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

UNITED STATES OF AMERICA, STATE OF ILLINOIS, Plaintiffs, NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Plaintiff-Intervenors, v. METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Defendant.	Case No. 1:11-cv-08859 Hon. George M. Marovich

RESPONSE IN OPPOSITION OF NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, INC. AND PRAIRIE RIVERS NETWORK TO THE UNITED STATES' AND STATE OF ILLINOIS' MOTION TO ENTER CONSENT DECREE

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SUMMARY OF ARGUMENT

Plaintiff-Intervenors Natural Resources Defense Council, Inc., Sierra Club, and Prairie Rivers Network (NRDC Group) respectfully request that this Court deny the motion by the United States on behalf of the Environmental Protection Agency (USEPA) and State of Illinois on behalf of the Illinois Environmental Protection Agency (IEPA) (Governments) to enter the Consent Decree (CD).[1] After more than 40 years of planning and construction of the Tunnel and Reservoir Plan (TARP) and 10 years of negotiating with the Metropolitan Water and Reclamation District of Greater Chicago (MWRD) over its continuous dumping of untreated sewage into the Chicago River in violation of the Clean Water Act (CWA), the Governments have done little more than order MWRD to continue implementing TARP, *despite admitting that TARP may not work*.

The Governments have not negotiated a hard bargain with MWRD. They have simply swallowed MWRD's existing plan whole, asking for no meaningful changes to the status quo. The CD allows MWRD to continue its decades-long pattern of continually pushing back TARP's completion date, currently estimated at 2029. Even on this extraordinarily protracted time scale, the CD will not eliminate combined sewer overflows (CSOs) or prevent MWRD from violating water quality standards. The Governments and MWRD admit that CSOs may continue, with undetermined frequency, after TARP is completed. Indeed, MWRD's position in proceedings before the Illinois Pollution Control Board (IPCB) is that TARP will not eliminate CSOs and water quality impacts will continue after TARP's completion.

Additional severe deficiencies abound. The Governments admit that they *do not know which and how many of the region's CSOs their settlement addresses* – the CD is internally inconsistent as to whether it covers all CSOs or only the fraction of CSOs controlled directly by MWRD. The CD does not set forth meaningful performance criteria for TARP, such as defining the number of overflow events that may occur or other quantitative limits on CSO discharges. It

[1] Alliance for the Great Lakes and ELPC (Alliance Group) join in this Opposition. Additionally, the Alliance Group has submitted a separate memorandum in opposition to the Governments' motion to enter (Alliance Resp.) in which the NRDC Group joins.

does not require a sufficient monitoring plan to demonstrate that TARP, if and when it is finally completed, has effectively addressed the violations of the CWA's water quality standards alleged in the Governments' Complaint (which available evidence suggests it will not).

The Governments' wholesale adoption of the status quo is insufficient under the CWA, which requires that the Governments carefully scrutinize any proposed resolution to ensure that it is in the public interest. Fortunately, this Court has the opportunity to subject the CD to the scrutiny that the Governments failed to give it. This Court can, and must, ensure that any settlement purporting to resolve the Chicago area's severe combined sewage problems does so. If the CD does not meet this basic standard, the Court should send it back to the Governments with an order that they do their job. Indeed, a court recently did just that rejecting a proposed CSO consent decree for Akron, Ohio. *See United States v. City of Akron*, 794 F. Supp. 2d 782 (S.D. Ohio 2011).

Importantly, as the Governments' own experts maintain, the timing of TARP is completely dependent on the regional market for quarried stone. TARP implementation is currently proceeding apace, and will continue with or without the CD, as it has for almost 40 years. Since the CD does little more than rubber-stamp what MWRD is already doing, built-in delays and all, entering it will make no difference in the overall timetable one way or the other. Thus, an order from the Court rejecting the CD would not slow anything down. There is no reason not to require the Governments to take the time to negotiate a proper CD that will end the violations alleged in the Complaint.

The Governments have squandered whatever deference that might have been owed when they admitted that they did not perform sufficient analysis to know whether the CD will solve the identified CSO problem, or what portion of that problem the CD addresses. A Court-approved CD under its current terms would saddle the entire Chicago region with a costly non-solution to the problem of untreated sewage flowing into our rivers and Lake Michigan. Indeed, this CD is patently weak when compared to other CSO consent decrees that USEPA has entered into with municipalities around the nation. These consent decrees (with the exception of Akron's, which a

court rightfully rejected as inadequate) set forth clear, quantitative performance criteria and contain detailed monitoring plans to ensure that the performance criteria and water quality standards are met. The Governments have given the Chicago area short shrift.

To be clear, NRDC Group does not take the position that TARP should be scrapped and the parties should go back to the drawing board. After 40 years of TARP implementation, it is too late for that. But it is certainly not too late for the Governments to take a hard look at TARP to determine what improvements can be made to it, additional measures taken, and performance measures put in place to ensure that the problem will be solved when TARP is completed, and to require real improvements to water quality between now and TARP completion.

Accordingly, this Court should reject the CD. This Court should decline to put its imprimatur on a non-solution to the Chicago region's CSO problems, which its own authors have not adequately evaluated and have not remedied as required by law.

REGULATORY AND FACTUAL BACKGROUND

A. The CWA And Water Quality Standards

Since its enactment in 1972, the express goal of the CWA is to make all waters of the United States "fishable and swimmable" – *i.e.* clean enough to support these sensitive uses. 33 U.S.C. § 1251(a)(2). To achieve that goal, the CWA requires states to designate for each water body in their jurisdiction the highest use that is attainable using available technology and practices. The states then establish water quality standards, like those the Government alleges MWRD has violated, to support the selected use. (*See* Doc. # 1, ID # 10-13.)[2]

State agencies, to whom permitting authority has been delegated by USEPA, then issue National Pollution Discharge Elimination System (NPDES) permits for "point sources," meaning any discrete conveyance of pollution to a water body, including CSOs. NPDES permits are required to contain provisions ensuring that discharges from the permitted point source do not

[2] Throughout NRDC Group's Response in Opposition to Entry of Consent Decree, NRDC Group will refer to pages of documents previously filed with the Court by their ECF identifiers as "Doc. #__, ID #__." NRDC Group will refer to exhibits filed with this Response in Opposition either by name or as "Ex. __ at __," with the page number referencing the internal page number identified in the referenced documents.

cause or contribute to an exceedance of the water quality standards that have been established to protect the designated uses. 33 U.S.C. § 1311(b)(1)(C), 1312, 1342(a); 40 CFR § 122.44(d).

In most of the Chicago Area Waterway System (CAWS), the IPCB has established varying use designations for different reaches of the CAWS and different purposes. As alleged in the Complaint, IPCB has promulgated water quality standards to protect these designated uses, including for dissolved oxygen (DO), which must not drop below certain levels or aquatic organisms cannot breathe. (*See* Doc. # 1, ID # 11-12.) Similarly, there are narrative criteria for the CAWS requiring that the waters "shall be free from unnatural sludge or bottom deposits, floating debris, visible oil, odor, unnatural plant or algal growth, or unnatural color or turbidity." (Doc. # 1, ID # 12-13.)

B. The Combined Sewer Overflow Control Policy

CSOs are the product of the combined sewer systems (CSSs) existing in Chicago and the many municipalities in the greater Chicago area. In a CSS, sanitary sewage and stormwater runoff flow into a single conveyance system, which sends it to a publicly owned treatment works (POTW) to be given primary and secondary treatment before it is discharged to a waterbody. *See* CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994), § I.A., attached as Ex. 1. However, during periods of heavier rain, the volume of combined sewage and stormwater runoff overwhelms the capacity of the POTW, and must be discharged through a CSO outfall before it is treated by the POTW. This discharge results in a CSO – a direct discharge of untreated sewage combined with polluted stormwater runoff into the water. Aside from the obvious impact of raw sewage on recreational uses, CSO events also cause DO levels to drop precipitously, sometimes down to zero, and cause violations of narrative standards concerning offensive conditions such as the one in effect in the CAWS.[3] (*See* Doc. # 1, ID # 13-15.)

In 1994, USEPA promulgated the CSO Control Policy to address the threat to water quality posed by CSOs. The CSO Control Policy was designed to ensure that POTWs design

[3] *See* Alliance Resp., Background I, for a more complete description of the impact of CSOs on water quality and public health.

effective solutions to their CSO problems, and that proper limits are established in NPDES permits for CSOs. *See* Ex. 1, § 1.A. In 2000, Congress enacted the Wet Weather Water Quality Act, which expressly incorporated the CSO Control Policy in its entirety into the CWA through new CWA § 402(q):

> Each permit, order, or decree issued pursuant to this chapter [the CWA] after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

33 U.S.C. § 1342(q). Thus, under the terms of the CWA, both NPDES permits and CSO enforcement consent decrees, such as the one at issue here, must comply in all respects with the CSO Control Policy. USEPA has made it clear in CSO Control Policy guidance documents that where, as here, an LTCP is in existence at the time CD negotiations commence, if the LTCP is not consistent with the CSO Control Policy, "then the LTCP should be modified during the negotiations or under a schedule set forth in the consent decree, to make it consistent with the Policy." (Doc. # 61-7, ID # 2619.)

The CSO Control Policy establishes a detailed set of steps that must be implemented by CSS communities to curb pollutant discharges from CSO outfalls and meet NPDES permitting requirements. Ex. 1, Section 1.A. Those specific directives also apply to enforcement authorities under Section 402(q) of the CWA. First, CSO dischargers are required to fully monitor, evaluate, and characterize their system to lay the groundwork for developing a plan to control CSOs. *Id.*, §§ II.A. & II.C.1. Next, they are required to develop a Long Term Control Plan (LTCP) for the CSOs. In developing the LTCP, the CSO Control Policy requires (1) that a full range of alternatives be evaluated, *id*., § II.C.4, (2) the LTCP be implemented on "a "fixed-date project implementation schedule" that achieves compliance "as soon as practicable," *id*, § II.C., (3) any selected LTCP alternative be shown capable of meeting CWA requirements upon completion. *Id.*, § II.C.4.

C. Development Of TARP

TARP is a public works project originally designed as a means of controlling severe flooding in the Chicago region. (Doc. # 61, ID # 1526.) The concept was to capture combined sewage and stormwater that the MWRD treatment system could not handle, to curb CSOs and prevent backups into residents' basements. TARP has been in process for more than four decades, based on plans developed in the early 1970s. (*See* Doc. # 61-3, ID # 1983-89.) Excavation of the as-yet incomplete Thornton, McCook I and McCook II reservoirs is being conducted by private mining companies, such that the pace of completion of TARP is directly tied to the market for quarry rock. (*See* Alliance Resp., Background II.A.)

1. Assessment of TARP performance

Reports concerning the TARP system have been prepared by primarily the Army Corps of Engineers (Corps) over the course of its development. The purpose of the Corps studies was to assess the federal interest in funding TARP as a flood control program. (*See* Doc #. 61-5, ID # 2159; Deposition of Dean Maraldo (US Dep.) at 142:13-143:16, attached as Ex. 2.)[4] In the initial studies, TARP was divided into two phases, and USEPA and MWRD recognized the initial first phase tunnel construction as a pollution control project. (*See* Doc. # 61-5, ID # 2025, 2055.) The second phase storage reservoirs served primarily non-pollution control purposes. (Doc # 61-5, ID # 2025.) Consistent with this division between the tunnels and the reservoirs, early assessments predicted that TARP would have almost completely eliminated biological oxygen demand (BOD) – the reason CSOs result in DO level drops – following completion of the tunnels in phase one. (*See* Doc. # 61, ID # 2072.)

The Governments have not reassessed or updated those early studies to determine whether the assumptions remain true today. (US Dep. at 135:17-138:24.) In fact, these outdated studies have turned out to be overly optimistic, as DO violations have continued (and are the

[4] Dean Maraldo, USEPA's Chief of Water Enforcement and Compliance Assurance Branch for Region 5, and Sydney Alan Keller, IEPA's Manager, Permits Section, Division of Water Pollution Control, were USEPA's and IEPA's 30(b)(6) witnesses with respect to whether CSOs would be reduced upon completion of TARP and other questions. (*See* 30(b)(6) Deposition Notices, attached as Ex. 3.)

subject of the Governments' Complaint) despite the completion of the portion of TARP that were projected to resolve DO problems. (*See* Doc. # 1, 13-15; Doc. # 61, ID# 1524; MWRD Continuous DO Monitoring Reports (2009-2011), attached as Exs. 4-1, 4-2 and 4-3.) The historical Corps' reports also did not address TARP in its current form as embodied in the CD. Rather, the Corps' reports assessed the projected efficacy of TARP based on larger proposed reservoirs than those required by the CD. (*See* Alliance Resp., Analysis II.A.1.) Even so, the Corps' reports concluded that the larger reservoirs that were initially considered would not be completely effective at eliminating CSOs or reversals to Lake Michigan (although they were projected to eliminate more than the current scaled-back plan). (*See id*.)

The Governments have not comprehensively modeled TARP to determine whether it would eliminate or reduce CSOs or result in MWRD meeting water quality standards. (*See* US RFA Resp. Nos. 2-3, 88, attached as Ex. 5, IEPA RFA Resp. Nos. 2-3, 88, attached as Ex. 6) The Governments have relied on data and modeling provided by MWRD, except that USEPA also created highly simplified estimates of TARP performance based on the capacity of the reservoirs. (*See* Alliance Resp., Analysis II.A.2., describing multiple significant flaws of modeling analysis.)

MWRD has also discussed TARP's anticipated performance in recent IPCB proceedings to update water quality standards for the CAWS, introducing evidence and arguing – as recently as six days ago – that TARP's completion would neither eliminate CSOs nor resolve the water quality impacts they cause. (*See* MWRD's Response to USEPA's Comments (August 30, 2013) at 14-15, attached as Ex. 6A; Excerpts of Testimony of Dr. Adrienne Nemura, IPCB-R08-9 (June 27, 2011) at 11, 126-27, attached as Ex. 7; Written Responses to Illinois USEPA's Pre-Filed Questions for MWRDGC's Witness Adrienne D. Nemura, IPCB-R08-0 (June 17, 2011) at 7-8, attached as Ex.8; Excerpt of Testimony of Dr. Adrienne Nemura, IPCB-R08-9 (September 24, 2008) at 118-119, attached as Ex. 9; Excerpt of Testimony of Samuel Dennison, IPCB-R08-9 (February 17, 2009) at 89-90, attached as Ex. 10.)

2. Timing of TARP implementation

Implementation of TARP has been repeatedly delayed over the course of its implementation. In 1972, TARP was "scheduled on a ten-year construction period, commencing in 1973 and totally operational by the end of 1982." (Doc. 61-3, ID 2010.) Since that time, the deadline for completion of TARP has regularly slipped, culminating (thus far) in the proposed 2029 completion date now suggested in the CD.

In a 1999 letter, MWRD assured IEPA that mining at the Thornton reservoir would be completed in 2013, McCook Stage 1 would be completed in 2009, and McCook Stage 2 would be completed in 2017. (Ex. 11 at 3.) By the time the 2002 NPDES permits were released the dates for Thornton had slipped to 2014, McCook Stage 1 to 2009, and McCook Stage 2 to 2015, in IEPA's non-binding, "for informational purposes," schedule. (*See* Doc # 61-3, ID # 1941, 1959, 1977.) In the draft renewal of these NPDES permits in 2002 (which still remain pending in draft with IEPA), these "informational" completion dates were pushed back again, with McCook Stage 1 date slipping to 2015, and the McCook Stage 2 date slipping to 2024. (*See* Draft 2009 Permits for Stickney, Calumet and Northside, attached as Ex. 12.)

By 2010, these dates further slipped, as indicated in MWRD's December, 2010 TARP Status Report. (Ex. 13.) The 2010 Status stated that Thornton was slated for completion in 2015, McCook Stage 1 in 2017, and McCook Stage 2 in 2029. (*Id.* at 3.) These are the completion dates that were included in the CD.

3. Rejection of supplemental measures in addition to TARP

MWRD considered but rejected measures in addition to TARP that would have controlled CSO discharges at the point of discharge, in addition to the plan to reduce such discharges through implementation of TARP. (*See* End-of-Pipe Treatment Study (2006), attached as Exs. 14-1 & 14-2; Alliance Resp., Analysis III.C.) MWRD's consultant identified five feasible and available end-of-pipe technologies, and determined that the majority of the 170 outfall sites studied had available land to locate treatment plants. (*See id*.)

MWRD rejected this proposal, based in part on the assumption that the TARP reservoirs would be on-line by 2012 and the hope that supplemental measures to control CSOs would not be necessary. (Ex. 14-2 at 33.) However, MWRD also acknowledged that CSOs would continue after the completion of TARP, and has not reconsidered end-of-pipe technologies even though TARP is further delayed. (*See id.*; Alliance Resp., Analysis III.C.) The Governments' declarant Valdis Aistars also expressly acknowledged that end-of-pipe treatment technologies exist, but they were a longer-term solution, and hence rejected in favor of the short-term fix represented by MWRD's boats. (*See* Doc. # 61-2, ID # 1749-50.)

D. Regulatory Approval Of TARP As MWRD's LTCP

On June 28, 1995, IEPA wrote MWRD a letter affirming that TARP "meets the objectives of the 'Presumptive [sic] Approach' as described in the federal CSO Control Policy (published in the *Federal Register* on April 19, 1994)."[5] (Doc. # 61-8, ID #2669.) The letter provides no reference to the three presumption approach performance criteria, or any analysis performed by either MWRD or IEPA to assess MWRD's ability to comply with them. (*Id.*) IEPA further stated in the letter that it "believes the completion of TARP will be adequate to meet water quality standards and protect the designated uses of the receiving waters pursuant to Section I.C." of the CSO Control Policy, but references no modeling, monitoring, or other analysis to support that conclusion. (*Id.*)

E. Lodging Of The CD

On December 14, 2011, the Governments lodged the CD before this Court, together with their Complaint. The Complaint alleged that MWRD's CSOs were causing or contributing to violations of the water quality standards applicable to the CAWS. (Doc. # 1.) Specifically, it alleged that CSO discharges are causing DO levels to drop below the minimum levels established by IPCB, and that the CSOs were also causing or contributing to violation of the applicable narrative prohibition against "unnatural sludge or bottom deposits, floating debris,

[5] IEPA was attempt to refer to the "presumption approach" whereby the CSO Control Policy in some instances allows a presumption that water quality standards will be met if one of the three LTCP performance criteria are implemented. (*See* Ex. 1, § II.C.4.a.; *infra* Section IV.)

visible oil, odor, unnatural plant or algal growth, or unnatural color or turbidity." (Doc. # 1, ID # 10-15.)

While a summary of the CD published by MWRD months earlier had included only TARP and floatables-collecting skimmer boats as the substantive remedy (Ex. 15), the lodged CD now included an "Appendix E" requiring that MWRD develop a plan to also implement a limited number of "green infrastructure" measures – *i.e.*, means of retaining stormwater onsite and recharging it to ground water rather than allowing it to enter the collection system. (Doc. # 3-3, ID # 132-39.) In its Responsiveness Summary, USEPA characterizes the stormwater expected to be captured by green infrastructure as a relatively small supplement to the much larger amount expected to be captured by TARP. (Doc. 61-1; ID # 1638-41.)

In March 2012, at the close of the public comment period, NRDC Group submitted their Comments (Doc. # 61-2, ID # 1768-1834) to DOJ, and the Alliance Group also submitted comments (Doc. # 61-2; ID # 1868-1914). The Governments' filed their Motion approximately one year and two months later, in June 2013. During this time, MWRD has continued to move forward with TARP consistent with the limitations inherent in a schedule based on the market conditions for excavated quarry stone.

ARGUMENT

I. THE CD IS NOT FAIR, REASONABLE, IN THE PUBLIC INTEREST, OR CONSISTENT WITH THE LAW.

This Court should not enter the CD because it is not fair, reasonable or in the public interest, and it is inconsistent with the CWA. *See United States v. Telluride Company*, 849 F. Supp. 1400, 1402 (D. Colo. 1994); *United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489 (6th Cir. 2010); *see also Akron,* 749 F. Supp. 2d at 790. Regardless of what gloss the Governments put on the standard of review, the CD does not meet it. The Governments have squandered any deference the standard might have afforded them because they failed to do their job – to evaluate the proposed solution and craft a comprehensible CD implementing it.

Subsequent sections of this memorandum describe the following deep flaws in the CD, which render it ineffective, unreasonable, and in places incomprehensible:

- **The Governments have no basis to contend that the CD will work.** The Governments and MWRD admit that CSOs will continue to occur after TARP is completed, and the Governments have no idea how many will occur. The Governments have not included in the CD any alternatives to TARP as currently formulated, or any meaningful supplemental measures, despite MWRD acknowledging that continuing CSOs after TARP completion will impact its ability to comply with water quality standards. (*See infra* Section II.)
- ***The CD is internally contradictory regarding its scope.*** The definitions of "CSO" and "CSO Outfall" – arguable the two most central definitions in the entire CD – are contradictory, rendering the CD ambiguous and unenforceable.[6] Remarkably, the Governments do not know whether the CD covers all 372 CSO outfalls that discharge to the TARP system, or only the 37 MWRD-permitted CSO outfalls. Whether all CSO outfalls or only a fraction of them are covered by the CD determines its effectiveness. The Governments' inability to describe which of the region's CSOs are covered by what portions of the CD makes it clear that the CD will be impossible to enforce. (*See infra* Section III.)
- **The CD does not include meaningful performance or monitoring criteria.** Contrary to the requirements of the CSO Control Policy, the CD sets forth no quantitative requirements to ensure that TARP will successfully remediate the water quality exceedances alleged in the Governments' Complaint. Similarly, the CD does not include a detailed monitoring plan to determine whether TARP meets water quality standards after completion. By contrast, other CSO CDs agreed to by USEPA around the country include robust performance and monitoring criteria. (*See infra* Sections IV and V.)

[6] As described in the Alliance Resp., the CD requirements concerning skimmer boats to control floatables are contradictory and vague as well. (*See* Alliance Resp., Analysis III.B.)

- **The CD overall does not comply with the CSO Control Policy**. The Governments are compounding 20 years of not holding MWRD to the planning and substantive requirements of the CSO Control Policy by offering a CD that similarly does not comply with the law. The Governments' assertion that they are exempted from essential planning requirements in the Policy, which assure the quality of LTCPs, is simply wrong. (*See infra* Section VI.)
- **The CD merely memorializes what MWRD has been doing for years.** The Governments have not struck a hard bargain. Rather, they have adopted TARP wholesale, in the same form that it has been planned in slowly implemented for the past 40 years. The gains the Governments claim to have achieved in the CD are illusory because the CD does not contain specific requirements to achieve them. TARP will continue to be implemented, at its same halting and chronically delayed pace, whether this Court approves or rejects the CD. (*See infra* Section VII.)

The Governments would sweep away the CD's failures under the cover of deference. They argue that USEPA and IEPA have expertise that must be considered and cannot be questioned. (*See* Doc. # 61, ID # 1522, 1536-37, 1564.) USEPA and IEPA deserve whatever deference the standard of review allows them, but only if they have brought their expertise to bear. *See Akron,* 749 F. Supp. 2d at 796. The Governments' judgment on the CD is only entitled to deference if they engaged in "reasoned decision-making." *Telluride*, 849 F. Supp. at 1404. Here, the Governments have done little reasoning at all regarding basic matters such as: (1) the number of CSOs that will occur after TARP is completed, (2) which CSOs are covered, (3) what performance standard TARP should achieve, or (4) how to monitor whether that standard has been achieved or the violations in the Complaint addressed after TARP is built.

Concerns with fairness of the CD are heightened given that USEPA has been considering enforcement for at least 10 years over MWRD's violations of the CWA before bringing a contested action. (*See* Doc. # 61-2, ID # 1745 (Declarant Astairs has been working on the USEPA enforcement case resulting in this CD since 2001).) CD's are more closely scrutinized

where, as here, they are not the product of litigation, but rather are filed in conjunction with a complaint – "merely as the vehicle by which the parties' settlement agreement could receive judicial approval," and "the adversary system has yet to function." *Telluride*, 849 F. Supp. at 1403. Now that the Governments have decided, after 10 years of consideration and an intervening citizens suit by the NRDC Group, to merely adopt what MWRD will do anyway under its 40-year old plan for TARP, this Court should very carefully review the result of those negotiations.

It is clear that the public has a substantial interest in raw sewage not polluting Chicago area waterways and Lake Michigan. *See Telluride*, 849 F. Supp. at 1402 ("This is not the typical litigation between private parties. Indeed, substantial public interests are at stake. In suits affecting the public interest, my role is more searching."). The CD impacts the entire Chicago area, and the number of recent CSOs underscores the severity of the problem. As of July 3, 2013 there have been 21 CSO events in MWRD's service territory – that is, 21 incidents of raw sewage being released into Chicago area waterways in a little over half the year. (US Dep. at 104:18.20.) Despite the clear public interest in clean water, USEPA and IEPA have no idea how many less CSOs will occur when TARP is completed. (*Id*. 108:15-109:15; Deposition of Sydney Alan Keller, IEPA (IL Dep.) at 99:22-100:3, attached as Ex. 16.)

The public interest, however, is not satisfied merely by the Governments' assertions that MWRD will come into compliance with the CWA and water quality will be enhanced at some point in the future. *Akron*, 794 F. Supp. 2d at 804, *citing United States v Akzo Coatings,* 949 F.2d 1409, 1435 (6th Cir. 1991) ("If the Court were to accept that view, *every* decree would be in the public interest. Such a limited review would turn this Court into the "rubber stamp" that the Sixth Circuit has expressly dictated against."). Instead, this Court must consider whether the CD "is capable of requiring compliance with the [CWA] and is in good faith calculated to do so." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F. 3d 743, 760 (7th Cir. 2004). Resolution under the terms of the CD is 16 long years away when TARP is completed in

2029, and even then CSOs will continue to occur and water quality standards may not be met. The long delay in TARP's completion, with results that are uncertain, is not in the public interest.

When confronted with similar circumstances – uncertain results over an extended period of time, the court in *Akron* rejected a consent decree on the ground that it was not fair, adequate, nor in the public interest. 749 F. Supp. 2d at 796. The Court expressly rejected "the parties' view that 'any decree is better than no decree at all.'" *Id.* at 808. The 17-year time frame for implementing the consent decree was way beyond the bounds of what would ordinarily be allowed. *Id.* at 796. The court held the timeframe unreasonable despite the fact that Akron, unlike MWRD, would need to *both* develop its LTCP and implement it over those 17 years, as opposed to merely continuing to implement a "work in progress" such as TARP.

The Governments base much of their argument on the fact that TARP has been in the works for more than 40 years – but as highlighted by the *Akron* court, the fact that TARP has been in the works for more than four decades merits this Court's close scrutiny of TARP as a purported solution for CSOs and water quality violations. Indeed, the court in *Akron* has ordered a special master to assist it in assessing whether the revised consent decree proposed by the parties will work. *U.S. v. Akron*, 2013 U.S. Dist. LEXIS 39816, at *21 (S.D. Ohio March 13, 2013), attached as Ex. 17.)

The CD is not based on careful analysis and reasoned decision making by the Governments to ensure its adequacy in meeting the CWA. Merely memorializing in the CD what MWRD has already been doing for years is not fair, reasonable, in the public interest nor consistent with the CWA. This Court should send the CD back to the Governments. They can and must do better to protect Chicago area waterways and Lake Michigan.

II. THE CD SHOULD BE REJECTED BECAUSE THE GOVERNMENTS ADMIT TO NOT KNOWING, AND NOT HAVING FULLY EVALUATED, WHETHER TARP WILL WORK.

The Governments and MWRD do not know whether TARP will eliminate CSOs or how many CSOs it will eliminate. Because the Governments have not made a passable attempt at determining whether TARP will work to bring MWRD into compliance with water quality

standards, the Governments are not entitled to deference in this Court's consideration of the CD. Moreover, ample evidence exists that TARP will *not* work, and the CD must be rejected. (*See* Exs. 6A, 7 & 8; Alliance Resp., Analysis I.)

A. The Governments And MWRD Admit To Not Knowing The Extent To Which TARP Will Reduce CSO Events.

The Governments admit that CSOs may continue to occur after TARP is completed in 2029. (*See* Ex. 5, Resp. Nos. 2-4; Ex. 6, Resp. Nos. 2-4.) MWRD agrees that CSOs may continue to occur after TARP is completed. (*See* MWRD RFA Resp. Nos. 2-4, attached as Ex. 18.) The Governments assert in broad terms that CSOs will be "substantially reduced as compared to the present time." (Ex. 5, Resp. Nos. 2-4; Ex. 6, Resp. Nos. 2-4.) USEPA and IEPA are unable to define what "substantially reduced" means, or how many CSOs are projected to occur after TARP is completed.

USEPA averred that, as of July 3, 2013, 21 CSO events had occurred this year. (US Dep. at 104:18-20.) Even with 21 CSO events as a baseline for the "present time" (though only half the year at that), USEPA could not say how many fewer CSOs could occur after TARP completion in order for CSOs to be "substantially reduced." (*Id.* at 108:15-109:6.) USEPA has no numeric goal at all as to the number of CSOs that should be allowed after TARP is completed. (*Id.* at 109:7-109:15.) USEPA does not have any estimate of the number of CSOs that will occur when TARP is completed. (*Id*. at 98:17-98:23.)

IEPA similarly does not have any specific goal in mind as to how many CSOs should be allowed to occur after TARP completion, or specific prediction of post-construction performance. (IL Dep. at 97:9-100:9.) Mr. Keller testified as follows:

> Q. But the point of, I guess, one part of the response is that CSOs may occur post TARP completion.
>
> A. Yes. They may.
>
> Q. But IEPA does not know how many?
>
> A. No.

(Keller at 99:22-100:3.) IEPA likewise cannot say how many CSOs will occur post-TARP completion for them to be considered "substantially reduced." (*Id.* at 98:9-17.) IEPA did not quantify that term in any way. (*Id.* at 98:21-24.)

MWRD has confirmed in the IPCB proceedings that CSOs will continue at some undefined level indefinitely into the future, regardless of TARP completion. As late as last week, MWRD unequivocally disagreed with USEPA's position that TARP alone will resolve the problem:

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

(Ex. 6A at 14-15.) Moreover, MWRD has introduced sworn evidence in the IPCB proceedings that CSOs will continue to impact water quality after TARP is completed:

> Q. On pages two to three of your pre-filed testimony, you state, quote, "because it is not possible to eliminate or fully treat these wet weather sources in the foreseeable future, the impact of these events on dissolved oxygen levels in the CAWS needs to be considered when establishing the highest attainable uses for these waterways." Question A, how long do you consider, quote, foreseeable future?
>
> A. At least until 2029, 18 years when TARP is fully implemented and probably longer. I believe a wet weather use will still be needed after TARP is fully implemented. This is because there will still be discharges from CSOs and municipal separate storm sewers and overlapping runoff to the tributaries.

(Ex. 7 at 11; *see also* Ex. 8 at 7-8; Ex. 10 at 89-90.)

In sum, this Court, like the Governments, has insufficient information to consider the CD's "likely effectiveness as a vehicle for cleansing" the CAWS, and available evidence indicates that TARP alone will not eliminate CSOs and their impacts on water quality. *See Akron*, 794 F. Supp. 2d at 790, *citing Akzo*, 949 F.2d at 1437. Clearly, the CD is not adequate or reasonable, and this Court should reject it.

B. The Governments Have Not Adequately Assessed TARP Performance Or Considered Additional Or Alternative Measures.

The Governments' lack of knowledge regarding the efficacy of the CD that they ask this Court to enter is precipitated by their complete failure to adequately study TARP's effectiveness, and near wholesale reliance on technical analysis by others, including the entity against whom they are purportedly enforcing. The decades-old analysis by the Corps that the Governments inappropriately relied upon is stale, and USEPA did nothing to update it. (*See* US Dep. at 135:17-138:24.) USEPA's one analytical study performed in 2009 was grossly oversimplified, relying upon only one somewhat atypical year of rainfall data, and considering the size of the reservoirs as the only variable – without evaluating all of the factors that impact whether combined sewage ever reaches those reservoirs. (*See* Alliance Resp., Analysis II.A.2.)

IEPA did even less by way of substantive analysis. IEPA does not know whether any modeling exists that would predict whether TARP will meet water quality standards when it is completed. (IL Dep. at 54:11-18.) IEPA is unaware of the capacity calculations USEPA was performing on the reservoirs. (*Id.* at 73:18-23.) While IEPA is aware of there being transient problems in the TARP system, it was not aware of hydraulic modeling studies that concluded that "inflow control or other surge mitigating is necessary for the mainstream system, even after the construction of the plan[ned] reservoir at the downstream end." (*Id.* at 58:8-59:16.) More critically, IEPA does not know whether the CD resolves the conveyance problems that experts recognized in the mainstream TARP system prior to TARP being completed. (*Id.* at 61:3-62:24.)

Worse yet, the Governments failed to ever evaluate or consider potential alternatives and supplements to TARP, some of which had been studied by other agencies. In its analysis of TARP performance undertaken in 1975, the Corps considered use of reservoirs considerably larger than those now being implemented as TARP. (Alliance Resp., Analysis II.A.1.) The Corps' analysis concluded that these larger reservoirs would not prevent all CSOs and reversals to Lake Michigan, but the projected results were better than under the less robust variant that MWRD ultimately selected as TARP. (*Id.*) In addition, the Governments failed to evaluate reductions in inflow and infiltration (I/I), meaning leaks in the system and unlawful connections

that greatly increase flow into the system, and hence the likelihood that volumes will exceed system capacity resulting in CSOs. (*Id.*, Analysis II.A.4.) Although the Governments have long voiced concern about the impact of I/I on the collection system, they did not evaluate, much less require in the CD, the well-understood means by which I/I can be limited. (*See id.*) The Governments also refused to consider end-of-pipe controls to minimize discharges as floatables on the dubious ground that these represent a long-term solution rather than a short-term fix – even though a study by MWRD had shown such technologies to be feasible and effective on the portion of CSO outfalls it evaluated. (*See* Ex. 14-2; Alliance Resp., Analysis III.C.)

Given MWRD's position that TARP by itself will not eliminate CSOs and that water quality impacts will remain, it is incredible that the Governments' refuse to put thought into how TARP can be supplemented and improved. This is particularly problematic given that some of the measures it ignored – notably I/I reduction and end-of-pipe controls – could help alleviate CSO pollution in the interim before the earliest date TARP is completed in 2029. The Governments acknowledge that, as of today, "[a]lthough MWRD has reduced CSO discharges through partial implementation of TARP, *substantial* CSO discharges continue to occur from portions of MWRD's or satellite communities' outfalls during and immediately following some rain events." (Doc. # 61, ID 1524.) Twenty-one CSO events had occurred through July 3, 2013. (US Dep. at 104:18-20.) Despite the ongoing severity of CSOs and their impacts to water quality, which will continue unabated the day the CD is entered and even after TARP is completed, the Governments have never seriously considered alternatives to TARP.

C. The Governments Are Not Entitled To Deference Because They Have Not Exercised Their Expertise.

The Governments repeatedly request that this Court grant them deference based on their "substantial expertise." (*See* Doc. # 61; ID # 1522, 1536-37, 1564.) Assuming the USEPA and IEPA have such expertise, they plainly did not bring it to bear in evaluating the effectiveness of the CD. Thus, they are not entitled to the limited deference ordinarily afforded government settlements. *See Akron*, 794 F. Supp. 2d at 796; *Telluride*, 849 F. Supp. at 1404.

As discussed above, the Corps performed a number of studies in the distant past to determine whether the Federal Government should contribute to what it largely described as a flood control plan. (*See, e.g.,* Doc. # 61-5, ID # 2078-2085, 2130-2138.) However, the planning and engineering reports prepared by another agency with a different agenda do not absolve the Governments from *independently* assessing the specific questions pertinent to the CD, which is whether TARP will redress the water quality standards violations enumerated in the Governments' Complaint.

The requirement of an independent hard look by the Governments to answer these questions is also critically important when the Governments rely on analyses and reports prepared by MWRD:

> Under these circumstances, the government's suggestion that I "pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment" borders on the ludicrous. An agency's judgment is entitled to deference when it is based on reasoned decision making. The reasons must be its own, not those of a well-heeled defendant. Here, in its "oversight role," the USEPA simply reacted to the proposals offered by Telco's expert; it did not "pull the laboring oar" in constructing some of the most essential terms of the proposed settlement and remedial plan. Consequently, where another party and not the USEPA has developed a remedial cleanup plan, the policy of the law to encourage such settlements is less forceful and review of the resulting plan need not be deferential.

Telluride Co., 849 F. Supp. at 1404 (citations omitted). Regardless of how MWRD and the Corps may view their own plan and expenditures, the Governments are charged with determining whether the CD is fair, reasonable, in the public interest and consistent with the CWA — which in turn requires reasoned decision making on their part and a hard look at the basic question of whether TARP will work to solve the identified problem. *Id.* That is, will the completion of TARP result in MWRD meeting the water quality standards of its permits and the CWA? Is there anything else that MWRD could do upon completion of TARP, or in the intervening 16 years, that might decrease CSOs or the impacts of CSOs?

Since the limited analyses by Governments do not answer the questions key to assessing the effectiveness of their chosen remedy, the Governments have not employed the expertise that

they ask this Court to rely upon, and the CD is entitled to no deference. *Telluride*, 849 F. Supp. at 1404.

III. THE CD IS UNENFORCEABLE BECAUSE ITS CONTRADICTORY TERMS MAKE THE SCOPE OF ITS COVERAGE AMBIGUOUS.

Remarkably, the CD is ambiguous as to the obviously critical question of which CSOs it covers. On its face, it is unclear whether the CD applies to all 372 CSO outfalls in MWRD's service territory, or whether it applies only to MWRD's 37 CSOs outfalls. If the latter is the case, the CD will not come close to solving the Chicago area's severe combined sewage problem, and municipalities in the region will be wide open to enforcement actions addressing their continuing CSOs. Either way, the CD is essentially unenforceable if it is not clear who and what it covers, and should not be entered in its current form. *See Nat'l Labor Relations Bd. v. Brooke Indus. Inc.*, 867 F.2d 434 (7th Cir. 1989) (Posner, J.); *see also Angela R. v. Clinton*, 999 F.2d 320, 326 (8th Cir. 1993) (parties' dispute over the consent decree's ambiguous enforcement provision reflected an absence of sufficiently well-defined agreement that is an essential predicate to the entry of an appropriate consent decree).

The problem arises from two critical definitions in the CD, "Combined Sewer Overflows" and "Combined Sewer Outfalls," that directly contradict one another. Since combined sewer overflows discharged out of combined sewer outfalls are what the CD is supposed to remedy, the result of the contradiction is wholesale confusion. USEPA's witness admitted that the defined terms appear to have different meanings at different places in the CD, and USEPA's and IEPA's witnesses gave contradictory testimony on which CSOs the CD is intended to cover. According to MWRD, the purpose of TARP is to create "a solution to the flooding and water quality problems caused by overflows from the combined sewer systems of *numerous municipalities* in metropolitan Chicago." (Doc. # 3-2, ID # 102 (emphasis added).) There are approximately 372 combined sewer outfalls in the TARP system, only 37 of which are owned by and permitted to MWRD. (*See* US Dep. at 32:2-10, 70:11-13.) Preventing discharges

to the Chicago area waterways from *all* combined sewer outfalls in the TARP system, and not just MWRD's, would thus be critical to achieving MWRD's stated purpose for TARP.

The relevant definitions in the CD, however, create significant doubt whether the CD applies to all outfalls in the TARP system. Specifically, Paragraph 8(f) of the CD defines "Combined Sewer Overflow" or "CSO" as "any discharge from any outfall specifically identified in Special Condition 10 . . . *in MWRD's Calumet, North Side or Stickney NPDES Permit*." (Doc. # 3-1, ID # 40 (emphasis added).) Thus, "Combined Sewer Overflow" or "CSO" means discharges from *only* the 37 combined sewer outfalls permitted by MWRD. (*Id.*; US Dep. at 32:2-34:11.) However, Paragraph 8(g) then defines "Combined Sewer Outfall" or "CSO Outfall" as "the MWRD *or municipal* outfall from which *CSOs* are discharged." (Doc. # 3-1, ID # 40 (emphasis added).) The "CSO Outfall" definition in Paragraph 8(g) appears to broadly define CSO Outfall to include both MWRD and municipal outfalls because it specifically references such municipal outfalls. (*Id.*) But, it also incorporates the limiting defined term "CSO" from the preceding Paragraph 8(f), *i.e.,* discharges from only the 37 MWRD-permitted outfalls. (*Id.*) The use of "CSO" as defined in Paragraph 8(f) in the more broadly-worded Paragraph 8(g) creates a fatal internal contradiction in the CD, and throws the definition of CSO, CSO Outfall and ultimately the entire CD into confusion.

Whether a covered "CSO" means discharges from only 37 outfalls or 372 outfalls in the TARP system is crucial. MWRD controls the entire TARP system, and MWRD, not the municipalities, controls whether and when combined sewage is sent into the TARP system or released through outfalls into Chicago area waterways. (IL Dep. at 240:20-241:24.) If the narrower definition applies, then 335 outfalls of Chicago area municipalities are outside the terms of the CD. Discharges from non-MWRD outfalls could, in principle, continue unabated after completion of TARP, meaning that water quality standards would continue to be exceeded. The entire purpose of TARP, and presumably the CD, would be unmet. Moreover, if the 335 municipal outfalls are not covered by the CD, municipalities may be left wide open to

government or citizen enforcement actions based on water quality standards violations to which their CSOs contribute.

USEPA's and IEPA's 30(b)(6) witnesses were questioned concerning the scope of the CD, and their answers reflected profound confusion. The expectation was that USEPA's Chief of Water Enforcement and Compliance Assurance Branch for Region 5, Mr. Maraldo, could speak to definitions in the CD, such as CSO and CSO Outfall, which are fundamental to understanding how and whether the CD will work. But, while Mr. Maraldo tried his best, he could not resolve or make sense of the clear conflict between Paragraphs 8(f) and 8(g). (*See Id.* at 35:15-66:21.) At times, Mr. Maraldo admitted that he did not know what "CSO" meant in the decree. (*Id.* at 46:10-46:24, 47:17-48:8.) Other times, he maintained that "CSO Outfall" included both MWRD and municipal outfalls despite the use of the term "CSO" as a qualifier. (*Id.* at 56:15-57:7.) Ultimately, in order to reconcile the conflict, Mr. Maraldo concluded that the term "CSO" as used in Paragraph 8(g) must mean something other than how it was narrowly defined just one paragraph above in 8(f). (*Id.* at 60:20-61:19.)

Mr. Maraldo then proceeded to admit more broadly that the term "CSO Outfall" could mean different things in different places throughout the CD, and that sometimes the Paragraph 8(f) definition of that term applied and sometimes it did not, with no clear indication in the CD one way or the other:

> Q. The term "CSO outfall" is used throughout the consent decree, correct?
>
> A. Yes.
>
> Q. And what the question is, is whether – when we see the term "CSO outfall," is that talking about outfalls from MWRD only, or is it talking about outfalls from MWRD and municipal outfalls?
>
> A. I don't know under what context it would be, you know. It may be defined – or, it may be – the term may be in the consent decree, you know meaning either one. I'm not sure.
>
> Q. When the term "CSO outfall" is used in the consent decree, it can mean either discharges from MWRD outfalls or discharges from municipal outfalls correct?

A. Yes.

(*Id*. at 63:20-65:6 (objections omitted); *see also id.* at 56:15-57:7, 60:20-61:19.)

When questioned concerning specific uses of the terms "CSO" or "CSO Outfall" throughout the CD, Mr. Maraldo stated either that he did not know what was meant by them in the context at issue, or that the terms had meanings different than their definitions in Paragraphs 8(f) and 8(g). Specifically, he testified as follows with respect to the multiple places the terms are used in the CD:

- Mr. Maraldo did not know if the term "CSO" in the reference to TARP being "MWRD's CSO long-term control plan" in Paragraph 14 meant TARP addressed only the 37 MWRD outfalls, or all 372 outfalls in the TARP system (US Dep. at 68:20-69:20);
- Then, because he decided the meaning in Paragraph 14 is for TARP to address all 372 outfalls, he admitted that the term "CSO" in Paragraph 14 does not mean the same as its definition in Paragraph 8(f) (*Id.* at 69:22-71:21);
- When "CSO outfall" is used in what purport to be the "Performance Criteria" Section of the CD, Paragraphs 28(f), 28(g), 29(f) and 29(g), it apparently means all outfalls in that portion of the TARP system whether permitted by MWRD or not, contrary to the definition in Paragraph 8(g) (*Id.* at 72:18-75:16);
- When the CD references a "CSO monitoring system" in Paragraph 30, Mr. Maraldo did not know whether "CSO" means only the 37 MWRD-permitted outfalls as defined in 8(f) or all outfalls (*Id.* at 75:18-77:21); and
- When the CD references "CSO discharge," Mr. Maraldo indicated variously that he did not know which combined sewer outfalls it included; but in Paragraph 34 it means only discharges from MWRD's permitted outfalls, and in Paragraph 30 he did not know what it meant (*Id.* at 78:11-90:18.).

IEPA's 30(b)(6) witness, its water permit manager, also gave conflicting testimony regarding the scope of the CD's coverage. At one point, he indicated that the CD addressed MWRD's CSO Outfalls only. (IL Dep. at 15:13-19, 17:7-18.) Then, when examining specific provisions of the CD as they related to compliance, Mr. Keller indicated that the CD would apply to any CSO outfalls or any CSO discharges regardless of who is on the permit. (*Id.* at 277:1-279:16.)

There is a fundamental flaw in a CD that is supposed to address CSOs from CSO Outfalls when neither USEPA's nor IEPA's 30(b)(6) witness can reconcile two key terms of the CD,

admit that the terms are used differently from their definitions throughout the CD, and do not know how they are used in certain portions of the CD. The Court should not affix its imprimatur to a self-contradictory CD that is not even understood by its authors.

Whether and under what circumstances the terms of the CD apply to 37 or 372 outfalls greatly affects multiple provisions of the CD. Numerous sections of the CD describing TARP performance requirements employ the terms "CSO" and "CSO Outfall," making the scope of applicability of all these requirements ambiguous. Indeed, "CSO" in particular is a frequently used modifier throughout the CD, *e.g.,* "CSO discharge," "CSO monitoring," such that whole sections of the CD are rendered meaningless if the term CSO is uncertain. By way of further example, Paragraph 29(f) prohibits discharges from "CSO Outfalls" in the Mainstream/Lower Des Plaines TARP System unless MWRD achieves the conditions of the prior five subparagraphs. (*See* Doc. # 3.1, ID# 59.) While USEPA's position, via its 30(b)(6) witness, is that "CSO Outfall" in Paragraph 28(f) includes all outfalls in the Mainstream/Lower Des Plaines TARP System, the definition of "CSO Outfall" in Paragraph 8(g) certainly allows for an argument that it only applies to the 37 MWRD outfalls in that system. Since assessment of the effectiveness of the CD does not occur until after TARP completion in 2029, allowing such ambiguity to fester for 16 years is unconscionable.

Because USEPA and IEPA cannot interpret their own CD, this Court is left wholly without basis to determine whether it is fair, adequate and reasonable. Another court asked to interpret this CD in 2029 or later would be in a still worse position. It would be absurd to enter a CD when its inherent ambiguity makes it unenforceable. *See Brooke Indus. Inc.*, 867 F.2d at 435-36. This Court should accordingly reject the CD and require the Governments to clarify whether the CD addresses the entire problem – all 372 outfalls – or just a portion of it.

IV. THE CD DOES NOT REFLECT PERFORMANCE CRITERIA NECESSARY TO ENSURE A SOLUTION TO THE IDENTIFIED CSO PROBLEM.

If the CD is going to address the Chicago area's CSO problem and attendant water quality standards violations that it purports to resolve, it is essential that it contain performance criteria

specifying measurable and enforceable requirements that must be achieved in order to meet that end. This CD does not contain such measurable, enforceable standards, and must therefore be rejected.

A. Presumption Approach Performance Criteria Have Not Been Appropriately Established.

At the heart of the CSO Control Policy is a requirement that LTCPs be designed to be sufficient to meet CWA requirements. Ex. 1, § II.C.4. This requirement necessarily applies to any consent decree (like the CD here) purporting to mandate implementation of an LTCP because CSO consent decrees must be consistent with the CSO Control Policy . *See* 33 U.S.C. § 1342(q). To ensure that this is done, the Policy requires that LTCPs include performance criteria, *i.e.* benchmarks to ensure that water quality standards are met. Such criteria can be derived, where "reasonable," from a presumption that it is sufficient if one of three quantitative performance criteria identified in the CSO Control Policy are met. Ex. 1, § II.C.4.a.

Here, IEPA purported to apply the presumption approach in a one-paragraph 1995 letter. (Doc. # 61, ID # 2669.) Given the information now available, as discussed in Subsection 2 below, IEPA's determination was not reasonable. However, even were it reasonable, IEPA could not go about selecting the performance criterion the way it did, having failed to perform the necessary analysis at the time, or at any time thereafter.

1. IEPA did not select performance criteria via the presumption approach in the manner contemplated by the CSO Control Policy.

The central mandate of the CSO Control Policy is the required implementation of an LTCP that enables a CSO discharger to cease causing or contributing to violations of CWA water quality standards. Ex. 1, § II.C.4. ("Because the final long-term CSO control plan will become the basis for NPDES permit limits and requirements, the selected controls should be sufficient to meet CWA requirements."). To achieve that, the permitting authority may choose either the "presumption approach" or the "demonstration approach" for an LTCP. While the demonstration approach requires that compliance with water quality standards be demonstrated at the outset, based on available data, the presumption approach allows, in certain circumstances,

selection of one of three quantitative performance criteria as a means of ensuring sufficiency. The three alternative presumption approach criteria are: (i) no more than an average of four CSO events per year, (ii) elimination or capture of at least 85% of combined sewage, or (iii) elimination of the mass of pollutants causing water quality impairment. The selected criterion is then included in the discharger's NPDES permit following completion of the LTCP. Ex. 1, § IV.B.2.c.

If the LTCP is designed to meet the selected quantitative criterion, it is presumed capable of achieving compliance with water quality standards during planning stages, *if and only if*, the permitting authority determines that the presumption approach is reasonable based on available data and analyses of the CSS:

> A program that meets any of the criteria listed below would be presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority *determines that such presumption is reasonable in light of the data and analysis conducted in the characterization, monitoring, and modelling of the system and the consideration of sensitive areas described above*.

CSO Control Policy, § II.C.4.a. (emphasis added).

As discussed above (*see* Regulatory and Factual Background), IEPA's 1995 letter to MWRD purports, in a cursory reference contained in one-paragraph, to select the presumption approach. (Doc. # 61-8, ID # 2669.) However, IEPA failed to specify *which* of the three presumption approach performance criterion it was relying upon; much less specify the basis for its purported conclusion that any one of the three criteria could be met, and why reliance on any such criterion was reasonable in light of available data as required by the CSO Control Policy. (*See* IL Dep. at 28:4-29:24, 31:9-33:11; USEPA's Combined Sewer Overflows Guidance for Long-Term Control Plan at 3-17, http://www.epa.gov/npdes/pubs/owm0272.pdf (The NPDES permitting authority must be able to judge that the system characterization data submitted by the municipality provide a reasonable assurance that WQS would be met with the presumption approach.").) There is no evidence that, at the time it wrote the letter in 1995, IEPA substantively analyzed whether TARP would meet any of the three presumption approach

criteria, much less whether selection of such criterion was "reasonable" in light of available information. (*Id.* at 102:14-20.) USEPA likewise admitted that it is not aware of any analysis conducted by IEPA to determine whether TARP met the presumption approach criteria. (US Dep. at 115:23-116:10.) IEPA today does not know which of the three presumption approach criteria was the basis for its approval of TARP as the LTCP. (IL Dep. at 30:2-8.)

In any event, even if the presumption approach were appropriate here, it is clear that the Governments do not know whether TARP can meet any of the three quantitative presumption approach criteria. The Governments and MWRD admit that one of the three baseline presumption approach criteria – a forecast limit of 4 or 6 CSOs per year – may well not be met after TARP is completed. (*See* Ex. 5, Resp. Nos. 56 & 57; Ex. 6, Resp. Nos. 56 & 57; Ex. 18, Resp. Nos. 56 & 57.) USEPA and IEPA expressly acknowledge that they lack sufficient information to determine whether the Mainstream portion of TARP – representing the large majority of the TARP system – will capture or eliminate at least 85% by volume of the combined sewage, the other potentially relevant presumption approach criterion. (Ex. 5, Resp. No. 58; Ex. 6, Resp. No. 58). They admit this despite the fact that IEPA now appears to have committed belatedly to criterion ii. (85% elimination or capture) as the one that MWRD must meet. (*See* IL Dep. at 34:1-34:16.)

In sum, nothing in the record indicates that the Governments have ever performed the analysis necessary to apply the presumption approach. Further, they have not directly incorporated the approach into any MWRD permits or the CD through adoption of a performance criterion. Even where application of the presumption approach is appropriate, the CSO Control Policy plainly requires more than IEPA's one-sentence hand wave in its general direction. Because IEPA improperly determined that TARP met the presumption approach, TARP has never had the hard look it deserves under the demonstration approach to test whether it will work, and the CD lacks the requirements to ensure that it does.

2. The available information makes plain that the presumption approach cannot be used here to ensure compliance with water quality standards.

Any reliance by the Governments on the presumption approach now is unacceptable given MWRD's position that TARP will *not* result in the achievement of water quality standards, in particular the DO standards that are at the heart of the Governments' Complaint. In view of this information, reliance on the presumption approach does not comply with the CSO Control Policy requirement of reasonableness. *See* Ex. 1, § II.C.4.a. IEPA cannot reasonably presume something that is known to be untrue.

As discussed in Section II, the Governments admit that TARP will not put an end to CSOs, and that they do not know how many will remain post-TARP. Even more to the point, MWRD has specifically taken the position before the IPCB that it cannot comply with DO water quality standards even *after* completion of TARP. (*See* Exs. 6A-9.) MWRD not only introduced evidence that CSOs would continue after TARP completion, but also proffered a proposal for a wet-weather dissolved oxygen standard that would allow DO crashes as a result of CSOs (and other purported causes) – on the stated ground that this relaxed standard would be necessary both before *and after* completion of TARP. (Ex. 7 at 11, 126-27; Ex. 8 at 7-8; Ex. 9 at 118-119.)

MWRD's expert explained how the presumption approach has been overtaken by the facts, such that the LTCP will not result in compliance with water quality standards:

> Q. Is that all part of developing a long-term control plan?
>
> A. Yes. The evaluation of picking a presumption approach or a demonstration approach is in terms of developing a long-term control plan.
>
> Q. Do you want to finish after the presumptive[sic] approach?
>
> A. Yes. Or they can choose a demonstration approach where the collect water quality data. They do water quality modeling to evaluate theses specific levels controls that they could then demonstrate that water quality standards would be met or they choose like for different segments of a waterway they could choose either the presumption or demonstration approach and it's my understanding that when the District is evaluated even before the CSO Control Policy was adopted into law into the Clean Water Act, the District evaluated when an appropriate level of CSO would be for the City of Chicago and that the Tunnel and Reservoir Plan, which is a phased approach, was the best way to control the CSO's in this particular system.

> Q. And the presumption was that water quality standards would be met? All of them, right, not just bacteria, right?
>
> A. Right, and that was before the UAA was done.
>
> Q. And now as we sit here today, you feel that they won't, water quality standards for DO will not be met by completion of TARP?
>
> A. I'm saying that because TARP will not adequately control all CSO discharges and these other wet water sources which the data have shown can effect DO in the system even if CSO's are not discharging that it is appropriate if you're going to adopt what you believe to be the highest attainable use of this system that a wet weather limited use would be needed.

(*See* Ex. 7 at 125:14-127:8.) Indeed, only six days ago, MWRD unequivocally reiterated its position in the IPCB proceedings that TARP alone will not eliminate CSOs or their impacts to water quality standards. (Ex. 6A at 14-15.) MWRD expressly noted that this position is contrary to USEPA's. (*Id.*)

The Governments' admitted ignorance concerning anticipated TARP performance coupled with MWRD's conclusion that TARP will *not* achieve an end to water quality standards violations, makes any reliance by the Government's on the presumption approach patently unreasonable.[7] The CSO Control Policy itself makes clear that a presumption cannot be favored over facts that make the presumption insupportable. To ensure that the CD complies with the law and adequately addresses the violations in the Complaint, MWRD or the Governments must demonstrate that TARP will meet water quality standards; and if not, modify the CD accordingly by implementing quantitative performance criteria to limit CSO events and ensure that the water quality violations cease.

B. The CD Contains No Meaningful Performance Criteria.

Having failed to implement presumption approach criteria, the CD offers no meaningful quantitative performance criteria to limit the number or frequency of CSOs that may occur post-

[7] The remaining record proffered by the Governments is very sparse concerning the impact of TARP on MWRD's ability to meet water quality standards. An early look at TARP in 1975 by USEPA suggests that applicable DO standards would *not* be met following completion of TARP. (*See* Doc. #61, ID #2046 (estimating that DO levels in the South Branch of the CAWS would drop to 3.0 during the design storm, less than the 4.0 DO minimum established in the applicable water quality criteria).) As discussed above, the Corps preliminary analyses has proven far too optimistic, predicting in the 1980s that TARP would drastically reduce BOD (which results in DO violations) solely through construction of the tunnels, before the reservoirs were in place. (Doc. # 61, ID # 2072; s*ee also* Regulatory and Factual Background.)

TARP or ensure that water quality violations —including those alleged in the Complaint – come to an end. The CD, as drafted, allows unlimited CSO discharges.

Section VIII of the CD purports to establish "performance criteria." (*See* Doc. # 3-1, ID # 56-61.) This section, however, provides nothing more than a loose qualitative description of the circumstances under which CSO events are allowed to occur post-TARP. Subsection a. of Paragraphs 28 and 29 in Section VIII identifies outfalls from which CSOs may occur, after completion of TARP, whenever the associated tunnel is "full." (*Id*.) While these paragraphs contain general requirements that TARP be operated properly – *e.g.,* that treatment plants treat the "Maximum Practical Flow," *etc.* – nothing contained in them *limits* the number of times the tunnels may end up "full," necessitating a CSO event. (*Id*.) What is more, subsection g. of these two paragraphs also allows for an unlimited number of "Transient Events" – defined in the CD as a pressure differential requiring that the sluice gates leading to the TARP tunnels be closed. The Governments have admitted, as they must, that a Transient Event can lead to CSOs, since by definition it involves the conduit for the combined sewage to reach the tunnels and reservoirs being closed off.[8] (*See* Alliance Resp., Analysis II.B.3.)

Indeed, such qualitative "performance criteria" are contrary to USEPA's own guidance. The 2003 CD Memo requires "*quantified* performance criteria" for LTCP provisions which are contained or incorporated within a CSO consent decree:

> c. Design criteria and *quantified performance criteria* for the engineering solutions contained in the LTCP. Examples of appropriate performance criteria could include provisions ensuring that pump stations pump at their design capacity, that treatment facilities treat the volume of wastes they were designed to treat, that storage facilities store the volume of waste water they were designed to store, or that a specific percentage removal of specified pollutants is actually achieved.

[8] Moreover, these very limited performance criteria are slated to be in effect only for a year after completion of the reservoirs. CD Section XXIII, Termination, provides that after a year of "satisfactory compliance" with those provisions, MWRD may apply for termination of the paragraph containing them. (CD ¶¶ 94a. and 95a.)

(Doc. # 61-7, ID # 2620 (emphasis added).) USEPA's failure to follow its own guidance further diminishes any deference to which it is entitled. *Akron*, 2013 U.S. Dist. LEXIS 39816, at 5-6.

Two additional performance criteria in the CD, "Maximum Practical Flow" and "Maximum Practical Pumping Rate," are likewise qualitative, not quantitative. Paragraphs 28.b and 29.b of the CD require MWRD, post completion of TARP, to "accept and provide full treatment of "Maximum Practical Flow" at all three wastewater reclamation plants (WRPs) during precipitation events. Paragraphs 28.d and 29.d require it to pump combined sewage from the pump station to the associated WRP "at the Maximum Practical Pumping Rate subject to the Maximum Practical Flow capable of receiving full treatment" at the WRP. "Maximum Practical Flow" and "Maximum Practical Pumping Rate" are in turn defined in paragraphs 8.u and 8.v of the CD as follows:

> "Maximum Practical Flow" shall mean the maximum flow accounting for all hydraulic and hydrologic factors that can pass through the Calumet WRP, North Side WRP or Stickney WRP within the then existing capacity constraints of the applicable WRP and receive full treatment in compliance with the NPDES Permit(s) for the WRP(s) receiving the flow.
>
> "Maximum Practical Pumping Rate" shall mean the maximum flow that can be delivered from TARP to the Calumet WRP or Stickney WRP within the constraints of the pump capacities and good operating practice of the Calumet TARP Pumping Station and the Mainstream Pump Station pumps and without exceeding the relevant WRP's Maximum Practical Flow.

(Doc. # 3-1, ID # 42.) These criteria are important because they essentially define the rate at which sewage is to be removed from TARP's tunnels and reservoirs ("dewatering") and passed through TARP's WRPs for treatment. If TARP is not dewatered quickly enough after a precipitation event, there may not be enough system storage capacity available for precipitation entering from the next event and CSOs may occur.

Paragraph 31 of the CD requires MWRD to use WRP flow rate records, TARP pump-back records and reservoir level records and treatment unit operations records to document compliance with these criteria. (Doc. # 31-1, ID # 60-61.) However, it provides no guidance, quantitative or otherwise, as to how the Governments are to use these records to judge whether

"Maximum Practical Flow" and "Maximum Practical Pumping Rate" have been achieved. This lack of quantified performance criteria for two important operating parameters of TARP not only directly contravenes the requirement in the 2003 CD Memo cited above, it also renders these requirements vague and unenforceable.

Nor do the bare gallon capacity requirements of TARP constitute "performance criteria." The mere size of TARP does not, by itself, ensure that it will limit the number of CDs that will occur. Even if the holes in which to put all the wastewater were sufficient (and they are not), it does not mean the plumbing will be adequate to get the wastewater to the holes. (Alliance Resp., Analysis II.)

Similarly, the mere fact that MWRD has specified a total gallon retention requirement for the limited "green infrastructure" measures it is implementing does not represent a performance criterion for those measures – *i.e.*, a way to quantify the degree of CSO reduction that the green infrastructure is being designed to achieve. As explained in the Comments, knowing only the cumulative design retention capacity of the proposed green infrastructure provides no information as to what it will achieve in curbing CSO overflows. (Doc. # 61-2, ID # 1810-24.) Projects of one type or location may significantly reduce CSOs, and others may do very little; but the CD contains no means to tell the difference. (*Id.*) Once again, this lack of meaningful and enforceable performance criteria falls woefully short of the guidelines USEPA has established for itself and generally applies for ensuring that green infrastructure measures are meaningful and adequate. (*See* Joint Memorandum, attached as Ex. 19 (requiring that green infrastructure implementation plans include "enforceable performance criteria [and] implementation schedules").)

Accordingly, the Governments have not engaged in the actual hard-look analysis that the CWA and associated guidance require to develop and include quantitative performance criteria in the CD to ensure that it achieves results. This CD should be rejected.

C. Other Municipalities' CSO Consent Decrees Consistently Include Detailed Performance Criteria That Are Absent In The CD.

Since the inception of the Policy, USEPA has negotiated multiple consent decrees with municipalities around the country to address and resolve their CSO problems. Across the board, these consent decrees adopt specific quantitative performance criteria – generally based on the presumption approach criteria, but tailored as required by the CSO Control Policy to ensure that they are reasonable in light of existing data and analyses. These requirements are consistently laid out in these other communities' consent decrees in a detailed set of appendix tables that list each control measure to be taken, the level of control it will provide, and the maximum number of overflow events per year that will be achieved and/or the percent of combined sewage that will be captured for treatment.[9]

The performance criteria that are included in the consent decrees of some of the larger communities with which USEPA has entered into CSO consent decrees are summarized below:

Community	**Performance criteria**	**Location**
Ft. Wayne	Maximum 4 overflow events per year	Ex. 20, App.3
Kansas City	96-98% capture plus maximum 7 overflow events per year	Ex. 21, App. A
Indianapolis	95% capture plus maximum 4 overflow events per year	Ex. 22, Ex. 1
St. Louis	Maximum 4 overflow events per year	Ex. 23, App. D
Cleveland	Maximum 4 overflow events per year	Ex. 24, App. 1
King County	Maximum 1 overflow event per year	Ex. 25, App. B

Notably, the performance criteria in three of the communities listed above are not a rote restatement of the presumption approach criteria. The criteria have been adjusted to be more stringent to include a larger percent capture in some instances and smaller number of CSO events in another.

[9] Exceptions are "design and implement" consent decrees (*e.g.*, Cincinnati, Toledo, Seattle, and Louisville), which require the entity to develop a plan rather than, as here, requiring that a previously developed plan be implemented.

Similarly, a comparison of the meager green infrastructure provisions required in Appendix E with green infrastructure programs mandated in other communities – such as New York, Philadelphia, and Cleveland – reveals the latter to contain much more robust and well-defined performance criteria. Philadelphia's Consent Order implementing green infrastructure measures requires establishment of "enforceable numeric targets for green acres installed and annual gallons of CSO reduced by the 5-, 10-, 15-, 20-, and 25-year marks of the plan." *Green City Clean Waters Implementation and Adaptive Management Program*, Philadelphia Water Department, December 1, 2011, http://phillywatersheds.org/ltcpu/IAMP_body.pdf (Green City). The Cleveland CD requires that Cleveland's green infrastructure plan "propose a process for locating, designing, constructing, operating, and evaluating a set or sets of Green Infrastructure control measures to capture a minimum of 44 MG of wet weather flows in a typical year that would otherwise be discharged by NEORSD's CSOs." (Ex. 24, App. 3.)

USEPA should not treat the Chicago area differently from these other communities. The lack of performance criteria demonstrates the unfairness of the CD. There is simply no reason why the third largest city in the nation should not benefit from the well-defined performance criteria that are required by the CSO policy and routinely required other places.[10]

V. THE CD DOES NOT CONTAIN THE REQUIRED MECHANISM TO MONITOR PERFORMANCE AND ASSESS POST-TARP COMPLIANCE.

Another requirement of the CSO Control Policy is that an LTCP (and a CD implementing one, per the CWA) include provisions to monitor performance and ensure that the CSOs cease causing water quality standards exceedances. Specifically, the Policy provides as follows:

> The selected CSO controls should include a post-construction water quality monitoring program adequate to verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of CSO controls. This water quality compliance monitoring program should include a plan to be approved by the NPDES authority that details the monitoring protocols to be followed, including the necessary effluent and ambient monitoring and, where

[10] As explained in note 11, *infra*, the exemption that the Governments claim from LTCP planning requirements due to the fact that TARP was ongoing at the time the Policy was implemented does not, by its terms, apply to substantive LTCP requirements in the CSO Policy such as performance criteria, but only to planning activities.

> appropriate, other monitoring protocols such as biological assessments, whole effluent toxicity testing, and sediment sampling.

Ex. 1, § II.C.9. As discussed below, for purposes of virtually every other CSO CD it has entered into, USEPA has appropriately interpreted this provision to require a detailed monitoring plan, containing specific parameters, as an integral part of the CSO LTCP. Here, however, once again, Chicago is different. Not only have the Governments failed to specify the performance criteria that the CD is being designed to achieve, as discussed in Section IV, *supra,* but have included inadequate monitoring requirements and other provisions to ensure that any such criteria –and the cessation of water quality standards exceedances they contemplate – are ever attained. Similarly, the CD contains no meaningful plan to determine whether its limited green infrastructure provisions have any actual impact on CSOs.

A. The CD's Monitoring And Compliance Assurance Provisions Are Facially Inadequate To Ensure That The CD Has Addressed The Identified Problem.

Section IX of the CD merely sets forth requirements that substantially mimic the current requirements of MWRD's permits issued in 2002, requiring only future submittal and approval of a monitoring plan. (Doc. # 61-3, ID # 1936-37, 1954-55, 1972-73.) Specifically, it requires that MWRD submit to IEPA for approval within one year of entry of the CD a plan that includes monitoring, "[i]dentification of water quality standards parameters of concern," and "Determination of whether MWRD's CSOs are in compliance with the then-effective . . . NPDES Permit, including applicable water quality standards incorporated therein." (Doc. # 3-1, ID # 61-62.) These skeletal requirements do not comply with the detailed monitoring plan required by CSO Control Policy § II.C.9. .

The first major problem with this limited requirement is that on its face, it does not apply to ensure compliance at any CSO outfalls other than the 37 owned and operated by MWRD. If the requirements of the CD are intended to address all CSO outfalls in the region – which they must if the CD is to come close to fixing the problem, then the CD's monitoring provisions are grossly deficient. Under the CD as written, although all "CSO Outfalls" (which may or may not encompass municipal outfalls as discussed in Section III, *supra*,) will be monitored, the

requirement that the CSOs be shown to be in compliance with water quality standards (Doc. # 3-1, 61-62) expressly applies *only* to MWRD's 37 permitted outfalls. Thus, there is no requirement that the remaining 355 municipal outfalls be shown to be in compliance. The CD then contains no provisions to address continued discharges of raw sewage from municipal outfalls into Chicago's waterways after the completion of TARP that likely will result in violations of the DO and floatables criteria identified in the Governments' Complaint.

The second problem is that the bare-bones nature of the monitoring requirement in the CD does not specify for what pollutants the not-yet-developed plan will monitor. Logically, it would be essential to include the parameters that are the subject of the Governments' Complaint, as well as any others that may be necessary to ensure overall compliance with water quality standards. But the CD does not require this. Thus, the monitoring plan that is ultimately determined may not be sufficient to demonstrate compliance with the violations that the Governments originally charged to MWRD.

The CD does specifically require that the monitoring plan assess whether the CSOs are in compliance with MWRD's (and only MWRD's, not the municipalities') "then-effective" permits – *i.e.*, the future permits that will be written and become effective as of the date TARP is completed, whenever that may be. This implies, at least, that the monitoring would need to cover any pollutant parameters addressed in these future permits. However, no one knows with any certainty what pollutants will be regulated in future permits. Accordingly, the Governments can and should require development of a detailed monitoring plan that specifies precisely what parameters will be addressed, as the CSO Control Policy requires.

Similarly, there are no meaningful monitoring provisions to assess what impact, if any, the green infrastructure measures required in Appendix E will have on system performance. USEPA's guidance concerning green infrastructure – which it generally implements in CSO CDs, except not here – appropriately requires that green infrastructure implementation plans include "monitoring plans and protocols [and] progress tracking and reporting." (*See* Ex. 19.) Yet the CD is almost devoid of such specifics. (Doc. # 3.1, ID # 132-39.) The only quantitative

measure of performance provided for in the CD is the total required 10,000,000 design detention capacity of the GI measures (with interim milestones). Accordingly, the few brief references in the CD concerning performance monitoring and reporting requirements relate to achievement of this goal. The size of the project in terms of raw gallons – be it TARP or green infrastructure – is not by itself a sufficient indicator of effectiveness.

B. The CD Does Not Require That Compliance With Water Quality Standards Be Achieved Before It Terminates.

Section XXIII of the CD, governing termination, provides that MWRD may apply for full termination of the CD once it has, *inter alia,* completed the requirements of Paragraph 36 (Post Construction Monitoring). (Doc. # 3-1, ID # 63-65.) Paragraph 36, however, does *not* require that compliance with water quality standards requirements have been achieved. Rather, that paragraph requires only that, in the event monitoring shows that the CSOs are violating MWRD's then-current permits (and whatever requirements concerning water quality standards that they may or may not contain), MWRD shall *develop a plan* to take additional steps to address the problem. Specifically in such instance, MWRD is required to submit to USEPA "a plan analyzing the range of alternatives available to come into compliance with such requirements and identifying the actions," after which USEPA is to "approve or disapprove" the plan. (Doc. # 3-1, ID # 64.) Paragraph 36 contains no requirement that MWRD *implement* the plan it has developed – or, for that matter, that the Governments have approved it.

Thus, CD Paragraphs 36, 94, and 95, read together, allow the CD to be terminated before any supplemental plan to address remaining water quality problems has ever been implemented, much less shown to work. Thus, after 16 years (optimistically) of waiting for TARP to be completed in 2029, followed by many more years of monitoring and design of a supplemental plan that purports to address identified deficiencies, the public could still be left without a demonstrated solution to the region's CSO problem, or any recourse under the CD if the supplemental plan does not work. This is inadequate, inconsistent with the law and not in the public interest.

C. Other Municipalities' CSO Consent Decrees Consistently Include Detailed Monitoring Plans And Compliance Assurance Requirements That Are Absent From The CD.

USEPA has in recent years entered into multiple CSO consent decrees with other municipalities pursuant to the CSO Control Policy; and all of them (except design and implement consent decrees) incorporate a detailed, already-developed post-construction monitoring plan to assure compliance. These detailed plans set forth all of the elements required in CSO Control Policy § II.C.4.9. with considerable specificity. In particular, among many other things, the monitoring plans all specify which contaminants will be monitored. (*See* Ex. 20, App. 4; Ex. 21, App. D; Ex. 22, Ex. 2; Ex. 23, App. E; Ex. 24, App. 2; Ex. 25, Paragraph 9.x. & Ex. 26.)

A comparison with green infrastructure monitoring requirements in other CSO communities' CDs and LTCPs yields a similarly stark contrast. New York's Consent Order requires tracking, monitoring, and reporting obligations continue for 20 years to ensure that 10-, 15-, and 20-year targets for GI implementation, and corresponding CSO reductions, are achieved. (*See* Ex. 27 at 4.) Philadelphia's plan requires performance tracking protocols using hydrologic and hydraulic models; up-to-date values for metrics; and an assessment of how each metric compares to modeled performance standards. (Ex. 28 at 2-10.) Cleveland's CD requires a sewershed-specific monitoring plan that shall "set forth the steps NEORSD shall take to evaluate the performance and effectiveness of Green Infrastructure measures on a sewershed scale," by, for example, collecting rainfall and wet weather flow data sufficient in scope and detail to allow "hydrologic adjustment of the sewershed portion of the collection system model to determine the impacts of the Green Infrastructure measures on system performance within the subject sewershed." (Ex. 24, App. 3 at 3-4.) There is no reason why the Chicago area deserves less than these communities. By treating the Chicago area differently, the CD is unfair.

VI. THE CD SHOULD NOT BE APPROVED BECAUSE IT DOES NOT COMPLY WITH THE REQUIREMENTS OF THE CSO CONTROL POLICY.

The CD must not only be fair, reasonable and in the public interest, but must also be compliant with the law; and compliance with law is a requirement that must be met independent of the other criteria for judicial approval. *United States v. BP Exploration & Oil Co.*, 167 F.

Supp. 2d 1045, 1049 (N.D. Ind. 2001); *Telluride*, 849 F. Supp. at 1402. The CSO Control Policy represents the applicable law in this matter, since it has been expressly incorporated into the CWA with a requirement that CSO CDs comply with it. 33 U.S.C. § 1342(q)(1).

The CD should be rejected because it and the LTCP it implements are not in compliance with the CSO Control Policy in numerous respects. Several specific areas of non-compliance are identified in other sections of this Memorandum, and/or in the Alliance Resp. These include failure to comply with the Policy's requirements that selected LTCP be grounded in appropriate performance criteria (Section IV, *supra*); failure to require adequate monitoring post-completion (Section V, *supra*); failure to require completion of TARP by a date certain (*see* Alliance Resp., Analysis III.A.); and failure to consider sensitive areas. For these reasons alone, the CD should not be approved.

In addition to these instances of non-compliance with substantive LTCP requirements, the planning and development of TARP did not comply with numerous planning requirements set forth in the CSO Control Policy that call for proper system monitoring and characterization, analysis of alternatives through development of cost curves, and public participation. (*See* Doc. # 6102, ID # 1792-1807.) While the Governments claim to have taken certain planning steps that serve the same general purpose of these requirements, it is their position that IEPA's finding in its 1995 letter approving TARP as an LTCP categorically exempts them from compliance with the CSO Control Policy's planning requirements. For reasons explained below, this assertion is both problematic and not accurate.

A. TARP Did Not Meet Any Of The Circumstances Under Which IEPA Could Have Excused MWRD From Complying With CSO Control Policy Planning Requirements.

Section I.C. of the CSO Control Policy recognizes that by 1994, some municipalities and other POTWs had begun to make progress in addressing and controlling CSOs. *See* Ex. 1, § I.C. Therefore, under three specific circumstances set out in Section I.C., the permitting authority, in this case IEPA, could determine that certain planning portions of the CSO Control Policy do not

apply to the permittee. Specifically, Section I.C.2 (claimed by the Governments as applicable to TARP) provides as follows:

> Any permittee that, on the date of publication of this final Policy has substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet WQS and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this policy. Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.

Id., Section I.C.2. This exception describes a circumstance where there can be great confidence that the permittee will be able to meet water quality standards, and where there is a clear, pre-existing legal obligation that the permittee do so[11] – as opposed to the situation described immediately following in Section I.C.3, which allows only "consideration" of prior construction of CSO control measures where those measures have not been shown adequate to protect water quality.[12]

In its 1995 letter approving TARP, IEPA asserted that TARP fell into the category described in Section I.C.2, such that it was exempt from "the planning requirements otherwise expected" under the CSO Control Policy. (Doc. # 61-8, ID # 2669.) IEPA did not, however, provide a rationale for that conclusion, and there is no valid one. (*Id.*) To justify excepting TARP from substantial requirements under the CSO Control Policy, USEPA and IEPA have to demonstrate that there was a *permit or an order* pursuant to which MWRD was specifically required to implement TARP. However, there was no enforcement order; and notwithstanding the Governments' tortured reading of them, the permits that were effective in at the time the

[11] It is also clear that this exception applies only to "planning activities," rather than required substantive elements of an LTCP such as adopting a performance criteria approach, or completing the LTCP by a date certain. The also expressly does not include, *inter alia*, sensitive area consideration and post-construction monitoring. The Governments have not suggested to the contrary in their brief or Responsiveness Summary.

[12] The Governments take the position that the third circumstance affording only "consideration" of past efforts where an entity has "previously constructed" CSO control facilities but those facilities are insufficient to ensure compliance with water quality standards, Ex. 1, § I.C., cannot apply here because TARP construction has not been completed. (Doc. # 61-1, ID # 1590.)

CSO Control Policy was issued in 1994 show that the longstanding TARP project was not being implemented "pursuant to" those permits.

The permits under which MWRD was operating in 1994 referenced the ongoing TARP implementation only briefly in passing, with no language suggesting that this decades-old public works project initiated by MWRD and the Corps was being implemented "pursuant to" these late-1980s permits. (*See* Doc. # 61-8, ID # 2636, 2650.) TARP is referenced in these permits only as a mention in a long list of requirements of Special Condition 12 pertaining to preparation of an "operational plan" required to be implemented in the future "[u]pon approval" by IEPA. Specifically, the Permits state that the operational plan being developed should ensure, among many other things, that "the collection and treatment systems are operated to maximize treatment with special emphasis on the control of TARP and the regulators owned and operated by the District." [13] (*Id*.) Nothing in the permits in effect in 1994 described TARP at all, or specified how and to what degree TARP would control CSOs in the future – meaning that none of the certainty or sure progress that Section I.C. of the CSO Control Policy requires as a basis for exempting pre-existing efforts is reflected in MWRD's permits that were in effect in 1994. Thus, IEPA improperly exempted TARP from the planning requirements of the CSO Control Policy, and that exemption should be disregarded by this Court.

B. Development Of TARP Did Not Comply With CSO Control Policy Planning Requirements For LTCPs Set Forth In The Policy.

The Governments admit that being subject to the full weight of the CSO Control Policy would impose significant additional responsibilities upon them. (*See* Doc. # 61-1, ID # 1591-92.) The Policy contains explicit requirements for modeling and characterization of the system, alternatives analysis, and public participation that the Governments would, in principle, have to show had been met to the extent the claimed Section I.C.2 exemption does not apply. NRDC

[13] Indeed, the reference concerns elements of a plan that MWRD was being ordered to develop *in the future* for approval – such that this future plan (and any references it would eventually contain regarding TARP) was plainly not being implemented "pursuant to" the late 1980s permits before it was developed and approved. In any event, this future operating plan pertained only to the operation of the portion of the tunnel system that was built by that date, not the bulk of the TARP system or the reservoirs. (*See* Doc. # 61-8, ID # 2669.)

Group does not take the position that MWRD must go back to square one to comply with the CSO Control Policy planning requirements. However, the CD should have mandated, at minimum, that these planning requirements be implemented on a going-forward basis; and that the most significant omissions be remedied through additional planning and analysis.

The specific Policy-mandated planning requirements that were not implemented over the years TARP was developed are described in detail in the Comments. (Doc. # 61-2, ID # 1792-1807.) To summarize, the Policy requires the following planning steps:

- *System characterization.* The CSO Control Policy specifies in great detail the types of analysis that must be performed in preparation for development of an LTCP. Specifically, the system characterization process must include close scrutiny of data concerning (a) rainfall records, (b) the CSS, including the relationship of overflows to sensitive areas and other pollution sources, (c) monitoring according to specified parameters, and (d) system modeling. Ex. 1, § II.C.1.

- *Alternatives analysis.* The CSO Control Policy requires that a range of alternatives for meeting the presumption approach criteria be considered. Ex. 1, § II.C.4.

- *Public participation.* The CSO Control Policy specifically mandates that the public be informed of and involved in the evaluation of alternatives, and specifies the range of stakeholders who must be included. Ex. 1, § II.C.2.

The Governments rely on various half-measures that resemble these planning requirements in their broad outline. For example, MWRD did a measure of modeling and system characterization in the 1970s and 1980s, although it clearly did not include all of the system characterization elements required by the CSO Control Policy (*e.g.,* a detailed statistical analysis of rainfall data, study of overflows affecting sensitive areas). MWRD considered some alternatives during that time frame, but did not specifically evaluate alternatives to meet the presumption approach criteria (to the extent they can be appropriately applied) as mandated by the Policy. The Governments point to public meetings held as part of the environmental impact review conducted pursuant to the National Environmental Policy Act (*see* Doc. # 61-2, 1594-95), but can identify no public participation procedures that meet the Policy requirement that the decision-maker employ a process that "actively involves the affected public in the decision-making to select the long term CSO controls."

The basic structure of TARP has already been developed and selected decades ago, for better or for worse. However, the CD represents a crossroads at which the efficacy of TARP needs to be evaluated, and that evaluation should have been done in compliance with Policy planning requirements as much as possible – *i.e.*, using the Policy's system characterization methods, and involving the public to the extent the Policy requires. To the extent this Court may determine that TARP has not been shown sufficient to remedy the region's CSO problem, steps must be taken to supplement it, and the CD should require that any such additional measures be vetted and planned in a manner consistent with the Policy. Additionally, with respect to the inadequate monitoring provisions in the CD as addressed in Section V, *supra,* not only should a detailed monitoring plan be developed in accordance with the requirements of the CSO Control Policy, but the public should be allowed to review and comment on that plan in accordance with the CSO Control Policy's public participation requirements – rather than having it developed and approved by IEPA behind closed doors, as the CD currently allows.

The planning requirements in the CSO Control Policy are not mere bureaucratic hoops for the Governments to jump through. They are very real safeguards and quality control measures to ensure that an LTCP is vetted in the light of day and solves the identified CSO problem. Here, it is clear that the inappropriate exemption from the CSO Control Policy requirements of the CWA has significantly impacted the quality and thoroughness of the CD. Indeed, the thrust of the NRDC Group's concern is that the Governments' mistake, almost 20 years ago, of not conducting the legally required analysis is a substantial reason why we are here today – reviewing a CD that allows for protracted implementation delays and that may well not solve the CSO problem it purports to address. More specifically, failure to follow the CSO Control Policy's system characterization requirements deprived IEPA of the information that the CSO Control Policy states should inform a determination (which IEPA never in any event attempted to make) that the quantitative presumption approach criteria can reasonably be applied. Ex. 1, § II.C.4.a. This Court should therefore not enter the CD until and unless the

Governments comply with CSO Control Policy planning requirements to the maximum extent possible.

VII. THE CD IS NOT A HARD BARGAIN BUT MERELY AN ADOPTION OF THE STATUS QUO, AND HENCE REJECTING THE CD WILL NOT HALT ANY ILLUSORY "GAINS" CLAIMED BY THE GOVERNMENTS.

The Governments disagree that they have merely "reacted" to and adopted what MWRD was doing anyway in constructing TARP. (*See* Doc. # 61, ID 1538.) They assert that the CD "reflects intensely negotiated compromises made by MWRD as well as the Governments, leading to a settlement that requires MWRD to implement - on an enforceable schedule - the CSO control plan approved by Illinois EPA and adopted by the Corps." (*Id*.) Although the governments provide no explanation or detail as to what sort of compromises they supposedly wrested from MWRD, they do point to a number of purported gains that could be jeopardized if the CD is not entered: (1) the TARP completion schedule, (2) post-construction monitoring, (3) the TARP performance criteria, (4) the floatables control program, and (5) the green infrastructure plan. (*See* Doc # 61-1, ID 1671-73.)

The problem with these assertions, and threats of loss of the purported "gains" if deadlines are not implemented through entry of the CD, is that the gains are illusory, adding very little to the course of action MWRD has been pursuing for years. Indeed, MWRD has in substance admitted this, agreeing with NRDC Group that the CD simply adopts the status quo: "The consent decree is simply memorializing what we are already doing." Matthew Blake, *Federal court to shape future of Chicago-area flood prevention*, Daily Whale (August 6, 2013), http://www.dailywhale.com/articles/federal-court-shape-future-chicago-area-flood-prevention (quoting MWRD spokesperson Allison Fore).

The CD does not reflect a hard bargain with MWRD. Given that the MWRD has repeatedly admitted that its CSOs have caused violations of water quality standards, there was no way for the governments to lose their lawsuit. For example, comprehensive reports prepared by MWRD in 2008-2010 reflect DO levels in violation of water quality standards greater than 90% of the time at many of the locations measured. (Exs. 4-1, 4-2, 4-3.) Despite holding this

extremely strong hand, the CD does not achieve substantial gains over and above what is required in MWRD's existing permits issued in 2002. The fact remains that MWRD will continue forward with TARP regardless of this litigation or the CD that purports to resolve it; and TARP will continue to be constructed as it has been for the past 40 years. (*See* Blake article.) There is thus no harm in sending the CD back to require that the Governments inject some substance into it.

With respect to the timing of TARP implementation, the supposed "enforceable schedule" in the CD is meaningless. (*See* Alliance Resp., Analysis III.) It memorializes a plan for constructing TARP that has been rife with delay throughout the history of the project and licenses future delays. According to the Government, the schedule is totally dependent on one factor – the rate of mining at the quarries, which can and will vary over time as a result of market forces. (Doc. # 61, ID # 1546.) Because of the uncertainty of the market, the CD allows for a potentially unlimited number of "Contingency Events" that would push back the TARP completion date indefinitely. (Doc. # 3-1, ID # 49-51.) Contingency Events, which under can be triggered by anything that delays the mining of rock from the quarries or otherwise delays completion of the Reservoir, rob the CD of any certainty that the CD will achieve the purported (and distant) 2029 construction completion end date. (Alliance Resp., Analysis III.) None of this is plausibly the result of "hard, arms-length bargaining" with MWRD.

With respect to post-construction monitoring, Special Condition 10.10 of the permits already requires MWRD, within six months of the completion of TARP, "to develop and submit to IEPA a plan to determine whether or not the CSOs in the TARP service area have the potential to cause or contribute to either violations of applicable water quality standards or use impairment in the Chicago area waterways." (Doc. # 61-3, ID # 1936-37, 1954-55, 1972-73.) Special Condition 10.11 requires MWRD to monitor the frequency, duration of CSO discharges from certain outfalls and estimates in pounds of some water quality parameters. (*Id.*) MWRD is already required to do much of what Paragraph 35 of the CD requires under its current permits. Indeed, as discussed in Section V, *supra*, USEPA has inexplicably refused to require a detailed

monitoring plan in the CD, as it has in other CSO consent decrees across the country. USEPA, again, has achieved very little with respect to post-construction monitoring in the CD.

The purported performance criteria in Paragraphs 28 and 29 of the CD, as discussed in Section IV, *supra*., are devoid of any quantitative limitations on CSOs or other limits. These vague provisions are no improvement over the arguably more detailed collection, treatment and operations requirements already required by Special Conditions 10.1-10.5 & 10.8 in MWRD's existing 2002 permits. (*See* Doc. # 61-3, ID # 1935-36, 1953-54, 1971-72.)

The Floatables Control Program, at least, is in principle a "gain" in that it is not already contained in MWRD's existing permits. However, it still is little more than what MWRD was doing already to control floatables and less than what USEPA presented to MWRD as minimally sufficient. (*See* Alliance Resp., Analysis III.B.)

Finally, the very limited green infrastructure plan in the CD – thrown in at the last minute as an addition to earlier versions (*see* Doc. # 3-1, ID # 132-39), is as meager as any of the other purported "gains." MWRD is already in the early stages of implementing green infrastructure (*i.e.*, keeping stormwater onsite instead of sending it to the collection system), having approved and included green infrastructure in its December 2012 budget, and therefore will address the basic elements of the green infrastructure plan set forth in CD Appendix E. (*See id.*) Beyond these exploratory elements, however, Appendix E contains few hard requirements to ensure that the green infrastructure is installed in a manner and location that will curb CSO overflows. (*See* Doc. 61-1, ID # 1636-60.) It would allow MWRD to take credit for green infrastructure projects implemented by others, where MWRD involvement may have been minimal. Additionally, as discussed in Section IV, *supra*, the CD does not establish meaningful performance criteria, making it impossible to determine after implementation of Appendix E – much less now – what the green infrastructure projects will achieve. The proposed design retention capacity is a drop in the bucket, not substantial enough to reduce CSOs. (*Id.*) Just as with TARP, MWRD has substituted hyperbole about overall size – an oversimplified number of gallons retained – for

actual analysis of what is necessary to curb CSOs, and the projected impact of green infrastructure on CSO reduction.

CONCLUSION

The Governments failed to strike a hard bargain with MWRD, with the result that the CD blesses the continuing conduct by MWRD that led to the violations of water quality standards forming the basis of the Government's Complaint. This Court should reject the CD with an order that the Governments propose a consent decree with meaningful, enforceable performance criteria that will require MWRD to reduce CSOs and put an end to water standards violations. Doing so will not delay whatever progress MWRD is making toward constructing TARP. Otherwise, if the CD is entered in its current form, TARP may or may not be completed by 2029, but CSOs and water quality impacts will continue.

Dated September 5, 2013

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TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
1	CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994)
2	Deposition Transcript of Dean Maraldao, USEPA (August 5, 2013)
3	30(b)(6) Notices to USEPA and IEPA (July 12, 2013)
4-1	MWRD Continuous Dissolved Oxygen Monitoring Reports (2009)
4-2	MWRD Continuous Dissolved Oxygen Monitoring Reports (2010)
4-3	MWRD Continuous Dissolved Oxygen Monitoring Reports (2011)
5	United States' Corrected Responses to RFAs (August 1, 2013)
6	State of Illinois' Response to RFAs (July 29, 2013)
6A	MWRD's Response to USEPA's Comments (August 30, 2013)
7	Excerpts of Testimony of Dr. Adrienne Nemura, IPCB-R08-9 (June 27, 2011)
8	Written Responses to Illinois EPA's Pre-Filed Questions for MWRDGC's Witness Adrienne D. Nemura, IPCB-R08-0 (June 17, 2011)
9	Excerpt of Testimony of Dr. Adrienne Nemura, IPCB-R08-9 (September 24, 2008)
10	Excerpt of Testimony of Samuel Dennison, IPCB-R08-9 (February 17, 2009)
11	Letter from T. O'Connor, MWRD to S. Keller, IEPA (August 6, 1999)
12	2009 Draft NPDES Permits for Stickney, Calumet and Northside WRPs
13	TARP Status Report (December 1, 2010)
14-1	Technical Memorandum 3WQ, Study of End-Of- Pipe CSO Treatment (October 2006)
14-2	Technical Memorandum 3WQ, Study of End-Of- Pipe CSO Treatment (October 2006)
15	MWRD Summary of Consent Decree (April 21, 2011)
16	Deposition of Sydney Alan Keller, IEPA (August 6, 2013)
17	*U.S. v. Akron*, 2013 U.S. Dist. LEXIS 39816 (S.D. Ohio March 13, 2013)
18	MWRD Corrected Responses to RFAs (July 31, 2013)

19	Joint Memorandum, Protecting Water Quality with Green Infrastructure in Water Permitting Programs, USEPA (April 20, 2011)
20	Excerpts of Ft. Wayne Consent Decree
21	Excerpts of Kansas City Consent Decree
22	Excerpts of Indianapolis Consent Decree
23	St. Louis Consent Decree
24	NESORD/Cleveland Consent Decree
25	King County Consent Decree
26	King County Monitoring Plan Referenced in Consent Decree
27	New York City Administrative Consent Order
28	Philadelphian LTCP Update

CERTIFICATE OF SERVICE

I, Douglas Sanders, an attorney, hereby certify that on September 5, 2013, a copy of **Response In Opposition Of Natural Resources Defense Council, Inc., Sierra Club, Inc. And Prairie Rivers Network To The United States' And State Of Illinois' Motion To Enter Consent Decree and the related Exhibits 1 through 28**, were served upon the parties on the attached Service List, by the Court's CM/ECF system, in accordance with the Administrative Procedures for the Case Management/Electronic Case Filing System for the Northern District of Illinois, and/or by other service as indicated.

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