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Supreme Court of the United States
October Term, 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <i>Complainants,</i> v. STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 1 Original
STATE OF MICHIGAN, <i>Complainant,</i> v. STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 2 Original
STATE OF NEW YORK, <i>Complainant,</i> v. STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 3 Original

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER
CHICAGO'S RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

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INDEX OF ACRONYMS

CAWS	Chicago Area Waterway System
CCD	Chicago City Datum
CORPS	U.S. Army Corps of Engineers
CRCW.....	Chicago River Controlling Works
CSO	Combined Sewer Overflow
CSSC	Chicago Sanitary & Ship Canal
DISTRICT	Metropolitan Water Reclamation District of Greater Chicago
eDNA	Environmental DNA
LAKE	Lake Michigan
MICHIGAN.....	State of Michigan
TARP.....	Tunnel and Reservoir Plan
WPS	Wilmette Pumping Station
WRP	Water Reclamation Plant

INTRODUCTION

The State of Michigan (Michigan) is requesting this Court to enter a preliminary injunction that it contends is necessary to protect Lake Michigan (Lake) from Asian carp. As will be discussed herein, no one has done more than the Metropolitan Water Reclamation District of Greater Chicago (District) to protect the Lake from pollution and improve the quality of the Chicago Area Waterway System (CAWS). While the District supports the efforts of any federal, state, or local government or environmental group that shares the District's goal to protect and improve the water quality of the Lake and the local waterways, this Court must not overlook the potential disastrous consequences that could result if this Court grants Michigan the relief requested and enjoins the District from discharging to the Lake.

Michigan's Motion for Preliminary Injunction focuses almost exclusively on the economic impact to the region by closing the locks to commercial navigation, which will be substantial in spite of Michigan's claims to the contrary. However, Michigan devotes little, if any, attention to the equally, if not more important issue of widespread flooding likely to occur in the Chicago area if the District is not allowed to discharge to the Lake during extreme wet weather events and the potential adverse effects thereof on public health and safety. With all due respect to Michigan, its cavalier characterization of the impact of its request for relief as an "unavoidable

inconvenience” to the 5 million residents in the District’s service area is an attempt to trivialize the potentially devastating effects of granting its request for relief. (Mot. for Prelim. Inj., p. 18) The District is requesting that when this Court balances the equities, it include on the scale a weighty item omitted by Michigan: the potentially disastrous effects of flooding and impacts on public health and safety in the Chicago area.

Because of the flooding potential and risk to human health and safety, the District requests that the Court deny Michigan’s request for preliminary injunction. However, in the event that this Court grants Michigan’s request to close the locks to navigation, the District requests that this Court allow the District to discharge water from the CAWS to the Lake if the District determines that such action is necessary to prevent flooding and to protect public health and safety, and to take water from the Lake as necessary to maintain water levels for navigation and the health of the aquatic community.

FACTS

The District is a unit of local government created in 1889 by the Illinois Legislature for the purpose of protecting the quality of the Lake water, collecting and disposing of sewage, reducing pollution of the waterways, and reducing flooding.¹ The District’s current authority also

¹ 70 ILCS § 2605/1 *et seq.*

includes stormwater management.² The District's service area encompasses most of Cook County, which includes the City of Chicago and 125 municipalities. (Dist. App. p. 3) The District provides wastewater treatment service to approximately 5 million residents and thousands of businesses. (Dist. App. p. 3)

Within the District's service area is what is known as the CAWS. (Dist. App. p. 3) The CAWS consists of 76.3 miles of canals that traverse Chicago and 31 other communities, and serves the area for commercial and recreational navigation and to drain away from the Lake urban stormwater runoff and treated municipal wastewater effluent from the District's four wastewater treatment plants that discharge to the CAWS. (Dist. App. p. 3)

The District controls the water level in the CAWS for navigational purposes, storm relief and maintenance of adequate water quality for aquatic life through its operation of three lakefront structures: the Wilmette Pumping Station (WPS); the Chicago River Controlling Works (CRCW); and the O'Brien Lock and Dam; and two structures downstream on the Chicago Sanitary and Ship Canal (CSSC): the Lockport Lock and Powerhouse; and the Lockport Controlling Works. (Dist. App. p. 6)

The WPS is located on the Lake at the northern-most point of the CAWS and is owned, operated and maintained by the District. (Dist. App. p.

² 70 ILCS § 2605/7h.

6) The WPS consists of one large sluice gate separating the Lake from the North Shore Channel and one pump capable of pumping water from the Lake to the North Shore Channel for water quality purposes. (Dist. App. p. 6) The pump is used when the Lake level is low. (Dist. App. p. 6) When the Lake level is high, gravity flow through the sluice gates is used. (Dist. App. p. 6) The average amount of discretionary diversion water taken from the Lake by the District at the WPS is an annual average of 40 cubic feet per second (cfs). (Dist. App. p. 6) The District normally maintains the water level in the North Shore Channel between minus 1 foot Chicago City Datum (CCD) and minus 2 feet CCD.³ (Dist. App. p. 6) When the water level in the North Shore Channel reaches an elevation of plus 4.5 feet CCD, the District will evaluate the conditions and determine whether it may need to open the sluice gate to draw down the North Shore Channel to avoid flooding along the Channel. (Dist. App. pp. 6-7) The low point in the top of the gate separating the Lake and the North Shore Channel is at plus 5.0 feet CCD. (Dist. App. p. 7) Overflow of floodwater to the Lake will occur regardless of efforts to restrict flow to the Lake once the water rises above plus 5.0 feet CCD. (Dist. App. p. 7)

³ Chicago City Datum is the local reference point for measuring elevations. It provides a consistent starting point to compare flood and ground elevations. The Chicago City Datum started from the level of Lake Michigan. Zero in the Chicago City Datum is 579.48 feet above mean sea level.

Four miles downstream from the WPS, the District's North Side Water Reclamation Plant (WRP) discharges treated wastewater effluent to the North Shore Channel, at an annual average of 375 cfs. (Dist. App. p. 7) Four miles further downstream, the North Branch tributary discharges at the confluence of the North Shore Channel and the North Branch at an annual average of 133 cfs. (Dist. App. p. 7) These flows are the principal sources of flow in the North Shore Channel and North Branch portion of the CAWS. (Dist. App. p. 7)

The CRCW was constructed on the Lake in Chicago's downtown area by the District in the late 1930s. (Dist. App. p. 7) The CRCW navigational locks are currently maintained and operated by the U. S. Army Corps of Engineers (Corps). (Dist. App. p. 7) In addition to the locks, the District has eight sluice gates at CRCW that it utilizes to reverse the CAWS to the Lake during extreme wet weather events in order to prevent flooding in the Chicago downtown area. (Dist. App. p. 7)

The District must maintain an elevation in the Chicago River at the west end of the lock at no time higher than minus 0.5 foot CCD, and at no time lower than minus 2.0 feet CCD, except in times of excessive storm runoff into the river or when the Lake is below minus 2 feet CCD.⁴ When the water level in the Chicago River reaches an elevation of plus 3.0 feet CCD,

⁴ 33 C.F.R. § 207.420.

the District will consider whether it may need to open the sluice gates to draw down the CAWS to avoid flooding. (Dist. App. p. 7) On three occasions over the past decade, open sluice gates were insufficient to alleviate flooding concerns and the District had to request the Corps to also open the navigational lock gates. (Dist. App. p. 7)

The District also uses the sluice gates at the CRCW for diversion of Lake water to maintain the CAWS at appropriate levels for navigation and to maintain water quality, taking in an annual average of 150 cfs. (Dist. App. pp. 7-8) The Lake water from CRCW flows into the main stem of the Chicago River, then into the South Branch of the Chicago River, and into the CSSC. (Dist. App. p. 8) The District has no pumps at CRCW for the intake of discretionary diversion water. (Dist. App. p. 8) This discretionary diversion water constitutes the principal flow in the 1.5-mile reach of the main stem of the Chicago River. (Dist. App. p. 8)

The third lakefront structure, known as the O'Brien Lock and Dam, is located on the Calumet River. (Dist. App. p. 5) The O'Brien Lock and Dam was constructed by the Corps in 1960 as part of the Calumet-Sag Channel widening project, and controls the volume of water diverted from the Lake and the flow in a portion of the Little Calumet River and the Calumet-Sag Channel. (Dist. App. pp. 5, 8) The Corps owns, operates and maintains the navigational lock and dam. (Dist. App. p. 8) In addition to the lock, there are

also four sluice gates operated by the Corps at the direction of the District for the diversion of water from the Lake and reversals to the Lake. (Dist. App. p. 8) The District takes an annual average of 115 cfs discretionary and navigational diversion from the Lake at the O'Brien Lock and Dam. (Dist. App. p. 8) The District uses the sluice gates at O'Brien Lock and Dam for discretionary diversion because there are no pumps at the O'Brien Lock and Dam. (Dist. App. p. 8)

The District must maintain an elevation at the downstream end of the navigation lock at no time higher than minus 0.5 foot CCD, and at no time lower than minus 2.0 feet CCD, except in times of excessive storm run-off into the Illinois waterway, or when the Lake is below minus 2.0 feet CCD.⁵ When the water level in the Calumet-Sag Channel reaches an elevation of plus 3.0 CCD, the District will consider whether it may need to open the sluice gates to draw down the CAWS to avoid flooding. (Dist. App. p. 8)

Five miles downstream of the O'Brien Lock and Dam, the District's Calumet WRP discharges treated wastewater effluent to the Little Calumet River at an annual average of 380 cfs. (Dist. App. p. 8) Two miles further downstream, the Little Calumet River watershed discharges to the CAWS at an annual average of 195 cfs and the flow in the Calumet-Sag Channel moves downstream into the CSSC. (Dist. App. pp. 8-9) Three miles downstream of

⁵ 33 C.F.R. § 207.425.

the confluence of the CSSC and the Calumet-Sag Channel, the District's Lemont WRP discharges treated effluent to the CSSC at an annual average of three cfs. (Dist. App. p. 9)

All outflow exits the CAWS at the Lockport Lock and Powerhouse and, on occasion, the Lockport Controlling Works. (Dist. App. p. 9) In addition to two hydroelectric generating units at the Powerhouse, the District operates up to nine sluice gates to control floodwater discharge. (Dist. App. p. 9) The District will use one or more of the seven additional sluice gates two miles upstream of the Lockport Lock and Powerhouse at the Lockport Controlling Works to divert flow to the Des Plaines River under extreme wet weather events. (Dist. App. p. 9) The limiting control of floodwater discharges at Lockport is the capacity of the 160-foot wide CSSC in the 10-mile reach between the Lockport Controlling Works and the confluence of the CSSC and the Calumet-Sag Channel. (Dist. App. p. 9) The capacity is limited to approximately 20,000 cfs. (Dist. App. p. 9)

As discussed herein, there are several sources of inflow to the CAWS that pass through the Lockport Lock and Powerhouse. (Dist. App. p. 9) The waters entering the CAWS upstream of Lockport include treated wastewater effluent from water reclamation plants, discretionary diversion from the Lake, water to operate the navigation locks, leakage through control walls, tributary streams, storm runoff, and combined sewer overflows. (Dist. App. p.

9) Over 70 percent of the annual flow in the system is from the discharge of treated municipal wastewater effluent from the Calumet, Lemont, North Side, and Stickney WRPs owned and operated by the District. (Dist. App. p. 9)

9) During dry weather periods, virtually 100 percent of the flow is from these plants and other water reclamation plants on the tributary streams. (Dist. App. p. 9)

9) During wet weather periods, about 50 percent of the flow is from the water reclamation plants. (Dist. App. p. 9)

ARGUMENT

I. Preliminary Injunction Considerations.

Even if this Court determines that it has jurisdiction, Michigan has not met the necessary elements for a preliminary injunction. Because a “preliminary injunction is an extraordinary and drastic remedy,”⁶ whose “purpose...is merely to preserve the relative positions of the parties until a trial on the merits can be held,”⁷ the party seeking such an injunction must make a “clear showing” that temporary equitable relief is necessary.⁸ Therefore, Michigan carries a heavy burden, not only of demonstrating that it “is likely to prevail on the merits” but also that it “*will* suffer irreparable injury” without injunctive relief.⁹ That is especially so where, as here, the

⁶ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

⁷ *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

⁸ *Mazurek*, *supra*; see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“stringent” showing required).

⁹ *Doran*, 422 U.S. at 931 (emphasis added); see also *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (“likelihood of irreparable injury” required).

preliminary injunction would dramatically alter the status quo by requiring major changes and restrictions on how the District will deal with flooding and public health and safety issues.¹⁰

A. Michigan's Claims of Imminent Ecological and Economic Devastation are Contrary to the Available Science and Insufficient Under This Court's Recent Decisions.

Despite Michigan's claims that Asian carp are near the end of an "unrelenting march" into the Lake and that they are "infesting" the CAWS, this is not the case. (Mot. for Prelim. Inj., pp. 1, 7) In fact, buried at Footnote 24 of its Motion for Preliminary Injunction, Michigan admits that the Corp's Environmental DNA (eDNA) testing lakeward of the O'Brien Lock and Dam did not find any evidence of carp, let alone any actual carp. (Mot for Prelim. Inj., p. 14)

Michigan relies upon this newly developed environmental monitoring method in attempting to establish the existence of invasive species between the electric barrier and the Lake, and to support its contention that the devastation of the ecosystem of the Great Lakes and Michigan's commercial sport fishing industry is imminent. To the knowledge of the District, the science of eDNA is still an experimental procedure, the veracity of which has not been sufficiently established or challenged. (Dist. App. p. 23) Specifically,

¹⁰ See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-976 (10th Cir. 2004) (en banc) (preliminary injunction that would "alter the status quo" requires a "strong showing" both of likely success and equitable balance) *aff'd on other grounds and remanded sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006).

the District is unaware of the publication of the laboratory and field procedures in a peer reviewed scientific journal. (Dist. App. p. 23) Very tellingly, Michigan does not address the level of accuracy of eDNA sampling results. (Dist. App. p. 23) Even assuming the validity of eDNA data, it only suggests the possibility of Asian carp being close to the fish barrier, which is not the same as “imminent” for purposes of a preliminary injunction.

The possibility of irreparable harm is not sufficient to grant the extraordinary remedy of a preliminary injunction.¹¹ In *Winter v. Natural Resources Defense Council*, this Court reviewed the grant of a preliminary injunction against the Navy imposing restrictions on its use of sonar in training exercises due to its alleged injury to various species of marine mammals present in southern California waters. In reversing the 9th Circuit Court of Appeals, this Court weighed the alleged irreparable injury to marine mammals resulting from the Navy’s use of sonar in its training exercises against the Navy’s interest in effective, realistic training of its soldiers.¹² The Court found the distinction of irreparable harm being “possible” versus “likely” persuasive. The same reasoning applies in the instant case.

With respect to irreparable harm, the lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a “possibility” of

¹¹ See *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374-377 (2008).

¹² *Id.* at 374-377.

irreparable harm.¹³ In reversing the lower courts, this Court held that the “possibility” standard is too lenient, and that plaintiffs seeking preliminary relief are required to demonstrate that irreparable injury is likely in the absence of an injunction.¹⁴ This Court reasoned that, “issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”¹⁵ In the instant case, Michigan fails in its burden to establish, upon a clear showing, that it is entitled to the relief it seeks.

In contrast to Michigan’s assertion that the existence of Asian carp in the Great Lakes will wipe out the entire ecosystem and cripple the sport fishing industry, there is some evidence that bighead carp already exist in Lake Erie, having been collected in 1995, 2000, 2002, and 2003.¹⁶ There is no evidence, however, that populations of bighead carp have been established.¹⁷ The United States Geological Survey database lists these collections at <http://nas.er.usgs.gov/queries/default.asp>. This information raises three questions with regard to Michigan’s call for a preliminary injunction. First, if bighead carp are already in the Great Lakes system, but are not creating

¹³ *Winter*, 129 S. ct. at 374-377.

¹⁴ *Id.*

¹⁵ *Id.* at 375-376, (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, (1997)(per curiam)).

¹⁶ C.S. Kolar, D.C. Chapman, W.R. Courtenay Jr., C.M. Housel, J.D. Williams, & D.P. Jennings, *Bigheaded Carps: A Biological Synopsis and Environmental Risk Assessment* 45 (2007). (Dist. App. pp. 27-50)

¹⁷ *Id.* at 35.

large populations, where is the urgency to prevent them reaching that system? Second, if bighead carp have reached the Great Lakes through Lake Erie, why is it necessary to immediately enjoin the District from performing its environmental and flood management duties resulting in potential devastation to the economy and public health of the citizens of Chicago and surrounding communities? And third, doesn't the fact that Asian carp exist in the Great Lakes without collections having increased and widened over the past fifteen years possibly support the theory that Asian carp are not surviving and propagating in such great numbers so as to overwhelm the existing ecosystem?

Thus, even if, as Michigan asserts, Asian carp (bighead and silver) have a presence in the CAWS, that does not necessarily lead to an eradication of the Great Lakes ecosystem. A recent aquatic invasive species research project by the National Sea Grant College Program entitled *Evaluating Asian Carp Colonization Potential and Impact in the Great Lakes*,¹⁸ refers to recent comprehensive studies that show low plankton conditions are prevalent throughout Lake Michigan. The study concludes that even if Asian carp were to enter the Lake via the CSSC, it is unlikely they would be able to consume enough energy to swim to another plankton

¹⁸ Walter Hill & Mark Pegg, *Evaluating Asian Carp Colonization Potential and Impact on the Great Lakes, Final Report to Illinois-Indiana Sea Grant, An Aquatic Invasive Species Research Project, National Sea Grant College Program, National Oceanic and Atmospheric Administration, August 31, 2008, available at http://www.iisgcp.org/research/ais/hill_final.pdf. (Dist. App. pp. 52-57)*

oasis. (Dist. App. p. 56) Thus, the study concludes that filter-feeding Asian carp (bighead and silver) will be unable to colonize most open water regions within the Great Lakes because of the limited food source (plankton) that is available there. (Dist. App. p. 53)

While the District supports efforts to ensure that the migration of Asian carp is monitored and proactively dealt with by the agencies with the authority and obligation to address such matters, there are serious flaws in the fundamental basis upon which Michigan relies to effectively cut-off the District from utilizing Lake water to control the water levels in the CAWS for navigational purposes, to maintain adequate water quality for aquatic life, and to prevent flooding during wet weather events. At best, Michigan's position shows that there is a possibility of Asian carp reaching the Lake. A possibility is not a sufficient basis upon which to grant a preliminary injunction.

B. The Potential for Widespread Flooding and Public Health and Safety Concerns Tips the Balance of Equities In Favor of the District.

Michigan limits its discussion on the injury to Defendants as, "injury to the local economy through the disruption of the local barge and recreational traffic," and characterizes any injury as "temporary." (Mot. for Prelim. Inj., pp. 17-18) Michigan fails to address the potential damage to the

entire Chicago area as a result of flooding likely to occur and the public health and safety issues that may develop as a result of sewer back-ups.

When dealing with a preliminary injunction, courts “must balance the competing claims of injury and must consider the effect on each party the granting or withholding of the requested relief.”¹⁹ While Michigan may not have considered any flooding consequences and the resulting public health and safety aspects, these factors must be considered by this Court along with the other equities.

Michigan’s prayer for relief, as pertinent to the District, requests the following relief:

- (a) Closing and ceasing operation of the locks at the O’Brien Lock and Dam and the Chicago Controlling Works (sic).
- (b) Operating the sluice gates at the O’Brien Lock and Dam, the Chicago Controlling Works (sic), and the Wilmette Pumping Station in a manner that will not allow fish to pass those structures into Lake Michigan. This should include maintaining the waterways at the lowest level possible that is still consistent with protecting against serious threats to public health and safety, and limits opening the gates except as required to prevent significant flooding that threatens public health or safety.

(Mot. for Prelim. Inj., p. 28)

It is important to note at the outset that while Michigan suggests the relief sought will allow the District to reverse to the Lake via the sluice gates to prevent significant flooding that threatens public health and safety,

¹⁹ See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

Michigan requests that the District only be allowed to do so in such a manner “that will not allow fish to pass those structures into Lake Michigan.” (Mot. for Prelim. Inj., p. 28). The District has no means in place to prevent fish passage from the CAWS to the Lake when reversing excess floodwaters to the Lake during extreme wet weather events. (Dist. App. p. 9) Discharging hundreds of millions of gallons of water, or over eleven billion gallons as was required in September 2008, make it extremely unlikely that the District could design, install and operate a mechanical barrier that will prevent fish from exiting the CAWS to the Lake during a release of excess floodwaters of such magnitude. (Dist. App. pp. 9-10) Consequently, the relief requested by Michigan is in effect an absolute prohibition against a release of excess floodwaters even in those circumstances where a release is necessary to protect public health and safety, and to protect from the ravages of flooding.

Furthermore, even if the District could comply with this condition at the sluice gates, Michigan’s request for relief provides no similar option to utilize the two navigational locks to relieve the CAWS of water when the capacity of the sluice gates is insufficient to prevent flooding. (Dist. App. p. 10) The District has had to request the Corps to open the lock gates at the CRCW on three occasions in the last decade because the sluice gates could not relieve the CAWS of the necessary volume of floodwater in the timeframe required to prevent flooding. (Dist. App. pp. 7, 10) Additionally, the locks

provide the District with an alternative discharge outlet in the event the District encounters operational problems with the sluice gates. (Dist. App. p. 10) The District needs this operational flexibility in emergency situations to protect the public health and safety. (Dist. App. p. 10)

1. Decisions to reverse the CAWS to Lake Michigan.

The District conducts its operations to ensure that release of excess floodwater to the Lake is only done as a matter of last resort when all of the District's facilities are operating at their maximum capacity and the waterways are approaching or exceeding flood stage. (Dist. App. p. 10) The District routinely monitors the level of the CAWS around the clock to ensure it is maintained at the levels within the aforementioned regulations, while also closely watching the latest weather forecasts. (Dist. App. p. 10) If significant amounts of rainfall are expected, the District will draw down the water level in the CAWS in anticipation of floodwater inflows for additional storage capacity by opening the sluice gates at the Lockport Powerhouse and Lockport Controlling Works and allowing water to drain away from the Lake. (Dist. App. p. 10)

When the rain begins to fall and enters the District's interceptor sewers, the District's three largest WRPs will treat their maximum practical flow, which can be as great as a combined daily maximum flow of approximately 2.3 billion gallons. (Dist. App. p. 10) In addition, the District

utilizes tunnels for storage that have been constructed as part of its Tunnel and Reservoir Plan (TARP). (Dist. App. p. 10) TARP consists of 109 miles of tunnels that were completed in 2006 and have the capacity to hold 2.3 billion gallons of combined sewage and floodwater. (Dist. App. p. 10) The District is in the process of building two large reservoirs for additional storage to reduce the quantity of combined sewage and floodwater discharged to the waterways. (Dist. App. pp. 10-11) The Thornton Composite Reservoir will hold 7.8 billion gallons of stormwater and combined sewage upon its projected completion in 2015, while the McCook Reservoir will be constructed in two stages. (Dist. App. pp. 10-11) Stage I of the McCook Reservoir will hold approximately 3.5 billion gallons and is expected to be completed in 2017, while Stage II will hold an additional 6.5 billion gallons of water and has an anticipated completion date of 2029. (Dist. App. p. 11)

Upon the maximization of treatment at its WRPs and upon its TARP tunnels reaching capacity, the excess flow will be discharged to the CAWS via one of approximately 300 combined sewer overflow (CSO) outfalls located along the CAWS. (Dist. App. p. 11) At this point, the stormwater run-off and combined sewage discharging at the numerous outfall locations will cause an increase in the elevation of the CAWS. (Dist. App. p. 11) The maximum amount of water that the District can release downstream at Lockport is approximately 20,000 cfs, which is inadequate to prevent the CAWS from

continuing to rise under extreme wet weather conditions. (Dist. App. p. 11) Consequently, even with sluice gates at the Lockport Powerhouse and Lockport Controlling Works allowing the maximum amount of flow to go downstream, the water level in the CAWS will continue to rise. (Dist. App. p. 11)

The District monitors the water levels of the CAWS and rainfall at various points in the system, the weather forecast, ground conditions, and the status of the WRPs and the tunnels, in order to determine whether a release of excess floodwater to the Lake at one or more of the three lakefront structures is necessary to avoid flooding. (Dist. App. p. 11) The District will do so only after all other options have been exhausted, and only to the extent necessary. (Dist. App. p. 11)

2. Consequences of being enjoined from relieving excess floodwaters to the Lake.

If this Court grants Michigan's request to, in effect, cease release of excess floodwaters to the Lake, the District will have no option but to allow the water in the CAWS to rise. (Dist. App. p. 11) The precise extent of the flooding that will result is unknown in that the District has historically released excess floodwaters to the Lake in an effort to prevent such flooding. (Dist. App. p. 11) However, based upon the District's more than one hundred years of engineering experience in operating the waterways, its sewer system and treatment facilities, the District can affirmatively state that if the water

in the CAWS is allowed to rise unchecked, flooding will occur in the Chicago area during extreme wet weather events. (Dist. App. pp. 11-12) The flooding will result in the overtopping of banks, the inundation of low-lying property and basement sewer back-ups. (Dist. App. p. 12) Sewer back-ups occur when the level of water in the river rises, causing sewer outfall structures to become submerged and reducing or limiting discharge capacity, thereby forcing flow into basement drains and other low areas, such as, railroad underpasses and depressed interstate routes. (Dist. App. p. 12) When, where and the extent of flooding depends upon various factors, including the area wide extent, intensity and duration of the storm event, the increase in water elevation in the waterways, the geographic location, and the antecedent conditions. (Dist. App. p. 12)

While the District is unable to identify the exact scope of flooding that will occur across the Chicago area during intense rain events due to the many variables involved, the District is aware of certain adverse consequences that will result if the water in the CAWS rises above certain elevations. (Dist. App. p. 12) With respect to the North Shore Channel, once the water level rises to plus 5.0 feet CCD, the water will overtop the sluice gate and walls separating the Channel from the Lake and render it useless. (Dist. App. p. 12) Effects downstream of the WPS along the Channel itself and on the

nearby communities will depend upon the factors described in the preceding paragraph. (Dist. App. p. 12)

Even with the ability to release excess floodwaters at the WPS, severe flooding occurred along the North Branch in the Albany Park neighborhood of Chicago as recently as September 2008 due to high water levels. (Dist. App. p. 12) One certain fact is that higher water levels increase the area and severity of flooding. (Dist. App. p. 12)

Similarly, overtopping of the riverbank in downtown Chicago will occur in one or more locations at plus 4.7 feet CCD. (Dist. App. p. 12) The top of the lock gates at CRCW is at plus 6.0 feet CCD, and similar to the WPS, excess floodwaters will overtop the gates and be released to the Lake regardless of attempts to restrict their release. (Dist. App. p. 12) Lower Wacker Drive, a major underground thoroughfare running along the Chicago River for over 2 miles, is at approximately plus 4.7 feet CCD and risks flooding when the Chicago River nears this elevation. (Dist. App. pp. 12-13) In addition, based upon prior storm events, as the elevation of the Chicago River rises in the Loop to approximately plus 5.0 feet CCD, additional structures along the River are placed at risk, including the tracks at Union Station, a major train hub in Chicago's west loop. (Dist. App. p. 13)

At the O'Brien Lock and Dam, the maximum top of the lock gates is plus 6.5 feet CCD, allowing these gates to be overtopped by rising

floodwaters, resulting in a discharge to the Lake. (Dist. App. p. 13) Areas in the Little Calumet River watershed are particularly prone to flooding due the large developed areas at low elevations. (Dist. App. p. 13) Even with the ability to release excess floodwaters at the O'Brien Lock and Dam, severe flooding occurred as recently as September 2008 due to high water levels. (Dist. App. p. 13)

The foregoing examples are just a few of known instances of potential flooding. (Dist. App. p. 13) The only way to predict the location and extent of flooding throughout the entire CAWS with any degree of specificity, without allowing it to actually occur, is conducting a comprehensive study that incorporates sophisticated computer modeling. (Dist. App. p. 13)

This Court must also appreciate the fact that the floodwaters containing combined sewage that enter the basements of homes and businesses include both stormwater and untreated sewage. (Dist. App. p. 13) Although the sewage portion of the combined flow is highly dilute under storm conditions, it nevertheless will be present in the water that overtops the banks and backs-up into basements in homes and businesses. (Dist. App. p. 13) Untreated sewage backing up into basements can negatively impact public health due to the potential for direct exposure. (Dist. App. p. 13)

With the implementation of the tunnel portion of TARP, reversals to the Lake have decreased over the years, water quality in the CAWS has

improved drastically, and the number of fish species present has increased dramatically. (Dist. App. pp. 13, 20) As the Thornton Composite and McCook Reservoirs come on line in the upcoming years, reversals to the Lake will continue to decline and water quality in the CAWS will continue to improve. (Dist. App. pp. 13-14) However, the need to continue to relieve the CAWS to the Lake under extreme wet weather still exists. (Dist. App. p. 14) Even when TARP is fully operational, the need to reverse to the Lake may still exist on rare occasions due to the unpredictability of the weather. (Dist. App. p. 14) For example, although there have been only ten reversals to the Lake in the last decade, five of the ten reversals occurred in the past 16 months, forcing the District to discharge a combined total of approximately 12 billion gallons to the Lake. (Dist. App. p. 14) Storms in close succession do not allow sufficient time for tunnels and reservoirs to be evacuated before the next storm occurs. (Dist. App. p. 14) Had the District been enjoined from discharging to the Lake, much of this water would have had to find another outlet, such as overtopping the waterways or backing-up in basements and other low-lying structures. (Dist. App. p. 14) The District has spent over \$2.5 billion constructing TARP and the Corps has spent an additional \$250 million to date to improve water quality and reduce instances of flooding. (Dist. App. p. 14) Prohibiting reversals to the Lake under appropriate circumstances

could undo much of the flood control benefits achieved to date through TARP.
(Dist. App. p. 14)

For Michigan to call these impacts “minimal” or characterize them as an “inconvenience” is an insult to the millions of residents living in Chicago and its surrounding suburbs who will have to live in fear of flooding and deal with the potentially devastating public health and safety consequences.

3. Lake water diversion.

Although less dire than the flooding concerns, the District’s inability to take Lake water via the sluice gates at WPS, CRCW and the O’Brien Lock and Dam will also impact the CAWS. (Dist. App. p. 14) The District is authorized annually to take up to 35 cfs of Lake water for navigational make-up purposes and up to 270 cfs for discretionary diversion purposes, which is primarily used to maintain water quality in the CAWS and certain otherwise stagnant reaches. (Dist. App. p. 14) As stated previously, the District takes water from three locations: the Lake at WPS; the CRCW; and the O’Brien Lock and Dam. (Dist. App. p. 6)

If the District is prohibited from opening its sluice gates at WPS, CRCW and the O’Brien Lock and Dam, it will be unable to take water from the Lake, resulting in adverse social and environmental impacts. The District’s inability to do so will result in stagnation in certain reaches of the Chicago River, the Little Calumet River and the North Shore Channel. (Dist.

App. p. 14) Stagnation in the waterways will cause the following: (1) stream velocities decrease to near zero; (2) substantial loss in recreational use; (3) loss of natural re-aeration causing dominance in the oxygen demand of sediments; (4) loss of dissolved oxygen in the water; and (5) fish avoidance in low dissolved oxygen waters. (Dist. App. pp. 14-15)

Lack of diversion for navigational purposes will also impact commercial navigation and recreational users of the CAWS. (Dist. App. p. 15) The inability to open sluice gates to maintain proper water levels will result in water levels decreasing during dry weather and limit the ability of boaters, canoeists and kayakers to utilize the waterways. (Dist. App. p. 15) During extended dry periods or after the District draws down the CAWS in anticipation of a storm that is less severe than initially expected, the District's inability to take sufficient amounts of its allotted Lake water diversion may impede barge traffic and other commercial navigation due to low water levels in the CAWS. (Dist. App. p. 15) Low water levels and stagnant conditions may give rise to nuisance odors along the waterways, thereby adversely affecting the livability of nearby neighborhoods. (Dist. App. p. 15)

The District's motto is, "Protecting the Water Environment." When faced with flooding throughout the Chicago area and the accompanying public health and safety concerns by granting Michigan the relief requested

versus the “possibility” of a non-native fish species getting into the Lake at some time in the future, a balancing of the equities clearly weighs in favor of the District.

C. The Balancing of the Public Interests Involved Weighs in Favor of the District.

This controversy is unique in the sense that it pits public interest on one side versus public interest on the other side. Michigan seeks relief based on its concern of the impact that Asian carp will have on the Lake and Michigan’s commercial sport fishing industry. The District opposes the relief requested as relating to the District in that it will result in flooding in and around the Chicago area and damage the water quality in CAWS as well as its potential adverse impact on public health. Therefore, the public interest prong of the preliminary injunction analysis requires a balancing of the equities similar to the balancing discussed in the previous section.

The main difference between these threats is that one is more imminent and concerns the public interest more than the other. If this Court grants Michigan’s requested relief, relative to the District, there is a likelihood of flooding in and around the Chicago area during extreme wet weather and corresponding public health and safety issues. If this Court denies Michigan’s Motion for Preliminary Injunction, this will not necessarily result in the Asian carp’s “invasion” of the Lake and the destruction of Michigan’s commercial sport fishing industry.

When weighing the public interest of flooding in the Chicago area against the mere possibility of a negative impact on Michigan's commercial fishing industry, this Court should weigh the public interest in favor of the District.

D. Michigan Will Not Be Able to Succeed on the Merits of this Action Because the Court Lacks Subject Matter Jurisdiction.

The section of Michigan's Motion for Preliminary Injunction titled "Michigan is likely to succeed" appears to be a brief recitation of Michigan's Motion to Reopen and for Supplemental Decree ("Mot. to Reopen"), which takes the position that this Court should exercise its retained jurisdiction and reopen *Wisconsin v. Illinois*, 388 U.S. 426 (1967) and *Wisconsin v. Illinois*, 449 U.S. 48 (1980) as the procedural vehicle for deciding the current matter.

By issuing an opinion on the Motion for Preliminary Injunction, the Court would, in effect, be granting the Motion to Reopen, even though a response to this Motion is not due until February 19, 2010. Consequently, in an effort to preserve its right to oppose the Motion to Reopen, the District offers the following discussion.

Michigan is asserting that the instant case is within the jurisdiction of this Court by virtue of its retained jurisdiction over the 1967 Decree entered in the matter *Wisconsin v. Illinois*, 388 U.S. 426 (1967), on June 12, 1967. That decree enjoins the State of Illinois from diverting any of the waters of the Lake or its watershed in excess of a combined average of 3,200 cubic feet

per second. (Pet. App. pp.1a-6a) The Decree authorizes the State of Illinois to apportion diversionary water. (Pet. App. pp. 1a-6a) The District is currently allotted 305 cfs for discretionary and navigational diversion. (Dist. App. p. 14) Said diversion is subject to any regulations imposed by Congress in the interests of navigation or pollution control. (Pet. App. pp. 1a-6a) The decree sets forth the formula for determining whether the State of Illinois is in compliance with its diversion limits. (Pet. App. pp. 1a-6a) The Decree is narrow in scope and effect and does not address whether the “facilities built by the State of Illinois for diversion of water from the Lake are unlawful,” as Michigan now contends. (Mot. to Reopen p. 2)

Michigan brings the instant action under a new theory of “public nuisance.” (Mot. to Reopen p. 2) Michigan’s new “public nuisance” theory relates to the way in which the locks, dams and sluice gates are currently being operated such that, theoretically, Asian carp will be able to migrate into the Lake, thereby impacting Michigan’s sport fishing industry. Michigan does not seek to modify or alter the amount of Lake diversion that occurs or the way in which diversion is calculated. Thus the relief sought by Michigan is unrelated to the 1967 Decree, as amended in 1980.

In *New Jersey v. Delaware*, this Court denied the Motion to Reopen and For Supplemental Decree, which was filed by the State of New Jersey

under circumstances similar to the instant case.²⁰ In that case, New Jersey asserted that the Supreme Court had retained jurisdiction over a 1935 decree which arose out of a dispute over the boundary between the States. Subsequent to that Decree, New Jersey and Delaware got into a dispute over riparian rights on land owned by Delaware. In seeking to reopen the 1935 Decree, the State of New Jersey did not seek to modify any aspect of this Court's determination of the boundary line between the two states or any other provision of the 1935 Decree.

Similarly, in the instant case, Michigan seeks to reopen the 1967 Decree relating to the establishment of allotments and formulas for determining the appropriate amount of diversion of water from the Lake by the State of Illinois for the purpose of enjoining the District from performing its statutory duties to prevent flooding and preserve public health and safety. Nothing in the relief sought is remotely related to the subject matter of the 1967 Decree. Thus, Michigan fails to invoke this Court's retained jurisdiction in the 1967 Decree and its Motion for Preliminary Injunction and Motion to Reopen and For Supplemental Decree must be denied.

²⁰ *New Jersey v. Delaware*, 546 U.S. 1028 (2005); see also *New Jersey v. Delaware*, 552 U.S. 597 (2008).

E. The District Lacks Authority to Perform Much of the Relief Requested.

In the Prayer for Relief of its Motion for Preliminary Injunction, Michigan requests that this Court order the District (along with the State of Illinois and the Corps) to:

- (a) Closing and ceasing operation of the locks at the O'Brien Lock and Dam and Chicago Controlling Works (sic) ;
- (b) Operating the sluice gates at the O'Brien Lock and Dam, the Chicago Controlling Works (sic) and the Wilmette Pumping Station in a manner that will not allow fish to pass those structures into Lake Michigan. This should include maintaining the waterways at the lowest level possible that is still consistent with protecting against serious threats to public health and safety, and limits opening the gates except as required to prevent significant flooding that threatens public health or safety;
- (c) Installing interim Barriers or structures as needed in the Grand and Little Calumet Rivers to prevent the migration of bighead and silver carp into Lake Michigan.
- (d) Installing interim Barriers or structures between the Des Plaines River and the Chicago Sanitary and Ship Canal to prevent bighead and silver carp from entering the Canal from the Des Plaines River during a flood event.
- (e) Operating the existing Electrical Dispersal Barrier System at full operating power and expediting completion of proposed Barrier IIB.
- (f) Comprehensively monitoring the Chicago Sanitary and Ship Canal and all connected waterways for the presence and location of bighead and silver carp using the best available methods and techniques.
- (g) Eradicating any bighead or silver carp discovered in these waters.

(Mot. Prelim. Inj., pp.28-29)

The District has no authority to undertake any of the actions set forth in the prayer for relief except for operating the sluice gates and possibly monitoring of fish, which it does generally but not for purposes of tracking invasive species.²¹ (Dist. App. p. 24) And, with regard to operation of the sluice gates, it is neither feasible nor reasonable to require that the District guarantee operation of the gates in such a way as to never allow fish, and specifically Asian carp, to pass through them when opened. (Dist. App. p. 9)

In response to paragraph (a), the District points out that the Corps, through Memoranda of Agreement between the Department of the Army and the District, operates the two locks at issue. (Dist. App. pp. 7-8) While the District may request the Corps to open the lock gates on rare occasions to prevent flooding, it has no authority to do so on its own. (Dist. App. p. 10)

With regard to paragraphs (c), (d) and (e) of the Prayer for Relief, the District does not have the authority to erect and maintain barriers on or about the waterways nor has it ever undertaken to do so. Barriers are discussed by the Corps in its December 4, 2009 Draft Report entitled *Dispersal Barrier Efficacy Study, Interim 1 – Dispersal Barrier Bypass Risk Reduction Study & Integrated Environmental Assessment*. (Dist. App. pp. 59-62) In its report, the Corps also discusses interim risk emergency measures

²¹ 70 ILCS § 2605/1 *et seq.*

it has studied that could serve as a physical barrier to the passage of Asian carp from the Des Plaines River overland to the CSSC. Additionally, the Corps states that it will be producing another Interim Report that will include a recommendation for a permanent solution to dispersal barrier bypass. (Dist. App. p. 60)

With regard to paragraph (f) of the Prayer for Relief, as Michigan is well aware, the Corps has undertaken monitoring of Asian carp in the waterways. Thus, the District should not be required to duplicate work already being performed by the Corps. (Dist. App. p. 24)

With regard to paragraph (g) of the Prayer for Relief, Michigan's call for the eradication of any bighead or silver carp "discovered" in the waterways is vague at best. However, assuming that Michigan is advocating for fish kills, the District cannot initiate fish kills. In early December, the Illinois Department of Natural Resources (IDNR) engaged in a fish kill through the introduction of the fish toxin Rotenone into a 6-mile section of the waterways. The District is prohibited from engaging in such activities²².

Clearly, the District lacks the authority to address most of the relief sought by Michigan, some of which is already being addressed by the Corps. As for the operation of the sluice gates by the District, relieving excess

²² See 415 ILCS § 5/12. (Prohibits actions which would cause or threaten or allow the discharge of any contaminants into the environment... so as to cause or tend to cause water pollution in Illinois....).

floodwaters to the Lake is only done as a last resort in order to avoid flooding, preserve public health and safety, and maintain the water quality of the CAWS. The District is unable to prevent fish passage through the sluice gates during the limited time in which they must be opened.

CONCLUSION

None of the factors applied by the Court in determining whether to issue a preliminary injunction weigh in favor of the Petitioners. Accordingly, the District asks that this Court enter an Order:

- (a) Declining to exercise original jurisdiction;
- (b) Denying the Motion to Reopen and for a supplemental decree;
- (c) In the event this Court exercises jurisdiction, decline to grant the Motion for Preliminary Injunction;
- (d) If the Court grants the Motion for Preliminary Injunction, grant the District the right to open the sluice gates and Corps to open the lock gates when the District determines it necessary to prevent flooding and preserve public health and safety without the requirement that the District and Corps do so in a manner so as “not to allow fish to pass those structures into Lake Michigan;”
- (e) Continue to allow the District to take its discretionary diversion water from the Lake as currently provided for by Law; and
- (f) Any and all additional relief that this Court deems necessary and just.

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[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frederick M. Feldman", with a long horizontal line extending to the right from the end of the signature.

METROPOLITAN WATER RECLAMATION
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Dated: January 5, 2010