

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
CHANCERY DIVISION

ALLIANCE FOR THE GREAT  
LAKES, NATURAL  
RESOURCES DEFENSE  
COUNCIL, OPENLANDS, and  
SIERRA CLUB

2017CH05445  
CALENDAR/ROOM 08  
TIME 00:00  
Admin Review

Plaintiffs

No. \_\_\_\_\_

v.

Illinois Department of Natural Resources  
Docket No. LMO-14-5

The ILLINOIS DEPARTMENT OF  
NATURAL RESOURCES, WAYNE  
A. ROSENTHAL, Director of the  
Illinois Department of Natural  
Resources, in his official capacity, the  
OFFICE OF WATER RESOURCES  
of the Illinois Department of Natural  
Resources, the METROPOLITAN  
WATER RECLAMATION  
DISTRICT OF GREATER  
CHICAGO, the ILLINOIS  
ENVIRONMENTAL PROTECTION  
AGENCY, the ILLINOIS  
ATTORNEY GENERAL, and  
ROBERT MOOL, Legal Counsel for  
the Illinois Department of Natural  
Resources, in his official capacity.

Defendants

2017 APR 14 PM 3:01

**COMPLAINT FOR ILLINOIS ADMINISTRATIVE REVIEW**

## INTRODUCTION

1. The Alliance for the Great Lakes, Natural Resources Defense Council, Openlands, and the Sierra Club (“Plaintiffs”) seek judicial review of a final order of defendant Illinois Department of Natural Resources (“IDNR”) and its director, Wayne A. Rosenthal (“Director”), permitting the Metropolitan Water Reclamation District of Greater Chicago (“MWRD”) to divert an additional almost 420 billion more gallons of water from Lake Michigan into the Chicago Area Waterway System (“CAWS”) than it otherwise would have been allowed to divert.

2. The Great Lakes-St. Lawrence River Basin Water Resources Compact Act (the “Compact”), 45 ILCS 147 (West 2016), the Level of Lake Michigan Act, 615 ILCS 50/1 to 50/14 (West 2016), and its implementing regulations (the “Diversion Regulations”), 17 Ill. Adm. Code 3730.101 to 3730.501 (2016), contemplate that MWRD will draw Lake Michigan water for specified purposes. The laws and regulations also dictate how IDNR must evaluate such withdrawal requests and direct IDNR to condition its permits to minimize Lake Michigan withdrawals to the greatest extent feasible.

3. IDNR’s issuance of a modified permit to MWRD without a proper determination of the volume of such diversion and without conditions imposing conservation practices contravenes Illinois and federal law, as well as the requirements of the consent decree entered by the U.S. Supreme Court in *Wisconsin v. Illinois*, 388 U.S. 426 (1967) (“1967 Decree”). The modified permit fails to protect Lake Michigan, the CAWS and the public’s interest in a healthy Lake Michigan and CAWS.

4. Plaintiffs bring this case pursuant to the Illinois Administrative Review Law, 735 ILCS 5/3-101 to 5/3-113 (West 2016), which provides for review of IDNR decisions regarding diversions of Lake Michigan water under 615 ILCS 50/12 (West 2016).

5. In the course of reaching this decision, IDNR improperly disallowed discovery and testimony related to conservation practices that could reduce MWRD's water needs, notwithstanding statutory and regulatory requirements that IDNR consider such practices. The discovery sought to identify those conservation practices that are feasible for MWRD to implement between now and 2029, the new estimate for completion of the Tunnel and Reservoir Project ("TARP"), which MWRD represents will reduce the need for diversions related to ensuring sanitary conditions in the CAWS. IDNR also improperly refused to admit testimony and other evidence that would have shown that MWRD could implement conservation practices now and in the future to minimize the need for diversion.

6. Plaintiffs seek judicial review because IDNR's failure to comply with the law governing diversions of lake water put at risk the public welfare and environmental interests. Lake Michigan serves an important role for the public as a source of drinking water for more than seven million people, an essential Great Lakes fishery, and a center for tourism and recreational opportunities. Lake Michigan provides the basis for economic activities that generate billions of dollars in annual revenue. Ensuring that Great Lakes water is diverted to the least extent possible is particularly important because scientific models project that climate change will produce a drop of two feet in the average water level of the Great Lakes during this century. If allowed to stand, IDNR's decision will undercut and frustrate the purposes of, and the legal framework created by,

the Level of Lake Michigan Act, the Compact, and the 1967 Decree, which protect the globally important resource of the Great Lakes. The IDNR decisions in this proceeding adversely affect the rights and interests of Plaintiffs and their members.

7. Accordingly, the Court should issue an order vacating the Director's decision to issue a modified diversion permit and remanding this matter to IDNR, and, upon remand requiring that: (a) IDNR allow reasonable discovery to determine those conservation measures that should be required to minimize the need for diversions, (b) IDNR consider past and future water conservation measures in its calculations regarding MWRD's anticipated water diversion needs, (c) IDNR conduct a new hearing at which it must consider all testimony or evidence relevant to identify "all feasible means reasonably available" to reduce the need for diversions, 615 ILCS 50/5 (West 2016), (d) IDNR's decision on remand require all feasible means to promote the efficient and minimal diversion of Lake Michigan water and include permit conditions that require MWRD to undertake specific conservation practices during the period of the permit, and (e) IDNR determine the volume and duration of MWRD's diversion allocation consistent with full compliance with all water quality standards applicable to the CAWS under Illinois regulations implementing the Clean Water Act, 33 U.S.C. § 1251 et seq. (2012).

#### **PARTIES**

8. Plaintiff Alliance for the Great Lakes (the "Alliance"), a not-for-profit corporation incorporated and existing under the laws of Illinois, is headquartered in Chicago, Illinois and has additional offices in Michigan, New York, Ohio, and Wisconsin. As of January 1, 2017, more than 650 of its 1,200 members live in the State of Illinois. The Alliance's mission is to protect the Great Lakes, and it involves tens of thousands of people each

year in advocacy, volunteering, education, and research to ensure the lakes are healthy and safe for all.

9. Plaintiff Natural Resources Defense Council (“NRDC”), a not-for-profit membership organization incorporated under the laws of the State of New York, is a national environmental organization with over 2.4 million members with offices across the United States, including in Chicago, Illinois. As of April 11, 2017, more than 14,770 of these members live in the State of Illinois. NRDC is dedicated to the preservation, protection, and defense of the environment, its wildlife and natural resources, and it actively supports effective enforcement of laws protecting water quality and quantity on behalf of its members.

10. Plaintiff Openlands, a not-for-profit corporation organized and existing under the laws of the State of Illinois, is a regional conservation organization with approximately 3,000 supporters and is headquartered in Chicago, Illinois. Openlands protects natural and open spaces in northeastern Illinois and the surrounding region to ensure cleaner air and water, to protect natural habitats and wildlife, and to help balance and enrich Illinoisans’ lives. Additionally, Openlands owns and maintains a mile of beachfront property along the coast of Lake Michigan and three ravines that feed into the lake, areas that are open to the public.

11. Plaintiff Sierra Club, a not-for-profit corporation organized and existing under the laws of the State of California, is a national environmental organization with approximately 750,000 members, with offices and programs authorized and doing business in the State of Illinois, including Chicago, Illinois. As of February 28, 2016, 28,926 of these members live in the State of Illinois. The Sierra Club’s purpose is to

protect the natural environment and promote the responsible use of the Earth's ecosystems and resources.

12. Plaintiffs have members who are directly interested in and affected by IDNR's authorization of MWRD's withdrawal of water from Lake Michigan. Some of those members live in the Chicago area and use both Lake Michigan and the CAWS for recreation. Plaintiffs' members rely on the health of Lake Michigan, in terms of both water quality and quantity, to preserve their economic, recreational, and aesthetic interests in the Lake. Additionally, members of one or more of the Plaintiffs own property that is affected by changes in the water level of the Lake. Plaintiffs have continuously and arduously advocated for improved water quality of the CAWS and Lake Michigan for decades, including as parties of record to the IDNR administrative proceeding related to the MWRD diversion permit at issue in this Complaint. Plaintiffs have worked with MWRD to address longstanding issues in the CAWS through various projects and proceedings. Some Plaintiffs have set aside areas along or near Lake Michigan for conservation, ensuring that lakefront areas are kept clean, accessible to the public, and visually appealing. Diversion permits that do not adequately protect Lake Michigan or the CAWS undermine Plaintiffs' efforts over the past decades and adversely affect Plaintiffs' rights and interests related to the CAWS and Lake Michigan.

13. Defendant Illinois Department of Natural Resources, an entity organized and operating pursuant to the Department of Natural Resources Act, 20 ILCS 801 (West 2016), implements the Level of Lake Michigan Act, the Compact, and Illinois's Lake Michigan Water Allocation program.

14. Defendant Wayne A. Rosenthal is the Director of IDNR. Director Rosenthal approved the final administrative order in the permit hearing proceeding.

15. Defendant Office of Water Resources is a subdivision within IDNR and is the lead state agency for water resources planning, navigation, floodplain management, the National Flood Insurance Program, water supply, drought, and interstate organizations on water resources.

16. Defendant Metropolitan Water Reclamation District of Greater Chicago is the holder of the permit at issue in this proceeding, requested the modification of that permit, and owns and operates publicly owned treatment works in Cook County, Illinois. MWRD is responsible for meeting the navigation requirements and minimum discretionary dilution flows necessary to maintain the CAWS in a reasonably satisfactory sanitary condition. MWRD is also responsible for ensuring that the CAWS meet Illinois's water quality standards.

17. Defendant Illinois Environmental Protection Agency ("IEPA"), an entity organized and operating pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/4 (West 2016), is a state agency whose mission is to safeguard environmental quality, consistent with the social and economic needs of the State, so as to protect health, welfare, property, and the quality of life. IEPA participated as a party in the permit hearing proceeding.

18. Defendant Illinois Attorney General is the State's chief legal officer and is responsible for protecting the public interest of the State and its people. The Office of the Illinois Attorney General participated as a party in the permit hearing proceeding.

19. Defendant Robert Mool is an employee of IDNR with the title of “Legal Counsel.” Robert Mool served as the hearing officer for the relevant IDNR proceeding.

### **JURISDICTION AND VENUE**

20. The subject matter of this dispute is located in Cook County, Illinois. MWRD operates in Cook County, and its diversion of Lake Michigan water occurs in Cook County. Cook County is the appropriate venue for this dispute. 735 ILCS 5/3-104 (West 2016).

21. The circuit court has jurisdiction over this matter pursuant to the Illinois Administrative Review Law, 735 ILCS 5/3-104 (West 2016), which is made applicable to review of the IDNR decisions at issue here by 615 ILCS 50/12 (West 2016) and 615 ILCS 5/26c (West 2016).

22. This action is timely. An action to review a final administrative decision must commence with the filing of a complaint and summons within 35 days after service of the final administrative decision. 735 ILCS 5/3-103 (West 2016). The Director’s September 2016 Permit Order was issued on September 22, 2016, attached as Exhibit 1. Plaintiffs timely requested reconsideration of the September 2016 Permit Order on October 21, 2016. The Director issued the Final Decision denying Plaintiffs’ reconsideration request on March 14, 2017, attached as Exhibit 2. Plaintiffs timely file this appeal on April 14, 2017.



## FACTUAL BACKGROUND

### THE LAKE MICHIGAN WATER DIVERSION, SUBSEQUENT LITIGATION AND WATER QUALITY STANDARDS.

23. Before the twentieth century, the City of Chicago flushed its untreated sewage directly into the Chicago River. Often grossly polluted, the Chicago River then followed its natural course into Lake Michigan, harming drinking water, as well as recreational and commercial use of the Lake. To address the problem, MWRD's predecessor, the Sanitary District of Chicago, engineered the reversal of the Chicago River so that it would flow first into the Sanitary and Ship Canal, then the Des Plaines and Illinois Rivers. It also established a system of locks and dams to control when and how much Lake Michigan water would flow into the Chicago River. As a general matter and at most times, the Chicago River thus no longer contaminated Lake Michigan on a daily basis; instead, Lake water could be used to dilute the Chicago River and attached canals when necessary to address periodic water quality problems.

24. States other than Illinois were concerned that Chicago's practice of withdrawing Lake water was unsustainable and could threaten Lake Michigan's environmental health and their own interests. Thus, Chicago's water diversion led to litigation in the United States Supreme Court. See *Wisconsin v. Illinois*, 278 U.S. 367 (1929). Specifically, the other states contended that the reversal of the Chicago River's flow "would lower the [L]ake levels with injurious consequences to the Great Lakes navigation and to the complainant states." *Id.* at 419.

25. In 1967, the Supreme Court issued the 1967 Decree in *Wisconsin v. Illinois* that limited Illinois' annual diversions of Lake Michigan water to 3,200 cubic feet per second ("cfs"). 388 U.S. 426, 427 (1967). Of this state-level allocation, most was directed to

municipalities and is used for drinking water. A portion was designated to support navigation in the CAWS, and a final allocation was made to dilute and flush pollution in the CAWS. Specifically, the U.S. Supreme Court decreed that “[t]he water permitted by this decree to be diverted from Lake Michigan and its watershed may be apportioned by the State of Illinois among its municipalities, political subdivisions, agencies, and instrumentalities for domestic use or for direct diversion into the Sanitary and Ship Canal *to maintain it in a reasonably satisfactory sanitary condition*, in such manner and amounts and by and through such instrumentalities as the State may deem proper, subject to any regulations imposed by Congress in the interests of navigation or pollution control.” (Emphasis added.) *Id.* at 427-28.

26. In 1972, Congress amended federal statutes related to water quality through an enactment known as Clean Water Act, 33 U.S.C. §§ 1251 et seq. (2012). In compliance with federal and state law, including the Clean Water Act, the Illinois Pollution Control Board (“IPCB”) has established water quality standards that are applicable to Lake Michigan, the CAWS and other Illinois waters. For the CAWS, these standards require minimum levels of dissolved oxygen and the prevention of “offensive conditions” and “unnatural sludge.” 35 Ill. Adm. Code 302.203, 302.403, 302.405 (2016).

#### **DEVELOPMENT OF ILLINOIS LAW ON WATER DIVERSION**

27. To satisfy its obligations under the 1967 Decree, which was later modified in 1980, Illinois manages its annual allocation of 3,200 cfs through the Level of Lake Michigan Act, 615 ILCS 50 (West 2016). The Act designates IDNR “as the agency to control and regulate the diversion of Lake Michigan water and [it] is responsible for apportionment of water diverted from the Lake Michigan watershed.” 615 ILCS 50/1.2

(West 2016). This control is accomplished through a permitting system. *Id.*, 615 ILCS 50/14 (West 2016). The Level of Lake Michigan Act requires that “all feasible means reasonably available to the State and its municipalities, political subdivisions, agencies and instrumentalities shall be employed to conserve and manage the water resources of the region and the use of water therein.” 615 ILCS 50/5 (West 2016). The Act also requires IDNR to make water diversion decisions based on maintaining the CAWS in a “reasonably satisfactory sanitary condition,” *i.e.* the standard used in the 1967 Decree. 615 ILCS 50/3 (West 2016). IDNR promulgated rules on the allocation of water from Lake Michigan to implement the Level of Lake Michigan Act in the form of the Diversion Regulations, 17 Ill. Adm. Code 3730.

28. In 2007, Illinois and seven other states signed the Great Lakes-St. Lawrence River Basin Water Resources Compact to coordinate the protection of Lake Michigan and the other Great Lakes. The Compact was incorporated into Illinois law later that year and, in 2008, became federal law under Article I, Section 10 of the U.S. Constitution. 45 ILCS 147/5 (West 2016); Public Law No: 110-342, 122 Stat. 3739 (2008). The Compact proposes “to protect, conserve, restore, improve and effectively manage the Waters and Water Dependent Natural Resources of the Basin,” and to “prevent significant adverse impacts of Withdrawals and losses on the Basin’s ecosystems and watersheds.” Compact § 1.3(2)(a), (f). To ensure that the Compact’s goals are met, section 4.2 requires each State party to “develop its own [w]ater conservation and efficiency goals and objectives consistent with the Basin-wide goals and objectives” (“Compact Goals”). Compact at § 4.2(2) Moreover, the Compact also requires each State party to “implement \*\*\* a

voluntary or mandatory water conservation program for all, including existing, Basin Water users.” Compact § 4.2(5).

29. In 2014, IDNR revised the Diversion Regulations to conform with and implement the Compact, defining in detail the bases for allocation requests and the conditions that must be imposed when allocation permits are issued. 17 Ill. Adm. Code 3730. The permit “shall state the allocation the applicant is allowed, the starting date and duration of the permitted allocation, and such conditions as specified in Sections 3730.307 and 3730.309 as [IDNR] may require the applicant to comply with in order to receive or to continue to receive its allocated share of the Lake Michigan diversion.” 17 Ill. Adm. Code 3730.301(b). The Diversion Regulations are the mechanism by which the State implements the Compact’s goals and objectives.

#### **WATER QUALITY PROBLEMS IN CHICAGO AREA WATERWAY SYSTEM**

30. Combined sewer systems serve the City of Chicago and many of its older suburbs. Combined sewers convey both storm water and sanitary wastewater (*i.e.* everything flushed down Chicago’s toilets, among other sources) through the same pipes. At times, those pipes cannot accommodate both the storm water and wastewater, and, therefore, the excess combined water backs up into the system and overflows into waterways through pipes designed to convey the excess water. Such overflows are known as Combined Sewer Overflows (“CSOs”). Generally, CSOs occur during or immediately after rain or wet weather events when the water storage capacity of the MWRD’s sewer system and treatment plants cannot accommodate both sanitary and storm water flow. During CSOs, untreated sewage, including toilet paper, personal hygiene products, and raw human

waste, is discharged from over 600 outfalls (*i.e.* sewer pipes) into the Chicago River and the CAWS.

31. When they occur, CSOs can lead to violations of water quality standards such as the dissolved oxygen standard. CSOs can also cause violations of water quality standards prohibiting the presence of “Offensive Conditions” and “Unnatural Sludge.” 35 Ill. Adm. Code 302.203, 302.403 (2016).

32. In order to address the problem of CSOs, MWRD adopted TARP in 1972. TARP is to be constructed in two phases: Phase I involved construction of four distinct tunnel systems to capture water flow that would otherwise be discharged into the CAWS, and Phase II consists of developing reservoirs for additional storage. Once it is completed, MWRD claims that TARP will decrease the number of CSOs, thus reducing the amount of water diversion needed from Lake Michigan. Originally, both phases of TARP were expected to be complete in 2014. MWRD now projects TARP to be completed in 2029.

33. In addition to the water quality standards violations associated with CSOs during rain events, violations of the relevant water quality standards in the CAWS also occur during dry weather periods, *i.e.* when there is no ongoing or recent heavy precipitation. Such violations result from pollutants discharged from sewage treatment plants, among other sources, which can fuel algal and plant overgrowth, and/or from a lack of natural aeration in the waterway.

**THE 2000 MWRD WATER DIVERSION PERMIT AND MWRD’S SUBSEQUENT  
MODIFICATION REQUEST TO INCREASE DIVERSION VOLUME**

34. Through a permit issued pursuant to the Level of Lake Michigan Act, the State authorizes MWRD to: (a) divert an amount of Lake Michigan water necessary to allow for navigation in the CAWS; and (b) divert water, pursuant to the U.S. Supreme Court

authorized “discretionary diversion,” to maintain the CAWS in a “reasonably satisfactory sanitary condition.” The latter authorization is at issue in this action.

35. MWRD’s permit, issued by IDNR on September 20th, 2000 (“2000 Permit”), granted MWRD a discretionary diversion of 270 cfs of Lake Michigan water for maintaining water quality in the CAWS until 2014, the year in which TARP was then expected to be complete. After September 30, 2014, the 2000 Permit reduced the volume of diversion for maintaining water quality from 270 cfs to 101 cfs.

36. MWRD filed a Petition for Modification of Allocation Permit (“Petition”) on July 7, 2014 asking IDNR to modify the 2000 Permit by increasing the allocation of water it could draw from Lake Michigan for 2016-2030. MWRD’s Petition is based upon: (a) delays in the construction of portions of TARP, which is now anticipated to be completed by 2029 (when the last planned reservoir is scheduled to be completed); and (b) certain data indicating that some of the projections regarding dissolved oxygen levels under various CSO and dry weather conditions made prior to issuance of the 2000 Permit were based on inaccurate assumptions. MWRD requested that IDNR modify the 2000 Permit and increase the authorization for diversions during water years 2015–2029 from 101 cfs to 270 cfs.

### **PROCEDURAL HISTORY**

37. Following the commencement of the IDNR proceeding to review MWRD’s Petition for an increased allocation of Lake Michigan water after 2014, the Plaintiffs moved to intervene on November 18, 2014. On December 10, 2014, the Hearing Officer admitted Plaintiffs, IEPA, and the Illinois Attorney General’s Office as parties to the proceeding.

38. The parties filed and responded to discovery requests. On February 17, 2015, Plaintiffs (then as Interveners) requested information from MWRD and IEPA regarding, *inter alia*, whether and how MWRD has pursued means to reduce the need for Lake-water diversions, such as by studying and implementing water conservation practices. These topics of discovery were consistent with IDNR regulations, which require consideration of pollution reduction and other practices that diversion permit holders could implement including “improved treatment of all wastewater flows, elimination of untreated combined sewer bypass flows, [and] reasonable use of aeration facilities.” 17 Ill. Adm. Code 3730.304(b) (2016). Plaintiffs also requested information regarding the extent to which completion of TARP in 2029 (or some other date) would end the violations of the dissolved oxygen standards and other water quality standards that have occurred in the CAWS. MWRD responded and objected in part to Plaintiffs’ request.

39. In a Prehearing Order of March 27, 2015 (attached as Exhibit 3), IDNR Hearing Officer Mool granted Plaintiffs leave to file a Motion to Compel Responses to Information Requests and directed Plaintiffs to file a Statement of Contested Issues to address MWRD’s discovery objections. On April 17, 2015, Plaintiffs stated that the Contested Issues should be:

- i. Whether the delay in the completion of TARP is a substantial change of circumstances justifying a modification of the permit under 17 Ill. Adm. Code 3730.310(b);
- ii. Whether the change in the Illinois dissolved oxygen standards contained in 35 Ill. Adm. Code 302.405 is a change of circumstances justifying a modification of the permit under 17 Ill. Adm. Code 3730.310(b);
- iii. Whether it has been demonstrated that completion of TARP will substantially eliminate the need for discretionary diversions and assure compliance with 35 Ill. Adm. Code 302.403 and 302.405 in the CAWS such that other conservation practices will be unnecessary to reduce the need for discretionary diversions and, thus, that the Department need not

consider whether other feasible means are reasonably available to save water resources under 615 ILCS 50/5;

- iv. Whether the record contains information sufficient for the Department to consider the conservation practices that it is required to consider under 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- v. Whether through improved and more accurate monitoring of continuous dissolved oxygen levels in the CAWS the need for the requested diversion could be reduced in compliance with 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- vi. Whether the need for the requested diversion could be reduced through improved treatment of wastewater flows from the MWRD wastewater treatment plants and other wastewater flows into the CAWS in compliance with 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- vii. Whether, in addition to the completion of TARP, elimination or reduction of untreated combined sewer bypass flows could reduce the need for the requested diversion in compliance with 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- viii. Whether through reasonable use of aeration facilities the need for the requested diversion could be reduced in compliance with 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- ix. Whether through reasonable use of green infrastructure the need for the requested diversion could be reduced in compliance with 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304(b);
- x. Whether redirection of flows in parts of the CAWS is a means reasonably available to save water resources under 615 ILCS 50/5;
- xi. Whether under 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.307(c), conservation practices specified in 17 Ill. Adm. Code 3730.304(b), studies of conservation practices or other means reasonably available to conserve water resources should be made a condition of the permit; and
- xii. Whether the permit should be extended for three years, or another period less than 14 years, to allow time for appropriate studies of conservation practices and other means reasonably available to save water resources under 615 ILCS 50/5 and 17 Ill. Adm. Code 3730.304.

40. In an order issued on May 14, 2015 (“Contested Issues Order of May 14, 2015”)

(attached as Exhibit 4), the Hearing Officer:



- i. Excluded, in whole or in part, ten of the Plaintiffs' twelve contested issues for consideration in the proceeding, limiting what the IDNR Hearing Officer would consider to determine whether changes in circumstances justified modifying MWRD's existing permit. Specifically, the Order limited the issues to the first two listed above—whether either (i) developments related to TARP or (ii) the change in Illinois dissolved oxygen ("DO") water quality standards constituted substantial changes that justified a permit modification.
- ii. Excluded questions of how conservation measures, such as improved wastewater treatment and green infrastructure, could reduce the need for MWRD's requested additional diversion allocation.
- iii. Excluded discovery regarding the extent to which conservation measures should be required to be instituted during the permit period to reduce the need for discretionary diversions after TARP's assumed completion in 2029.
- iv. Allowed, in part, Plaintiffs' proposed issue regarding whether the permit should extend for less than fourteen years, which would require MWRD to return for a new modification after conducting conservation studies and learning the results of the implementation of other water saving measures. The Hearing Officer ruled that the appropriate time period of MWRD's proposed permit modification could be contested, but he eliminated consideration of what water-saving conservation measures MWRD might implement to reduce the volume or duration of the modification.
- v. Denied eight of nine contested discovery questions posed in Plaintiffs' Motion to Compel, requiring MWRD to respond to the single surviving question regarding water quality monitoring in the CAWS.

41. In compliance with the Hearing Officer's June 19, 2015 scheduling order, Plaintiffs filed written testimony of four witnesses to explain the factual inadequacies of MWRD's position under Plaintiffs' interpretation of the relevant law. Plaintiffs also filed a Prehearing Memorandum, laying out their interpretation of the relevant legal requirements that MWRD's petition failed to address. Plaintiffs offered that permitting the 270 cfs diversion until 2018 should be conditioned on studies of means to minimize the need for diversions from Lake Michigan, including studies of:

- i. green infrastructure (Pre-filed Testimony of Karen Hobbs);

- ii. advanced wastewater treatment (Pre-filed Testimony of Dr. Cynthia Skrukud);
- iii. landscape restoration (Testimony of Stacy Meyers, with support by Stantech); and
- iv. increased aeration (Pre-filed Testimony of David Zenz, offered by MWRD to the Illinois Pollution Control Board in R08-9, in which MWRD itself proposed increased aeration at two sites in the CAWS in order to prevent violations of water quality standards).

42. MWRD filed written testimony of three witnesses. IEPA and IDNR staff filed written testimony of one witness each.

43. Following the witness filings, on September 22, 2015, MWRD filed a Motion to quash Plaintiffs' Prehearing Memorandum and to strike Plaintiffs' pre-filed written testimony, on the ground that it purportedly did not strictly comply with the Hearing Officer's June 19, 2015 Order narrowing the range of issues to be addressed.

Notwithstanding Section 3730.211(c) of the Diversion Regulations, which requires IDNR to admit all offered evidence that would be admissible under "an arguable interpretation of substantive law," 17 Ill. Adm. Code 3730.211(c)(3) (2016), the Hearing Officer granted MWRD's requests, and excluded the testimony (except for the limited purpose of an offer of proof) in its Emergency Motion Order of September 25, 2015 attached hereto as Exhibit 5.

44. Through the Contested Issues Order of May 14, 2015, the Emergency Motion Order of September 25, 2015, and rulings made during the hearing, Plaintiffs were precluded from developing discovery and offering facts related to: (a) whether the completion of TARP would eliminate the need for diversions of Lake Michigan water, which might eliminate the need to develop additional water conservation practices prior to its completion; (b) whether feasible conservation practices could address potential

violations of the dissolved oxygen, Unnatural Sludge, and Offensive Conditions standards and thereby reduce the dependence of MWRD on lake diversions; and (c) whether studies of such practices should be required as conditions on the permit. The proceedings that followed were limited to testimony regarding what diversion allocation was needed to meet the dissolved oxygen standards in the CAWS during the 2018 to 2029 period without consideration of conservation practices.

45. IDNR staff, in its pre-filed testimony, interpreted Section 3730.307 of the Diversion Regulations as conferring upon IDNR sufficient discretion to draft tailored permit conditions of the kind proposed by Plaintiffs but rejected by the Hearing Officer as irrelevant. IDNR staff, who administer the Lake Michigan allocation permitting scheme, specifically recommended that certain conditions be placed in the permit pursuant to Section 3730.307(c)(10), including creation of guidance documentation, maintenance of particular structures, and submission of listed reports.

46. After hearings on October 6 and 7, 2015, Plaintiffs filed a Post-Hearing Brief on December 15, 2015. MWRD and IEPA also filed Post-Hearing Briefs. Plaintiffs and MWRD filed Post-Hearing Reply Briefs. To address arguments made for the first time in the MWRD's Post-Hearing Reply Brief, Plaintiffs filed a sur-reply on February 2, 2016.

47. Based upon these proceedings, the Director issued a modified diversion permit ("Permit") to MWRD on September 22, 2016 ("September 2016 Permit Order"), granting MWRD's Petition. The September 2016 Permit Order rejected Plaintiffs' proffered conditions—and even positions that IDNR staff had offered. The Contested Issues Order of May 14, 2015 provided the basis for several conclusions in the September 2016 Permit Order.

48. Plaintiffs challenged the Director's legal and factual conclusions in its September 2016 Permit Order by filing for administrative rehearing on October 21, 2016.

49. On March 14, 2017, the Director issued a final order affirming the September 2016 Permit Order and denying Plaintiffs' motion for reconsideration and rehearing of the September 2016 Permit Order ("March 2017 Final Order"). The Director's Permit granted MWRD a new allocation of approximately 39,890,000,000 gallons of Lake Michigan water for water years 2016–2017 (*i.e.* authorizing withdrawals at 270 cfs) and approximately 28,090,000,000 gallons per year for the water years 2018–2030 (*i.e.* authorizing withdrawals at 220 cfs), for an approximate total of 416,860,000,000 gallons.

## COUNT I

### **IDNR INTERPRETED THE DIVERSION REGULATIONS IN A MANNER INCONSISTENT WITH ILLINOIS'S OBLIGATIONS UNDER THE COMPACT.**

50. Plaintiffs repeat and reallege paragraphs 1 through 49 as though set forth here.

51. Because the Director's September 2016 Permit Order and his March 2017 Final Order are inconsistent with the legal requirements of the Compact, this Court must overturn those agency decisions.

52. The Compact was signed into Illinois law in 2007. See P.A. 95-238, § 5, eff. Aug. 17, 2007. In 2008, President George W. Bush signed a joint resolution of Congress providing consent to the Compact, which is required by the U.S. Constitution in order for the agreement to have effect and become federal law. U.S. Const., art. I, § 10, cl. 3. Congressional consent and approval by the President transforms an interstate compact within this clause into a federal law.

53. The State of Illinois has tasked IDNR with implementing the Compact's requirements.

54. While the Compact exempts Illinois from many of its rules relating to withdrawals of Lake Michigan water, see 45 ILCS 147/5 § 4.14(4) (West 2016), Illinois is expressly subject to the rest of the Compact, including the “Water Conservation and Efficiency Program” requirements of section 4.2. *Id.* These provisions require Illinois to “develop its own [w]ater conservation and efficiency goals and objectives consistent with the Basin-wide goals and objectives” set forth in the Compact. 45 ILCS 147/5 § 4.2(2) (West 2016); see also March 2017 Final Order at 7–8. Accordingly, IDNR has set forth its own set of Illinois Goals and Objectives (“IDNR Goals”).

55. The IDNR Goals articulate what Illinois has committed to do to fulfill its obligations under the Compact, and, under the terms of the Compact, these IDNR Goals must be “consistent with the Basin-wide goals and objectives.” 45 ILCS 147/5 § 4.2 (West 2016). The Basin-wide goals and objectives and IDNR Goals include the following:

- i. Include *water conservation and efficiency in the review of proposed new or increased uses* (Basin-wide Objective);
- ii. Promote the *efficiency of use* and reducing losses and waste of water (Basin-wide Goal);
- iii. Ensure *sustainable* use of Waters of the Basin (Basin-wide Goal);
- iv. Require that *all feasible means reasonably available be employed to conserve and manage the water resources of the region* (IDNR Goal paralleling language from the Level of Lake Michigan Act);
- v. Ensure that Lake Michigan water diverted directly into the Chicago Waterway system for various purposes *is kept to a minimum* (IDNR Goal);
- vi. Implement *water efficient technologies* and *invest in water infrastructure* and use innovative technology to improve water systems management (IDNR Goal);
- vii. *Maximize water use efficiency and minimize waste of water* (Basin-wide Objective); and

viii. *Conserve and manage existing water supplies* to prevent or delay the demand for and development of additional supplies. (Basin-wide Objective).

56. The Compact requires Illinois to create a program consistent with Illinois' goals and objectives, which themselves must be consistent with the Basin-wide goals and objectives listed above. 45 ILCS 147/5 §4.2 (West 2016). IDNR must also implement the program in a manner consistent with the above stated goals and objectives. *Id.*

57. To satisfy Compact Section 4.2, Illinois maintains and implements a water conservation and efficiency program that is structured by the Level of Lake Michigan Act and the Diversion Regulations.

58. Though Plaintiffs raised the applicability of the Compact throughout the IDNR proceedings, IDNR ignored its requirements until the March 2017 Final Order denying Plaintiffs' request for reconsideration and rehearing. In the March 2017 Final Order, IDNR finally recognized that Section 4.2 requires IDNR to implement a water conservation and efficiency program consistent with "promot[ing] conservation measures and minimiz[ing] the amount of water 'diverted directly into the Chicago Waterway system.'" March 2017 Final Order at 9. While acknowledging that "the Compact is relevant to the Department's Water Allocation Program and, by extension to this proceeding," March 2017 Final Order at 8, the Director nonetheless refused to explain how IDNR's interpretation of the Diversion Regulations was consistent with the Compact. Instead, the Director ruled that there was "no legal requirement or necessity to specifically cite or mention the Compact in the Department's Water Allocation Program or specifically in the Department Decision for this proceeding." *Id.*

59. In this permit modification proceeding, IDNR interpreted the Diversion Regulations in a manner inconsistent with the Compact in three ways. First, IDNR

refused to apply the sections of the Diversion Regulations that would minimize water usage and ensure that water from Lake Michigan was used efficiently. Second, and relatedly, IDNR excluded evidence that demonstrated the availability and feasibility of those conservation measures. Third, IDNR construed Section 3730.307(10)(c) in a manner inconsistent with the Compact's mandate to promote the efficient use of water and to minimize water usage by refusing to read that section as providing authority to craft tailored permit conditions. Each specific misreading of the Diversion Regulations is explained further in Counts II and III below, and each misinterpretation represents an inconsistency with the Compact.

60. The Department must abide by the provisions of the Compact, and the Director cannot put aside the requirements of the Compact in assessing whether IDNR complied with the law when it issued the permit modification. Because the Level of Lake Michigan Act, the Compact, and the Diversion Regulations all relate to Lake Michigan Diversions, they must be interpreted harmoniously. The Director's interpretation of the Level of Lake Michigan Act and the Diversion Regulations are inconsistent with the Compact and are therefore erroneous.

61. **WHEREFORE**, Plaintiffs pray for judgment and that the Court:

- A. Vacate MWRD's permit modification as to the years 2018 to 2029;
- B. Remand MWRD's petition for rehearing with instructions to allow discovery as to the feasible conservation practices that are necessary to minimize the need for diversions for the years after 2018;

- C. Instruct IDNR to interpret the Diversion Regulations to require the minimization of water use so as to be consistent with the Compact and IDNR's own Water Conservation and Efficiency Program;
- D. Instruct IDNR to assess MWRD's anticipated water needs under Section 3730.304 as required by the Compact;
- E. Instruct IDNR that it must tailor permit conditions as necessary for a particular water user as required by the Compact; and
- F. Instruct IDNR to interpret and implement the Diversion Regulations and Level of Lake Michigan Act so as to otherwise comport with the requirements of the Compact and IDNR's own Water Conservation and Efficiency Program.

## COUNT II

### **IDNR ERRED BY FAILING TO REQUIRE THAT THE PERMIT CONTAIN CONSERVATION PRACTICES AS CONDITIONS MANDATED UNDER SECTION 3730.304.**

62. Plaintiffs repeat and reallege paragraphs 1 through 61 as though set forth here.

63. The Director refused to determine MWRD's anticipated water needs before allocating it an additional nearly 420 billion gallons of Lake Michigan water.

Furthermore, IDNR failed to fulfill its statutory duty when it failed to take into account the means by which MWRD could minimize its needs under the rubric set forth in the Diversion Regulations.

64. Section 3730.304 of the Diversion Regulations sets out "Water Needs Criteria" and requires the Director to "determine anticipated water needs for each applicant" before issuing a diversion permit. 17 Ill. Adm. Code 3730.304 (2016). One aspect of determining these future water needs requires assessing the maximum amount of water IDNR is authorized to allocate through a permit. See 17 Ill. Adm. Code 3730.303(c)(3)



(2016) (requiring consideration of minimum discretionary diversion needed to keep water quality in the CAWS in a “reasonably satisfactory sanitary condition”).

65. The regulation lists criteria that IDNR must apply—including the effect of water conservation practices—to determine the anticipated water needs for each entity requesting a water allocation. 17 Ill. Adm. Code 3730.304 (2016). The purpose of these provisions is to ensure that permit holders are allocated only the amount of water they truly need, presuming they are acting to minimize their water needs. For example, if measures exist which can reduce an entity’s water needs and reduce the volume of diversion allocation needed, the Director must calculate a diversion allocation based on the assumption that those measures will be employed. See 17 Ill. Adm. Code 3730.304 (2016) (IDNR “will determine anticipated water needs for each applicant.”); 17 Ill. Adm. Code 3730.301(b) (2016) (requiring IDNR to determine entitlement to allocation “according to the criteria set out in this Subpart”).

66. Conservation measures exist that, if implemented, could reduce MWRD’s anticipated water needs by reducing the volume and frequency of the CSOs that drive MWRD’s need to divert Lake Michigan water. Such conservation measures include the increased use of green infrastructure and other approaches to reduce stormwater flows into the combined sewer system, as well as component projects within TARP that will increase the storage capacity of that system. The Hearing Officer erred by excluding evidence related to these conservation measures. Contested Issues Order of May 14 at 3–9, 2015; September 2016 Permit Order at 52–53, 61.

*A. Failure to Apply Water Needs Criteria*

67. Section 3730.304 establishes different “water needs criteria” to evaluate the water needs of different categories of diversion applicants. As relevant here, Section 3730.304(b) applies to Category IIA and IIB applicants. 17 Ill. Adm. Code 3730.304(b) (2016). Category IIA applicants are entities “whose primary water demands are for the minimum flows necessary to meet navigation requirements and minimum discretionary dilution flows necessary to maintain the [CAWS] in a reasonably satisfactory sanitary condition.” 17 Ill. Adm. Code 3730.303(a)(3) (2016). Category IIB applicants are entities “whose water demands are for the minimum discretionary dilution flows necessary to meet water quality standards in the [CAWS].” 17 Ill. Adm. Code 3730.303(a)(4) (2016). MWRD is the only Category IIA and IIB permit holder in the state; no other state-permitted entity qualifies for either category.

68. As such, Section 3730.304(b) presents a non-exhaustive list of six conservation practices IDNR must consider when it determines MWRD’s anticipated water needs: (1) improved and more accurate measurement and accounting procedures, (2) improved treatment of all wastewater flows, (3) elimination of untreated combined sewer bypass flows, (4) reasonable use of aeration facilities, (5) implementation of navigational and storm response operations, and (6) procedures to minimize Lake Michigan diversion and implementation of effective programs of leak prevention, detection, and correction. 17 Ill. Adm. Code 3730.304(b) (2016).

69. IDNR did not consider any of these conservation practices to determine MWRD’s future water needs to meet its obligations as a Category IIA and IIB permit holder.

70. Further, IDNR did not consider the extent to which TARP will reduce that need for diversion. MWRD represented that the completion of TARP will reduce the diversion necessary to maintain the CAWS in a “reasonably satisfactory sanitary condition.” However, IDNR did not consider the needs and practices relevant to meeting water quality standards other than those related to dissolved oxygen. Further, IDNR did not evaluate the extent to which TARP will reduce, but not eliminate, the need for diversions once it is complete in 2029. Such a consideration is indispensable to the broader Section 3730.304 inquiry to determine what feasible conservation practices should be implemented during the permit term.

71. IDNR based its decision not to apply Section 3730.304 on an arbitrary and irrelevant distinction between an “applicant” for a permit and a “petitioner” for a modification, interpreting Section 3730.304 to apply to only a first-time “applicant” and not to an existing permit holder seeking a permit modification under Section 3730.310. See September 2016 Permit Order at 52–53. This interpretation affirmed the Contested Issues Order of May 14, 2015, which first implied that a distinction between an “applicant” and an existing permit holder could be read into Section 3730.304. Contested Issues Order of May 14, 2015 at 5. According to IDNR, Section 3730.304 and Section 50/5 of the Act (“Application for allocation or diversion of water”) applies to only first-time applicants, whereas Section 3730.310 provides the exclusive evaluative inquiry relevant to permit modifications. *Id.*

72. IDNR’s distinction is without foundation and is in conflict with numerous provisions of the Level of Lake Michigan Act and the Diversion Regulations:

- i. Examination of the Diversion Regulations as a whole reveals that Section 3730.310 is procedural, outlining the modification process and the proper bases for modification.
- ii. Furthermore, Section 3730.202 authorizes IDNR to hold hearings in several circumstances, including on a petition for *modification* of an allocation permit. Section 3730.202 states that the “burden of proof in a modification proceeding will lie with the *petitioner/applicant*.” (Emphasis added.) 17 Ill. Adm. Code 3730.202(c) (2016). The Diversion Regulations themselves treat the terms “petitioner” and “applicant” as interchangeable in the specific context of a permit modification hearing.
- iii. The Level of Lake Michigan Act requires the Director to “consider the water requirements” for “*each* allocation of water,” without differentiating between new permit applications and existing permit modifications. (Emphasis added.) 615 ILCS 50/5 (West 2016).
- iv. Section 3730.304(b), which applies to Category IIA and IIB entities, would be meaningless if it is not applied to the MWRD petition because MWRD is the only Category IIA and IIB entity in the state. MWRD (then known as the “Metropolitan Sanitary District of Greater Chicago”) was initially issued the diversion allocation at issue in this proceeding in 1980, long before the current language of Section 3730.304(b) was promulgated, so any changes to the diversion allocation of the only Category IIA or IIB entity under the current regulation would necessarily be made through a modification proceeding. MWRD is the only possible Category IIA or IIB entity because it has

exclusive control over the physical mechanisms that effectuate diversions into the CAWS. Therefore, limiting Section 3730.304 to apply exclusively in the initial application context would render Section 3730.304(b) meaningless as there will be no further Category IIA/IIB applications to which the section could apply.

***B. Specific IDNR Failures to Consider Fully All Issues Relevant to the Water Needs Analysis***

73. In addition to refusing to apply Section 3730.304 to the Petition, the Director claimed that the only information needed to determine MWRD's anticipated water needs was the permittee's "actual historical use." September 2016 Permit Order at 53. But the Director's determination contradicts one of the purposes of a permit modification under the Diversion Regulations—a purpose MWRD cited as justification for modifying its Permit in the IDNR proceeding. Section 3730.310(b) allows for a permit modification based on "a change in circumstances that *results in a change in water needs* of the entity." (Emphasis added) 17 Ill. Adm. Code 3730.310(b) (2016). A "permittee's actual *historic* water use" cannot be the exclusive source of information to determine its *future* water needs if a modification is sought to accommodate "a *change in water needs*."

74. In addition, as described in Count I, IDNR erred by failing to interpret the Diversion Regulations consistently with the Compact requirements that new or modified diversions be kept to a minimum.

75. Based on an erroneous interpretation of Section 3730.304 and contrary to section 3730.211, which directs the Hearing Officer to admit evidence when its admissibility depends on an "arguable interpretation of the substantive law," the Director affirmed the Hearing Officer's decision to exclude eight contested issues proposed by Interveners to

be included in the administrative hearing. September 2016 Permit Order at 61. These excluded issues asked IDNR to consider the criteria laid out in Section 3730.304. See Contested Issues Order of May 14, 2015 at 6–9. IDNR found Section 3730.304 inapplicable to the proceeding based on a distinction it found by implication and that does not appear on the text of the regulation, so it is, at least, “arguable” that section 3730.304 does apply.

76. **WHEREFORE**, Plaintiffs pray for declaratory relief and judgment as follows:

- A. The court should vacate IDNR’s permit modification and remand the case to IDNR for rehearing.
- B. The court should instruct IDNR to interpret, on remand, Section 3730.304(b) as applicable to permit modification proceedings, including that of MWRD.
- C. The court should instruct IDNR to consider, on remand, the effect of water conservation practices and the ongoing implementation of TARP on MWRD’s anticipated water needs in the context of Section 3730.304(b).
- D. The court should instruct IDNR to allow, on remand, Plaintiffs to obtain discovery, to develop and submit evidence, and to ask questions regarding the conservation practices identified in Section 3730.304(b), which would reduce MWRD’s water needs and, thereby, support a reduced diversion volume.

### **COUNT III**

#### **IDNR INTERPRETED SECTION 3730.307 IN A MANNER THAT CONTRADICTS THE LEVEL OF LAKE MICHIGAN ACT AND ARBITRARILY PREVENTS IDNR FROM IMPOSING SPECIFIC PERMIT CONDITIONS.**

77. Plaintiffs repeat and reallege paragraphs 1 through 76 as though set forth here.

78. By rejecting the position of Plaintiffs (and IDNR staff) that tailored permit conditions were an appropriate mechanism to implement the Diversion Regulations, the

Director misread the Diversion Regulations to limit IDNR's permitting authority and frustrated the State's ability to comply with the Level of Lake Michigan Act and the Compact.

79. The Level of Lake Michigan Act mandates that “*all* feasible means reasonably available \*\*\* shall be employed to conserve and manage the water resources of the region.” (Emphasis added.) 615 ILCS 50/5 (West 2016). Requiring conservation measures through the terms and conditions of allocation permits is one such “feasible means.”

80. Sections 3730.301 and 3730.307 of the Diversion Regulations describe how IDNR must draft the substantive conservation conditions to be included in allocation permits. In drafting conditions, the permit shall state “such conditions as specified \*\*\* in Sections 3730.307 and 3730.309 as the Department may require.” 17 Ill. Adm. Code 3730.301(b) (2016). Of particular relevance, Section 3730.307 provides for permit conditions that require the “installation of facilities and implementation of programs to reduce to a reasonable minimum” water used for navigation and discretionary purposes. 17 Ill. Adm. Code 3730.307(c)(10) (2016).

81. Nonetheless, the Director rejected Plaintiffs' arguments that the general language of Section 3730.307(c)(10) must be translated into particular permit conditions that would require MWRD to undertake identified water conservation projects and actions.

82. The Director rejected this approach to Section 3730.307 despite the fact that it was precisely how IDNR staff proposed to implement the Diversion Regulations. IDNR staff recommended the inclusion of specific permit conditions in MWRD's modified Permit, specifically asserting that the Permit should require the following, to implement

Section 3730.307(c)(10): (a) development of guidance documentation for the optimal use of the discretionary diversion along with the Instream Aeration Stations and Sidestream Elevated Pool Aeration Stations; (b) maintenance of all lakefront sluice gates and structures under MWRD jurisdiction to reduce leakage; and (c) accurate reporting of discretionary diversion flows and completion and implementation of certain optimization reports.

83. The Director rejected the imposition of specific permit conditions proposed by IDNR staff and those proposed by Plaintiffs based on an erroneous and novel distinction without basis in statute or regulation. In the September 2016 Permit Order, the Director concluded that a permit must include as a condition only the generic phrases listed in Section 3730.307 and must do so verbatim. The Director calls this approach a “Permit Condition Approach,” and he contrasts it with a “Case By Case Determination Approach.” September 2016 Permit Order at 53. As a result, the Director forbade IDNR staff from crafting tailored provisions that specify *how* a permittee should conserve water and limit the volume of water it diverts from Lake Michigan. September 2016 Permit Order at 54. In other words, under the Director’s interpretation, the permit could require MWRD to install “facilities,” but it could not specify what facilities or what types of facilities; the permit could require MWRD implement “programs,” but it could not actually describe how those programs should be designed or what such programs should seek to achieve.

84. The Director’s “Permit Condition Approach” ignores the plain language of the Diversion Regulations. Directly before listing the ten conservation conditions, Section 3730.307(c) states that “[t]he Department shall require evidence of adoptions by the



permittee of the following conservation practices *as applicable to the particular user.*” (Emphasis added.) 17 Ill. Adm. Code 3730.307(c) (2016). The Director fails to give effect to this language, which indicates that the listed types of condition must be tailored in each permit with language specific to the situation. Moreover, while the Director focused on the phrase “such conditions as specified \*\*\* in Section[] 3730.307” in Section 3730.301, he again ignored language that suggests more authority to tailor condition language: The immediately following phrase “as the Department may require the applicant to comply with” suggests ample agency authority to tailor permit conditions. 17 Ill. Adm. Code 3730.301(b) (2016); September 2016 Permit Order at 53-54.

85. The Level of Lake Michigan Act requires that this regulatory language be applied to do more than simply identify which type of Section 3730.307(c) condition is applicable to a given water user; rather IDNR must also tailor permit conditions of the relevant type to that specific permittee. The statute mandates that “*all* feasible means reasonably available \*\*\* shall be employed to conserve and manage the water resources of the region.” (Emphasis added.) 615 ILCS 50/5 (West 2016). See also 17 Ill. Adm. Code 3730.101 (2016) (titled “Scope and Purpose,” the “practices and procedures of the Director and his or her delegated representatives” must be “conducted \*\*\* pursuant to the Level of Lake Michigan Act.”).

86. The Compact also supports IDNR authority to craft tailored permit conditions. The Compact envisions that conservation measures “reducing \*\*\* Diversion \*\*\* consider the particular facilities and processes involved, taking into account the environmental impact, age of equipment \*\*\* and other appropriate factors.” 45 ILCS 147/5 § 1.2 (West 2016). A permit condition limited to the generic language of section

3730.307(c)(10) does not meet this requirement: it does not specify particular facilities or processes, the environmental impact, age of equipment, or other appropriate factors. See 17 Ill. Adm. Code 3730.307(c) (2016).

87. Moreover, proper consideration of the conservation practices that MWRD should be required to undertake during the permit term should be informed by consideration of the extent to which violations of water quality standards are expected to continue after the completion of TARP. It is currently anticipated that continued diversion allocations will be necessary to maintain reasonably satisfactory sanitary conditions after the completion of TARP.

88. The Director's interpretation is clearly erroneous. Section 3730.307 must be read in a way that is consistent with the plain language of the Diversion Regulations, the Level of Lake Michigan Act, the Compact, and IDNR staff opinion.

89. **Wherefore**, Plaintiffs pray judgment and that the Court:

- A. Vacate IDNR's permit modification and remand the matter to IDNR for rehearing;
- B. Instruct IDNR on rehearing to interpret Sections 3730.301 and 3730.307 as giving IDNR discretion to make case-by-case determinations in permitting and to implement those decisions through drafting specific permit conditions;
- C. Instruct IDNR to consider what conservation practices are feasible to minimize the need for diversions to maintain the CAWS in a reasonably sanitary manner for the period after the completion of TARP as well as earlier periods; and
- D. Instruct IDNR to incorporate the Level of Lake Michigan Act's mandate—that IDNR “require that all feasible means readily available \*\*\* shall be employed”—on remand in

this proceeding regarding MWRD's permit modification request and in all of its permitting proceedings at every stage.

#### COUNT IV

**IDNR ERRONEOUSLY INTERPRETED THE PHRASE  
"REASONABLY SATISFACTORY SANITARY CONDITION,"  
AND THUS FAILED TO CONSIDER ADEQUATELY WATER QUALITY IN THE CAWS.**

90. Plaintiffs repeat and reallege paragraphs 1 through 89 as though set forth here.

91. IDNR interpreted the phrase "reasonably satisfactory sanitary conditions" to require protection of the CAWS against *only some* violations of *only* the dissolved oxygen standard, ignoring the many other applicable water quality standards that reflect the health of the CAWS. That phrase must be read consistently with its use in the 1967 Decree, the Level of Lake Michigan Act and the Diversion Regulations to require consideration of what diversion allocations and conservation practices are necessary to prevent violations of any and all applicable water quality standards, such as the standards prohibiting "Unnatural Sludge" and "Offensive Conditions." This is an error of law that renders the allocation determination invalid, because the very purpose of MWRD's diversion allocation is to provide for the volume of water necessary to maintain the CAWS in a reasonably satisfactory sanitary condition.

92. The Level of Lake Michigan Act authorizes the diversion of Lake Michigan water to maintain the CAWS in a "reasonably satisfactory sanitary condition." 615 ILCS 50/3 (West 2016). Functionally, the statute authorizes IDNR to allow MWRD to use Lake Michigan water to dilute the CAWS during periods of higher contamination. The phrase "reasonably satisfactory sanitary condition," provides the legal standard for CAWS water quality against which permitting decisions must be measured.

93. "[R]easonably satisfactory sanitary conditions" must be read consistently with the

legally binding water quality standards for the CAWS enacted by the Illinois Pollution Control Board pursuant to the Clean Water Act. That is, the phrase must be read to reflect (a) all water quality standards applicable to the CAWS and (b) full compliance with each of them.

94. However, IDNR not only picked only one standard, dissolved oxygen, but also concluded that incomplete compliance with that single standard—only 95%—constituted “an appropriate standard for achieving water quality in the CAWS.” September 2016 Permit Order at 27. This conflicts with the Level of Lake Michigan Act and the Clean Water Act. Both statutes individually required full compliance with water quality standards, as does Illinois law requiring statutes be read harmoniously with each other.

95. In defining the one of the classes of Lake Michigan water user that includes MWRD, *i.e.* Category IIB, the Diversion Regulations specifically link MWRD’s diversion authorization to “meet[ing] water quality standards in the” CAWS. 17 Ill. Adm. Code 3730.303(a)(4) (2016). The Diversion Regulations recognize that a central purpose of MWRD’s allocation is complying with “water quality standards.”

96. Further, the Level of Lake Michigan Act was enacted to implement the 1967 Decree. The Level of Lake Michigan Act directly adopts the language from the 1967 Decree in terms of keeping the CAWS in a “reasonably satisfactory sanitary condition.” 615 ILCS 50/3 (West 2016), *Wisconsin*, 388 U.S. at 427–28. The Diversion Regulations similarly reference the 1967 Decree and recognize that they must be applied “[c]onsistent with the limitations expressed in [the] U.S. Supreme Court Decree.” 17 Ill. Adm. Code 3730.101(b) (2016).

97. The 1967 Decree used the phrase “reasonably satisfactory sanitary condition” and

further dictated that the CAWS must be maintained in a “reasonably satisfactory sanitary condition in such manner and amounts and by and through such instrumentalities as the State may deem proper, *subject to any regulations imposed by Congress in the interests of navigation or pollution control.*” (Emphasis added.) *Wisconsin*, 333 U.S. at 428. The Clean Water Act is such a regulation, 33 U.S.C. §§ 1251 et seq. (2012). The 1967 Decree was issued during a period when federal environmental laws were undergoing significant changes, and the 1967 Decree’s reference to “regulations imposed by Congress” was appropriately open-ended so as to accommodate future federal laws related to water quality. Compliance with the federal Clean Water Act requires compliance with state water quality standards. See 33 U.S.C. § 1313 (2012). Accordingly, IDNR is bound by the Clean Water Act and the water quality standards that implement the Clean Water Act.

98. The Director’s determination that 95% compliance with only the dissolved oxygen standard is sufficient to fulfill Illinois’ obligations under the 1967 Decree and Level of Lake Michigan Act is inconsistent with the Clean Water Act, and state law implementing the Clean Water Act, in two important ways.

99. First, the Clean Water Act mandates compliance with all applicable water quality standards, not just one. Singling out dissolved oxygen is wrong because the state regulations implementing the Clean Water Act include other applicable standards. See 35 Ill. Adm. Code 302.403–412 (2016). As section 302.402, indicates, all of the standards, both “numeric and narrative,” are essential to “assur[ing] the protection” of the CAWS.

100. The CAWS has not been sufficiently protected if allocation decisions are aimed at only partial compliance with only one standard. Portions of the CAWS have repeatedly been found to violate the narrative “Unnatural Sludge” standard, 35 Ill. Adm. Code

302.403 (2016), applicable to the CAWS. The September 2016 Permit Order references these violations—by copying portions of the briefing that discussed them—but concludes that IDNR would exclusively employ partial compliance with the dissolved oxygen standard as the water quality benchmark for its diversion allocation decision. September 2016 Permit Order at 26–27.

101. The Unnatural Sludge standard is an appropriate indicator of whether “sanitary conditions” in the CAWS are “reasonably satisfactory.” Unnatural sludge includes “floating debris,” 35 Ill. Adm. Code 302.403 (2016), and floating debris can—and often does—include highly offensive material. The presence of such “floatables” in the CAWS is inconsistent with the CAWS being maintained in a “reasonably satisfactory sanitary condition,” independent of dissolved oxygen levels.

102. Second, the Clean Water Act mandates full—100%—compliance with water quality standards. 33 U.S.C. § 1319 (2012). Even considering the dissolved oxygen standard only, nothing in that dissolved oxygen standard indicates that partial compliance is acceptable: the regulation mandates dissolved oxygen concentrations “*shall not be less than*” the specified amount (5.0 mg/L) “*at any time.*” (Emphasis added.) 35 Ill. Adm. Code 302.405(c)(1) (2016). By determining that 95% compliance is sufficient, the September 2016 Permit Order accepts that MWRD can violate applicable water quality standards.


103. **Wherefore**, Plaintiffs pray for declaratory relief and judgment as follows:

- A. The Court should vacate the September 2016 Permit Order and the March 2017 Final Order and remand this matter to IDNR.

B. The Court should instruct IDNR that maintaining the CAWS in a “reasonably satisfactory sanitary condition” refers to full compliance at all times with all water quality standards in Subpart C: Chicago Area Waterway System and Lower Des Plaines River Water Quality and Indigenous Aquatic Life Standards. 35 Ill. Adm. Code 302 (2016).

104. Plaintiffs have attached hereto as Exhibits, and identified herein where appropriate, those IDNR decisions and parts of decisions for which review is sought in this Complaint. Plaintiffs further request that IDNR file the entire transcript of evidence as part of the record of proceedings under review, which IDNR must file with its answer hereto. See 735 ILCS 5/3-108 (West 2016).

ALLIANCE FOR THE GREAT LAKES, NATURAL RESOURCES DEFENSE COUNCIL,  
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### COMPLAINT EXHIBIT LIST

<b>Exhibit #</b>	<b>Document</b>
1	September 2016 Permit Order of September 22, 2016
2	Final Decision of March 14, 2017
3	Prehearing Order of March 27, 2015
4	Contested Issues Order of May 14, 2015
5	Emergency Motion Order of September 25, 2015
6	735 ILCS 5/3-105 Affidavit of Robert A. Weinstock