded that, in all the simulated storm

events studied, the Calumet System would not experience overflows at any point in the system as long as the flows captured were pumped from the system to the treatment plant for treatment and discharge on a timely basis. JA270 ("during the storm event scenario 04/24-26/2007, not a single point in the entire Calumet system network overflowed"); JA271 ("the 09/12-14/2008 storm does not induce flooding at any point in the system network"); JA272 (no flooding occurs in simulation of 20-year design storm); JA273 (Thornton Reservoir does not overflow in simulation of 5-year design storm followed five days later by 20-year design storm). The only scenarios in which the University of Illinois researchers predicted overflows from the Calumet system were: (1) a simulation of the "wet year 2007-2008" that assumed *none* of the water captured in the system was pumped to the treatment plant (JA274); and (2) a simulation of calendar year 2006 that assumed none of the flow was pumped out for treatment until more than one full day after the flow into the system stopped (JA275).[3]

As discussed below, Intervenors have no analysis of TARP's present design that undercuts the 2009 EPA and University of Illinois studies. The actual performance data for the Calumet and Upper Des Plaines systems coupled with the 2009 studies provide substantial evidence for the District Court's conclusion that the Consent Decree would achieve compliance with the CWA.

[3] Intervenors contend there is no evidence that pumping rates sufficient to avoid the modeled overflows can be achieved (AOB 20), but nor is there evidence such pumping rates cannot be achieved, and it is Intervenors' burden to prove the District Court's approval of the Consent Decree was an abuse of discretion.

3. The CWA does not require elimination of all CSOs.

Intervenors at times seem to hold the Consent Decree to a false standard – the elimination of all CSOs: "MWRD admitted that MWRD may continue to discharge combined sewage" (AOB at 18); "MWRD's experts found that large CSO discharges will continue after TARP's reservoirs are completed" (*Id.*); characterizing as "substantial defects in the [Consent Decree]" that the District could not show "TARP will prevent CSOs in every future year" and that "transient events will likely cause future CSOs" (AOB at 34-35). The District Court properly characterized the notion that the CWA requires the elimination of CSOs as the "fundamental fallacy" of Intervenors' attack on the Consent Decree. A26. Neither the CWA nor the District's permits require the elimination of all CSOs. CSOs are permissible under the law and the permits as long as they do not cause violations of water quality standards or impair designated uses of the receiving waters.

The CWA bars discharges of pollutants except in compliance with discharge permits (33 U.S.C. § 1311(a)) and discharge permits require compliance with technology- and water quality-based requirements of the Act (33 U.S.C. § 1342(a)(1)). There is no *per se* ban on CSOs. The CWA mandates that discharge permits issued after December 21, 2000, conform to the CSO Control Policy. 33 U.S.C. § 1342(q)(1). The CSO Control Policy, in turn, requires permitting authorities to include in CSO discharge permits "requirements to monitor and collect sufficient information to demonstrate compliance with WQS [water quality standards] and protection of designated

uses . . . ." SA10. In addition, permits are required to contain a "reopener clause" allowing the permitting authority to "reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses." *Id.*

The District's permits comply with the CSO Control Policy and do not contain an outright ban on CSOs. To the contrary, Special Condition 10 of the permits specifically authorizes CSOs, subject to a number of conditions, including that discharges "not cause or contribute to violations of applicable water quality standards or cause use impairment in the receiving waters." SA38-40, 47-48, 55-58.

Water quality standards and designated uses that the standards are designed to protect are specific to individual water bodies. *See* ILL. ADMIN. CODE tit. 35, § 302 (water quality standards applicable to categories of designated uses and Lake Michigan); ILL. ADMIN. CODE tit. 35, § 303 (designated uses and certain site-specific water quality standards). The District's water reclamation plants discharge into the Chicago Area Waterway System. Parts of that System are designated "Aquatic Life Use A Waters," which are to have "quality sufficient to protect aquatic-life populations predominated by individuals of tolerant and intermediately tolerant types that are adaptive to the unique physical conditions, flow patterns, and operational controls necessary to maintain navigational use, flood control and drainage functions of the waterways." ILL. ADMIN. CODE tit. 35, § 303.235(a). Other parts of the Chicago Area Waterway System are designated "Aquatic Life Use B Waters," which are

to have "quality sufficient to protect aquatic life populations predominated by individuals of tolerant types that are adaptive to unique physical conditions and modifications of long duration . . . ." ILL. ADMIN. CODE tit. 35, § 303.235(b). Because these designated uses are different, a CSO discharging into one reach of the System could be permissible when the same discharge into another reach of the System could cause a permit violation.

Water quality standards and designated uses also change over time. The record before this Court contains excerpts of proceedings before the Illinois Pollution Control Board in which the Board was evaluating possible updates to the designated uses and criteria for the Chicago Area Waterway System. *See* JA203-38.

The site-specific and mutable nature of water quality standards are part of what makes it impossible to determine in advance whether any CSOs that may escape the completed TARP system will violate the CWA.

4. Intervenors' technical attack on TARP's design fails for want of expert support.

Intervenors cannot back up their claim to have proven that the Consent Decree will not achieve compliance because they failed to offer expert testimony on key issues. It is axiomatic that a party seeking to prove a matter by relying on technical or scientific evidence beyond the lay understanding of the finder of fact must present the evidence through a competent expert witness. *See* 4 Jack B. Weinstein and Margaret A. Berger, Weinstein's Federal Evidence, § 702.03[1] (Joseph M. McLaughlin ed., 2d ed. 2010) ("in some instances, the courts recognize matters as being so technical or specialized in nature that

expert evidence is required for the party bearing the burden of proof to be able to sustain a decision by the finder of fact."); *see e.g., Myers v. Illinois Central R. Co.*, 629 F.3d 639, 643 (7th Cir. 2010) (When "there is no obvious origin to an injury and it has 'multiple potential etiologies, expert testimony is necessary to establish causation.'"). In contrast, the District Court was entitled, indeed required, to defer to EPA's technical expertise. *See*, *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) ("in evaluating the efforts of an agency charged with making technical judgments and weighing complex data, we must give a proper degree of deference to the agency's expertise"); *see also U.S. v. Akron*, 2014 U.S. Dist. LEXIS 6763 (N.D. Ohio 2014) (applying *Akzo* in approving a CWA consent decree); *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011) ("the trial court must defer to the expertise of the agency").

Here, in attempting to meet their burden to prove the District Court abused its discretion in approving the Consent Decree, Intervenors rely heavily on engineering studies and reports to "prove" what they contend are design flaws in TARP. *See* AOB at 18-20, 30, 33. But, although Intervenors included nearly 100 exhibits with their oppositions to the entry of the Consent Decree, they did not offer the declaration of a single qualified expert to attest to their interpretation of these technical documents.

On November 5, 2013, Intervenors belatedly sought an evidentiary hearing in order, among other things, to call an engineering expert not previously disclosed. JA309-10. The Alliance Intervenors had retained an

expert as of the June 25, 2013, status conference (*see* JA319), and Intervenors stated at the July conference that they would disclose any experts they intended to rely upon with their opposition briefs, which were filed six weeks later, on September 5, 2013 (*see* 2013-07-25 Tr. at 24). Intervenors offered no explanation for failing to supply a declaration from their expert. JA309-10. The District Court's local rules contain no provision for an evidentiary hearing on motions and explicitly grant judges the discretion to decide motions without oral argument. L.R. 78.3. Although the Court granted Intervenors' request for oral argument, the Court reasonably exercised its discretion to deny the request for an evidentiary hearing, stating: "The intervenors filed two 50-page briefs and reams of exhibits, including deposition transcripts. The time for introducing new evidence has passed." JA312.

It is undeniable that the services of an expert were essential if the District Court was to give any weight to the technical documents proffered by Intervenors. In the first place, the terminology of the reports on which Intervenors rely is not comprehensible without the assistance of experts. For example, Intervenors contend a 1994 analysis by scientists at the University of Minnesota studied TARP's performance in a "moderately heavy" storm. AOB at 19. That characterization appears nowhere in the 1994 report. Instead, the report states: "This analysis is based on Mr. Clint J. Keifer's (1987) simulated inflow hydrographs of Oct. 18, 1985, storm, modified in such a way that the peak value of each hydrograph agrees with the design value furnished by the Metropolitan Water Reclamation District of Greater Chicago." SA17. Although

the actual storm on October 18, 1985, may have been "moderately heavy" in someone's view, data from that storm apparently were translated into "simulated inflow hydrographs" that were in turn "modified" such that "the peak value of each hydrograph agrees with the design value." What relationship there is between these modified, simulated hydrographs and any future storm that TARP may have to contend with is not stated in the report itself and is beyond the unaided capacity of the Court or Intervenors' lawyers to determine.

Even if the meaning of the 1994 study were plain on its face, its relevance to the future performance of TARP cannot be established in the absence of expert opinion. The study analyzes several hypothetical configurations of the Mainstream System but it did not, and could not, analyze the actual configuration of the Mainstream System as it is now being built. The principal reason for this is that the location of the McCook Reservoir that is now under construction is different from the location that was under consideration in 1994. JA040-43. Expert opinion is thus essential to explain whether or to what extent the results from modeling the hypothetical 1994 system are applicable to the actual system being built.

Moreover, the purpose of the 1994 study was limited to identifying options to minimize transient events[4] that occurred during a unique storm

[4] 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

event. SA17, 33-34. The object was to determine if inflow restrictions could eliminate transient events, regardless of the impact on CSO control. The report expressly recommended "a new study in search of the inflow control method that can optimize CSO storm water capture over the long-term periods with geyser prevention as the constraint." SA34. In other words, the study was not designed to determine how TARP would perform when operated to achieve maximum CSO capture without transient events. Nor did it attempt to assess the impact of CSOs on water quality, which is the issue of relevance in this appeal. Intervenors are asking the Court to draw conclusions from the report that are not stated in the report itself.

A CSO control system is to be judged by how it performs over a range of circumstances. SA10. The 1994 study of how a hypothetical system would respond to a single, hypothetical storm cannot be given weight absent the testimony of a qualified expert. Intervenors' claim to have proven through this study that TARP will fail to achieve CWA compliance is unfounded.

5. Intervenors' distortion of the statements of a District consultant does not prove that the Consent Decree will fail to achieve CWA compliance.

> 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.

SA87 (¶ 8jj).

Adrienne Nemura, a District consultant, testified before the Illinois Pollution Control Board during a proceeding to determine whether modifications to designated uses of Chicago Area Waterway System should be adopted. Appellants tout her testimony as an admission by the District that CWA violations will continue after the completion of TARP. AOB at 18.

Ms. Nemura was not testifying as an expert on the expected performance of TARP. She acknowledged that she was "not familiar with the design of TARP" and did "not know how much CSO would be captured [by the McCook reservoir]." JA199. Despite her limited knowledge of TARP, Ms. Nemura testified it was her understanding that CSO discharges would continue after TARP is completed. JA194. The source of that understanding is not stated in the excerpts of Ms. Nemura's testimony that Intervenors included in the record. But whether or not there would still be CSOs after TARP is completed was not critical to Ms. Nemura's analysis. She testified that a wet weather limited use standard would be necessary even if there were no CSOs: "hypothetical model simulations showed that if all gravity CSOs were eliminated that the existing standards could not be met during and after wet weather." JA195. Appellants misleadingly use italics in quoting Ms. Nemura's testimony (AOB at 31) to insinuate she was urging the Board to adopt a less stringent standard because of TARP's inadequacy. But Ms. Nemura's point was that, *even without CSOs*, there are other wet weather sources, specifically discharges from municipal separate storm sewers and overland runoff, that cause a temporary reduction

in dissolved oxygen and that make a wet weather limited use the highest use attainable. JA194-97.

Even if water quality violations due to CSOs occur after the completion of TARP, that is not a flaw in the Consent Decree. Neither Ms. Nemura nor anyone else can tell now where or under what circumstances such violations might occur after 2015 or 2029, when each system is to be completed, or what the appropriate corrective action might be to achieve CWA compliance as mandated by the Decree. As discussed below, that is the function of the monitoring and corrective action provisions of the Decree.

6. Intervenors' contention that the "floatables" problem will get worse is illogical.

Intervenors contend that "the 'floatables' problem will continue, if not be worse, after TARP's two reservoirs are completed, because the [Consent Decree] does not require MWRD to continue implementing the Floatables Plan after those reservoirs are constructed." AOB at 32. Not so. In the first place, the additional capacity of TARP to capture CSOs by definition reduces the floatables problem—fewer CSOs, fewer floatables—it is as simple as that. Second, if floatables remain a problem after TARP is complete, the Consent Decree requires the District to take whatever further measures are required to achieve full compliance with the CWA. The Decree does not mandate that the District continue the specific Floatables Plan required as an interim measure, but the District would only have reason to discontinue the Plan if it were no longer necessary for floatables control or if it were replaced by something equally or more effective.

D. The Consent Decree's reliance on post-construction monitoring and subsequent corrective measures, if necessary to achieve full compliance, is appropriate and sensible.

The CSO Control Policy sets forth EPA's national strategy for controlling CSOs. The Policy expressly adopts as one of its four goals: "Providing sufficient flexibility to municipalities . . . to consider the site-specific nature of CSOs and to determine the most cost-effective means of reducing pollutants and meeting CWA objectives and requirements." SA3. This means that municipalities are not required to overbuild their systems in order to deal with every possible contingency. Rather, a system is to be "designed to allow cost-effective expansion or cost-effective retrofitting if additional controls are subsequently determined to be necessary in order to meet WQS or designated uses." SA7. To assess whether additional controls are needed after completion of construction, the Policy requires LTCPs to contain a post-construction compliance monitoring program.

The Consent Decree is completely consistent with the CSO Control Policy regarding post-construction monitoring and corrective action. As described earlier in detail, the Decree requires the District to monitor the Calumet and Mainstream Systems once each system is fully in operation, pursuant to Post-Construction Monitoring Plans approved by the Governments. If the final construction monitoring report shows the District to be in violation of any of the terms of its permits, the District will then have to submit to the Agencies a plan analyzing the range of alternatives available to come into compliance with the permit requirements and identifying the actions the District proposes to

take to meet the permit requirements, including a schedule for each step of the actions. The Consent Decree cannot be terminated until the District has maintained compliance with all applicable TARP System Performance Criteria for one year (SA133-36 (¶¶ 94-96)), which means that the District must implement the approved plan and take any additional measures required to achieve compliance.

The monitoring and corrective action requirements are completely reasonable. The Consent Decree, together with the District's then-existing permits, will set the broad criteria for determining compliance with the CWA. It is up to the District, using its detailed knowledge of TARP, and subject to the Agencies' approval, to devise the specific elements of the monitoring plan that will demonstrate compliance with those performance criteria. SA104-06 (¶ 35). If the monitoring report discloses deficiencies in performance, the Consent Decree then puts the onus on the District to assess the alternatives for achieving compliance and to choose a corrective action plan, subject to the EPA's approval, that will achieve compliance. This is consistent with the overall approach to pollution control in the CWA. Available control technology and local water quality standards set the standards that dischargers must meet but it is up to the dischargers to determine how to meet them. SA5. This scheme recognizes that the public agencies that operate municipal treatment plants are stewards of public funds responsible to their rate-payers to be cost-effective. It also recognizes that the operators of these complex systems are the

ones with the knowledge and understanding that make them best able to devise and implement appropriate corrective action.

The District Court properly recognized that the public interest that must be served by the Consent Decree is multi-faceted. The public is interested in keeping the waterways clean but the public is also interested in preventing flooding of sidewalks, streets, and basements, and the tax-paying public is interested in seeing pollution control achieved at a reasonable price. A19. Intervenors have never purported to be able to predict where and under what circumstances CSO-caused water quality violations may occur after TARP is completed. Nor do they contend that water quality violations will inevitably occur at every CSO outfall. The risks in predicting how TARP will perform in the future are well illustrated by the Corps of Engineers' analysis in 1975, which predicted that the Majewski Reservoir in the Upper Des Plaines System would need to be three times larger than it is, but the existing system with a much smaller reservoir has proven fully capable of meeting its permit requirements. *See* JA201-02; JA241-44.

Under these circumstances, the District Court properly rejected as "fiscally irresponsible" the notion of constructing end-of-pipe treatment at every CSO outfall. A24. The Court was correct in concluding that the reasonable and responsible course was to complete TARP and then see what more, if anything, is required to achieve consistent CWA compliance as demanded by the Consent Decree. A27.

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINTS IN INTERVENTION

A. Standard of Review

While the parties agree that the District Court's order approving the Consent Decree is reviewed for abuse of discretion, Intervenors contend that the District Court's follow-on ruling dismissing Intervenors' complaints on *res judicata* grounds is reviewed *de novo*. AOB at 26. But the *res judicata* ruling resulted from the Court's consideration of the substantial evidentiary record compiled for the motion to enter the Consent Decree. The key issue of the *res judicata* analysis, as framed by Intervenors, was whether there is a "realistic prospect" that the Decree will not achieve compliance with the CWA. AOB at 42. This is merely a restatement of the Intervenors' claim that the decree is "unreasonable" and should not have been approved because it is not likely to end the CWA violations alleged in the complaints. AOB at 27. However phrased, the question requires an application of law to the specific facts in the record and, under this Court's precedents, such a ruling by a district court is reviewed for clear error. *Thomas v. GMAC*, 288 F.3d 305, 307 (7th Cir. 2002) (the review of rulings not involving pure questions of law is deferential; clear error and abuse of discretion are both deferential standards and "as a practical matter, similar or even identical in the amount of leeway they give the district judge.").

Thomas is clear that the standard of review of a district court decision depends upon the nature of the analysis underlying the decision. Where the

decision involves the application of law to specific facts, review is deferential. Here the District Court reviewed an extensive record and concluded that the Consent Decree is likely to achieve compliance with the CWA. Based on that conclusion, the Court made two related decisions: it approved the Consent Decree and it dismissed Intervenors' complaints. Because they arise from the same factual and legal analysis, both decisions should be reviewed under the same deferential standard of review.

As Intervenors acknowledge (AOB at 26 n.15), in *Friends of Milwaukee's Rivers v. Milwaukee Metro Sewerage Dist.* 556 F.3d 603, 609-10 (7th Cir. 2009) ("*Friends IV*"), this Court reviewed the trial court's *res judicata* ruling for clear error. There the district court had conducted an evidentiary hearing and here the District Court considered the evidence without a hearing, but in both cases the ultimate determination was based on an evidentiary record and the same deferential standard of review should apply.

B. Dismissal of the complaints in intervention was proper.

The CWA gives primary enforcement authority to federal and state enforcement agencies. Under 33 U.S.C. § 1365(b)(1)(B), citizen suits may be dismissed for lack of subject matter jurisdiction if brought after a federal or state agency has commenced and is diligently prosecuting an enforcement action against an alleged polluter. As the Supreme Court stated in *Gwaltney of Smithfield v. Chesapeake Bay Found.*, "the citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. 49, 60 (1987). Here, once the District Court determined that the Consent Decree negotiated by the

Governments was adequate to redress the violations at issue, there was no longer a purpose to be served by the Intervenors' complaints in intervention, which alleged the same violations as the Government's complaint. Dissatisfied with the District Court's resolution of the issues, Intervenors' recourse was to do what they have done – appeal to this Court – not to continue litigation of those issues separately in the District Court. Accordingly the Court properly dismissed the complaints. Because the logic and necessity of terminating the trial court proceedings upon entry of the Consent Decree was contested by Intervenors, the District Court explained its decision in terms of both 33 U.S.C. § 1365(b)(1)(B) and the doctrine of *res judicata*. The District Court's reasoning under both approaches was correct.

1. Intervenors' Complaints were properly barred by the District Court under 33 U.S.C. § 1365(b)(1)(B).

Dismissal based on 33 U.S.C. § 1365(b)(1)(B) was appropriate because the District Court had granted Intervenors intervention as of right, but limited the scope of intervention to conducting limited discovery, filing briefs in opposition to the motion to approve the Consent Decree, and presenting oral argument at the hearing. JA026i; JA322-25; JA312. As of the close of the hearing, Intervenors had completed their participation in the case pursuant to the limited right of intervention the Court had granted. Once the Court determined that the Consent Decree constituted diligent prosecution of the case by the Governments, § 1365 (b)(1)(B) barred any further participation by Intervenors. Dismissal of their complaints was then appropriate.

Allowing the complaints in intervention to proceed after final judgment was entered on the underlying Governments' complaint would have undermined the hierarchy of enforcement authority established in the Citizens' Suit provision of the CWA. Section 1365(b)(1)(B) bars citizen suits initiated after the government "has commenced and is diligently prosecuting" an enforcement action, but allows intervention in the underlying government action. One district court has observed that "written into the citizen intervenor provision is a preference for an administrative enforcement action, rather than private citizen enforcement action." *United States v. Lexington-Fayette Urban Cnty. Gov't*, 2007 U.S. Dist. LEXIS 53938 at *5 (E.D. Ky. July 24, 2007) (denying motion to require intervenors' participation in settlement negotiations). While the statute permits citizens to intervene in government enforcement actions, "an unconditional right to intervene is not equivalent to an unconditional right to participate in the proceedings." *Id.* at *6; *see also* Fed. R. Civ. P. 24 advisory committee's note (1966) ("intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings"); *Dubois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987) (the CWA "was not intended to enable citizens to commandeer the federal enforcement machinery."). As another district court held in approving a CWA consent decree over the objections of intervenors: "once intervenors have been given the opportunity to object to the decree they have had an appropriate day in court

and a judgment on consent may be entered." *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85 (D. Alaska 1977).

Consistent with the logic of the CWA's citizen suit provision and with the rules governing intervention, when the underlying government enforcement action is resolved, the ability to intervene in that government enforcement action is also terminated. If complaints in intervention are allowed to proceed, the district court would be required to treat those complaints in intervention as independently-filed citizen suits. Doing so would allow the Intervenors to evade the diligent prosecution bar to later-filed citizen suits under the guise of a motion to intervene. Therefore, it must be the case that Appellants' complaints in intervention cannot survive the District Court's entry of the Consent Decree and subsequent termination of the Governments' Complaint.

2. Dismissal based on the doctrine of *res judicata* was also appropriate when the District Court determined that the Consent Decree should be entered.

The District Court properly barred Intervenors' claims under the principles of *res judicata*. *Res judicata* normally has no application within a single case. *See Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995). But, as *Amcast* acknowledges, "there are exceptions to this principle too." *Id.* Here, Intervenors sought to proceed with their own lawsuit as if it were separate from the lawsuit brought by the Governments and resolved by entry of the Consent Decree. The District Court's *res judicata* analysis provides a second analytical framework through which to demonstrate

that Intervenors had no right to persist with their claims in the District Court after the Consent Decree was properly entered.

Under federal common law, *res judicata* has three elements: "(1) an identity of the parties or their privies in the first and second lawsuits; (2) an identity of the cause of action; and (3) a final judgment on the merits in the first suit." *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014). All three elements are satisfied here. First, the Intervenors and the Governments are in privity with one another because, as described below, the Governments acted in their *parens patriae* capacity and diligently prosecuted the claims. Second, Intervenors have agreed with the District Court that the causes of action asserted by the Intervenors are the same as those asserted by the Plaintiff Governments. *See* JA027; Dkt. 61, Exhs. 7-1, 7-2. Third, it is undisputed that the District Court's decision to enter the Consent Decree is embodied in a binding final judgment. SA138 (¶ 103). Because all three elements of *res judicata* are satisfied, the Court should affirm the District Court's ruling barring the Intervenors' claims.

The only *res judicata* element contested by Intervenors is whether Intervenors and the Government Plaintiffs were in privity with one another. *See* AOB at 41-42. In order for a prosecuting government agency to be in privity with citizen plaintiffs, the court must find that the government agency was acting in its *parens patriae* capacity. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004) ("*Friends II*"); *see also EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1991) (relying

on *parens patriae* in holding that citizens' CWA claims were barred by entry of an EPA-negotiated consent decree). As a representative of the public's interests, the government agency must prosecute or defend an action with "due diligence and reasonable prudence," in order to bind the citizen plaintiffs by any resulting judgment in favor or against the government agency. *Friends II*, 382 F.3d at 759 (quoting section 42 of the Restatement (Second) of Judgments). As noted by the Eighth Circuit:

> The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interest. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void. That does not mean, however, that [the citizen's group] is *ipso facto* entitled to its own, 'personalized' remedy in this or any other CWA case.

Green Forest, 921 F.2d 1394, 1405 (8th Cir. 1991) (*quoting Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988); *see also River Vill. W. LLC v. Peoples Gas Light & Coke Co.*, 618 F.Supp.2d 847, 853 (N.D. Ill. 2008) (adopting reasoning of *Green Forest* and limiting citizen suit under a different environmental law to only those instances when the government has not taken action).

This Court addressed the meaning of diligent prosecution in *Friends II*, a case in which the Court was reviewing whether a stipulation resolving a state enforcement action raised a *res judicata* bar to an earlier-filed federal citizens' suit. In general, diligence on the part of the enforcement authority is presumed and must be rebutted with persuasive evidence. 382 F.3d at 760 (*citing*

Connecticut Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("The court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct that could be dilatory, collusive, or otherwise in bad faith."). Looking to the language of the CWA to discern the meaning of "diligent prosecution," this Court concluded that "[i]f the judicial action is 'capable of requiring compliance' with the Act and is 'calculated to do so,' the citizens' suit will be barred." 382 F.3d at 760. Thus, "[t]he focus of the diligent prosecution inquiry should be on whether the actions are calculated to eliminate the cause(s) of the violations." *Id.* Nevertheless, "diligence does not require a state agency to have perfect foresight. . . . '[t]he statute does not require the [State] succeed; it requires only the [State] try, diligently.'" *Id.* at 759, *quoting Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992).

In remanding the case back to the district court, the *Friends II* panel instructed the lower court to determine if "there is a realistic prospect that violations due to the same underlying causes purportedly addressed by the 2002 Stipulation will continue after the planned improvements are completed . . . ." 382 F.3d at 765. Intervenors seize on this phrase as though it was intended to state a standard of diligence different from what the Court twice articulated earlier in the opinion: whether the government enforcement action is "capable of requiring compliance with the Act and is in good faith calculated to do so." *Id.* at 759, 760. Intervenors' assert that the "reasonable prospect"

analysis is different from the analysis the district court needs to undertake to approve a consent decree, but they do not identify any difference. AOB at 40, 46. Intervenors themselves contend that to determine whether the Consent Decree was reasonable the District Court was required "to determine whether the remedy embodied in the [Consent Decree] will likely be effective to end the environmental violations alleged in the Government's Complaint." AOB at 27. Although they vary in wording, each of these formulations at its core requires the district court to make a careful examination of the government's action to assess whether it is likely to achieve compliance with the law. That is exactly with the District Court did here in approving the Consent Decree, and it was entirely proper for the Court then to rely on that determination to conclude that the Governments had acted with due diligence sufficient to bar further prosecution of the complaints in intervention.

Intervenors contend the District Court failed to conduct a detailed examination of the impact of the Consent Decree and relied on the words of the Decree rather than the actions it requires to conclude that it would achieve compliance with the CWA. This characterization is unfair to the District Court.

The District Court reviewed an ample factual record. Intervenors appear to fault the Court for not conducting an evidentiary hearing, pointing out that the district court in *Friends* did conduct such a hearing. AOB at 25 n.15. This Court's remand in *Friends II* did not direct the district court to conduct an evidentiary hearing, and the decision whether or not to allow the presentation of evidence on a motion lies within the discretion of the trial court. *See*,

Sullivan v. Running Waters Irrigation, Inc., 739 F.3d 354, 359 (7th Cir. 2014); *see also* Fed. R. Civ. Pro. 78(b); L.R. 78.3.

The record before the District Court consisted of: (1) the Governments' motion to approve the decree and supporting papers, including a 100-page responsiveness summary with 40 exhibits detailing the comments submitted by the public, including Intervenors, and the Governments' responses to those comments with supporting evidence (Dkts. 60; 61; 61-1 – 61-8); (2) the Alliance Group of Intervenors' 50-page opposition memorandum and 67 exhibits (Dkts. 101; 102; 102-1 – 102-5; 103; 103-1 – 103-5); (3) the NRDC Group of Intervenors' 50-page opposition and 28 exhibits (Dkts. 100; 100-1 – 100-31); (4) the District's reply memorandum in support of the Consent Decree and 10 exhibits (Dkts. 111; 111-1; 112); and (5) the Governments' 40-page reply brief and four exhibits (Dkts. 110; 110-1). The District Court denied Intervenors' request for an evidentiary hearing because it was already facing this mountain of evidence: "The intervenors filed two 50-page briefs and reams of exhibits, including deposition transcripts. The time for introducing new evidence has passed." JA312.

Intervenors complain that the dismissal order did not contain an analysis of the effectiveness of the actions required by the Consent Decree. AOB at 48. There is no reason why the District Court needed to repeat in the dismissal order the analysis of the opinion approving the Decree. In the Court's opinion approving the Decree, it looked at the specific elements of the decree and what each element would accomplish. *See* A7-12 (spelling out the

Decree's TARP deadlines, post-construction performance requirements, monitoring requirements, floatables control program, and green infrastructure program). It further reviewed and considered the history, purpose and potential success of the TARP program. A3-5. The Court also considered and rebutted, with evidence, Intervenors' challenges regarding the duration of the TARP project (A20-23); the necessity for "end-of-pipe" technologies (A23-24); the continuation of CSOs after completion of TARP (A24-27); the adequacy of the performance evaluation and monitoring plan (A27-30); the floatables control plan (A30-31), and the quantity of the water flowing into the sewer system (A31). In all the Court considered the effectiveness of the Decree and determined that its required actions were reasonable and adequate to achieve compliance. A28-29, 32.

Intervenors appear to contend that the District Court's assessment of due diligence is limited to judging the impact of TARP without regard to the contingent supplemental corrective measures required by the Decree. AOB at 48 ("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.") (emphasis in the original). But *Friends II* did not mandate myopia. Rather, this Court instructed the district court to determine whether "there is a realistic prospect that [the violations at issue] . . . will continue after the planned improvements are completed . . . ." 382 F.3d at 765. The District Court was entitled, indeed required, to assess whether compliance would be achieved after *all* of the actions required by the Decree are implemented. Here

the Decree not only mandates the completion of TARP on a specified schedule (SA89-92 (¶¶ 14-18)); it also requires the District to assess whether TARP is sufficient to achieve compliance with the CWA and, if it is not, to design and implement further measure that will achieve compliance (SA104-08 (¶¶ 35-36), S133-37 (¶¶ 94-97)). These provisions are not mere self-serving words, as Intervenors belittle them. They are significant mandates requiring real actions. As discussed above, this requirement for further corrective action if necessary is meaningful, sensible, and entirely consistent with EPA's CSO Control Policy.

Finally, the District Court concluded that the actions required by the Consent Decree will end the violations within a reasonable time period. The Court stated in its ruling dismissing the complaints in intervention:

> 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 concluded that the construction deadline incorporated in the 2002 Stipulation are not so lengthy as to indicate a lack of diligence.").

A37-38. As this Court has noted, "[m]erely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity

Appellant desires does not entitle Appellant to injunctive relief." *Friends II*, 382 F.3d at 761.

In sum, contrary to Intervenors' assertion, the District Court in approving the Consent Decree did conduct a detailed analysis of whether the Consent Decree would achieve compliance with the CWA. For the same reasons that the Court's approval of the Consent Decree was correct, so, too, was its dismissal of the complaints in intervention.

CONCLUSION

For all of the reasons stated above and in the Governments' Answering Brief, the District Court's approval of the Consent Decree and its dismissal of the complaints-in-intervention should be affirmed.

Dated: December 5, 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 2010, the Brief contains 9,881 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 requirements of Rules 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 2010 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: December 5, 2014 By: /s/ *Benjamin F. Wilson*
Benjamin F. Wilson

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by 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.

By: /s/ *Benjamin F. Wilson*
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