

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METROPOLITAN WATER	)	
RECLAMATION DISTRICT OF GREATER	)	
CHICAGO,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 2016-028
	)	(Variance – Water)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that on January 27, 2016, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, **INITIAL COMMENTS OF ENVIRONMENTAL GROUPS ON THE MWRD PETITION FOR VARIANCE FROM DISSOLVED OXYGEN STANDARDS**, a copy of which is attached hereto and herewith served upon you.

Dated: January 27, 2016

Respectfully Submitted,



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**INITIAL COMMENTS OF ENVIRONMENTAL GROUPS ON THE MWRD PETITION FOR VARIANCE FROM DISSOLVED OXYGEN STANDARDS**

Over three years ago, the Sierra Club, Natural Resources Defense Council, Friends of the Chicago River, Openlands, Environmental Law and Policy Center and Prairie Rivers Network (“Environmental Groups”) agreed to support the Metropolitan Water Reclamation District of Greater Chicago (“MWRD”) in seeking one five-year variance from dissolved oxygen (“DO”) standards "with regard to combined sewer overflow discharges." Also, in 2012, the U.S. Environmental Protection Agency (“USEPA”) indicated that it might approve of a variance from violations of the DO standards from combined sewage overflows. USEPA approval is necessary for the variance to be valid under 33 USC. §1313(c).

The Environmental Groups will fully adhere to their agreement with MWRD. However, certain contradictions and confused language contained in the June 2015 MWRD Petition for Variance from Dissolved Oxygen Standards (“MWRD DO Variance Petition”) make it unclear whether the MWRD DO Variance Petition is intended to stay within the contours of the agreement with the Environmental Groups, or is consistent

with what USEPA stated it might approve. As currently worded, the MWRD DO Variance does not comply with the law and is far from anything that could be properly approved by the Board.

The Board should not grant the MWRD DO Variance Petition as it is currently drafted. A variance petition should be granted only if it meets the following criteria:

- It is clearly limited to violations of DO standards caused by combined sewer overflows (“CSOs”),
- It requires proper reports on the effects on DO levels of the completion of the Tunnel and Reservoir Project (“TARP”) that are based on adequate DO monitoring,
- It contains a clear ending date for the life of the variance, and
- It complies with the new federal requirements for variances, adopted in August 2015 and codified at 40 CFR 131.14, so as to be approvable by USEPA.

## **I. Background**

### **A. The Agreements and Decisions in 2013 are limited to CSOs**

As the Board is aware, the Illinois Environmental Protection Agency (IEPA) on October 26, 2007, filed a petition (R08-09) to the Board to revise certain water quality standards applicable to the Chicago Area Waterway System (“CAWS”) and the Upper Dresden Pool of the Lower Des Plaines River. Among the standards proposed for revision were the use designations for various portions of the CAWS, and the applicable DO standards. In some cases, and as to some water bodies of the CAWS, the IEPA proposal would make the DO standards more stringent; while in others, the IEPA proposal would not appreciably change the DO standards, or would actually make them less stringent.

The record before the Board made abundantly clear that the CAWS was frequently in violation of the DO standards that were in effect before IEPA filed its 2007 petition. As a result of CSOs and other forms of pollution, the levels of the DO in the CAWS often fell well below the minimum standard of 4 mg/L DO that was then applicable to much of the CAWS. This fact is demonstrated even in the exhibits to the current MWRD DO Variance Petition, which show numerous occasions in which DO fell below 3.0 mg/L in 2001 and 2003. Ex. H, Attachment A pp.8-9; Ex K Attachment A pp.67-80.)<sup>1</sup> Indeed, on December 14, 2011, IEPA and USEPA filed suit against MWRD in federal court for, inter alia, causing violations of the dissolved oxygen standards that were in effect at that time through its CSO discharges.<sup>2</sup>

After many days of hearings on the proposed CAWS use designations, the proposed DO standards and other issues, the Environmental Groups and MWRD in 2012 agreed to make certain joint proposals to the Board to resolve these issues. Pursuant to this agreement, MWRD dropped its opposition to certain use designations for various segments of the CAWS. The Environmental Groups agreed, as recognized in an exhibit to the current MWRD DO Variance Petition, to support one five-year variance from violations of the DO standards "with regard to combined sewer overflows." (MWRD DO

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<sup>1</sup>Thus, this is not a case where the applicant for a variance seeks only to prevent application of a new standard that would cause the applicant to begin causing violations. Here, the MWRD is seeking a variance from standards that it was frequently causing to be violated long before the IEPA filed its petition and which it continued to cause to be violated throughout the R08-09 proceeding. MWRD's problem is only to a small extent due to the Board changing the DO standard. Accordingly, the automatic stay of the effectiveness of new water quality standards, 415 ILCS 5/38(b), will be of very limited assistance to MWRD. MWRD discharges continue to cause violations of the old standards.

<sup>2</sup>The settlement of this lawsuit resulted in a Consent Decree, which appears with the MWRD DO Variance Petition as Ex. J.

Variance Petition Ex. A. p. 2 fn. 3). The reason for these agreements was that it was clear that the CSOs, and the violations of the DO standards that resulted from them, would not end before much more work was done on TARP; and it was furthermore clear that that work on TARP (and potentially other work on Green infrastructure and other measures) could not be completed until more than five years after 2012.

These agreements and proposals were presented to the Board on January 9, 2013, in the Report of the Metropolitan Water Reclamation District of Greater Chicago and Environmental Groups Regarding Proposed Aquatic Life Designated Uses (MWRD DO Variance Petition Ex. A, R08-09 Document #1366)

The Environmental Groups would not, of course, have agreed to support any variance regarding forms of pollution that would not be addressed by TARP, the purpose of which is to address CSOs. The Environmental Groups believe that MWRD should have a reasonable time to fix problems but no time simply to put off addressing problems.

Further, the agreement specifically carved out, as not subject to its terms, the claim relating to nutrient pollution brought by NRDC, PRN and Sierra Club in NRDC v. MWRDGC 11-cv-02937 (N.D. Illinois) which was already the subject of litigation between them and MWRD. MWRD Petition Ex. A, PCB 08-09 Document #1366, Report of MWRD and Environmental Groups, p. 1, n.2. Count II of NRDC v. MWRDGC (N.D. Ill.) relates to discharges of phosphorus from the wastewater treatment plants.

MWRD had met with USEPA on May 23, 2012 regarding the possibility of obtaining USEPA approval for a variance from DO standards. (MWRD DO Variance Petition Ex. L) In its letter regarding the meeting and its response, USEPA stated:

[I]t appears that MWRD's variance request would be based primarily upon MWRD's assertions that: 1) the DO criteria that are being considered for

adoption by the IPCB are not attainable because at a minimum, the Combined Sewer Overflow (CSO) controls specified in the Tunnel and Reservoir Project (TARP) are a necessary precursor to attainment of those DO criteria; 2) there is a schedule for completion of TARP included in the consent decree pertaining to the MWRD, Illinois EPA and EPA that has been lodged in federal district court; and 3) TARP cannot be completed within five years, such that the DO criteria are not attainable for at least the first proposed five-year variance term.

....

**EPA notes that the information that MWRD has asked EPA to consider in providing this preliminary feedback does not appear to support MWRD's assertion that the DO variance should apply to the three wastewater treatment plants' effluents since the information provided by MWRD focuses on the CSOs.** To the extent that MWRD would be seeking to have the variance apply to the wastewater treatment plant effluents, MWRD should demonstrate what DO-related water quality-based permit conditions applicable or expected to be applicable to the treated discharge effluent discharges from its plants cannot be complied with, why those compliance problems cannot be remedied in five years (the term of the proposed variance), what conditions are currently obtained, and what actions MWRD could take to achieve the highest attainable effluent quality during the term of the variance.

MWRD DO Variance Petition Ex. A, Ex. A.

On November 21, 2013, the Board adopted certain designations for segments of the CAWS to which the DO standards were made applicable. Opinion and Order of the Board, PCB 08-09 Subdocket C. This ruling and rulings in Subdocket D had the effect of making DO standards more stringent in some water segments and during certain months. For example, the minimum standard below which DO should not fall "at any time" was strengthened from 4.0 mg/L to 5.0 mg/L during the period of March through July in Aquatic Life Use A waters. 35 Ill. Adm. Code 302.405(c)(1), but the "at any time" standard was loosened from 4.0 mg/L to 3.5 mg/L for Aquatic Life Use A waters from August through February and for Aquatic Life Use B waters for the whole year. 35 Ill. Adm. Code 302.405(c)(2), (d)(2).

MWRD filed its DO Variance Petition on July 11, 2015. On August 21, 2015, USEPA issued final new federal rules concerning variances from water quality standards, Fed. Reg. Vol. 80, No. 162/Friday August 21, 2015, 51020 (codified at 40 CFR 131.14).

**B. It does not appear that the Current MWRD DO Proposal is Limited to CSOs, and the time period and conditions are unclear.**

In a footnote to the MWRD DO Variance Petition (p. 3 n. 2), MWRD states that “coverage of the discharges from the [O'Brien, Stickney and Calumet] Plants (“the Plants”) may be necessary in the future but is not being requested at this time.” However, in numerous places in the Petition, MWRD appears to request relief from liability for violations of DO standards resulting from discharges from the Plants. The problem begins on the first page of the Petition, where MWRD states that it seeks a “variance authorizing discharges from its O’Brien, Calumet, and Stickney wastewater treatment plants (“Plants”) and from Combined Sewer Overflow (“CSO”) outfalls ...” MWRD DO Variance Petition p. 1.

Further, as to each of the Plants, after mentioning a few requirements as to habitat improvement and aeration that would continue to apply under the proposed variance, MWRD states in the Petition that under the proposed variance:

No other DO-related control requirements will apply to the [O'Brien/Stickney/Calumet] Plant or the CSOs covered in the [O'Brien/Stickney/Calumet] Plant during the term of the variance. (This is not intended to refer to control of any nutrients including nitrogen and phosphorus.) Any water quality-related requirements in the permit that accompanies this variance are subject to this condition.

MWRD DO Variance Petition pp. 12-13, 14, 15, 19, 20, 21.

Further, as to the Calumet Plant, MWRD proposes that it prepare a report regarding DO in 2017 after completion of the Thornton Reservoir; and as to the O'Brien

and Stickney Plants, MWRD proposes that it prepare a report on DO following completion of the McCook Stage I Reservoir in 2019. MWRD DO Variance Petition pp. 13-16. In language that is identical as to each of the three plants, MWRD proposes as follows:

The results of the report will be assessed in determining whether a variance will be issued to accompany the next permit that is issued after submittal of the report. Such a variance, if issued, would incorporate the results of the report, specifying the expected nonattainment rate of the new DO standard during the variance term, requiring continued operation of the aeration stations whenever operable (from April to October), consider the feasibility of taking other steps to address low DO ..., and specifying that **no other DO-related control requirements (other than with regard to nutrients)** would apply during the term of the variance except such steps as are found by the MWRD or the Board to be feasible and appropriate given the goals of the Clean Water Act.

MWRD DO Variance Petition pp. 13, 15, 16 (emphasis added).

MWRD DO Variance Petition pp. 13, 15, 16 (emphasis added).

Regarding the length of the proposed variance, MWRD states:

The proposed beginning date for the initial variance for each Plant would be the date that the Permit for that Plant is modified to include the variance, and the term for the initial variance would be for a maximum of five years, ending no later than the end of the term for that Plant's Permit.

MWRD DO Variance Petition p.23.

Both the scope of the variance sought and the time period, then, are unclear.

**II. The Variance must be strictly limited to violations of DO standards caused by CSOs.**

The variance as proposed should not be approved by the Board. It is ambiguous as to its coverage, and appears to improperly apply to discharges from the Plants. MWRD has provided no basis for granting a variance from violations of DO standards insofar as the violations are caused by Plant discharges. The Environmental Groups agreed to a



variance regarding violations caused *by CSOs*, and that is all that USEPA said it might approve. Nonetheless, MWRD's proposed language for the variance and conditions on the variance suggests that discharges from the Plants would be subject to the variance, except insofar as the violations are caused by nitrogen and phosphorus.

It is of particular concern that specific provisions in the 2013 permits such as the CBOD5 and DO effluent limits that address some of the pollutants that cause violations of DO standards, could be affected by the variance as proposed *see e.g.*, MWRD DO Variance Petition Ex. C, Stickney permit p. 2. As currently worded, the MWRD proposed DO variance could be read to render those limits inoperable.

The Environmental Groups take MWRD at its word that it only seeks a variance regarding DO violations caused by CSOs. However, the final variance must be worded to uphold this intent, and to stay within the parameters that the Environmental Groups agreed to, and the USEPA indicated it might approve. Certainly, MWRD cannot be given a broader variance than it proves is warranted.

**III. Monitoring in the North Shore Channel and Reports Required as a Condition of the Variance should be clarified and strengthened.**

The monitoring and conditions proposed for the variance also must be improved. First, the DO monitoring in the proposed variance for the O'Brien Plant permitted CSO discharges is inadequate. MWRD proposes to conduct continuous DO monitoring at Foster Avenue on the North Shore Channel, and at Addison and Division Street on the North Branch of the Chicago River. MWRD DO Variance Petition pp. 13, 19. These are sites, however, where the water is temporarily pumped up with DO from the discharge

from the O'Brien Plant, such that DO violations are relatively infrequent.<sup>3</sup> As is readily apparent from exhibits that MWRD filed with its DO Petition, the portion of the North Shore Channel most in need of continuous DO monitoring is the portion north of the O'Brien Plant at Simpson Street and at Main Street in Evanston, which has suffered numerous severe DO crashes. MWRD DO Variance Petition Ex. H, Attachment A pp. 8-9; Ex. K Attachment A p. 79.<sup>4</sup>

Further, details of the reports to be produced should be spelled out and clarified. Assuming that the variance is limited in scope to DO violations caused by CSOs, it should be understood that the "assessment of feasible options to further increase DO levels" (MWRD DO Variance Petition pp. 13, 15, 16, 19, 21, 22) will include considering options to reduce CSOs in addition to the completion of TARP. In particular, consideration of green infrastructure and other measures to reduce CSOs, pollution caused by CSOs and DO violations from CSOs must be included in the assessment.

Finally, the difficult language regarding the "results of the report" in the proposed MWRD DO Variance Petition quoted supra at 7, requires considerable clarification. In particular, it should be made clear that the report created by MWRD will not determine the scope of any future variance but will, at most, form the factual basis of a future variance request that MWRD would propose to the Board and ultimately USEPA. Further, if this report is to serve as the basis for a future variance that extends coverage

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<sup>3</sup> Of course, the CBOD and nutrients in the O'Brien effluent work to take DO out of the water and create algal activity that lowers DO levels, but those effects are mainly seen further downstream.

<sup>4</sup> The consequence of not requiring DO monitoring at those sites is that MWRD can plausibly deny that violations are occurring there without ending them.

beyond DO violations caused by CSOs, much more must be studied in terms of potential options for wastewater treatment.

**IV. The Term of the Variance must be demarcated clearly.**

The language regarding the length of the variance is also unclear. The MWRD 2013 plant permits expire in 2018. Given the "ending no later than the end of the term for that Plant's Permit" language, all the variances should end in December 2018, five years after the 2013 plant permits were issued. That would be reasonable given that Phase 1 of the McCook Reservoir is supposed to be completed in 2017 and, thus, 2018 would be an appropriate time to re-consider the variance.

**V. The Variance must be supported by proof adequate to satisfy the requirements of 40 CFR 131.14.**

In filing the DO Variance Petition, MWRD properly sought to follow Board rules applicable to such petitions. However, since the date of the filing, USEPA has established regulations that apply to all variances. These regulations provide, among other things, that a variance must be supported with showings of the "highest attainable interim criterion" or "the greatest pollutant reduction achievable," and "documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition." 40 CFR 131.14(b). MWRD's petition should be modified to meet these new requirements.

**CONCLUSION**

MWRD should be granted a variance only if it is clearly limited to violations of the DO standards caused by CSO discharges, requires appropriate monitoring and other conditions, is properly and clearly limited as to the applicable time period and is

supported by all the data and findings required for USEPA to approve the variance under 40 CFR §131.14.

Respectfully Submitted,



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*Counsel for Sierra Club and authorized to file this comment also on behalf of NRDC, Friends of Chicago River, Openlands, Prairie Rivers Network and the Environmental Law and Policy Center.*



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**CERTIFICATE OF SERVICE**

I, Albert Ettinger, hereby certify that I have filed the attached **NOTICE OF ELECTRONIC FILING** and **INITIAL COMMENTS OF ENVIRONMENTAL GROUPS ON THE MWRD PETITION FOR VARIANCE FROM DISSOLVED OXYGEN STANDARDS** in PCB 2016-028 upon the attached service list by electronic mail on January 27, 2016.

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**PCB 2016-028 SERVICE LIST**

January 2016

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