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
Case No. 11 C 8859
The Honorable Judge George M. Marovich

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES UNITED STATES AND STATE OF ILLINOIS

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GLOSSARY

CSO	Combined Sewer Overflow
CWA	Clean Water Act
District	Metropolitan Water Reclamation District of Greater Chicago
EPA	Environmental Protection Agency
IEPA	Illinois Environmental Protection Agency
LTCP	Long Term Control Plan
MWRD	Metropolitan Water Reclamation District of Greater Chicago
NPDES	National Pollutant Discharge Elimination System
TARP	Tunnel and Reservoir Plan
WRP	Water Reclamation Plant or Wastewater Treatment Plant

STATEMENT OF JURISDICTION

The jurisdictional statement in the opening brief (Op. Br.) is complete and correct.

STATEMENT OF THE ISSUES

This appeal involves challenges by Intervenors to a Consent Decree entered by the district court (January 6, 2014) and to the district court's subsequent dismissal of the Intervenors' complaint with prejudice (February 14, 2014).

1. Whether, under the highly deferential standard afforded such matters, the district court's entry of a Consent Decree settling claims by the United States and State of Illinois against the Metropolitan Water Reclamation District of Greater Chicago constituted an abuse of discretion.
2. Whether, given that the district court found the Consent Decree resolving the United States' and Illinois's Clean Water Act claims to be reasonable, the district court erred in dismissing the Intervenors' complaint asserting the same claims as the Governments' complaint.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case concerns a civil enforcement action by the United States and State of Illinois (collectively, the "Governments") against the Metropolitan Water Reclamation District of Greater Chicago ("MWRD" or the "District") for discharges of pollutants from combined sewer system overflow outfalls in violation of Section 301 the Clean Water Act ("CWA" or "Act"), 33 U.S.C. 1311, and of the National Pollutant Discharge Elimination System ("NPDES") permits issued to the District. After more than four years of negotiations between the Governments and the District, the Governments filed a complaint and simultaneously lodged a proposed consent decree. Following the public comment period on the proposed consent decree, several environmental groups (Alliance for the Great Lakes, Environmental Law and Policy Center, Natural Resources Defense Council, Inc., Sierra Club, and Prairie Rivers Network, collectively "Intervenors") intervened in the Governments' suit, filed two separate complaints in intervention alleging claims that mirror those in the Governments' complaint, and objected to entry of the Consent Decree ("Decree"). The Decree requires the District to: complete implementation of its previously-approved combined sewer overflow long term control plan, known as the Tunnel and Reservoir Plan ("TARP"); meet operational performance

criteria when construction has been completed; perform extensive monitoring; develop additional measures if needed to attain compliance with the CWA; and maintain the Decree in force until compliance with the CWA has been achieved for a year. The Decree will not be terminated until the district court is satisfied that compliance has been achieved.

In this appeal, Intervenors challenge the district court's conclusion that the Decree is fair, reasonable, and in the public interest. They argue that the district court abused its discretion in entering a Decree that will not bring MWRD into compliance with the CWA, and that the Decree does not adequately address: controls for solid and floatable materials, and monitoring, performance, and operational requirements. Intervenors also challenge dismissal of their own claims against the District.

A. Statutory Background

The Clean Water Act makes it unlawful for any person to discharge any pollutant from a point source into waters of the United States except, as pertinent here, in compliance with a National Pollutant Discharge Elimination System permit issued by the United States Environmental Protection Agency ("EPA") or an authorized state. 33 U.S.C. 1251(a), 1311(a), 1342, 1362. The Illinois Environmental Protection Agency ("IEPA") has been authorized by EPA to administer the NPDES permit

program in Illinois. Illinois's water pollution control statute also makes it unlawful for any person to discharge a pollutant to waters of the State without a NPDES permit. 415 Ill. Comp. Stat. 5/12(f) (2012).

A NPDES permit typically contains technology-based effluent limitations and, if necessary, more stringent water-quality-based effluent limitations on the amounts and types of pollutants that may be discharged. 33 U.S.C. 1311(b). A NPDES permit also contains conditions such as operating, monitoring and reporting requirements. NPDES permits issued by IEPA implement both the CWA and comparable provisions of Illinois law.

Pursuant to CWA Section 309(b) and (d), 33 U.S.C. 1319(b) and (d), the United States may enforce state-issued NPDES permits through actions for injunctive relief and civil penalties. States may also enforce NPDES permits either through the citizen suit provision of the CWA, 33 U.S.C. 1365, or under state law. The CWA bars citizen suits if the government (federal or State) has commenced and is diligently prosecuting a civil action but allows any citizen to intervene in that action as a matter of right under certain circumstances. 33 U.S.C. 1365(b)(1)(B).

In addition to the general CWA provisions, Congress has provided specific direction regarding combined sewer overflows (CSOs) by requiring

discharge permits issued after December 21, 2000, to conform to a nationwide policy developed by EPA, known as the Combined Sewer Overflow Control Policy or "Control Policy." *See* 33 U.S.C. 1342(q)(1). Combined sewer systems were designed to collect and convey both stormwater and wastewater (including commercial wastewater and domestic sewage) in the same pipe to a wastewater treatment plant. Combined sewer systems also were designed to allow discharge of untreated combined sewer overflows through outfalls during periods of heavy rainfall or snowmelt, when the amount of wastewater in the combined sewer system may exceed the available treatment capacity in the treatment plant or storage capacity in the sewer system. The purpose of CSO outfalls is to avoid overwhelming treatment facilities and to prevent flooding and sewer system backups into properties and streets, but they result in discharges of wastewater directly to nearby water bodies before reaching a treatment plant. The CWA does not categorically prohibit all CSOs; it allows CSOs authorized by a NPDES permit.[1]

The nationwide policy referenced by the Act (*see* 33 U.S.C. 1342(q)(1)) was issued by EPA in 1994 as "a comprehensive national

[1] The CWA does prohibit all dry weather CSOs. *See* 59 Fed. Reg. 18688, 18689 (Apr. 19, 1994) (SA3). Dry weather CSOs, however, are not at issue in this case.

strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives." 59 Fed. Reg. 18688, 18689 (Apr. 19, 1994) (SA3).[2] The Control Policy describes both immediately implementable provisions and a framework for developing and implementing long-term CSO control measures. The short-term course of action for controlling CSOs is referred to as "nine minimum controls." SA5. These are technology-based measures to reduce CSOs and their impacts that do not require significant engineering studies or major construction. JA296. Implementation of the nine minimum controls, however, generally will not result in attainment of applicable water quality standards.

Therefore, the Control Policy calls for a multi-step process of developing and implementing a Long Term Control Plan ("LTCP") to effectuate the long-term remedial measures necessary for a community's

[2] The Governments' citation conventions in this brief are as follows: "SA_" refers to the page(s) in the Separate Appendix filed with the Opening Brief; "A_" refers to the page(s) in the addendum to the Opening Brief; "JA" refers to the page(s) in the Joint Appendix filed by the Appellees; Dkt__:ID__ refers to the district court docket number, followed by the consecutive ID numbers listed on the document.

CSOs to "ultimately result in compliance with the requirements of the CWA." SA5. The Control Policy recognizes that problems associated with CSOs are site-specific in nature and therefore provides the necessary flexibility to tailor controls to local situations. SA3 (col. 3). The Control Policy calls for implementing the long term control plans as soon as practicable. SA2 (col. 3).

The Control Policy provides for two "approaches" to developing a long-term control plan: the "Presumption Approach" and the "Demonstration Approach." SA6-7. The Presumption Approach, relevant here, provides that a long term control plan that meets any of the following criteria would be "presumed to provide an adequate level of control to meet the water-quality based requirements of the CWA": (1) "[n]o more than an average of four overflow events per year;" (2) "[t]he elimination or the capture for treatment of no less than 85% by volume of the combined sewage collected" by the system during precipitation events on a system-wide annual average basis; or (3) elimination or removal of a specified mass of pollutants causing water quality impairment. SA6. The Policy requires post-construction monitoring upon completion of the long term control plan to verify compliance with water quality standards and to ascertain the effectiveness of the CSO controls. SA8.

B. Factual Background

MWRD is responsible for the operation and management of wastewater and stormwater collection and treatment, including wastewater treatment plants (also called water reclamation plants), in the Chicago area. This case involves the three largest of the District's seven wastewater treatment plants and its system of connecting "interceptor sewers" for those three plants. Dkt1:6-7 at ¶¶22, 25. The three plants receive flows from combined sewer collection systems in a portion of the District's service area that includes Chicago and 51 suburbs. JA32; SA146. Municipalities in the District's service area collect and convey combined flows through local sewer systems to the District's interceptor sewers, which transport the flows to the District's treatment plants.

The District holds NPDES permits issued by IEPA pursuant to Section 402 of the CWA, 33 U.S.C. 1342, and 35 Ill. Adm. Code 309.101 *et seq*. JA33. The permits authorize discharges from the District's 37 combined sewer outfalls from the sewer collection system to water bodies in the Chicago area subject to conditions, including the prevention of: the accumulation of sludge deposits, floating debris, and solids; and the depression of dissolved oxygen levels. *Id.*; Dkt1:7 (¶24). The local sewer systems that feed into the District's interceptors are subject to other

NPDES permits authorizing discharges from over 300 (non-District) combined sewer outfalls. JA33. None of the District or other outfalls is located on or directly discharges to Lake Michigan. *Id.* All of the outfalls discharge to rivers, creeks or canals that normally flow away from the Lake. During severe rainfall events that cause substantial flooding, sluice gates or locks at three locations may be opened to allow those waterways to backflow into Lake Michigan to relieve high water levels or flooding (sometimes referred to as "reversals"). JA125.

In the early 1970s, after evaluating numerous alternatives, the Flood Control Coordinating Committee (consisting of representatives from the District, Chicago, Cook County, and the State) adopted a tunnel and reservoir plan (known as "TARP") as a regional solution to address combined sewer system issues. JA37. The twin purposes of TARP are flood control and pollution prevention. SA76. Shortly after the adoption of TARP, and still in the 1970s, Congress directed the Army Corps of Engineers ("Corps") to study cost effective alternatives for flood damage reduction in the Chicago area. JA144. After completion of various studies, in 1988, Congress authorized federal funding for the McCook Reservoir portion of TARP as a Corps flood control project. JA37-40; JA174-75. The Corps is responsible for planning, design, construction activities, and post-

construction performance evaluation for the McCook Reservoir, the largest of the three reservoirs in the TARP system. JA143-44, JA153-54.

In 1995, IEPA, as the permitting authority, confirmed that TARP met the long term control plan objectives of the Control Policy, exempting the District from further planning requirements, but requiring verification of compliance with water quality standards when TARP is completed. JA187.[3] IEPA approved TARP as the District's long term control plan under the presumption approach of the CSO Control Policy. *Id.*; SA44; SA52; SA61; SA77.

TARP is designed to capture and store combined sewer flows, which otherwise would discharge through CSO outfalls, in tunnels and reservoirs until such flows can be pumped to the District's treatment plants for primary and secondary treatment prior to discharge to local waterways. SA146. TARP includes three major features: (1) a near-surface collector and drop-shaft system that connects to the tunnels; (2) four underground

[3] When EPA issued the Control Policy in 1994, it recognized that some permittees had already completed some CSO abatement planning and construction, and therefore some of the initial CSO control program development provisions of the Policy would not apply. SA4. The Policy instructed such permittees to complete their CSO control facilities and then implement other provisions of the Policy, such as post-construction monitoring. *Id.* The District qualified as such a permittee. JA37-41, JA48-52.

conveyance tunnels that feed into a storage reservoir; and (3) three storage reservoirs that will be dewatered into three of the District's wastewater treatment plants. SA146; JA141. Currently, when the TARP tunnels reach capacity, excess flows then discharge through CSO outfalls to local waterways (JA142), which are "waters of the United States" within the meaning of the CWA.

Construction of the tunnel system commenced in 1975 and the tunnels are now completed and operational. JA37; SA77; SA147 (Upper Des Plaines tunnel); SA148 (Mainstream and Lower Des Plaines tunnels); SA154 (Calumet tunnel). Combined, this consists of approximately 109 miles of tunnels with a design storage capacity of approximately 2.3 billion gallons. SA77. The first of the three planned reservoirs – the Gloria Majewski Reservoir – was completed in 1998. It is the reservoir for the Upper Des Plaines tunnel system and has a storage capacity of approximately 350 million gallons. SA78. From 2005-2012, the completed Upper Des Plaines TARP system has captured and treated, on average, 98% of the combined flows in that system. JA304. It also had two or fewer CSO events per year from 2005–2011. JA285-94; SA147 (Upper Des Plaines TARP system flows into the Kirie Water Reclamation Plant); SA6 col. 3 (a

CSO event is one or more overflows from a combined sewer system as a result of a precipitation event).

While TARP has been under construction continually since 1975, the remaining work centers on completion of two reservoirs currently under construction that will connect to the three other tunnel systems. These are: (1) the Thornton Reservoir to store 4.8 billion gallons for the Calumet tunnel system (SA78, SA90); and (2) the McCook Reservoir to store 10 billion gallons for the Mainstream and Lower Des Plaines tunnel systems (SA91). The chart below aggregates the data from the record to show the design storage capacity and status of the various portions of TARP; the

symbols (^, +, *) indicate associated tunnels and reservoirs.[4]

TARP Component	Storage Capacity	Completion Date
Upper Des Plaines Tunnels^	71 million gallons	1980
Mainstream Tunnels+	1.2 billion gallons	1985 (portion) 1998 (entire)
Majewski Reservoir^	350 million gallons	1998
Lower Des Plaines Tunnels+	405 million gallons	1989 (portion) 2001 (entire)
Calumet Tunnels*	630 million gallons	1986 (portion) 2006 (entire)
Thornton Reservoir[5]*	4.8 billion gallons	2015 (scheduled)
McCook Stage 1+	3.5 billion gallons	2017 (scheduled)
McCook Stage 2+	6.5 billion gallons	2029 (scheduled)
Current Capacity	2.6 billion gallons	
Capacity in 2017	11 billion gallons	
Total Capacity in 2029	17.5 billion gallons	

C. Procedural Background

On December 14, 2011, the Governments filed a complaint alleging that the District violated the CWA by discharging untreated sewage and other pollutants through CSO outfalls to local waterways in violation of

[4] The information summarized in the table is at: SA77, 78, 90-92, 147-49, 153, 155, 157. A completion date identified as "portion" indicates that part of the tunnel system commenced operation at that time. The associated components are referred to as the Calumet TARP system and the Mainstream/Lower Des Plaines TARP system (defined in the Decree at SA82-83 and SA85).

[5] The Thornton Reservoir includes an additional 3.1 billion gallon capacity for floodwaters from Thorn Creek for a total capacity of 7.9 billion gallons. SA157.

Section 301 of the CWA, 33 U.S.C. 1311, and its NPDES permits. The first claim alleged violations of Special Conditions 10.2 and 10.10 of the District's 2002 permits (for contributing to violations of applicable water quality standards for dissolved oxygen). Dkt1:13-14. The second claim alleged violations of Special Conditions 5, 10.2 and 10.10 of the District's 2002 permits for failure to treat CSOs "to the extent necessary to prevent accumulation of sludge deposits, floating debris and solids." Dkt1:14-15. The third claim (brought only by the United States) alleged violations of Special Condition 10.1 of the 2002 permits, for failing to provide the equivalent of "primary treatment" and disinfection to certain flow volumes prior to discharging as CSOs. Dkt1:15-16. The Governments sought injunctive relief and civil penalties. Dkt1:18-19.

Simultaneously with filing the complaint, the Governments lodged a proposed consent decree that was the result of more than four years of negotiations between the Governments and the District. When the Governments lodged the Decree, they asked the court to defer action while the United States submitted the proposed consent decree to public review for a 30-day comment period pursuant to 28 C.F.R. 50.7. *See* 76 Fed. Reg. 79710-03 (Dec. 22, 2011); 77 Fed. Reg. 2319 (Jan. 17, 2012) (extending public comment period until March 21, 2012 at request of Intervenors).

The United States received ten sets of public comments on the Decree, including lengthy comments from Intervenors.

On March 20, 2012, two groups of environmental organizations moved to intervene pursuant to the CWA, 33 U.S.C. 1365(b)(1)(B), and submitted proposed complaints. Dkt14, 17. On August 7, 2012, the district court held that the CWA authorized those groups to intervene as of right (citing 33 U.S.C. 1365(b)(1)(B)) and granted their motions to intervene. SA68, 72. The district court determined that their proposed claims "track" (SA65), "are based on the same facts and law" (SA71), and "seek[] to remedy the same allegedly unlawful discharges" as the Governments' claims (SA66). The court did not decide the scope of intervention at that point but stated that, at a minimum, the intervenors may file briefs in support or opposition to any motion to enter the proposed Decree. SA71. Thereafter, in August 2012, the two groups filed complaints in intervention (Dkt48, 49), alleging violations of the District's 2002 permits that mirrored the Governments' claims.

On June 7, 2013, after carefully considering public comments on the proposed Decree, the Governments moved for entry of the Decree and filed a brief in support of their motion and a response to public comments (Responsiveness Summary), with numerous attachments, including

declarations of experts. Dkt60, 61. Intervenors sought, and the court granted, discovery regarding the Decree. The district court did not set any substantive limits on discovery, but limited the period to six weeks. During the discovery period, Intervenors propounded extensive written discovery upon the Governments and the District and took Fed. R. Civ. P. 30(b)(6) depositions of an EPA and an IEPA official. *See* JA329, 331 (Tr. 7/25/2013, status conf.). After the close of discovery, Intervenors filed motions in opposition to entry of the Decree but they did not rely upon any experts of their own. Dkt100-05. On November 5, 2013, Intervenors filed a motion requesting an evidentiary hearing and oral argument. Dkt115. The district court denied Intervenors' motion for an evidentiary hearing but granted oral argument (Dkt117), which was held on December 17, 2013 (Dkt120). In sum, the court ultimately allowed the Intervenors to conduct discovery, file briefs in opposition to the motion to approve the Decree, and present oral argument. SA71; JA322-25 (Tr. 6/25/2013); Dkt117; A35.

D. The Consent Decree

The centerpiece of the remedial program in the Decree is an enforceable schedule for completing TARP, the District's long term control plan. Placing the TARP completion schedule in an enforceable mechanism,

in this case a judicial order, conforms to the provisions of the CSO Control Policy. SA10.[6]

Two reservoirs remain to be completed: the Thornton Reservoir and the McCook Reservoir. Under the Decree's schedule the Thornton Reservoir, with a design storage capacity of approximately 4.8 billion gallons, is scheduled to be completed and in operation for the Calumet tunnel system by December 31, 2015. SA90-91.[7] The McCook Reservoir will be completed in two stages. For Stage 1, designed to store approximately 3.5 billion gallons, the deadline for mining necessary to create the rough hole for the reservoir is December 31, 2016, and the Reservoir is scheduled to be in operation for the Mainstream and Lower Des Plaines tunnel systems by December 31, 2017. SA91, 151-52. Under the Decree, Stage 2 of the McCook Reservoir, designed to store approximately 6.5 billion gallons, mining is scheduled to be completed by December 31, 2028, and the Reservoir is scheduled to be in operation for the Mainstream and Lower Des Plaines tunnel systems by December 31, 2029. SA92, 152-

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[6] The NPDES permits issued in 2002 included "projected schedules for reservoir construction" for "informational purposes" (*see, e.g.*, SA51, 60), but those were not "compliance dates" in an "enforceable mechanism." SA10.

[7] The Decree required completion of mining for the Thornton Reservoir by December 31, 2013. SA90, 155-56. The mining was completed ahead of that deadline. JA335 (Tr. 12/17/2013).

53. Thus, by the end of 2017, the District will have added 8.3 billion gallons of storage capacity to TARP, for a total storage capacity of approximately 11 billion gallons, more than quadrupling TARP's current capacity of 2.6 billion gallons. JA142-43 ¶10. Upon completion, the McCook Reservoir will be the largest reservoir for storage of combined sanitary and stormwater flows in the country. JA122; JA143 ¶12.

The Decree also requires the District to: meet performance standards, conduct extensive monitoring following completion of the construction of each reservoir, implement enforceable measures to control floatables in response to rain events that cause CSO discharges, pay a civil penalty of $675,000, and perform a range of "green infrastructure"[8] programs, consisting of measures such as permeable pavement, rain barrels, and rain gardens. SA88, SA92, SA99-108, SA166-169, SA175-182. The Decree cannot be terminated until the District has demonstrated compliance with the CSO-related provisions of its then-current NPDES permits. SA104 ¶34; SA134 ¶94(b); SA135-36 ¶95(b).

[8] Green infrastructure uses vegetation, soil, permeable surfaces, and on-site detention mechanisms to manage some rainwater where it falls. SA84.

E. The District Court Decision Entering the Consent Decree

On January 6, 2014, the district court issued a detailed and well-reasoned memorandum opinion and order approving entry of the Decree. A1-32. The district court recognized that, before entering the Decree as a court order, it "must satisfy itself that the decree is reasonable" and in the public interest. A13 (citing *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985)); A19. The court acknowledged Intervenors' interest in using the waterways for recreation, but it also explained that the public interest includes the interests of residents, pedestrians, taxpayers, and businesses, who benefit from clean waterways, flood prevention, and completion of TARP at a reasonable cost. A19. The court concluded that the Decree is reasonable, fair and adequate, and thus approved its entry. A32.

The district court began by explaining what issues were not before the court. No one has suggested that the District should be required to build a separate sewer system for stormwater, an approach that was considered and rejected in 1972 because of the massive cost, disruption to public streets, and inability of such an approach to provide flood control. A14-15. Nor did the court reconsider the merits of TARP, noting that IEPA approved TARP as the District's long term control plan in 1995 and reaffirmed that TARP meets the objectives of the Control Policy in the 2002

NPDES permits. A15-19. The court stated that Intervenors could not challenge those determinations by IEPA either in federal court or at this late date. A18-19. Thus, the court identified the question before it as "not whether TARP was the right choice or even a good choice, but whether this consent decree is reasonable." A19.

The court then considered the various respects in which the Intervenors asserted that the Decree was unreasonable. First, it rejected Intervenors' assertion that the Decree allows the District too much time to complete Stage 2 of the McCook Reservoir. A19-23. The court found that the Governments "considered and rightly rejected other alternatives" to the existing means of excavating the reservoir — a contract with Vulcan Construction Materials (Vulcan) to mine the limestone on the site owned by the District. A22. The court found that other alternatives, such as paying someone to remove the limestone more quickly and then either storing or disposing of the limestone in a landfill, are not reasonable. A22-23. As the court noted, other alternatives would require making a 35-foot-high pile of limestone at a storage facility covering more than one square mile or throwing away approximately $1 billion worth of limestone. *Id.*; *see also* Dkt61-2:1696 (¶57).

The court also rejected Intervenors' argument that the mechanism for dealing with mining delays that are beyond the District's control, which the Decree calls "contingency events," is unreasonable or makes the deadlines "illusory." A23. The court recognized that to qualify for such an event, the District must follow prescribed procedures and obtain approval from EPA before a deadline can be extended based on a contingency event. *Id.*[9] As recognized by the district court, the Consent Decree "sets penalties that will be assessed" if there are delays in the schedule that do not qualify as contingency events; these penalties can run as high as $5,000 per day. *See* A9; SA115-16 ¶52(a).

Second, the district court rejected Intervenors' contention that the Decree should require the District to build treatment plants at CSO outfalls, which the Intervenors describe as "end-of-the-pipe" technologies. The court noted that the estimated cost of constructing such treatment plants is approximately $966 million. A23-24.[10] The court concluded that the end-of-the-pipe treatments would duplicate the TARP system's task and that,

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[9] The court also recognized (A12) that, if there are contingency-event related schedule delays, the District must implement additional green infrastructure projects. *See* SA93-94 ¶20; SA96 ¶24; SA180-81.

[10] This estimate comes from a District consultant's 2006 study of 170 outfalls, of which 7 were owned by the District. Dkt103-1:ID5628, 5668-69.

once the TARP reservoirs are available for storage, many (if not all) of the end-of-pipe treatment plants would be obsolete. Thus, the court explained, it would be "fiscally irresponsible" to construct end-of-pipe treatments now. A24.

Third, Intervenors objected to the Decree on the grounds that CSOs might still occur after TARP is completed and operational, and that certain "hydraulic events" (which the Decree terms "transient events") will occur and will cause CSOs. A25-26. The court found that even if completion of TARP and the Decree did not stop all future CSOs, this would not make the Decree unreasonable. According to the court, Intervenors' argument rested on "a fundamental fallacy" that all CSOs violate the Act, explaining that "CSOs that comply with a permit do not violate the [Act]." A26. The court also explained that the Decree reasonably allows operators to close sluice gates for transient events to prevent harm to people or property. A27. Moreover, the court emphasized that the Decree requires the District to monitor TARP's performance and if, upon completion, the TARP system has not brought the District into compliance with the CSO-related provisions of the three permits at issue, the District must analyze alternatives for bringing its system into compliance, select among the alternatives and schedule their implementation. A27; SA107-08.

The district court also rejected Intervenors' arguments that provisions of the Decree inadequately addressed: (1) post-construction monitoring (A27-30); (2) floatables (A30-31); and (3) green infrastructure (A31). The court, in sum, concluded that the Decree was reasonable, fair, adequate, and in the public interest, and granted the motion for the Decree's entry as an order of the court. A19, A32.

F. The District Court Decision Dismissing the Intervenors' Claims

After entry of the Decree, Intervenors filed a motion to set a status hearing seeking, *inter alia*, a schedule for further proceedings including discovery. Dkt124. The district court dismissed Intervenors' claims with prejudice, prior to the filing of responses by the Governments or the District. A38. The court held that the claims were barred by the CWA's citizen suit provision, 33 U.S.C. 1365(b)(1)(B), and, alternatively, that the claims were barred by *res judicata*. A35-38. The court explained that it already had considered whether the Decree required compliance with the CWA and concluded that it does because, by its terms, the Decree "could not be terminated until MWRD achieves compliance with the three NPDES permits at issue in this case." A37.

SUMMARY OF ARGUMENT

First, the district court reasonably exercised its discretion in entering the Decree. The Decree requires completion of the construction and operation of the remaining portions of the District's long term control plan on an enforceable schedule, imposes performance standards, requires post-construction monitoring, and specifies interim measures to improve water quality while the remaining portions of the TARP system are completed. It also requires that the District develop additional measures to address CSOs if, after completion of the remaining portions of TARP, monitoring shows that any discharges violate the governing NPDES permits. Thus, the Decree provides for oversight and review by the district court to ensure compliance with the NPDES permits prior to termination of this Decree (*see supra* at 18 and *infra* at 29 n. 11).

The district court properly rejected Intervenors' mischaracterizations of and misapprehensions about the effectiveness of the Consent Decree in achieving compliance with the CWA. The court also properly rejected Intervenors' contention that, as a remedy, it should require a duplicative, expensive, end-of-pipe system while TARP is under construction. Actual data on the effectiveness of the one completed tunnel and reservoir system show an average rate of 98% capture of combined flows, with two or fewer

overflows per year from 2005-2011. The tunnel element of the Calumet tunnel (even without the Thornton Reservoir) achieved an average rate of 85% capture of combined flows from 2005-2009. Moreover, if monitoring reveals that completion of the remaining elements of TARP does not bring the District into compliance with the CSO provisions of its NPDES permits, additional measures specifically targeted to address any noncompliant discharges that persist would be necessary before the Decree is terminated. This is because the Decree cannot be terminated until the District has demonstrated compliance with the CSO provisions of the NPDES permits to the district court's satisfaction.

The district court's entry of the Decree is subject to review under a highly deferential version of the abuse of discretion standard, which recognizes that the district court, in reviewing a consent decree, defers to agency expertise and "the federal policy encouraging settlement." *See United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011); *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985). Intervenors identify no material factor that the district court failed to consider nor any serious mistake in weighing the relevant factors.

Second, the district court – having found the Decree reasonable and calculated to achieve compliance with the CWA – correctly dismissed

Intervenors' claims. As Intervenors, they may appeal the appropriateness of the remedy set forth in the Decree, as they have done here. *See Whiting Paper Co.*, 644 F.3d at 372. But once it is determined that the district court properly exercised its discretion in entering the Decree, no further litigation on their claims – claims the same as those settled by the Decree – is permitted under the citizen suit provision of the CWA. Allowing Intervenors to continue to pursue their claims independently in the district court would contravene the structure of the CWA's citizen suit provision, which the Supreme Court has stated is "meant to supplement rather than to supplant governmental action." *Gwaltney Smithfield, Inc. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Permitting citizens to continue to seek relief other than that already achieved through a reasonable, fair and adequate decree between the government and a defendant would undermine the government's ability to resolve cases through such settlements. It also would undermine general principles of finality and repose. This Court should affirm.

STANDARD OF REVIEW

In reviewing the district court's entry of a consent decree, this Court is "constrained by a double dose of deference." *See Whiting Paper Co.*, 644 F.3d at 372; *see also Donovan*, 752 F.2d at 1177 ("a district court judge's

decision to approve a settlement is reviewed under a highly deferential version of the 'abuse of discretion' standard"). First, the trial court "must defer to the expertise of the agency and to the federal policy encouraging settlement," and "must approve a consent decree if it is reasonable, consistent with [the statute's] goals, and substantively and procedurally fair." *Whiting Paper Co.*, 644 F.3d at 372. Second, this Court reviews the district court's decision for an abuse of discretion. *Id.* It will only disturb the district court's decision if the appellants meet the "heavy burden" of showing that the "court ignored a material factor or made 'a serious mistake in weighing' the relevant factors." *Id.* at 374. If "the record provides a rational basis on which the district court could conclude" that the consent decree was "substantively fair," applying deference to the government's "expertise in weighing ambiguous and conflicting evidence of substantive fairness," the district court's finding of substantive fairness should not be disturbed. *Id.* at 373-74.

This Court reviews *de novo* questions of law, including application of the CWA's citizen suit provision. *See Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist. (Friends II)*, 382 F.3d 743, 751 (7th Cir. 2004) (reviewing *de novo* the district court's dismissal of CWA citizen suit); *cf. Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 492-93 (7th

Cir. 2011) (reviewing *de novo* dismissal of claims under analogous citizen suit provision in another environmental statute). Issues regarding dismissal of an action on *res judicata* grounds generally are reviewed *de novo*, except if the ruling turns on the district courts' factual determinations regarding "diligent prosecution;" findings of fact and application of law to those findings are reviewed for clear error. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 556 F.3d 603, 609-10 (7th Cir. 2009) (*Friends IV*).

ARGUMENT

I. The District Court Reasonably Exercised Its Discretion in Entering a Consent Decree that is Reasonable and in the Public Interest.

The district court reasonably exercised its discretion in entering the Decree, because the court's conclusion that the Decree is reasonable and in the public interest is supported by the record. The Decree holds the District accountable by requiring the District to implement appropriate injunctive relief to address its Clean Water Act violations, including completing its long term control plan on a practicable and enforceable schedule. The District also must comply with performance standards to optimize the operation of TARP and conduct post-construction monitoring to ensure that the District's discharges comply with its then-effective permits,

including applicable water quality standards requirements. SA99-108 (Decree ¶¶ 28-36). The Decree will not terminate until after the District demonstrates, to the satisfaction of the district court, that compliance with the requirements of the then-existing permits has been achieved, thereby holding the District accountable for remedying the violations alleged in the complaints.[11]

Intervenors concede that the district court identified the correct legal standard in evaluating the reasonableness of the Decree, but contend that the court erred in applying that standard. Op. Br. 27. Specifically, they argue that the district court's evaluation of the Decree's reasonableness is deficient in three main respects: (1) it failed to confirm that the Decree will end violations of the CWA because "TARP does not work now and, by itself, TARP will not end MWRD's CWA violations in the future" (*id.* at 34, 29-34); (2) it postponed to future generations the task of assessing and

[11] The Decree will not terminate until the district court has determined that the District has "maintained satisfactory compliance" with Section VIII of the Decree (SA134-136 ¶¶ 94(b) and 95(b)), *i.e.*, that any CSO discharges comply with the CSO requirements of the relevant NPDES permits (SA104 ¶34). Pursuant to Paragraph 34 of Section VIII in the Decree: "Upon 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 . . . NPDES Permit, as applicable, including all applicable water quality standards requirements incorporated therein." SA104.

addressing the remedy's inadequacy (*id.* at 29, 34-36); and (3) it failed to insist on "clear performance standards" by which the Decree's adequacy could be measured, now or in the future (*id.* at 29, 36-39).[12] In order to prevail, Intervenors must establish that the "court ignored a material factor or made 'a serious mistake in weighing' the relevant factors." *Whiting Paper Co.*, 644 F.3d at 374. Intervenors have not met this heavy burden. The district court performed a careful analysis in rejecting Intervenors' arguments, and the court's finding that the Decree is reasonable and in the public interest was not an abuse of discretion.[13]

A. The Consent Decree requires the District to achieve compliance with the CWA.

The district court correctly found that the Decree meets the legal standard for entry, because it is fair, reasonable, and in the public interest,

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[12] Intervenors have abandoned numerous arguments made in district court about the substantive fairness of the Decree. Most significantly, they no longer dispute the selection of Vulcan to mine the limestone, the terms of the contract between the District and Vulcan, or the timeframes the Decree establishes for completing excavation of the rough holes for the reservoirs.

[13] Intervenors highlight the City of Akron CSO settlement as an example of a court rejecting EPA's proposed consent decree. Op. Br. 27-28. But, Intervenors fail to note that, after further explanation of its terms, the district court approved the Akron consent decree as fair, adequate, reasonable and in the public interest, and entered it in January 2014, several months before their Opening Brief was filed in June 2014. *See United States v. City of Akron*, No. 5:09-cv-00272 (N.D. Ohio) (Dkt154).

consistent with the statute's goals. The injunctive relief in the Decree includes requiring the completion of TARP's remaining two massive reservoirs on a practicable and enforceable schedule followed by extensive post-construction monitoring and development of additional measures (as necessary). The Decree also meets the additional standard that Intervenors would impose (*see, e.g.*, Op. Br. 29, 34) because the injunctive relief provisions in the Decree require compliance with the District's NPDES permits and are "calculated to achieve" compliance with the CWA. *Cf. Friends IV*, 556 F.3d at 610 (in context of evaluating preclusive effect of a CWA settlement on a citizen suit, the focus is on whether the "agreement or judgment is capable of and in good faith calculated to achieve compliance with the law"). Moreover, in asserting that the Decree will not lead to compliance with the CWA, Intervenors misread or ignore data in the record evaluating the adequacy of TARP's storage capacity and the completed portions of TARP's past performance, and misconstrue the post-construction requirements in the Decree.

1. Intervenors ignore both an EPA study regarding TARP's storage capacity and existing data concerning TARP's performance, which show that TARP will have adequate storage.

In 2009, EPA evaluated the planned storage capacity of the TARP systems as they are designed today and described in Appendix A of the

Decree. JA246-55. Using conservative assumptions, EPA analyzed whether there would have been adequate storage capacity for overflows that occurred in the past, if the storage capacities for the Thornton and McCook Reservoirs had been available. EPA's analysis indicated that, had the TARP system been fully completed and functioning, the Calumet and Mainstream/Lower Des Plaines TARP systems *would have had adequate storage capacity for the combined sewer flows* under conditions such as those in 2006. JA248, 250.

The estimate used precipitation and CSO data from 2006, a year that had more precipitation than average for the Chicago area. JA246-47. The estimate conservatively assumed that all precipitation over the area would flow into the TARP systems, an overestimate of the flow that would actually go there. That is so because precipitation falls on both land and water and the amount of precipitation that falls into rivers, streams, and wetlands in the Chicago area – and not onto land that feeds precipitation into TARP – is significant. JA247. Moreover, other features that absorb precipitation also were not factored into the analysis of the precipitation amount, such as precipitation absorbed by trees, parks, and yards and precipitation removed by evapotranspiration. *Id.* These amounts were not deducted from the estimates of the amount of precipitation that would flow into

TARP. *Id.* Intervenors do not mention this EPA analysis, which is based on TARP as currently designed.

Nor do Intervenors acknowledge the capacity information from actual data on the effectiveness of the completed portions of TARP, as distinct from predictions of future performance. For the years 2005-2009, the tunnel element of the Calumet system (even without the Thornton Reservoir) achieved an average capture rate of 85% of combined sewer flows in that system. *See* JA302. For the eight years from 2005-2012, the completed Upper Des Plaines system (*i.e.*, tunnel and reservoir) achieved an average capture rate of 98% of combined flows in that system. *See* JA304; *see also* JA285-94 (CSO monitoring reports showing that the completed Upper Des Plaines TARP System has had two or fewer CSO events per year from 2005-2011).[14]

[14] As explained *supra* at 11-12, a CSO event is one or more overflows from a combined sewer system as a result of a precipitation event. SA6. For the period from 2005 to 2011, there were two or fewer CSO events per year in the Upper Des Plaines TARP system, including 2008, a year with the most precipitation ever recorded for the Chicago area. Dkt110:ID6349. The data in the record from the District's monitoring reports show CSO events as follows: 2005 – 1; 2006 – 1; 2007 – 1; 2008 – 2 (5 days but only 2 CSO events); 2009 – 2; 2010 – 2; 2011—1. JA285-94.

2. Instead of using more recent actual data, Intervenors unduly rely on a twenty-year-old study of transient events and statements of a consultant unfamiliar with TARP, and misconstrue a 2009 University of Illinois study.

Instead of addressing the actual performance data in the record on TARP's performance, Intervenors first rely (Op. Br. 18-20, 30) on a twenty-year-old "Hydraulic Transient" study (1994) (SA13-35) and argue that, even after completion, the Mainstream and Lower Des Plaines tunnels and associated reservoir would be able to convey and store only about a third of the combined sanitary and stormwater flows generated. The purpose of the 1994 study was to analyze and model transient events[15] in the Mainstream/Lower Des Plaines TARP system as the system was designed at that time, not to predict the future performance of TARP or the volume of CSOs that might occur following completion of TARP. The study, relying on only one storm event which was modified for use in the study, discussed

[15] Transient events (which sometimes involve "geysering") are defined 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's 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 tunnel diameter or tunnel end." SA87 ¶jj.

various hypothetical scenarios restricting inflow to parts of TARP to analyze effects upon transient events. SA17.

Intervenors fail to note that the McCook Reservoir has been modified since that study. In fact, the reservoir for the Mainstream tunnels analyzed in the 1994 study was planned for a different site with different design dimensions than the current McCook Reservoir. JA40-42. Intervenors failed to demonstrate that this study could accurately predict the future performance of the TARP project now underway.

Intervenors argue (Op. Br. 30) that the district court disregarded the 1994 study. Although the court did not specifically reference the 1994 study in its opinion, the court questioned counsel for Intervenors about the 1994 study during oral argument, demonstrating that the court was aware of the study. JA336-37, JA343 (Tr. 12/17/2013). Moreover, the court considered the occurrence of transient events and the possibility of CSOs remaining after TARP is completed, but found that the Decree by its terms will nonetheless achieve compliance with the CWA. *See* A26-27, A29.

Second, Intervenors argue that the District admitted in a state proceeding that TARP will not bring the District into compliance with the CWA. Op. Br. 30. However, Intervenors rely upon various statements made in the proceeding by a District consultant who stated that she was

"not familiar with the design of TARP" and did "not know how much CSO will be captured" after completion of Stage 1 of the McCook Reservoir. JA199. She was testifying on water quality impacts on designated uses from various wet weather sources, including CSOs. JA191 (Dkt100-9:ID3986). One of the very passages cited by Intervenors shows that the proffered testimony was that "other wet weather sources," such as the municipal separate storm sewers and runoff to the tributaries (JA191), can affect the dissolved oxygen in the waterways "even if CSO's [sic] are not discharging." JA192. To that end, Intervenors have not demonstrated by her testimony: (a) that the District will have CSOs after completion of TARP that will violate the District's NPDES permits or (b) that the district court abused its discretion by failing to consider an important factor.

Third, Intervenors (Op. Br. 20, citing Dkt103-4) misconstrue the findings in a 2009 University of Illinois study, Hydraulic Conveyance Analysis of the Calumet TARP System ("U of I Study" or the "Study"). This study modeled the "conveyance capacity" of the Calumet/Thornton Reservoir segment of TARP. As defined in the Study, "conveyance capacity" is the largest discharge that the system can convey without overflow at any part of the system. JA267. The Study found that, based on 2006 precipitation data, "reservoir overflow could be prevented" by pumping

flows from the Thornton Reservoir one day after a storm ends and that, under the study's modeling, there would be "no local overflows if the reservoir does not overfill." JA275; *see also* JA278 (overfill of reservoir is "prevented if pumping starts 1 day after events"). Contrary to Intervenors' assertion, the U of I Study does not state that the reservoir will overflow unless it is drained at an "elevated rate." Op. Br. 20 (citing Dkt103-4:6010 (U of I Study, included at JA275)). Moreover, though Intervenors assert there is no evidence that the District can achieve the "required [pump] rate," the reservoir pump out rate used in the study is within the applicable pumping capacity. JA268 (examining the system "as currently designed"), 275.

Importantly, maximizing flows for treatment ("increasing the pumping rate and/or decreasing the event-to-pumping interval") is also required in the Decree, as discussed *infra* at 50-51. The conclusions of the U of I Study are consistent with EPA's findings in its 2009 study and do not show that the reservoir is too small.

3. The district court considered possible future CSOs and correctly found that the Consent Decree will ensure compliance with the District's permits.

Intervenors argue that the Decree will not achieve compliance with the NPDES Permits because TARP will allow discharges of combined

sewage to occur when tunnels are full or transient events are anticipated. Op. Br. 31-32. This assertion highlights a mistake made throughout Intervenors' brief. Completion of TARP and compliance with the Decree are not the same. The Decree assures compliance with the NPDES permits and therefore with the CWA, either through TARP and the other injunctive measures specified in the Decree, or through additional measures following completion of TARP as needed prior to termination of the Decree.

Intervenors assert that throughout TARP's construction, CSOs have continued. Op. Br. 9. That is to be expected while a long term control plan is underway, as the Control Policy contemplates (*see* SA10 col. 3), and is true here where the most significant storage capacity will be in the reservoirs currently under construction. *See supra* at 13 (chart showing storage capacities). It is not a basis for faulting the Decree.

Without citing to any evidence in support of their argument, Intervenors speculate that transient events occurring during heavy rainstorms will result in "massive" discharges. Op. Br. 31-32. As noted above (*supra* at 32-33), the evidence is to the contrary. Intervenors' unsupported assertion that there will be "massive discharges of combined sewage" fails to recognize the success of the system shown by data on the

completed portion of TARP (the Upper Des Plaines System), which has had two or fewer CSO events per year from 2005 to 2011.

The district court acknowledged that there might be CSOs after completion of TARP, but recognized that the CWA and Control Policy do not categorically prohibit CSOs and that any CSOs remain subject to the District's NPDES permits. A26.[16] Importantly, the district court also recognized that the Decree requires monitoring of any such discharges and, upon completion of TARP, selecting and scheduling remedial measures to bring any remaining CSOs into compliance with then-existing NPDES permits. A27, A29.

Intervenors fail to acknowledge the role of the post-construction monitoring and evaluation requirements in the Decree in ensuring compliance with the CWA, in accordance with the Control Policy.[17] The Decree provides for such monitoring following completion of each

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[16] Intervenors suggest (Op. Br. 34-35) that all CSO discharges are prohibited by the CWA. That plainly is incorrect, as the district court recognized "CSOs that comply with a permit do not violate the Clean Water Act." A26.

[17] The Control Policy provides that post-construction monitoring provisions, including for attainment of water quality standards, apply to communities whose long term control plans were substantially developed or being implemented prior to issuance of the Policy, as is true here. 59 Fed. Reg. at 18690 (SA4).

remaining TARP system (Calumet and Mainstream/Lower Des Plaines), in accordance with a monitoring plan that meets specified requirements and must be approved by EPA. SA104-08. The Decree also provides for a post-construction monitoring report and review by EPA and IEPA, and specifies that such report must include CSO outfall monitoring results for frequency, duration, and estimated volume, and water quality monitoring results, including an analysis of the impact to water quality by any discharges from CSO outfalls. SA106-07.

If EPA or IEPA finds that CSOs in the Calumet or Mainstream/Lower Des Plaines TARP system are violating CSO requirements of the NPDES permits (SA106-08), the Decree requires the District to identify the actions it proposes to take to come into compliance, along with a schedule for implementing such measures. SA107-08. Any such plan must be made available to the public and approved by EPA. SA108 ¶36(c). Moreover, the Decree will not terminate until the district court has determined that the District has "maintained satisfactory compliance" with the CSO requirements of the relevant NPDES permits. *See supra* at 29 n.11.

Thus, Intervenors' argument that the district court failed to consider that there might continue to be CSOs in violation of the NPDES Permits is incorrect. The district court did not abuse its discretion in concluding that

the Decree's requirements relating to monitoring and development of any additional measures were reasonable. As the court recognized, the Decree cannot be terminated until the District has demonstrated "to the Court's satisfaction" that it has achieved compliance with its NPDES permits. A29.

4. The district court properly concluded that the addition of skimmer boats is a reasonable interim measure for addressing floatable materials.

Intervenors argue (Op. Br. 32-34) that the Decree is unreasonable because it "does not solve" the District's "continuing inability" to control solid and floatable materials in the CSOs. The Decree includes the Floatables Control Plan as one of the "nine minimum controls" required pursuant to the Control Policy during the interim period while the District completes construction of the reservoirs. SA5 (col. 1) (number 6 of the "nine minimum controls" is "Control of solid and floatable materials in CSOs"). *See also supra* at 6.

The Floatables Control Plan in the Decree (SA92 ¶18; SA166-69) requires the District to take additional actions beyond those it is currently implementing to control floatable debris to improve waterway cleanup operations.[18] The District currently operates two pontoon boats with nets

[18] Some of the District's outfalls have baffles. In addition, various District pump stations that, among other tasks, pump CSOs into waterways, have *Cont.*

to pick up floatables from mid-April to mid-October. The Decree's Floatables Control Plan requires the District to purchase two skimmer boats (also referred to as trash collection boats). SA168-69. Skimmer boats are more effective than pontoon boats at collecting floatables, and "are typically used to clean broad areas of open water." JA257-58 (EPA Combined Sewer Overflow Technology Fact Sheet, Floatables Control, Sept. 1999). The District may continue to use its pontoon boats for routine operations but must use the skimmer boats in response to CSO events. SA166, 168-69. Skimmer boats are a commonly used – and effective – means to remove floatables that have been discharged into waterways from CSOs or from other sources, such as windblown litter.[19] *See* JA80; JA167. Skimmer boats will be particularly effective here because they will collect floatables from multiple sources, not just the District's outfalls. JA80-81. The Decree also requires the District (subject to necessary permits and easements) to install a containment boom at one location (along Addison

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screens that capture some debris. Also, communities whose sewer systems feed into TARP implement floatables controls. For example, Chicago implements floatables controls by operating a skimmer boat, street sweeping, and modifying catch basins. *See* JA80 n.36.

[19] Skimmer boats have been used to pick up floatable materials in Milwaukee, New York City, Washington DC, Passaic, New Jersey, and Philadelphia. JA80 n.37.

Creek) where there have been occasional discharges and construction of the boom is feasible and would not impede navigation. SA169; JA81; JA167.

The Floatables Control Plan is a demonstrable improvement from the District's current program, both in terms of the technology employed (use of skimmer boats rather than solely pontoon boats with fish nets) and by increasing the CSO response operation from 6 months of the year to operation throughout the year (provided that safety so permits). SA166. The Governments also reviewed other possible interim mechanisms for addressing floatables but found that, in general, containment booms and other mechanisms were not feasible in these waterways, some of which are used for navigation and can have strong currents. *See* JA81; *see also* JA167-68.

On appeal, Intervenors do not suggest what action they believe would "solve" the "solid and floatables" issue. That is, Intervenors do not identify what they believe would be a reasonable interim measure; they argue only that the existing interim measures in the Decree are unreasonable because they will not immediately rectify discharges of those pollutants. The primary permanent remedy for the floatables and solids related violations alleged in the Governments' and Intervenors' Complaints is completion and operation of the TARP systems. Intervenors ignore this and disregard the

fact that the Floatables Control Plan in the Decree is an interim measure, and that it improves upon the existing interim measures, including by mandating year-round operations (so long as safe).

In the district court, Intervenors argued that the way to address the floatables (and sludge) issue was to construct end-of-pipe treatment plants at CSOs where there is adequate land to do so. In so arguing, Intervenors were essentially asking not for an interim measure pursuant to the Control Policy but for construction of an alternative long-term control system to TARP, at a juncture when TARP is well underway but not completed. The district court rejected Intervenors' argument, stating that end-of-pipe treatments (estimated to cost approximately $966 million) struck the court as "fiscally irresponsible," duplicative of TARP's purpose, and might be rendered obsolete upon the completion of TARP. A23-24. Thus, the district court considered the fact that the Decree does not require this "alternative" to the Floatables Control Plan and found that did not render the Decree unreasonable. *Id*. at 24.

Intervenors assert that 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." Op. Br. 32. This assertion is mistaken.

First, it fails to acknowledge that floatables will substantially decrease as TARP is completed because two new massive reservoirs will be available to store combined sewer flows and those stored flows will then receive primary and secondary treatment in the treatment facilities before discharge into the waterways. Additionally, the Decree provides that until the District achieves compliance with its applicable permits, including any floatables limitations in effect at the time, the Decree shall not be terminated. *See supra* at 29 n.11. Thus, the District will be required to control floatables after TARP is completed, as necessary to comply with the CWA.

Intervenors also assert (Op. Br. 32, 33) that the district court did not address the fact that the Floatables Plan does not address sludge or bottom deposits. To the contrary, the court addressed this argument when it rejected unspecified end-of-pipe controls suggested by Intervenors. A23-24. Solids and floatables are identified in the nine minimum controls as matters that should be addressed through interim measures. SA5 (col. 1). Thus, consistent with the Control Policy (SA5, col. 2), the Decree has interim control measures for solid and floatable materials. But prevention of sludge and bottom deposits are, like other pollutants, addressed through the long term control plan, namely TARP.

B. The district court did not postpone the determination of the Consent Decree's legal adequacy.

Intervenors next assert that the district court postponed until an undetermined point in the future the requirement that the District comply with the CWA and abdicated its ability to review the criteria by which the District's compliance with the law will be measured. Op. Br. 35. That is incorrect. Rather, the Decree requires the District to complete all segments of TARP that are not yet finished – imposing an enforceable schedule for that completion – and thereafter to monitor and determine whether and where additional measures might be required.

Specifically, the Thornton Reservoir (which will connect with the Calumet tunnel system) must be operational by December 31, 2015, and must have a verified operational plan and be in full operation within one year of that date. SA91. If monitoring that begins in 2017 reveals that discharges from the Calumet TARP system are occurring in violation of the NPDES permit, the District must develop such additional mechanisms and submit a plan containing such measures to IEPA and EPA for approval. SA107-08. Similarly, Stage 1 of the McCook Reservoir is scheduled to be operational by December 31, 2017, and must have a verified operational plan within one year of beginning operation. SA91.

If additional measures are needed, the Decree requires the District to select and schedule completion of such measures. SA107-08 ¶ 36(c). The Decree cannot terminate until compliance with the then-applicable NPDES permits has been achieved. *See supra* at 29 n.11. Accordingly, the district court has retained its ability to review the District's compliance with the CWA.

Intervenors point to other CWA consent decrees that require an already-developed post-construction monitoring program to argue that this decree is inadequate (Op. Br. 35). However, in consent decrees in CWA cases and other areas of environmental law, EPA often requires parties to submit plans for EPA approval, rather than having the plan set forth in full at the time of execution of the consent decree.[20] Accordingly, there is nothing unique or unusual about the post-construction monitoring

[20] For example, the Metropolitan St. Louis Sewer District decree, included by Intervenors as an exhibit in the district court (Dkt100-26:ID4742-4743), required submission of a post-construction monitoring plan within a year of entry of the consent decree. Similarly, in other areas of environmental law, EPA commonly requires parties to submit compliance plans, monitoring plans, and post-construction evaluation plans for EPA approval, rather than setting forth the plan in full at the time the consent decree is executed. *See, e.g.*, *United States and State of Wisconsin v. Northern States Power Co.*, W.D. Wis. No. 3:12-cv-565 (Dkt2-1 at 13-14, Consent Decree Between the United States, Wisconsin, Northern States Power Company, and the Bad River and Red Cliff Bands of the Lake Superior Tribe of Chippewa Indians; Dkt11, Order entering decree (Oct. 19, 2013)).

provisions in this Decree. The district court's approval of these provisions as part of the Decree did not constitute an abuse of discretion.

Consistent with this practice, paragraph 35 of the Decree requires the District to submit for EPA's approval a post-construction monitoring plan for the Calumet TARP system within one year of entry of the Decree and for the Mainstream/Lower Des Plaines TARP system within five years of Decree entry. SA104-06. These timeframes are keyed to the completion deadlines for these TARP segments. Moreover, the elements of the post-construction monitoring plans are specified in the Decree: (1) CSO frequency and duration monitoring, as well as estimates of CSO volumes; (2) identification of specific water quality standards parameters of concern; (3) applicable in-stream water quality monitoring; (4) determination of whether the District's CSOs are in compliance with the then-relevant NPDES permit; and (5) submission of a report describing the results of the monitoring undertaken. SA104-06. Furthermore, post-construction monitoring must commence following the completion of each TARP system. SA106 ¶ 35(d) ("MWRD shall implement the approved post construction monitoring plans after it has commenced full operation of each reservoir in accordance with Paragraphs 16(e) and 17(g) above."). Therefore, post-construction monitoring will begin as early as 2017 at the

Calumet TARP system – thus providing valuable information on the efficacy of this portion of TARP when anchored with a large reservoir. SA104-105 ¶35(a).[21]

In short, the Decree requires completion, monitoring, development of additional measures as necessary, and review by the district court for compliance. This approach is eminently reasonable and surely not an abuse of discretion by the district court.

C. The Consent Decree reasonably specifies the standards for compliance.

Intervenors assert that the district court erred in entering the Decree because the Decree has no stated performance criteria for judging whether it is working effectively and that the "performance criteria" allow an unlimited number of transient events and CSO discharges. Op. Br. 37.[22] These assertions are incorrect.

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[21] In addition to the post-construction monitoring required by the Decree, the District's NPDES permits require on-going CSO and in-stream water quality monitoring. JA92 n.48 and accompanying text.

[22] Intervenors (Op. Br. 36) repeat their argument about the monitoring provisions. That issue is addressed in Section B *supra*. Intervenors also assert (Op. Br. 47) that "the Government expressly disclaims that the Decree will result in compliance," citing ¶82 (SA128). That standard consent decree language makes clear that the District's compliance with any aspect of the Decree does not excuse it from compliance with permit and other legal requirements.

The Decree includes performance criteria requiring the District to maximize collection, storage, and treatment of combined flows in operating TARP. *See* JA83-88. For instance, the Decree requires the District to pump combined sewage from the Calumet TARP pump station at the maximum practical pumping rate subject to the maximum practical flow capable of receiving full treatment at the Calumet treatment facility. SA99-100 ¶28(d); *see also* SA101-02 ¶29(d) (same for Mainstream pump station); JA87-88. The Decree defines "Maximum Practical Flow" and "Maximum Practical Pumping Rate." SA85; *see also* JA85. The Decree also includes requirements pertaining to operation of the TARP sluice gates to maximize flows to TARP, while minimizing transient events that could injure people or TARP components. SA100, 102-04; JA89-90. Intervenors do not even argue that it would make sense to have fixed levels or numbers assigned to the operation of the sluice gates or tunnels to maximize flows; conditions vary from storm to storm. Finally, the Decree requires that any remaining CSOs after completion of TARP must comply with the District's NPDES permits, as discussed *supra* at 29 n. 11.

Intervenors also argue that the Decree contradicts EPA guidance (Op. Br. 38, citing JA182) because it lacks "quantified performance criteria." The referenced guidance document is a joint 2003 memorandum by the

Department of Justice and EPA, entitled *Negotiation of Combined Sewer Overflows Consent Decrees* (the "2003 DOJ/EPA Memo"). JA180-85. The 2003 DOJ/EPA Memo is a guidance document explaining how EPA and DOJ "intend to exercise their discretion in implementing provisions of the CSO Policy concerning judicial consent decrees to resolve CSO enforcement actions." JA185. It is not a regulation and "does not impose legally binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances." *Id.*

In any event, performance criteria cited in the 2003 DOJ/EPA Memo include, for example, provisions that storage facilities store the volume of wastewater that they were designed to store. JA182. In this case, consistent with the 2003 DOJ/EPA Memo, the Consent Decree requires the Thornton and McCook Reservoirs to meet specified design storage capacities. SA90-91 ¶¶16, 17; SA151, 153, 157 (Decree Appendix A).

Intervenors, as in the district court, again attempt to point to other consent decrees in arguing that this Decree is unreasonable. Op. Br. 37, citing Dkt100:ID3501 (JA189). As the Governments pointed out in the proceedings below, the quantified performance criteria in the cited

settlements are substantially different than Intervenors described.[23] In any event, the substantive fairness of this Decree should be evaluated based on the terms and circumstances at issue here.

Intervenors also fault the Decree for failing to require that the District complete any additional necessary projects (Op. Br. 37-38) and fault the district court for failing to determine whether compliance with the CWA will be achieved (Op. Br. 39). It is not unusual for a Decree to leave open the precise nature of alternative mechanisms that will be required if necessary to completely achieve the aim. For example, in reviewing a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) consent decree, the Sixth Circuit addressed an argument that the consent decree "did not adequately define defendants' obligations in the event" the principal method failed to achieve established cleanup levels. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1421 (6th Cir. 1991). The consent decree required the defendants to fund and implement

[23] For instance, Intervenors (Op. Br. 37) cite their lower court brief that mischaracterized the performance criteria in other consent decrees by omitting the term "in a typical year" from their description of the performance criteria. JA189. In fact, in each of the cited settlements, the performance criteria do not set an absolute maximum, but a number of CSO events in a "typical year" which is based on average annual precipitation over a specified period of years. *See* Dkt110:ID6346-47; Dkt100-23:ID4448, 4452; Dkt100-27:ID4820, 4824, 4829-30.

an alternative, permanent remedy, if the methods in the consent decree were ineffective but it did not specify the alternative remedy. *Id.* at 1420. As the Sixth Circuit explained, "[t]he decree's failure to specify an alternative remedy may in fact be in the public's best interest, as it allows the parties to consider the nature of remaining contamination, the effect of changed . . . conditions, and the use of new remedial technologies." *Id.* at 1438.

Similarly, if TARP does not prove adequate to bring the District into compliance with its NPDES permits, the District must develop, select, publish on its website, and schedule implementation of additional remedial mechanisms (if any are needed). Any such mechanisms will be tailored to conditions that exist once the current Long Term Control Plan is in place. Moreover, the Decree requires that upon initiating full operation of the Calumet and Mainstream/Lower Des Plaines TARP systems, "any CSO discharges shall comply with the CSO requirements" of the then-effective NPDES permits. SA104 ¶34. Accordingly, because the Decree requires that any post-TARP completion CSOs comply with the District's permits, the Decree does not authorize an "unlimited number of Transient Events and CSO discharges," as Intervenors contend. Op. Br. 37.

In sum, the district court considered the relevant factors and reasonably exercised its discretion in finding that the Decree is substantively fair, designed to remedy the CWA violations at issue in the enforcement action, and in the public interest. A19, A29, A32. It is consistent with the Control Policy and the CWA for the District to complete the CSO Long Term Control Plan and not duplicate its functions at significant cost, especially where the data indicate that the portions that have been completed are operating well and that portions yet to be completed are likely to operate well. By supplementing TARP with floatables control and green infrastructure programs to reduce the volume of stormwater into TARP, and by providing a requirement to develop and schedule remedial control measures if post-construction monitoring shows post-TARP completion violations, the Decree is designed to achieve compliance with the CWA (indeed, it expressly requires compliance with the CWA), and is in good faith calculated to do so. Intervenors have failed to meet their heavy burden of demonstrating that the court abused its discretion in entering the Decree.

II. The District Court Correctly Dismissed Intervenors' Claims Against the District Because They Were Resolved in the Consent Decree.

Entry of the Decree resolved all claims between EPA, the State, and the District, claims that the district court determined were "the same as" those that had been set out by Intervenors. A36; *see also* JA26i (Dkt47:ID1098) (Intervenors' complaints "share common issues of law and fact" with the Governments').[24] The district court correctly concluded that dismissal was mandated under either the citizen suit provision of section 1365 or principles of *res judicata*. This Court should affirm.

The Clean Water Act authorizes a citizen to bring a civil action to abate violations of the Act in certain circumstances. 33 U.S.C. 1365(a)(1) & (b)(1). As relevant here, after giving sixty days' notice to EPA, the affected State and the alleged violator, a citizen may "commence" a civil action on his or her own behalf against any person who is alleged to be in violation of an effluent standard or limitation under the Act or an order issued by EPA or a State with respect to such a standard or limitation. *Id.* But the Act also

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[24] Below Intervenors acknowledged that their claims in this case mirrored the Governments' claims and related to the same discharges. *See* Alliance Group's Memorandum of Law in Support of Motion to Intervene Dkt18:ID718; NRDC Group's Reply in Support of Motion to Intervene Dkt43:ID1013-14, 1022 (JA23-24); Reply of Alliance for the Great Lakes and Environmental Law and Policy Center in Support of Motion to Intervene Dkt44:ID1067 (JA25).

limits when citizens can pursue their own action. 33 U.S.C. 1365(b)(1). Specifically, it provides that "[n]o action may be commenced" by a citizen "if the [EPA] 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." *Id.*

Where, as here, the Government filed and is diligently prosecuting an action to require compliance, a citizen is statutorily prohibited from commencing its own action; instead, the citizen may only "intervene as a matter of right." *Id.* That structure demonstrates that a "citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. If citizens could seek relief that the EPA chose to forgo, "then the [EPA's] discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities." *Id.* at 60-61. Congress did not intend for the citizens' role to be "potentially intrusive" but, rather, "to permit citizens to abate pollution when the government cannot or will not command compliance." *Id.* at 61-62; *cf. Friends II*, 382 F.3d at 759 n.9 (CWA should not be read to prevent government authorities from achieving a settlement as to conduct that is the subject of a citizen complaint because doing so likely would lead to underenforcement of the CWA); *Supporters to Oppose*

Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1324 (7th Cir. 1992) (Resource Conservation and Recovery Act citizen suits "serve as goads" without displacing the government "as the principal enforcer"); (*Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (Clean Air Act precludes citizens from second-guessing EPA's assessment of an appropriate remedy). As the Sixth Circuit stated in *Ellis* in the context of the CAA's citizen suit provisions (which are parallel to those in the CWA), a private citizen cannot seek to obtain relief on more stringent terms than those worked out by EPA or a State because that "fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the State and private citizens, all of which permit citizens to act where the EPA has 'failed' to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view." 390 F.3d at 477.

Here, consistent with section 1365, Intervenors did not seek to commence a new suit, but instead intervened in EPA's and the State's enforcement action, asserting the same violations of the law.[25] The district court initially limited the scope of their participation in the litigation to

[25] Three Intervenors had earlier filed a suit involving two of the claims at issue here, and one not at issue here, but that lawsuit was not joined with this one. The question presented here is the proper disposition of Intervenors' claims in *this* suit.

filing briefs in support or opposition to the Consent Decree: "If the intervenors want additional involvement in the case once the governments have filed their motion to enter a consent decree, they may seek the Court's permission at that time." JA26i.

The district court's decision to limit the scope of intervention to challenging the Consent Decree was correct and consistent with the CWA. *Cf. Gautreaux v. Pierce*, 743 F.2d 526, 530 (7th Cir. 1984) (affirming district court's ruling that relief sought by Intervenors was beyond the scope of the original limited intervention). Intervenors cannot press their same claims in this case after entry of the Decree. What Intervenors can do (and have done) in this case is challenge the Decree, *i.e.*, to challenge whether the Decree "is reasonable, consistent with [the statute's] goals, and substantively and procedurally fair." *Whiting Paper Co.*, 644 F.3d at 372. To allow Intervenors to continue with the Government-commenced litigation after the parties' settlement would be inconsistent with the structure and purpose of the Act's citizen-suit provision – it would allow them to "supplant governmental action," which is exactly what the Supreme Court has explained this provision prohibits. *Gwaltney*, 484 U.S. at 60. It would effectively allow a citizen to "commence" and pursue its own civil action within an existing government action even after the government has

commenced its own action, as here. That is not consistent with the Act's provision that prohibits commencement of an action under such circumstances. *See* 33 U.S.C. 1365(b)(1)(B).

Allowing Intervenors to continue to pursue their claims also would make it extremely difficult, if not impossible, for governments to resolve cases through consent decrees because a defendant would nevertheless be exposed to the expense of ongoing litigation and the risk of additional injunctive relief. The district court was therefore correct that the Act's citizen-suit provision required dismissal of Intervenors' claims once the court found the Decree to be fair, reasonable and in the public interest.

That Intervenors' claims were properly dismissed once the Decree was entered is only underscored by the process followed for entry of the Decree and this current appeal. That is, Intervenors were able to submit and have the district court consider their objections to the proposed Decree. But if Intervenors' claims survive entry of the Decree, one is left to wonder why Intervenors would file objections to the proposed Decree at all because, under Intervenors' theory, they would be free to continue to litigate their claims even after entry of the Decree by the district court. Indeed, because entry of the Decree necessarily meant that Intervenors' claims here were dismissed, Intervenors have standing to appeal; otherwise

the judgment would not be adverse to them, they would not be injured by entry of the Decree, and they would lack standing to appeal the Decree's entry. *See Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997) ("It is well-established that permission to intervene in a district court action does not automatically confer standing to appeal."). As the Court explained in *Transamerica*: "The analysis of standing to appeal focuses on injury caused by the judgment rather than injury caused by the underlying facts." *Id.*

Intervenors' argument (Op. Br. 39-51), that some additional review of the district court's dismissal of its claims, even after the court found the Decree to be reasonable, fair and adequate, is required, lacks merit. They argue that the district court needed to find there had been diligent prosecution by the Governments before dismissing their suit. (Op. Br. 42-44). They misconstrue the scope of their right to intervene under section 1365.

Intervenors rely principally upon this Court's decision in *Friends II, 382 F.3d at 764-65.* There the Court considered what effect the entry of a consent agreement in a lawsuit subsequently filed by the State of Wisconsin, in which Friends did not seek to intervene, had on Friends' prior-filed and still pending suit. *See id.* at 748. The Court determined that

res judicata would apply to bar the citizen's action if the government was in privity with the citizen plaintiffs and that privity would exist if the government was diligently prosecuting its enforcement action. In analyzing whether the government was diligently prosecuting the citizens' claims, the Court considered whether the consent decree "is capable of requiring compliance with the Act and is in good faith calculated to do so." *Friends IV*, 556 F.3d at 606; *see also Friends II*, 382 F.3d at 759. But, consistent with the language of section 1365, it was only because the plaintiffs in *Friends II* had commenced their own *prior* suit (as opposed to intervening in the government's suit, as here) that caused the court to undertake the diligent prosecution inquiry at all. *Id.* at 759. Here, Intervenors did not commence their own suit; they sought leave to intervene in the Governments' suit.

Accordingly, the district court did not need to consider whether there had been diligent prosecution because *Friends II* establishes the relevant inquiry only for dismissal of a citizen's *separate* suit, not for dismissal of an intervenor from the Governments' suit that has been settled under a reasonable, fair and adequate consent decree. The same rationale distinguishes the three district court decisions cited by Intervenors, all which involved citizens' suits commenced under section 1365, not

intervention by a citizen in the government's suit, as here. *See Borough of Upper Saddle River v. Rockland Cnty. Sewer Dist. #1*, 16 F. Supp. 3d 294, 301 (S.D.N.Y. 2014); *Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 896, 905 (S.D. W. Va. 2010); *St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*, Nos. 07-cv-739-J-34TEM, 07-cv-747-J-34MCR, 2010 WL 745494 at *1 (M.D. Fla. Mar. 1, 2010); *see* Op. Br. 49. It also distinguishes *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008) (citizen CWA suit mooted by subsequent government enforcement action), and *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 933 F.2d 124 (2nd Cir. 1991) (same).

Regardless, even if the *Friends II* inquiry were required here, it is satisfied. Here, the district court correctly determined that the Decree is capable of requiring compliance with the Act and is in good faith calculated to do so. A37. That is the test established by *Friends II*. 382 F. 3d at 759.[26] Indeed, as the district court noted, the Decree, by its own terms, cannot be terminated until the District completes construction of TARP on the schedule prescribed by the Decree and thereafter achieves compliance with the governing NPDES permits. *See* A37. The court, thus, specifically

[26] Intervenors also assert that the district court should have determined, as part of its diligent prosecution analysis, that there was no "realistic prospect" that violations would continue. Op. Br. 45.

addressed the prospect of continuing violations in its diligent prosecution analysis.

And although *res judicata* has "nothing to do with how issues are resolved within a single case," *Robinson v. City of Harvey*, 617 F.3d 915, 916 (7th Cir. 2010), the district court's judgment should be affirmed because the same judicial policies that animate "the technical rules of preclusion," *i.e.*, a concern for finality and repose, apply with equal force here. *Arizona v. California*, 460 U.S. 605, 619 (1983).

Illustrative is *Arizona*, where a group of Indian tribes intervened in a suit involving the Colorado River. The Supreme Court, years earlier in the same case, entered a decree adopting a Special Master's report that set out a quantity of river water for future use by the tribes. 460 U.S. at 609-10. The tribes' interests were found to have been adequately represented by the United States, and in those earlier proceedings the federal government had won the tribes a "complete victory." *Id.* at 617. Nonetheless, the tribes, appearing for the first time on their own behalf years later, asked the Court to modify the prior decision and increase their water allotment. *Id.* The Court refused the tribes' request, although it recognized along the way that neither the law-of-the-case doctrine nor *res judicata* strictly compelled that

result. *Id.* at 618-19. Instead, and as relevant to *res judicata*, the Court explained:

> It is clear that *res judicata* and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Id. at 619 (citations omitted) (quoting *Montana v. United States*, 440 U.S. 147, 153–154 (1979)).

Here, likewise, Intervenors had a full and fair opportunity in the district court to argue their position regarding the inappropriateness of the Decree, and the district court nonetheless entered a final judgment by approving the Decree, which it found to be "reasonable, fair and adequate." A32. Although *res judicata*, as in *Arizona v. California*, is not "strictly applicable" because the court dismissed Intervenors in the same case (as opposed to a later one), *id.* at 619, the result is the same. The issues presented by Intervenors were fully resolved. Intervenors have the right to appeal. *See Whiting Paper Co.*, 644 F.3d at 372. They do not have the right to continue litigating the Governments' settled claims in the district court.

Thus, no matter how the dismissal of the claims in Intervenors' complaint is analyzed, the district court properly dismissed them. There is no clear error in its factual determination, weighing all the evidence and providing deference to the agency's technical expertise, that the Decree resolved the claims in a manner that is calculated to achieve and, indeed, requires compliance with the relevant NPDES permits. This Court should reject Intervenors' efforts to exact a different settlement, or different unspecified injunctive relief, where an existing consent decree is in place and is designed to achieve compliance with the CWA through completing construction of the largest tunnel and reservoir system in the country on an enforceable schedule, enhancing the District's existing floatables program, implementing a green infrastructure program in the interim, and requiring post-construction monitoring and development and scheduling of additional measures where needed to achieve compliance with the NPDES permits.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,896 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Katherine W. Hazard
KATHERINE W. HAZARD

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Katherine W. Hazard
KATHERINE W. HAZARD

STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter 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 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 402, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 880; amended Pub.L. 95-217, §§ 33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub.L. 100-4, Title IV, §§ 401 to 404(a), (c), formerly (d), 405, Feb. 4, 1987, 101 Stat. 65 to 67, 69; Pub.L. 102-580, Title III, § 364, Oct. 31, 1992, 106 Stat. 4862; Pub.L. 104-66, Title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub.L. 106-554, § 1(a)(4) [Div. B, Title I, § 112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; Pub.L. 110-288, § 2, July 29, 2008, 122 Stat. 2650; Pub.L. 113-79, Title XII, § 12313, Feb. 7, 2014, 128 Stat. 992.)

ADD. 1

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1365

§ 1365. Citizen suits

Currentness

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) 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.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

ADD. 2

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term “effluent standard or limitation under this chapter” means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,. [1]

(g) “Citizen” defined

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For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 505, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 888; amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

Notes of Decisions (823)

Footnotes

1 So in original.

33 U.S.C.A. § 1365, 33 USCA § 1365

Current through P.L. 113-180 approved 9-26-14

End of Document

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ADD. 4

Case: 14-1776 Document: 41 Filed: 12/04/2014 Pages: 84

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 415. Environmental Safety
Act 5. Environmental Protection Act (Refs & Annos)
Title III. Water Pollution (Refs & Annos)

415 ILCS 5/12
Formerly cited as IL ST CH 111 1/2 ¶1012

5/12. Actions prohibited

Effective: August 24, 2012
Currentness

§ 12. Actions prohibited. No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

(b) Construct, install, or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

(c) Increase the quantity or strength of any discharge of contaminants into the waters, or construct or install any sewer or sewage treatment facility or any new outlet for contaminants into the waters of this State, without a permit granted by the Agency.

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

(e) Sell, offer, or use any article in any area in which the Board has by regulation forbidden its sale, offer, or use for reasons of water pollution control.

(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

No permit shall be required under this subsection and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, [1] and regulations pursuant thereto.

For all purposes of this Act, a permit issued by the Administrator of the United States Environmental Protection Agency under Section 402 of the Federal Water Pollution Control Act, [2] as now or hereafter amended, shall be deemed to be a permit issued

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by the Agency pursuant to Section 39(b) of this Act. However, this shall not apply to the exclusion from the requirement of an operating permit provided under Section 13(b)(i).

Compliance with the terms and conditions of any permit issued under Section 39(b) of this Act shall be deemed compliance with this subsection except that it shall not be deemed compliance with any standard or effluent limitation imposed for a toxic pollutant injurious to human health.

In any case where a permit has been timely applied for pursuant to Section 39(b) of this Act but final administrative disposition of such application has not been made, it shall not be a violation of this subsection to discharge without such permit unless the complainant proves that final administrative disposition has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

(g) Cause, threaten or allow the underground injection of contaminants without a UIC permit issued by the Agency under Section 39(d) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any regulations or standards adopted by the Board or of any order adopted by the Board with respect to the UIC program.

No permit shall be required under this subsection and under Section 39(d) of this Act for any underground injection of contaminants for which a permit is not required under Part C of the Safe Drinking Water Act (P.L. 93-523), as amended,[3] unless a permit is authorized or required under regulations adopted by the Board pursuant to Section 13 of this Act.

(h) Introduce contaminants into a sewage works from any nondomestic source except in compliance with the regulations and standards adopted by the Board under this Act.

(i) Beginning January 1, 2013 or 6 months after the date of issuance of a general NPDES permit for surface discharging private sewage disposal systems by the Illinois Environmental Protection Agency or by the United States Environmental Protection Agency, whichever is later, construct or install a surface discharging private sewage disposal system that discharges into the waters of the United States, as that term is used in the Federal Water Pollution Control Act, unless he or she has a coverage letter under a NPDES permit issued by the Illinois Environmental Protection Agency or by the United States Environmental Protection Agency or he or she is constructing or installing the surface discharging private sewage disposal system in a jurisdiction in which the local public health department has a general NPDES permit issued by the Illinois Environmental Protection Agency or by the United States Environmental Protection Agency and the surface discharging private sewage disposal system is covered under the general NPDES permit.

Credits

P.A. 76-2429, § 12, eff. July 1, 1970. Amended by P.A. 78-862, § 1, eff. Sept. 14, 1973; P.A. 82-380, § 1, eff. Sept. 3, 1981; P.A. 84-1320, § 30, eff. Sept. 4, 1986; P.A. 86-671, § 1, eff. Sept. 1, 1989; P.A. 92-574, § 5, eff. June 26, 2002; P.A. 96-801, § 10, eff. Jan. 1, 2010; P.A. 97-1081, § 20, eff. Aug. 24, 2012.

Formerly Ill.Rev.Stat.1991, ch. 111 ½, ¶ 1012.

Notes of Decisions (67)

Footnotes

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1 33 U.S.C.A. § 1251 et seq.

2 33 U.S.C.A. § 1342.

3 42 U.S.C.A. § 300h et seq.

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Current through P.A. 98-1125 of the 2014 Reg. Sess.

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