STATE OF ILLINOIS

DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF )

 ) No. LMO-14-5

PETITION FOR MODIFICATION )

LAKE MICHIGAN WATER )

ALLOCATION FOR METROPOLITAN )

WATER RECLAMATION DISTRICT OF )

GREATER CHICAGO )

**POST-HEARING MEMORANDUM OF INTERVENERS**

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Interveners Alliance for the Great Lakes, Natural Resources Defense Council, Openlands, and Sierra Club ("Interveners") file this Post-Hearing Memorandum in support of their position that the petition of the Metropolitan Water Reclamation District (MWRD) to increase its current discretionary diversion allocation of Lake Michigan water from 101 cubic feet per second (cfs) to 270 cfs for the years 2016 to 2029 should be granted in part, but substantially reduced in volume and made subject to conditions requiring studies of conservation practices and the implementation of such practices. The need for allocation reductions is shown from the facts in the record. Reductions in the volume of the discretionary diversion allocation should be required even under the (erroneous) view of the law stated in the Pre-Hearing Order Identifying Contested Issues and Ruling Upon Interveners’ Motion to Compel Responses to Information Requests of May 14, 2015 (the “May 14, 2015 Order”) and subsequent rulings of the Hearing Officer.

 In addition, the record and a proper interpretation of applicable law requires that allowing any part of the requested increase in the MWRD’s allocation for the discretionary diversion for 2016 to 2029 be made subject to a requirement that MWRD study and implement reasonable conservation practices under 17 Ill. Adm. Code 3730.307(c)(10).

 This Post-Hearing Memorandum is divided into two parts. In the first part, it will be shown that even accepting the view of the law set forth in the May 14, 2015 Order and subsequent rulings, the Department should grant the Petition only in part. This is true because the record shows that the Illinois Environmental Protection Agency (IEPA) was correct when it stated that MWRD should be required to demonstrate the extent of the need for the discretionary diversion after Phase I of the McCook Reservoir has been completed. Further, IDNR staff was correct in urging that the allocation be reduced from 270 cfs to 220 cfs beginning in 2018, albeit for reasons different from those presented by IDNR staff.

 In the second part of this Memorandum, Interveners will demonstrate that the Order of May 14, 2015 and subsequent rulings were incorrect in holding that evidence regarding the period after 2029, the date that the Tunnel and Reservoir Project ("TARP") may be completed, is irrelevant. The May 14 Order and subsequent rulings were also incorrect in holding that conservation measures cannot be required of MWRD and other existing diversion permittees. Under a proper view of the law, conservation measures requested by IDNR staff and by Interveners should be required under 17 Ill. Adm. Code 3730.307(c)(10).

 Finally, Interveners believe that some or all of the requested conservation practices can be ordered in this proceeding without the need for additional discovery or presenting additional evidence. This is true because key facts are uncontested, and because the conservation practices that IDNR staff and Interveners have requested in the first instance are simply reporting of certain data and studies of what should be done. Interveners are, however, prepared to go forward with such additional discovery, testimony and additional cross-examination of MWRD and IDNR witnesses as is ruled to be necessary by the Department (or a court).

**I. The evidence admitted shows that the Petition should not be granted except with limits that will reduce the allocation in 2018 and require MWRD to make a new demonstration no later than 2020.**

 Interveners agree with MWRD, IEPA and IDNR that some extension of the allowance of a 270 cfs discretionary diversion is justified. The allocation, however, must be substantially reduced. Even accepting the constricted view of the scope of this proceeding adopted by the Order of May 14, 2015 and subsequent rulings, the evidence shows that:

- MWRD's petition to increase its currently allowed discretionary diversion for the years from 2016 to 2029 from 101 cfs to 270 cfs should only be granted through 2017 - the year of the expected completion of Phase I of the McCook Reservoir,

- As recommended by the IDNR staff, the allocation for discretionary diversion should be cut to 220 cfs for the years 2018 through 2021,

- The facts regarding the modeled effects of the diversions and the MWRD optimization plans are very imperfectly understood at this time, particularly as to the period following the completion of the Phase I of the McCook Reservoir, and

- As originally recommended by IEPA, MWRD should provide further demonstration of need following completion of Phase I of the McCook Reservoir. This requirement for a further demonstration of need in 2020 can be implemented through a permit condition, or, more simply, by reducing the allocation granted at this time for the period after 2020 to 101 cfs or less.

**A. Allocation reductions or permit conditions should be ordered so as to require MWRD to adequately demonstrate its need for the discretionary diversion after the completion of McCook Phase I.**

 An allocation of 270 cfs should be allowed until Phase I of the McCook Reservoir is completed. Thereafter, "MWRDGC should provide further demonstration of need for the level of diversion or if diversion would be needed after the completion of McCook Phase I" (IEPA Ex. 1, Testimony of Scott Twait, p. 2).

 The hearing abundantly demonstrated that MWRD’s water quality model and optimization plan are far from complete, and are certainly an inadequate basis for making decisions that will last for over a decade. The entire matter should be reconsidered after McCook Phase I has been completed, and there has been time for MWRD to submit a study to determine the extent to which completing Phase I will reduce MWRD’s dependence on its diversion. Under the applicable rules, to ensure that this reconsideration occurs, the amount of the allocation granted in this proceeding must be either made subject to conditions or substantially reduced for the year in which a reappraisal of the diversion should be completed.

**1. Because the record does not sufficiently inform how completing Phase I will affect the need for diversions, it is premature to continue to prescribe the same level of diversion beyond the date McCook Phase I is complete.**

 Evidence developed in the hearing held in this matter has shown that the amount of the discretionary diversion that should be allowed after the 2017 completion of Phase I of the McCook Reservoir is simply not known. The hearing abundantly demonstrated that it would be extremely imprudent to make decisions for the next 14 years based on the current information. In particular, it was determined that the model that MWRD presented as the principal basis for its petition has numerous limitations and has only begun to be calibrated. Further, predictions of what combined sewer overflows will be after the completion of McCook Phase I are based on decade-old models by parties other than MWRD that have never been tested. Still further, MWRD’s operation plan is currently a "work in progress" (Oct. 6, Melching Tr. 40), and most key elements of its optimization plan have not been developed.

**a. In numerous respects, the MWRD model of the expected compliance with dissolved oxygen standards requires further work and should be reexamined in the future.**

 A centerpiece of the support of MWRD's petition is the Duflow model of the Chicago Area Waterway System (CAWS) developed by Dr. Charles Melching (the "Model") of how wet weather flows from combined sewer overflows (CSOs) and low flows during dry periods can be expected to relate to violations of the dissolved oxygen (DO) standards applicable to the CAWS (Petition p. 10). The Model is by Dr. Melching’s admission useless as to the Unnatural Sludge standard of 35 Ill. Adm. Code 302.403 and the fecal coliform standards applicable in the CAWS (Oct. 6, Melching Tr. 113, 160). Even as to predicting compliance with the DO standards, however, the model is of limited value, as discussed below. Moreover, it is far from clear whether the Model is too conservative and predicts violations when there are none, thereby suggesting more discretionary diversion than is necessary, or too insensitive and fails to predict violations when they will occur. Review of the record shows that it has frequently missed badly in both directions.

 As an initial matter, it must be understood that the dissolved oxygen standards prescribe both minimum levels of dissolved oxygen that must be met over certain average periods, and DO levels below which the water bodies must never fall. For example, 35 Ill. Adm. Code 302.405(c)(1), applicable to some of the CAWS, states that dissolved oxygen shall not be less “during the period March through July, [than] 5.0 mg/L *at any time*.” The Model, however, does not even attempt to predict minimum dissolved oxygen levels "at any time," but instead provides only daily average values (Oct. 6, Melching, Tr. 51). Further, while Dr. Melching recognizes that algal growth affects dissolved oxygen levels in at least the Cal Sag Channel and the Little Calumet River by increasing dissolved oxygen levels during the day and decreasing them at night, the Model does not track any of these changes over the course of a day that are caused by such growth. (Interveners' Ex. 2, p. 98) Because of this, the Model could predict that the DO level was a legal 6 mg/L when it was actually in violation of the standard at 4 mg/L for parts of the 24-hour day (Oct. 6, Melching, Tr. 51).

 Problems in the Model are not a theoretical matter. The record demonstrates that in numerous instances the Model has proven to be extraordinarily inaccurate. Given that the Model is supposed to predict compliance with a DO standard that must never be violated and to direct when diversions are necessary to meet those standards, it is unclear that Dr. Melching's calculations of seasonal average values, Petitioner's Ex. 1 App. 1 pp. 66, 69, 73, 75, 79, 81, are of much relevance.[[1]](#footnote-1) However, even using Dr. Melching's measure of success, Dr. Melching admits that the Model is unacceptably inaccurate as to the North Shore Channel and the Little Calumet River. (Petitioner's Ex. 1 App. 1 pp. 79, 81). These are the areas into which the effluent from the O'Brien and Calumet plants is backing up according to Dr. Melching (Interveners' Ex. 1 pp. 38, 50, 112), where there have been high levels of non-compliance with DO standards during months without discretionary diversion (Interveners' Ex. 7), and where CSO flows may actually increase after completion of the Thornton and McCook Stage 1 Reservoirs (Interveners' Ex. 1 p. 158).

 Asked to explain some of these extraordinarily large misses, Dr. Melching admitted that the presence of algal growth probably affected DO in a way that could not be captured by the Model. (Oct 6, Melching, Tr. 66, 69; Interveners' Ex. 1 p. 153). As to other instances in which the Model was off to a huge extent, Dr. Melching claims that there are some unknown forces that are somehow causing the Model to generate highly inaccurate DO predictions for the North Shore Channel and Bubbly Creek (Oct. 6, Melching, Tr. 76-77).

 Read in light of the DO standards with which the Model was designed to bring compliance, the Model's level of accuracy in predicting seasonal averages is anything but comforting even as to the locations where Dr. Melching believes the Model is reasonably accurate. Looking at the North Branch of the Chicago River for 2003, Petitioner's Ex. 1. App. 1 Table 2.14, it can be seen that for the summer the Model substantially over-predicted DO at the Fullerton, Division and Kinzie Street monitoring locations (17%, 12%, 27%, respectively).[[2]](#footnote-2) At Fullerton and Kinzie, the Model predicted that the DO would be at a safe 5.0 mg/L while the measured DO show levels below 5.0 mg/L, the level that is the minimum DO standard "at any time" for the months of June and July.

 If one looks behind these seasonal average figures, which mask daily problems, and considers what the Model needs to predict to prevent violations and avoid unnecessary diversions, the situation is much more grim. The Model predicted DO in the CSSC in 2008 as under 8 mg/L when DO was measured as over 14 mg/L (Interveners' Ex. 1, p. 151). The Model predicted that DO levels for 2003 would be below 6.0 mg/L in the North Shore Channel at times when it was over 20 mg/L, thereby missing by a huge 14 mg/L margin. (Petitioner's Ex. 1, App. 79, 81)

 But it cannot be said that the Model always errs on the low side. For 2008 for Fullerton and Kinzie on the North Branch, Lockport on the CSSC, and the C&W site on the Little Calumet River the Model failed to predict numerous violations of DO standard, predicting levels above 6 mg/L where the actual DO level was in violation of the standard and even under 3.0 mg/L. (Interveners' Ex. 1 pp. 143, 146, 151)

 Moreover, predicting what will happen to DO after the completion of McCook Phase I does not only require that the Melching Model be made accurate. Other models must be used to predict the extent of the CSOs that will occur after completion of McCook Phase I, and the accuracy of these models is unconfirmed. (Oct. 6, Melching Tr. 93, 105-08). These models, from the U.S. Army Corps and the University of Illinois, have never been tested concerning discharges following completion of McCook Phase I, of course, because McCook Phase I has not been completed (Oct. 6, Melching,Tr. 93). Thus, the Models may be too conservative, and thus lead to an overly high prediction of the need for discretionary diversion, or too forgiving. We do know these models do not take into effect anything that might have changed CSP flows that has happened in the system since 2003 (Oct. 6, Melching Tr. 100).

**b. The optimization plan requires a great deal of work that should be reviewed in a future proceeding.**

 Much of the pre-filed testimony of Dr. Melching presented by the MWRD concerns efforts to optimize the use of the diversion (Oct. 6, Melching Tr. 4) but at the hearing Dr. Melching made clear that he needed to do much work before the plan would be done (Oct. 6, Melching Tr. 23-7). For example, MWRD is still trying to determine the proper locations for monitors (Oct. 6, Melching Tr. 25; Oct. 7, Wasik, Tr. 204). There are no data at this point as to whether the optimization plan works (Oct. 6, Melching Tr. 28). Currently, MWRD's optimization plan is based entirely on 2003 data although MWRD intends to also use 2001 and 2008 data (Petitioner's Ex. 1 App. 1 p. 16; Oct. 6, Melching Tr. 35). MWRD will try to implement the plan when it is finished (Oct 7, Wasik Tr. 186). Indeed, at the time of the hearing it was unclear that even the contracts for Dr. Melching to do the work needed to finish the optimization plan had been settled (Oct. 7, Wasik Tr. 204-05). Of course, any time something new is implemented, "you find new problems." (Oct. 7, Staudacher Tr. 254)

**2. MWRD must be required to provide further demonstration because it is the only entity with access to the critical information.**

 Given that petitioner MWRD is in control of the information needed to establish the size of the diversion necessary to prevent violations of dissolved oxygen standards, there is no alternative to requiring it to supply the critical information.

 In the Petition, MWRD is at pains to make clear that the responsibility for managing the diversion and the condition of the CAWS lies with IDNR, but admits that the State "receives some critical assistance from the District in satisfying its water management duties." Petition p.3. MWRD is too modest. The MWRD manages the diversion, maintains the sluice gates, uses employees, monitoring equipment and experts of its choosing and reports to IDNR on what it has already done. (Petitioner's Ex. 3, Staudacher Pre-filed Testimony, Oct. 7, Staudacher Tr.224-26). MWRD hired Dr. Melching, who has modeled the system with regard to DO. (Petitioner's Ex. 1 pp.3-6). MWRD is developing an optimization plan, of which IDNR has requested to receive a copy once it is complete, and reports on its implementation. (IDNR Ex. 2, Injerd direct testimony last page; Oct. 7, Injerd, Tr. 279-80). MWRD is performing dissolved oxygen monitoring of the CAWS and reports some of this data to IEPA. (Oct. 7, Wasik Tr. 201; Stauderdacher Tr. 231-40). Also, of course, MWRD runs the TARP system and the sewage treatment plants.

 Thus, it is entirely appropriate that MWRD make the demonstration of what level of diversion is necessary after McCook Phase I is completed. No one else has the data or resources to take on this task.

**3. To require effectively that the necessary demonstration be made, the allocation should be reduced to 101 cfs or less after 2021.**

 Under 17 Ill. Adm. Code 3730.308(b), any diversion allowance could continue indefinitely at the rate at which it was set unless effective conditions are placed on the permit or the permit automatically reduces the allocation until a new petition is filed. Giving MWRD an allocation of 270 cfs until 2020 or 2030 is effectively an allocation in perpetuity, or until the very unlikely event that some other party somehow develops the data necessary to seek a modification notwithstanding that MWRD holds all the relevant information. Without some specific language in the Order, the allocation given for the last year would be effectively permanent. (Oct. 7, Injerd Tr. 274). Accordingly, in order to require MWRD to make the necessary showing of need following the completion of McCook Phase I, the permit needs to include a condition mandating that MWRD make such a demonstration or take certain actions to reduce its allocation. Interveners propose both a condition requiring such a demonstration be made in 2020, and that the allocation be set at 101 cfs for 2021 or at some other reduced level that will require MWRD to make the necessary demonstration.

**B. The discretionary diversion should be reduced to 220 cfs for the years after 2017 but not for the reason given by IDNR staff.**

 IDNR staff has proposed that the amount of the discretionary diversion should be 220 cfs beginning in 2018, instead of the 270 cfs proposed by MWRD. Daniel Injerd’s Direct Testimony states:

Subsequent to Phase I’s completion and based on the facts presented in Dr. Melching’s report as well as IEPA’s concurrence with that report, the Department believes a discretionary diversion of 220 cfs should be adequate to maintain and perhaps exceed existing [95%] compliance with the dissolved oxygen standard in almost all but the most stressful years.

IDNR Ex. 2. p.5[[3]](#footnote-3)

Interveners agree with the IDNR staff’s position as to the appropriate allocation for 2018-2020, but do not agree with IDNR’s rationale that 95% compliance with the dissolved oxygen standards is appropriate or even tolerable. The dissolved oxygen standards applicable to the various reaches of the CAWS state the values for dissolved oxygen on average and “at any time.” As noted above, 35 Ill. Adm. Code 302.405(c)(1), applicable to some of the CAWS, states that dissolved oxygen shall not be less “during the period March through July, [than] 5.0 mg/L *at any time*.” Nothing in the standard suggests that 95% compliance is good enough.

 Moreover, contrary to MWRD and IDNR staff, Interveners do not believe that it is reasonable to focus solely on compliance with the dissolved oxygen standards. There is a potential for chloride violations in the CAWS (Oct. 7, Twait Tr. 288). More critically, portions of the CAWS have been repeatedly found to violate the narrative “unnatural sludge” standard, 35 Ill. Adm. Code 302.403, applicable to the CAWS, which states that “waters subject to this subpart shall be free from unnatural sludge or bottom deposits, floating debris, visible oil, odor, unnatural plant or algal growth, or unnatural color or turbidity.” http://www.epa.state.il.us/water/tmdl/303-appendix/2014/appendix-b2.pdf (Little Calumet HA-05 p.48; North Shore Channel, HCCA-02 p.62) MWRD and state agencies are not free to pick and choose which water quality standards must be met. Further, the Supreme Court standard that discretionary diversions may be used to keep the CAWS in “reasonably satisfactory sanitary condition” plainly addresses the types of conditions forbidden by the fecal coliform standard of 35 Ill. Adm. Code 302.209 standard that is applicable to much of the CAWS, 35 Ill. Adm. Code 302.401(b), 35 Ill. Adm. Code 303.220, and the unnatural sludge standard of 35 Ill. Adm. Code 302.403. IEPA has specifically recognized that avoiding violations of 35 Ill. Adm. Code 302.403 is part of keeping the CAWS in a "reasonably sanitary condition." Illinois EPA's Responses to Questions Submitted by the Interveners ¶12.

 However, the amount of the diversion should be reduced to 220 cfs after the completion of McCook Phase I because approaches other than dilution with Lake Michigan water should be implemented immediately to prevent violations of Illinois water quality standards. The basic principles of the Compact, the Level of Lake Michigan Act and the regulations enacted under those laws are fundamentally inconsistent with the idea that the solution to CAWS pollution is dilution with Lake Michigan water if there are any reasonable alternatives. Interveners believe that the gap between the expected level of compliance with all of the relevant water quality standards after the completion of McCook Phase I and full compliance should be closed with enhanced wastewater treatment, green infrastructure technology, wetlands restoration and other feasible conservation practices.

**II. Conservation practices should be studied and required because TARP will not eliminate the need for discretionary diversions and conservation practices could reduce the need for diversions.**

 Interveners completely support the "allocation objectives" set forth at the IDNR website, including:

* To carefully consider the competing needs *of all water users* in the region so that allocations promote the efficient development of water supplies in the region in light of long range needs and objectives.
* To require *all users* *of Lake Michigan water* to conserve and manage this resource.

https://www.dnr.illinois.gov/WaterResources/Pages/LakeMichiganWaterAllocation.aspx (emphasis added). Based on their agreement with these IDNR objectives, Interveners agree with IDNR that an extension of the 270 cfs discretionary diversion should be conditioned on implementation of conservations practices under 17 Ill. Adm. Code 3730.307(c)(10). (IDNR Ex. 2, Direct Testimony of Daniel Injerd, IDNR, Office of Water Resources p. 4)

 The law and the evidence requires that conservation practices requested by IDNR staff and additional conservation practices requested by Interveners be mandated as a condition of the permit. As will be explained below, the law as set forth in the Great Lakes-St. Lawrence River Basin Water Resources Compact Act, 45 ILCS 147, the Level of Lake Michigan Act, 615 ILCS 50/5, and the IDNR regulations of 17 Ill. Adm. Code 3730, supports requiring that diversions be allowed only to the extent that they cannot be avoided through feasible conservation practices. Further, these laws and regulations require that conservation practices be imposed as a condition on diversions when permits are issued or modified.

 To show that implementation of conservation practices may reduce the need for discretionary diversions to maintain the CAWS in a reasonably satisfactory sanitary condition and meet water quality standards, Interveners offered proof regarding types of conservation practices that should be studied during the period between the granting of the petition and 2020. If, after the required studies, it is concluded that implementation of any or all of these practices would allow the diversion to be reduced for the years 2021 and thereafter, implementation of those practices should be imposed and the level of diversion should be adjusted downward accordingly. In particular, Interveners offered evidence that permitting the 270 cfs diversion until 2018 and 220 cfs from 2018 through 2020 should be conditioned on studies of:

* green infrastructure (Pre-filed Testimony of Karen Hobbs)
* advanced wastewater treatment (Pre-filed Testimony of Dr. Cynthia Skrukrud)
* wetlands restoration (Testimony of Stacy Meyers and attached Statement of Scott Peyton), and
* 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, attached as Ex. A to Prehearing Memorandum of Interveners, filed 9/18/2015)

 However, the proceedings in this matter were substantially affected by legally erroneous rulings by the Hearing Officer made in the May 14, 2015 Order, in the September 25, 2015, "Prehearing Order Ruling Upon Petitioner's Emergency Motion to Quash Interveners' Prehearing Memorandum and to Strike Interveners' Pre-filed Written Testimony," and during the hearing held October 6 and 7 in this case. The Hearing Officer erroneously ruled, first, that Interveners could not obtain discovery, develop evidence or ask questions regarding the potential effect of the projected completion of the TARP system in 2029 on water quality. Second, the Hearing Officer ruled that Interveners could not seek to have conservation practices be required under 17 Ill. Adm. Code 3730.307(c)(10), or offer evidence of how implementation of conservation practices might lessen the need for diversions, with or without completion of TARP.

 The normal remedy for the Hearing Officer erroneously limiting the scope of the proceeding would be, of course, to reopen the proceeding. Interveners remain willing to provide the evidence barred by the Order. However, because most of the essential facts showing the need for conservation practices are shown by documents that MWRD itself introduced or are otherwise uncontested and because the conditions that IDNR and Interveners seek are generally in the nature of reports and studies designed to determine what conservation practices should be implemented, Interveners believe that the conservation practices requested by IDNR and Interveners could be granted based on the current record.

**A. The Hearing Officer erroneously excluded evidence regarding the period following the completion of TARP but it is nonetheless clear that TARP will not obviate the need for conservation practices.**

 The Hearing Officer Order’s order was clearly erroneous in allowing MWRD to both claim that delay in completion of TARP was an important event justifying its Petition, yet deny Interveners any opportunity to determine more specifically how important that delay is with respect to relevant factors governing allocations.

**1. The Hearing Officer erred in ruling that MWRD may use the supposed benefits of the completion of TARP to support its petition and justify its temporal scope while prohibiting Interveners from determining the extent of the need for diversions after the completion of TARP**.

 The Hearing Officer ruled that the amount of diversion that will be needed after 2029 was outside the scope of discovery and that evidence on this subject was inadmissible. This ruling was made although the first of the bases that MWRD alleged in support of its petition was:

One significant prediction that has changed is the expected completion date of the District's Tunnel and Reservoir Plan ("TARP"). Specifically, at the time the IDNR issued the District's current permit, it was assumed that TARP could be completed by 2015. That expected date has now changed to 2029.

This change is substantial because the scheduled reduction of the District's permitted allocation limit was premised on the prediction that TARP would be completed in 2015, thus reducing the "water needs" of the CAWS. (MWRD Petition p. 5)

Interveners were nonetheless forbidden to raise questions about or contest this basic premise of the Petition. If the completion of TARP is not going to reduce substantially the need for a discretionary diversion, then nothing relevant has changed due to the delay in the completion of TARP, and continuing the existing diversion until 2029 is thus totally arbitrary.

 Moreover, to the extent that completion of TARP will not end the need for discretionary diversions, the Department should consider implementing alternative conservation practices well before 2029. If TARP will never eliminate the need for discretionary diversions, granting the petition without looking seriously at additional conservation practices just kicks the can down the road for 14 years and leaves to 2029 to begin work on feasible means reasonably available to conserve water resources and conservation practices that should have begun in 2016 or sooner.

**2. The Petition is not, in fact, limited to 2029 because of the legal effect of 17 Ill. Adm. Code 3730.308(b).**

 The justification given for limiting the scope of the proceeding was that MWRD’s petition only sought water until 2029 and so only that period was relevant. Petitioner's Response to Interveners' Information Requests p.12. As discussed above, this rationale for limiting the scope of the proceeding until 2029 makes no sense because, if nothing important is going to happen in 2029, there is no basis for extending the allocation until that year.

 However, even the premise for the illogical conclusion is false. The MWRD Petition is not in fact limited to 2029 because through operation of law, MWRD through this petition in effect seeks to extend its diversion for as long as there is water in Lake Michigan. Under 17 Ill. Adm. Code 3730.308(b), MWRD’s petition effectively sought a 270 cfs allocation until someone successfully petitions to modify the allocation or the end of time. The 270 cfs automatically renew as a matter of law.

**3. The evidence is clear that TARP will not eliminate the need for discretionary diversions and that conservation practices that would reduce the need for diversions would serve to conserve Lake Michigan water.**

 It is quite clear based on documents than have been placed in the record that even the completion of TARP (i.e. completion of Phase II of the McCook Reservoir) will not eliminate the need for diversions. In an admission, made prior to entry of the May 14 2015 Order, MWRD stated that it "believes that some amount of discretionary diversion will always be necessary." Petitioner's Response to IDNR's Information Requests p.32. This is also implied by the Melching Model, which shows substantial numbers of dissolved oxygen violations during dry weather conditions if diversion is reduced to 101 cfs, even if all the wet weather violations that can be addressed by TARP are eliminated. Petitioner's Response to IDNR's Information Requests p.28. Moreover, Dr. Melching admitted that TARP will not in fact eliminate wet weather overflows (Oct. 6, Tr. 152-4). Further, in portions of Dr. Melching’s 2013 Report (Interveners Ex. 1) about which the Hearing Officer refused to allow questioning (Oct. 6, Tr. 165-66), Dr. Melching predicted that there would continue to be major wet weather combined sewer overflows even after TARP is entirely completed (Oct. 6, p. 172, 371). Further, the completion of the Thornton Reservoir will not stop combined sewer overflows in the Calumet system (Oct. 6, Melching Tr. 157). [[4]](#footnote-4)

**B. The Department should impose conservation practices under 17 Ill. Adm. Code 3730.306(e)(1) as a condition of granting the increased allocation.**

 Illinois law requires that all users of Lake Michigan water must implement reasonable conservation practices. The Hearing Officer clearly erred in holding to the contrary. However, re-opening the hearing may not be necessary because the facts showing that MWRD should study and implement conservation practices appear in the record and are not actually disputed by MWRD.

**1. The Law requires that all users of Great Lakes water be required to implement reasonable conservation practices, and the Hearing Officer erred in ruling to the contrary.**

 It has been the position of the MWRD that, by proceeding by modification of an existing permit under 17 Ill. Adm. Code 3730.310, it could circumvent the requirements for conservation practices required of "applicants" under 3730.304 as well as those required of "permittees" under 3730.307. This position was adopted in this proceeding in the May 14, 2015 Order. The Hearing Officer adhered to this ruling throughout the balance of the proceeding and consistently excluded all questions and evidence designed to determine whether conservation practices could reduce the amount of Great Lakes water needed to be used for diversion.[[5]](#footnote-5)

 The position of the MWRD and the Order of May 14, 2015, and subsequent rulings are erroneous. Conservation practices must be considered for the following reasons:

* To interpret 17 Ill. Adm. Code 3730 in the fashion urged by MWRD and accepted in the May 14, 2015 Order is inconsistent with the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) and the Level of Lake Michigan Act;
* To allow existing permittees to circumvent the conservation practice requirements would open a huge exception to the requirement that “the Department shall require *all feasible means reasonably available*" to conserve water in the Great Lakes Basin (615 ILCS 50/5, emphasis added);
* The distinction between existing permit holders and applicants that is made in the May 14, 2015 Order is not consistent with the language of 17 Ill. Adm. Code 3730 and, contrary to principles of statutory construction, renders much of the regulation absurd or mere surplusage;
* There is no basis in the rules for believing that 17 Ill. Adm. Code 3730.310 was intended to create a loophole by which existing permittees could expand diversions without implementing conservation practices;
* 17 Ill. Adm. Code 3730.310 (c), regarding the potential for a modification affecting outstanding securities, debt obligations and contractual obligations, has no applicability in this case as no evidence has been offered by any party that this proceeding could affect any such securities, debt or contractual obligations;
* The record regarding the 2014 Amendments of 17 Ill. Adm. Code 3730 demonstrates that the conservation practices required in 17 Ill. Adm. Code 3730.307 were intended to apply to existing permittees; and
* The Department's 2000 LMO-00-01 Order lends no support to the contention that MWRD has a right to continue the discretionary diversion at a level of 270 cfs until such time as TARP is completed. Certainly, it has no right to do so without practicing feasible conservation.

**a. 17 Ill. Adm. Code 3730 cannot properly be interpreted to conflict with the Great Lakes Compact and the Level of Lake Michigan Act.**

 It is a basic maxim of legal construction that a regulation must be interpreted to not conflict with statutory law if possible. *Arellano v. Dept. of Human Services*, 402 Ill. App. 3d 665, 675 (Ill. App. 2010). The proposition that 17 Ill. Adm. Code 3730 allows existing permittees to increase their diversions without implementing conservation practices is inconsistent with the language and policies of the Great Lakes Compact and the Level of Lake Michigan Act. It would allow the hundreds of entities that have an existing allocation to circumvent the basic requirements of the law. Every camel that has even a whisker of its nose in the tent would be able to waste water in direct contravention of the plain language and clear policy of the law.

**i. The Compact requires conservation from existing water users.**

The Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) governs water use in the Basin, and recognizes that Illinois is exempt from the Compact's sections which conflict with the US Supreme Court Decree concerning such use, *Wisconsin et al. v. Illinois et al* (the “Decree”). Compact § 4.14. Although exempt from some Compact provisions, Illinois shares with the other Great Lakes States the ecological and economic benefits the Basin’s water resources and diverse ecosystems provide. As a result, Illinois is subject to specific provisions of the Compact, particularly its overarching goals and objectives to promote water conservation and efficiency. IDNR confirmed the applicability of the Compact's goals and objectives in their most recent report to the Compact Council, stating that “Section 4.2 of the Compact (Agreement Article 304) applies to Illinois.” IL Water Management Program Report 2014 p. 6, online on IDNR’s website at: <http://www.dnr.illinois.gov/WaterResources/Documents/2014Water%20Management%20Program%205%20Year%20Review%20-%20Letterhead.doc.>

Compact Section 4.2, Water Conservation and Efficiency Programs, identifies the Compact’s overarching conservation goals, and compels each Party to develop its own conservation and efficiency goals and objectives consistent with those goals. Compact Section 4.2 also compels Parties to promote “environmentally sound and economically feasible water conservation measures.” Compact § 4.2(4). The Compact specifically requires that each Party “implement … a voluntary or mandatory Water conservation program for *all, including existing*, Basin Water users.” Compact § 4.2(5) (emphasis added).

 IDNR has a duty under the Compact to consider water conservation methods before approving a petition to modify upward the discretionary diversion. The Compact parties, including Illinois, recognized the value of the Great Lakes Basin as both a water source and a natural resource, and recognized a shared duty “to protect, conserve, restore, improve and manage the renewable but finite waters of the Basin.” Compact §1.3(1)(f). Towards these aims, Compact §4.2(1) contains five water conservation and efficiency goals:

a. Ensuring improvement of the Waters and Water Dependent Natural Resources;

b. Protecting and restoring the hydrologic and ecosystem integrity of the Basin;

c. Retaining the quantity of surface water and groundwater in the Basin;

d. Ensuring sustainable use of Waters of the Basin; and,

e. Promoting the efficiency of use and reducing losses and waste of Water.

 All the states involved in the Compact are bound by these goals. Allowing a permit modification that increases an entity's diversion without consideration of conservation methods, which might render the increased diversion unnecessary or reduce the volume of water needed for diversion, violates the principles of the Compact. In particular, allowing the MWRD to increase greatly its discretionary diversion for the period 2015 to 2029 from 101 cfs to 270 cfs, without considering conservation methods, is at odds with these goals both because it does not ensure sustainable use of the Waters of the Basin and because it does not promote efficient water use.

**ii.** **The Level of Lake Michigan Act requires that "all feasible means" be used to conserve water.**

 The Level of Lake Michigan Act states:

The Department shall require *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 in accordance with the best modern scientific knowledge and engineering practice. (615 ILCS 50/5, emphasis added)

 Thus, the Level of Lake Michigan Act also requires water conservation practices as a condition of diversions. Interpreting 17 Ill. Adm. 3730.310 to allow modifications that increase water allocations without implementation of feasible water conservation measures directly conflicts with a clear requirement of the Level of Lake Michigan Act.

**b. The plain language of 615 ILCS 50 and 17 Ill. Adm. Code 3730 and principles of statutory construction show that existing permittees are included in the category of "applicants" and "permittees" and are subject to all of the conservation requirements applicable to applicants and permittees.**

 It would seem obvious that:

* 17 Ill. Adm. Code 3730.301(b) which mentions "discretionary dilution";
* 17 Ill. Adm. Code 3730.303(a)(3) and (4), which establish categories of water demands needed to keep the CAWS in "reasonably satisfactory condition" and to "meet water quality standards" in the CAWS;
* 17 Ill. Adm. Code 3730.304(b) which discusses specific conservation practices to be considered for water users falling into the categories established by 17 Ill. Adm. Code 3730.303(a)(3) and (4) including “improved treatment of wastewater flows, elimination of untreated combined sewer overflows [and] reasonable use of aeration facilities”; and
* 17 Ill. Adm. Code 3730.307(c)(10) which explicitly provides for "installation of facilities and implementation of programs to reduce to a reasonable minimum, and to accurately account for, water used for navigational and discretionary diversion purposes,"

are applicable to a petition to increase the amount of diversion allowed between 2015 and at least 2029 for discretionary diversions to maintain the CAWS in a reasonably satisfactory condition and meet water quality standards.

 However, based on a reading of 17 Ill. Adm. 3730.310 in isolation, the May 14, 2015 Order states that the entirety of these rules are inapplicable to this proceeding because this proceeding concerns an "existing permit modification" and these provisions relate to applications for new allocations (p. 5). Indeed, based solely on a reading that rules that apply to "applicants" do not apply to persons seeking to modify existing permits derived from 17 Ill. Adm. Code 3730.310, the May 14, 2015 Order also interprets the Level of Lake Michigan Act 615 ILCS 50 as only requiring conservation from applicants. The May 14, 2015 Order states:

First, the plain language of both the Rule and the Act indicate Section 3730.310 applies to existing permit modifications, whereas Section 3730.304 and Section 615 ILCS 50/5 apply to permit applicants and applications versus permits. Second, Section 3730.310 specifically incorporates the Rule's procedural requirements set forth in Sections 3730.201 through 3730.215, but fails to similarly incorporate the Rule's substantive decision requirements set forth in Sections 3730.301 through 3730.309, which is consistent with the interpretation that the substantive decision requirements in those sections were not intended to apply to 3730.310 decisions.

This reasoning is flawed.

**i. 615 ILCS 50 makes no distinction between new applicants and existing users as to water conservation.**

 One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. [*In re Donald A.G.*, 221 Ill. 2d 234, 246, 850 N.E.2d 172, 302 Ill. Dec. 735 (2006).](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=864c6ee6-0cc3-474f-b37c-bac6e0dc0a86&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MYG-C5D0-0039-40FX-00000-00&pdcontentcomponentid=6662&pddoctitle=J.S.A.+v.+MH.%2C+224+Ill.+2d+182%2C+863+N.E.2d+236%2C+309+Ill.+Dec.+6+(2007)&ecomp=r9ffk&prid=f3e9e558-c1d4-4424-b279-ed4f31c7fb12) The Level of Lake Michigan Act, viewed as a whole, makes no distinction between existing permit holders seeking to expand their allocation and other entities seeking an increased water allocation except that certain “new users” are given a priority over other new users.

 The Level of Lake Michigan Act states that "No regional organization, municipality, political subdivision agency or instrumentality ... shall divert water without first obtaining a valid allocation permit from the Department." 615 ILCS 50/1.2 (emphasis added). The Act makes clear further that certain existing uses, including specifically "the amount used for discretionary dilution for water quality purposes" are subject to the "continuing program for apportionment" of water to be diverted from Lake Michigan and discusses this diversion as among the allocations that the IDNR must "allocate". 615 ILCS 50/3. This contradicts any claim that the MWRD’s discretionary diversion is somehow above the law or outside the apportionment scheme.

 Further, there is nothing in the Act to suggest that existing permittees cannot also be considered "applicants." A comprehensive allocation scheme must treat existing permittees the same as other applicants at least where, as here, an existing permittee is seeking an increased water allocation. To treat existing permittees as outside the law would be unfair to entities that could not obtain water and undercut the entire allocation scheme designed to conserve water and only allow entities to have water to the extent they need it. 615 ILCS 50/5 should not be interpreted in this fashion. *Citizens' Opposing Pollution v. ExxonMobile Coal USA*, 962 N.E. 2d 956, 964 (Ill. 2012) (it is presumed that legislature in enacting statute "did not intend absurdity, inconvenience or injustice").

 The Act does make use of the concept of a new user and specifically defines "New users". 615 ILCS 50/1.1. The Act, however, does not create a category of "new users" to impose special requirements on such users, or otherwise suggest that existing users have a vested right to water.[[6]](#footnote-6) Most importantly, the key language in the second paragraph of 615 ILCS 50/5 requiring "all feasible means" to conserve water is not limited to applicants, new users or any other category or subcategory of users or potential users established by the statute. It applies to "the State and its municipalities, political subdivisions, agencies and instrumentalities." 615 ILCS 50/5. This includes existing permittees, such as the MWRD.

 17 Ill. Adm. Code 3730.310 is not part of the Level of Lake Michigan Act, and it need not be considered in determining the meaning of the Act. However, insofar as 3730.310 explicitly deals with "allocations," the allocations allowed by the regulation should be eligible for permits under the Level of Lake Michigan Act. The Act specifically states what the state shall consider "in determining each allocation of water." 615 ILCS 50/5.

**ii. Reading 17 Ill. Adm. Code 3730 as a whole and applying proper principles of regulatory interpretation, reasonable conservation practices should be required of existing permit holders, including the allocation for the discretionary diversion.**

 As mentioned, the May 14, 2015 Order reads 3730.310 in isolation to trump all of the provisions of 3730 requiring the IDNR to condition allocations on implementation of feasible conservation practices. To do this violates a rule of statutory construction that proper interpretation of regulations requires reading "all the provisions of an enactment as a whole." *Portman v. Dept. Human Services*, 393 Ill. App. 3d 1084, 1089 (Ill. App. 2009). As explained in *Portman*,

As administrative rules and regulations have the force and effect of law, they are to be construed under the same standards that govern the construction of statutes.  The primary objective in interpreting an agency's regulation is to ascertain and give effect to the intent of the agency. The language of the regulation is the best indicator of the agency's intent.  "In determining the plain meaning, we consider the regulation in its entirety, keeping in mind the subject it addresses and the apparent intent of the [agency] in enacting it." *Madigan [v. Illinois Commerce Commission]* 231 Ill. 2d at 380 (citations omitted).

 Reading 17 Ill. Adm. Code 3730 as a whole and applying established principles of construction shows that any interpretation of 3730.310 that distinguishes "applicants" from entities seeking to modify existing permits, and allows such modifiers to circumvent feasible conservation practices, must be rejected. A large number of provisions of 17 Ill. Adm. Code 3730 are inconsistent with the idea that the amount of the discretionary diversion to address water quality problems in the CAWS can be increased without regard to conservation practices. Here, Interveners will focus on the provisions most clearly inconsistent with allowing 3710.310 to trump the rest of 17 Ill. Adm. Code 3730.

 Section 3730.101(b) - This section states that "this Part implements the Department’s program for apportionment of water to be diverted from Lake Michigan ... for domestic purposes or for direct diversion into the Chicago Area Waterway System to maintain the waterway in a reasonably satisfactory sanitary condition." However, if 3730.310 trumps everything else, the regulatory language of 3730.101(b) is at best misleading as to the discretionary diversion. Assuming existing permittees need only establish that a modification is justified, there is no apportionment as to them. They get the amount they desire without having to practice conservation and IDNR can apportion the rest.

 Section 3730.102 - This section defines "Permittee" to mean "any regional organization, municipality, political subdivision, agency, instrumentality, association or individual that has an allocation permit for water from the Lake Michigan diversion." On its face, this broad language includes existing permittees. However, if 3730.310 were deemed to somehow exempt existing permittees from 3730.301 to 309 on the basis that they are not “applicants,” the section 3730.102 definition would have to mean something entirely different from what it says on its face. Similarly, 3730.307(d) and (e) refer to "all permittees." However, if the allocation rules of 3730.301 to 3730.309 do not apply to existing permit holders, then either the definition in 3730.102 is defective for failing to exclude existing permit holders from the definition of "permittee," or 3730.307(d) and (e) should not refer to "all permittees" but rather "all new applicants" or "all new permittees."

 Section 3730.301(b) - This section also presents a problem for the claim that Sections 3730.301 to 3730.309 do not apply to existing permit holders seeking to modify their permit. The section starts with a reference to an "allocation permit to any applicant," and several sentences later provides that "allocations for navigational makeup and discretionary dilution will be limited by a running average over five annual accounting periods." Thus, if 3730.301 does not apply to petitions by existing permit holders seeking to modify their permits, then it does not apply to anyone or anything, because the only entity with an allocation to divert water for discretionary diversions -- MWRD -- already has a permit. Moreover, is it contended that the running average provision is not applicable to the MWRD diversion because MWRD is not an "applicant"? The more reasonable interpretation is to treat MWRD as an "applicant" here and in the rest of the 17 Ill. Adm. Code 3730 allocation rules.

 Sections 3730.303(a)(3) and (4) - As mentioned above (supra p.24-25) the categories set forth in 3730.303(a)(3) and (4) appear to refer to the diversion at issue here and only to the diversion at issue here. If, however, existing permit holders cannot also be "applicants" and those provisions only apply to “applicants,” the language creating these categories must be mere surplusage, despite the rule of interpretation that regulations should not be interpreted to contain surplusage. *Bethania Ass'n v. Jackson*, 262 Ill. App. 3d 773, 780 (1994).

 Section 3730.303(b)(3) is also inconsistent with the theory that existing permit holders are not applicants and do not have to follow the rules applicable to applicants. Tracking the provision of 615 ILCS 50/3 regarding "new users," it states that "For *new applicants*, priority will be given to allocations for domestic purposes." If existing permit holders who desire allocations (particularly ones seeking huge increased allocations) are not "applicants," who are the old "applicants" that are contrasted in this provision with "new applicants"? The reference to "new applicants" appears again at 3730.303(b)(4).

 Section 3730.303(c) - This section also refers directly to diversions to maintain water quality in the CAWS and limits it to 270 cfs. If this provision does not state a substantive decision requirement as to existing permittees seeking to modify their permit to seek a greater allocation, may MWRD seek an allocation greater than 270 cfs? If this provision does not state a decisional rule as to the existing MWRD discretionary diversion, it appears to serve no purpose whatsoever.

 Sections 3730.304(b) and 3730.307(c)(1) - Interpreting the 3730.310 to trump all of the conservation practice requirements for existing permittees also renders 3730.304(b) and 3730.307(c)(10) to be pointless surplusage. These provisions refer to the discretionary diversion and require conservation practices. If the May 14, 2015 Order is correct and these provisions do not apply to the diversion at issue here, they do not apply to anything. It should be noted further that 3730.301(c) does not specify requirements for "applicants," but of what should be required by the Department of a "permittee."

 Section 3730.307(d) - This section states that "new applicants" may petition for waiver of a certain requirement but that "[e]xisting permittees are not eligible to petition." If 3730.307 is not applicable to existing permittees, what could this language mean? Moreover, the language purporting to limit what existing permittees can do under 3730.307 would seem to be utterly futile. Under the reasoning advanced by MWRD and accepted in the May 14, 2015 Order, existing permittees can petition for anything they want without being subject to the substantive decision requirements in 3730.301 to 3730.309 by petitioning to modify their existing permit.

 In short, interpreting the 3730.310 to allow existing permit holders to proceed by modification without the restrictions on allocations and requirements for conservation required in 3730.301 to 3730.309 renders numerous provisions of 17 Ill. Adm. Code 3730 meaningless and nonsensical. Because the law is clear that regulations should not be interpreted in a manner that would lead to absurd results (*People v. Hanna*, 207 Ill. 2d 486,497 (Ill. 2003)), the substantive rules for allocating diversions and requiring conservation should apply to existing permittees and other old "applicants" that seek to increase their allocation.

**iii. If 17 Ill. Adm. Code 3730.310 applies to petitions to increase diversions at all, it cannot be interpreted properly to allow existing permittees to circumvent implementation of feasible conservation practices by proceeding by modification.**

 Even if read in isolation from the other sections of 17 Ill. Adm. Code 3730, there is nothing in 17 Ill. Adm. Code 3730.310 that suggests that anyone may proceed under that provision to increase diversions, let alone do so without being subject to conditions requiring conservation practices.

 First, the language of 3730.310, while not explicitly precluding petitioning for more water under the provision, does not appear to apply to such petitions. Two of the specific examples and provisions of that section, 3730.310(b)(2) and (3) apply to the situation in which it is necessary to *reduce* an allocation permit because of changes or violations that have occurred since the allocation was granted. The examples of potential grounds for modification mentioned in 3730.310(b)(1) and (4) could in some cases arguably support an increased allocation but nothing in those examples suggests that such an increase could be made without requiring implementation of appropriate conservation practices.

 17 Ill. Adm. Code 3730.310(c), that is mentioned in the May 14, 2015 Order, contemplates the situation in which a petitioner seeks to modify an entity's allocation *downward* in a fashion that might threaten the entity's securities, debt or contractual obligations. That provision is completely inapplicable here where the MWRD has offered no evidence, or even suggested, that its failure to secure the increased allocation might affect any of its bond or contract obligations. The presence of 3730.310(c) in the Code reinforces the inference that the 3730.310 is mainly about potential reductions, not petitions for increased diversions.

 The fact that 3730.310 does not explicitly incorporate the Subpart C 3730.301-309 allocation rules cannot properly be read to give existing permittees a blank check to increase diversions without being subject to feasible conservation practices. First, inference from the absence of a reference to another rule is at best very weak. There is no reason to conclude that this failure to explicitly mention other sections of the Subpart C of the 17 Ill. Adm. 3730 means anything. Other sections of Subpart C do not mention 3730.310. Does that mean that entities subject to those rules can never file a petition to modify?

 Further, 17 Ill. Adm. Code 3730.310 also does not explicitly mention any of the Subpart A, Subpart D or Subpart E rules. Does that mean that those subparts are not applicable to existing permit holders? If the fact 3730.310 does not mention 3730.309 is significant, does that mean that MWRD and other existing permit holders can quit filing reports under 3730.309, which assuming the May 14, 2015 Order is correct, should not be required of them because that rule only applies to “applicants”; and which, again assuming the May 14, 2015 Order is correct, does not include existing permit holders?

 In fact, the failure to incorporate the subpart C allocation rules is completely consistent with interpreting 3730.310 as not applying to persons proposing to increase an allocation at all. Even assuming that 3730.310 may be used by existing permittees to seek an increased allocation, a very good reason why 3730.310 would not explicitly incorporate all the subpart C rules in considering petitions for modification is that persons seeking a modification may well be entities seeking to reduce another entity's allocation. An entity seeking a modification to reduce another entity's allocation – for example, IDNR, IEPA or an environmental group seeking to reduce an entity's allocation because of the permit holding entity's violation of a permit condition or failure to properly utilize an allocation under 3730.310(b)(2) – should not have to follow the rules for old applicants, "new applicants" and "permittees" set forth in sections 3730.301 through 3730.309.

 Again assuming that 3730.310 is available for making modifications that have the effect of increasing the allocation of an entity, there is absolutely nothing in this provision that supports MWRD's attempt to escape implementing feasible conservation measures here. There is no suggestion in 3730.310 that entities petitioning to modify somehow lose their character as "existing applicants" or "permittees" who are explicitly made subject to the requirements for implementing feasible conservation measures required by the Level of Lake Michigan Act and Section 3730.307.

**iv. The history of the recent amendments to 17 Ill. Adm. Code 3730 makes clear that existing permittees do not enjoy a waiver from proving compliance with the conservation and efficiency measures.**

 In addition to the language of the Great Lakes Compact, the Level of Lake Michigan Act and 17 Ill. Adm. Code 3730, the record underlying the enactment of the 2014 amendments to 17 Ill. Adm. Code 3730 shows that conservation practices are required of all permittees including existing permit holders. For example, in response to a letter suggesting that the Wisconsin rules were stronger than the Illinois rules, an IDNR official stressed that the Illinois rules were stronger precisely because they require water conservation of all existing permittees:

The Department maintains that it is in full compliance with the regional water conservation and efficiency goals and objectives and believes that the proposed changes to *our rules will continue Illinois' leadership in requiring water conservation and efficiency measure for all its permittees*. It is noted that the Wisconsin program, which you cite as a leader, is only mandatory for new or increased withdrawals in the Great Lakes basin; existing water users are allowed to have a voluntary program for water conservation and efficiency. While Section 4.2 of the Compact allows signatory jurisdictions to have a voluntary water conservation and efficiency program, Illinois' program has been, and will continue to be a mandatory program *for all permittees*. (emphasis added)[[7]](#footnote-7)

 Further, interpreting 3730.310 to mean that MWRD modifications are not subject to the allocation rules and conservation practices set forth in 3730.301 to 3730.309 is completely inconsistent with the MWRD’s 2014 comments on proposed amendments to the 3730 rules and IDNR’s response to those comments. Indeed, MWRD’s only comment on the proposed amendments was to complain of the wording of 3730.304(b), a section that the May 14, 2015 Order states is not applicable to modifications and, thus, under the disputed reasoning of that Order would not limit MWRD because it is not an “applicant.”

In its comment, MWRD objected to the idea that it might have to accept “expanded use” of aeration under that section. After discussing wastewater treatment and the “all feasible means” language of 615 ILCS 50/5, the IDNR accepted the change proposed by MWRD to 3730.304(b) and stated that:

[D]iscussions concerning the role of aeration facilities as it pertains to the direct diversions of Lake Michigan water in the Chicago Waterway System to keep it in a “reasonably satisfactory sanitary condition” can be deferred until such time as a hearing is scheduled to consider MWRDGC’s allocation for discretionary diversion.[[8]](#footnote-8)

 However, when a hearing was finally heldto consider MWRD’s allocation for discretionary diversion - aeration and the other conservation practices, identified in 3730.304(b) and required of permittees using water for discretionary diversion purposes by 3730.307(c)(10) - the Hearing Officer blocked any consideration of conservation practices.

**v. The Order in LMO 00-01, entered before the Great Lakes Compact was enacted or 17 Ill. Adm. Code 3730 was amended to incorporate Compact requirements, did not grant MWRD a vested right to divert Lake Michigan water until TARP was completed without being subject to feasible conservation practice requirements.**

 IDNR staff got it just right in saying that factual changes relating to the date for the completion of TARP "warrant consideration." (IDNR Ex. 2, Direct Testimony of Dan Injerd, p.1) IDNR goes on to support continuing the 270 cfs allocation to MWRD for several years subject to the requirement of implementing conservation practices under Section 3730.307(c)(10). On these points, Interveners agree completely with IDNR staff. The changes in the date for the completion of TARP warrant consideration of an increased allocation. But to say that the change in the expected completion date warrants consideration of an allocation greater than 101 cfs for years after 2015 does not mean that MWRD has a vested right to have more than 101 cfs after 2015, or speak at all to the question of whether an increased allocation for years after 2015 should be conditioned on implementation of feasible conservation practices.

 The LMO 00-01 Order of September 20, 2000 does not give MWRD the right to do anything but to divert 35 cfs for navigation until 2020 and 270 cfs up to 2015 and 101 cfs from 2016 to 2020 to meet water quality standards in the CAWS. The statement in the LMO 00-01 Order that "if circumstances such as the completion of TARP or problems with significant exceedances of water quality standards occur, a proceeding for modification may need to occur" merely states the obvious. If things change or the unexpected occurs, different things might have to be done.[[9]](#footnote-9)

 In the unlikely event that the LMO 00-01 Order could be read as creating some sort of presumption that the discretionary diversion should be modified if MWRD failed to complete TARP in 2015, it could not be held to be binding in this proceeding. Even reading more into the two-page order than is there, it cannot be concluded that MWRD may increase the discretionary diversion for the years after 2015 without being subject to feasible conservation practices. The Order states nothing as to conditions under which an increased diversion might be allowed if MWRD failed to complete TARP in 2015. This is hardly surprising given that it was impossible to determine in 2000 what might be feasible in 2015. The issue was not actually litigated.

 The May 14, 2015 Order cryptically mentions *Citizens Opposing Pollution v. Exxon Coal USA*, 962 N.E.2d 956 (Ill. 2012), but the only fact that this case shares with the facts in that case is that both cases involve citizens concerned about pollution. The defendant in *Citizens Opposing Pollution* did not argue that some statement made in connection with the granting of an old permit gave it the right to a new, expanded or modified permit. The whole point of the case is that the defendant had fully complied with its old permit and a reclamation plan, the old permit had expired and the defendant had not sought a further permit or permit modification. The defendant was done.

 Here, Interveners here are not complaining of MWRD's old 2000 permit or anything that was done or not done under that permit. They are not charging that some law prohibited MWRD from doing what it was permitted to do under the 2000 permit. Interveners are seeking to prevent issuance of a new allocation of water for the period 2016 to 2029 that improperly is not conditioned to require feasible water conservation measures as required by the Level of Lake Michigan Act and 17 Ill. Adm. Code 3730.

**2. The conservation practices requested by IDNR and Interveners can be granted on the current record because it is uncontested that conservation practices could reduce the need for the discretionary diversion.**

 IDNR staff requested that certain conservation practices be imposed without apparent objection by MWRD and MWRD witnesses have admitted that there is no reason why they could not do what IDNR staff has requested (Oct. 7, Wasik Tr. 188-89, Staudacher Tr. 226). Interveners offered testimony of four witnesses to establish that conservation practices might reduce the need for the discretionary diversion and should be studied by MWRD and implemented if found reasonable. This evidence was improperly excluded. Nonetheless, the conservation practices requested by IDNR and Interveners should be imposed based on the current record.

 First, MWRD cannot claim that conservation practices are unnecessary because the completion of TARP will eliminate the need for diversions. As explained above (supra II.A.3), it clear that MWRD "believes that some amount of discretionary diversion will always be necessary." Petitioner's Response to IDNR's Information Requests p.32. This is also implied by the Melching Model which shows substantial numbers of dissolved oxygen violations if diversion is reduced to 101 cfs even if TARP were to eliminate wet weather violations. Petitioner's Response to IDNR's Information Requests p. 28. Further, Dr. Melching admitted that TARP will not even end wet weather combined sewer overflows (Oct. 6, Melching Tr. 152-54).[[10]](#footnote-10) Indeed, a portion of a Melching report about which Interveners' were not allowed to ask questions, shows that large amounts of pollutants will enter the CAWS even after the completion of McCook Phase II. (Interveners' Ex. 1, p. 371 (F-454); Oct. 6, Melching Tr. 165-66)

 Further, MWRD cannot sensibly deny that the proposed conservation practices might reduce the need for diversions by reducing the amount of pollution that reaches the CAWS. Dr. Melching recognized that reducing phosphorus in the system so as to limit algal growth could affect the outputs given by the Model although he did not know if it was possible to sufficiently limit phosphorus pollution (Oct. 6, Melching, Tr. 141-2). Dr. Melching also recognized that implementation of Green Infrastructure, such as that championed by MWRD’s Executive Director David St. Pierre and MWRD Commissioner Deborah Shore (Interveners Exhibits 4 and 5), could reduce combined sewer overflows (Melching Tr. 101).[[11]](#footnote-11) Dr. Melching also recognized that increased aeration might improve dissolved oxygen levels, although Dr. Melching thought it more efficient to use Lake Michigan water for that purpose (Tr. 102).[[12]](#footnote-12)

 Unless MWRD wishes to contest statements made by its own leadership and expert, the conservation practices that Interveners ask be studied should be ordered to be studied as a condition of granting the permit.[[13]](#footnote-13) If the studies show that the conservation practices are feasible and would reduce the amount of diversion needed to keep the CAWS in a reasonably satisfactory condition, the practices should be implemented.

**III. Conclusion**

 Interveners agree with IEPA and IDNR that the petition should not be granted except with reductions in the allocation and/or imposition of conditions. The Department should order that the discretionary diversion allowed be as follows:

2016 270 cfs

2017 270 cfs

2018 220 cfs

2019 220 cfs

2020 220 cfs

2021 101 cfs (or less)[[14]](#footnote-14)

 Such an order would be in accord with the proposal of IDNR staff for the years 2016 through 2020 and would require the MWRD to provide further demonstration of the need for the level of diversion, or if diversion would be needed after the completion of McCook Phase I.

 In addition, pursuant to 17 Ill. Adm. Code 3730.307(c)(10), the permit should be conditioned on implementation of conservation practices that have been requested by IDNR staff and Interveners. These conservation practices should include the following actions by MWRD:

- Develop Guidance for optimal use of the Discretionary Diversion, along with instream Aeration Stations and the Sidestream Elevated Pool Aeration Stations (IDNR Ex. 2, Injerd direct testimony p. 4);

- Maintain the accuracy of reported discretionary diversion flows, and complete and implement the optimization report as described in Dr. Melching’s testimony (IDNR Ex. 2, Injerd direct testimony p. 6);

- Submit an annual report documenting its activities, including a description of any corrective actions taken, to the Department (IDNR Ex. 2 Injerd direct testimony, p. 6);

- Complete studies by 2018 regarding the potential for each of the following conservation practices to reduce the need for the discretionary diversion to maintain the CAWS in a reasonably sanitary condition:

 - water conservation practices, including green infrastructure

 - advanced wastewater treatment

 - wetlands and upland restoration, and

 - increased aeration.

If the required studies identity best management practices that would allow the diversion to be reduced for the years 2020 to 2029, implementation of those practices should be imposed immediately, and the level of diversion adjusted for those years accordingly. The studies should also be refined after Phase I of the McCook Reservoir has been completed in 2017 to reflect any data MWRD gathers on the Reservoir’s effectiveness, or lack thereof, that would impact conservation practices.

Respectfully submitted, December 15, 2015



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Counsel for Alliance for the Great Lakes and authorized by all of the named Interveners to file this Memorandum on their behalf

STATE OF ILLINOIS

DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF )

 ) No. LMO-14-5

PETITION FOR MODIFICATION )

LAKE MICHIGAN WATER )

ALLOCATION FOR METROPOLITAN )

WATER RECLAMATION DISTRICT OF )

GREATER CHICAGO )

**NOTICE OF FILING**

NOTICE OF FILING TO: See Attached Service List / Proof of Service

PLEASE TAKE NOTICE that today I have electronically mailed to the Illinois Department of Natural Resources, for filing, the **POST-HEARING MEMORANDUM OF INTERVENERS**, copies of which are attached hereto and hereby served upon you.

/s/ Albert Ettinger

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**PROOF OF SERVICE**

I hereby certify that on the 15th day of December, 2015, I served the foregoing Notice of Filing and Post-Hearing Memorandum of Interveners to the following individuals by sending copies via electronic mail.

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1. Knowing the Chicago average summer temperature would not be much help in determining whether or not to wear a coat to a Cubs game. [↑](#footnote-ref-1)
2. The Model misses high by similar percentages for Fullerton and Kinzie for 2008 thereby suggesting that there were fewer DO violations than actually occurred. (Interveners' Ex. 1, Table 4.10, p. 142) The Model summer DO average is also way off on the high side at Main Street on the North Shore Channel for the summer of 2001. (Interveners' Ex. 1, Table 4.14, p. 149) [↑](#footnote-ref-2)
3. The Direct Testimony of Daniel Injerd is not paginated. Interveners have cited to page numbers by counting from the first page of the document. [↑](#footnote-ref-3)
4. In addition, it is clear that there will be violations of the fecal coliform standard after completion of TARP unless conservation practices are implemented because the Model shows that even if Thornton Reservoir had been completed in 2008, there would have been a large CSO in the Calumet part of the system that will not be benefitted by the completion of Phase II the McCook Reservoir (Oct. 6, Melching Tr. 156-61). There will likely be violations of the fecal coliform standard as long as there are CSOs (Oct. 7, Twait, Tr. 289). [↑](#footnote-ref-4)
5. 17 Ill. Adm. Code 3730.211 (c)(3) provides, “When the admissibility of disputed evidence depends on an arguable interpretation of the substantive law, the Hearing Officer shall admit such evidence.” Evidence should have been admitted under this rule showing that imposition of conservation practices under 17 Ill. Adm. Code 3730.307(c)(10) may reduce the need for diversions for the years 2016 to 2029 and thereafter. [↑](#footnote-ref-5)
6. , The Act merely gives "new users" for domestic purposes priority over other types of new users. 615 ILCS 50/3. [↑](#footnote-ref-6)
7. Letter of Robert G. Mool to Joel Brammeier, August 25, 2014 (attached to Prehearing Memorandum of Interveners as Ex. B). [↑](#footnote-ref-7)
8. Second Notice of Proposed Rulemaking p. 2-3. (Prehearing Memorandum of Interveners Ex. C) [↑](#footnote-ref-8)
9. IDNR staff certainly does not feel bound by the LMO 00-01 Order, which it believes is "antiquated." (Oct 7, Injerd Tr. 278) [↑](#footnote-ref-9)
10. Still further, as explained above (II.B), the CAWS must also be brought into compliance with at least the Unnatural Sludge narrative standard stated at 35 Ill. Adm. Code 302.403 to be in a reasonably sanitary condition. [↑](#footnote-ref-10)
11. In Petitioner's Responses to Interveners' Information Requests, MWRD admitted that it is "unknown" how green infrastructure, water conservation and efficiency measures, comprehensive land use planning and other best management practices have affected water quality of will affect water quality. (p. 10). [↑](#footnote-ref-11)
12. MWRD in its Responses to IDNR's Discovery requests also admitted that aeration could achieve high levels of DO compliance, albeit in a more costly and complicated manner than simply using clean Lake Michigan water to flush and replace the polluted low-oxygen water in the CAWS. MWRD Response to IDNR's Discovery Requests p. 13. [↑](#footnote-ref-12)
13. If MWRD now does wish to claim that improved wastewater treatment, green infrastructure, wetlands treatment and aeration cannot possibly reduce the amount of the discretionary diversion needed, Interveners will seek discovery on the basis of that claim, to cross-examine Dr. Melching on topics that they were prevented from questioning him about, and will offer the testimony that was improperly excluded at the hearing. [↑](#footnote-ref-13)
14. Also, a condition could be imposed on the permit requiring MWRD to make a new demonstration of need no later than 2020 based on information developed by that time regarding the effects of the completion of the McCook Reservoir Phase I, improvements made in the Model, and completion of the Optimization Plan. [↑](#footnote-ref-14)