

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

STATE OF MICHIGAN, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Case No. 10 CV 4457
v.)	
)	Hon. Robert M. Dow, Jr.
UNITED STATES ARMY CORPS OF)	
ENGINEERS, <i>et al.</i> ,)	
)	
Defendants.)	

**CITY OF CHICAGO’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF
LAW REGARDING PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

The City of Chicago (“City”) respectfully requests that this Court deny Plaintiffs’ Motion for Preliminary Injunction and enter an order that includes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. The City Relies Upon The Navigational Locks And Sluice Gates In The Chicago Area Waterway System (“CAWS”) To Protect And Promote The Public Health, Safety, And Welfare Of Its Citizens.

1. Within the City of Chicago, there are twenty-six miles of lakefront, twenty-eight miles of the Chicago River system, and fourteen miles of the Calumet River system. (Chueng Decl. ¶ 2.)

2. There are thousands of households and businesses, and dozens of schools, parks, and other public spaces along the CAWS. (*Id.* ¶ 3.)

3. Lake Michigan is the sole source of municipal drinking water for the City and dozens of surrounding municipalities, and key pieces of the City’s drinking water infrastructure are in Lake Michigan and along the lakeshore. (Mulvaney Decl. ¶¶ 2-3.)

A. Use Of The Navigational Locks By City Departments Charged With Protecting Public Health And Safety.

4. The Chicago Police Department’s (“CPD”) Marine and Helicopter Unit is the primary agency that conducts law enforcement and homeland security patrols, and responds to marine distress emergencies in and along the Chicago portion of Lake Michigan and the CAWS. (Georgas Decl. ¶ 2.)

5. CPD’s Marine Operations consists of eight watercraft, which are docked in both Lake Michigan and the Chicago River during the warmer months, and docked solely in the Chicago River when ice is present in Lake Michigan. (*Id.* ¶ 5.)

6. On average, CPD personnel pass through the navigational locks at the Chicago River Controlling Works (“CRCW”) or the O’Brien Lock and Dam (“OL&D”) at least several times

per day to perform both their emergency response and patrol duties. (*Id.*) CPD responds within Lake Michigan approximately three hundred times per month on average during the boating season and approximately thirty times per month on average during the off-season. (*Id.*)

7. Based on critical infrastructure threat assessments conducted by local, state, and federal agencies, several high-profile homeland security targets are located on and along Lake Michigan and the CAWS. (*Id.*) In 2009, CPD's Marine Operations personnel completed 7,314 site inspections of these critical facilities and targets. (*Id.*)

8. In keeping with the goals of patrol missions, CPD performs its homeland security and law enforcement patrols at regular, but non-repetitive intervals, and initiates its patrol missions quickly and without advance notice to the public. (*Id.* ¶ 9.)

9. CPD's continued unrestricted access to the navigational locks at CRCW and OL&D for emergency response, as well as law enforcement and homeland security patrol missions, is necessary to protect public health and safety. (*Id.* ¶¶ 6, 9, 10.)

10. The Chicago Fire Department's ("CFD") Air Sea Rescue Division docks and maintains both of its emergency response watercraft in Lake Michigan. (Fox Decl. ¶ 2.)

11. CFD has one 96-foot fireboat ("E58") and one 33-foot fire/rescue boat ("6-8-8"), both of which respond to emergencies in and along Lake Michigan and the CAWS. (*Id.*) E58 is docked in Lake Michigan in order to be in close proximity to critical municipal infrastructure along the lakeshore. (*Id.*) 6-8-8 is also docked in Lake Michigan because it responds to numerous emergency calls in the lake involving watercraft, persons, or aircraft in distress, especially between April 1st and November 1st. (*Id.*)

12. In order to respond to emergencies in, along, or near the CAWS, CFD's watercraft must pass through the locks at either the CRCW or the OL&D. (*Id.* ¶ 3.)

13. In an average year, CFD's Air Sea Rescue Division passes through the locks at the CRCW and the OL&D approximately two hundred fifty times in responding to and returning from emergencies in and along the CAWS. In 2009, CFD responded to approximately one hundred sixty-five incidents in and along the CAWS. (*Id.* ¶ 5.)

14. Due to E58's large size, it cannot be transferred from Lake Michigan to the CAWS over land rather than through the locks. (*Id.* ¶ 3.)

15. E58 is CFD's only boat capable of delivering large quantities of water directly from Lake Michigan or the CAWS when land-based hydrant water supplies are compromised or inaccessible to land-based fire crews. (*Id.* ¶ 2.)

16. CFD's continued unrestricted access to and use of the navigational locks at CRCW and OL&D is necessary to protect public health and safety. (*Id.* ¶¶ 6, 7.)

17. If a preliminary injunction imposed limitations on CPD or CFD's access to or use of the locks at CRCW and OL&D, then the health and safety of the general public would be put at risk. (Georgas Decl. ¶¶ 6, 9, 10; Fox Decl. ¶¶ 6, 7.)

B. Use Of The Sluice Gates To Maintain Water Quality In The CAWS.

18. The Metropolitan Water Reclamation District of Greater Chicago ("MWRD") uses the sluice gates at the CRCW, OL&D, and Wilmette Pumping Stations ("WPS") to divert water from Lake Michigan into Chicago's inland waterways as necessary to maintain water quality and water levels in those waterways. (Mulvaney Decl. ¶ 4; MWRD Resp., Lanyon Afft. ¶ 28.)

19. Water quality in Chicago's inland waterways is affected by, among other things, surface runoff, industrial discharges, MWRD's discharge of non-disinfected effluent from its sewage treatment plants, and combined sewer overflows ("CSOs"). (Mulvaney Decl. ¶ 6.)

20. CSOs occur when excess stormwater in the combined sewer system causes the sewers to discharge stormwater and untreated sewage into the CAWS. (*Id.* ¶ 9.)

21. MWRD uses the sluice gates to bring Lake Michigan water into the CAWS, and thereby avoid stagnant water conditions and dilute the potentially detrimental impacts from runoff, effluent discharges, and CSOs. (Mulvaney Decl. ¶ 7; Lanyon Afft. ¶¶ 83, 84.)

22. The detrimental impacts that could result from a prohibition or limitation on MWRD's discretionary water quality diversions include odor nuisances and an increased concentration of non-disinfected and untreated sewage discharge in the CAWS. (Mulvaney Decl. ¶ 8; *see also* Lanyon Afft. ¶ 86.)

23. Sewage potentially contains the following human pathogens: *Salmonella*, *Shigella*, *Norovirus*, *E. coli* O157:H7, *Cryptosporidium*, and *Giardia*. (Ritger Decl. ¶ 3.) These pathogens can cause, among other things, diarrhea, vomiting, abdominal cramps, and fever. (*Id.* ¶ 4.)

24. The City has spent approximately \$74.5 million over the past twelve years on infrastructural improvements along the Chicago River, largely to improve and encourage public access. (Chueng Decl. ¶ 4.)

25. The Chicago Park District has spent approximately \$31.5 million over the past several years on improvements to Chicago's riverfronts and its riverfront parks. (Foster Decl. ¶ 3.)

26. Over the next five years, the City plans to invest more than \$17 million on additional improvements along the CAWS. (Chueng Decl. ¶ 5.)

27. In addition to public investments in the riverfronts, the City is also required by the Chicago Zoning Code to review proposals for private development within 100 feet of the Chicago River. (*Id.* ¶ 6.) Within this context, the City has reviewed more than 27 waterfront

projects since 1998, creating nearly 3.5 miles of riverwalk trails, river overlooks, public plazas, and other riverbank improvements. (*Id.*)

28. Stagnant water conditions, odor nuisances, and increased sewage concentrations in the CAWS would likely discourage public use, and public and private investments along the CAWS. (*Id.* ¶ 7.)

29. If MWRD's use of the sluice gates to make discretionary water quality diversions is restricted, then stagnant water conditions, odor nuisances, and increased sewage concentrations in the CAWS would harm users of the CAWS, residents and businesses along the CAWS, and the City's significant efforts and investments to promote public use and access to the CAWS. (Mulvaney Decl. ¶¶ 8-10; Chueng Decl. ¶¶ 3, 4, 6, 7.)

C. Use Of The Navigational Locks And Sluice Gates For Flood Control.

30. If MWRD is limited in its ability to use the sluice gates at the WPS, CRCW, and OL&D for reversals to Lake Michigan during significant precipitation events, this could have substantial negative impacts on the City's portion of the sewer system and other infrastructure, as well as promoting surface flooding conditions. (Mulvaney Decl. ¶ 11.)

31. In addition, these negative impacts could be exacerbated if the United States Army Corps of Engineers (the "Corps") is limited in its ability to use the locks at the CRCW and OL&D to help maintain water levels. (*Id.*)

32. Draining the City-maintained portion of the sewer system becomes increasingly difficult as river elevations rise, potentially resulting in larger areas of Chicago experiencing water in basements and for longer time periods. (*Id.*) Low points along the river such as Lower Wacker Drive could become inundated with overbank flooding, adversely impacting traffic and other utilities. (*Id.*) Flooding could also impact riverbank stability along the CAWS by saturating the

earthen banks and raising the risk of sloughing, erosion and sedimentation. (*Id.*) Surface ponding within the City could occur from either overbank flooding or from surcharged sewers not being able to convey flows from street catch basins. (*Id.*)

II. Steps Taken By The Legislative And Executive Branches Of The Federal Government To Address The Migration Of Asian Carp Through The CAWS.

33. In 1996, Congress directed the Corps to “investigate and identify environmentally sound methods for preventing and reducing the dispersal of aquatic nuisance species” between the Great Lakes basin and the Mississippi River basin through the Chicago Sanitary and Ship Canal (“CSSC”), and authorized the Corps to carry out the dispersal barrier demonstration project. (Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 as amended by the National Invasive Species Act of 1996, 16 U.S.C. §§ 4722(i)(3)(A) and -(3)(C); Corps Resp., Peabody Decl. ¶ 9; Corps Resp., Quarles Decl. ¶ 10.)

34. Pursuant to Congressional authorization, the Corps has adopted a four-pronged strategy to prevent the dispersal of Asian carp through the CSSC: 1. designing, constructing, maintaining and improving the electric fish dispersal barrier; 2. monitoring for the presence of Asian carp in the CAWS; 3. executing an efficacy study regarding the dispersal barrier so that near-term solutions to evolving information can be devised and applied; and, 4. executing the long-term Great Lakes and Mississippi River Inter-Basin Study (“GLMRIS”) study in order to, among other things, gain a scientifically-based understanding of the impacts of various long-term solutions, and make recommendations for permanent solutions. (Peabody Decl. ¶¶ 9-11, 18; P.I. Hearing Tr., Peabody Testimony at 215-16.)

35. The first electric dispersal barrier (“Barrier I”) became operational in 2002. (Quarles Decl. ¶ 12.)

36. In 2003, the Corps began design and construction of a permanent electric dispersal barrier (“Barrier II”) under Section 1135 of the Continuing Authority Program. (Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1135, 33 U.S.C. § 2309a; Quarles Decl. ¶ 18.)

37. In 2005 and 2007, Congress specifically authorized the construction of Barrier II, and authorized the Corps to upgrade and make permanent Barrier I. (District of Columbia Appropriations Act, 2005, Pub. L. No. 108-335, § 345, 118 Stat. 1352; Water Resources Development Act of 2007 (“2007 WRDA”), Pub. L. No. 110-114, § 3061(b)(1), 121 Stat. 1121; Peabody Decl. ¶ 9; Quarles Decl. ¶ 17.)

38. A second dispersal barrier (“Barrier IIa”) was constructed in 2006 and, after extensive testing, went into operation in April of 2009. (Peabody Decl. ¶ 21.)

39. A third dispersal barrier (“Barrier IIB”) is under construction and the Corps expects to put it into full service in fiscal year 2011. (Quarles Decl. ¶ 38.)

40. In addition to authorizing further construction on the electric dispersal barrier, the 2007 WRDA authorized the Corps to study the efficacy of the dispersal barrier in preventing Asian carp from migrating through it, and its susceptibility to being bypassed (“Efficacy Study”). (2007 WRDA § 3061(b)(1)(D); Peabody Decl. ¶ 10; Peabody Testimony at 215-16.)

41. The Corps is conducting the Efficacy Study in interim steps, and anticipates completion of the Final Efficacy Study by Spring 2011. (Peabody Decl. ¶¶ 35-48; Peabody Testimony at 305.).

42. The 2007 WRDA also authorized the Corps to consult with appropriate Federal, State, local, and nongovernmental entities in order to conduct a “feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the

Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways.” (2007 WRDA § 3061(d); Peabody Decl. ¶ 11.)

43. Assuming sufficient funding, the Corps estimates that the earliest anticipated completion date for the CAWS portion of this long-term feasibility study, also known as GLMRIS, would be 2015. (Peabody ¶ 51; Peabody Testimony at 304.)

44. In 2009, Congress granted the Secretary of the Army temporary emergency authority to undertake “such modifications or emergency measures as [he] determines to be appropriate, to prevent aquatic nuisance species from bypassing the [dispersal barrier] and to prevent aquatic nuisance species from dispersing into the Great Lakes.” (Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2845 (“Section 126”).)

45. Pursuant to its authority under Section 126, in November 2009, the Corps approved the use of Federal funds to support an inter-agency effort to apply rotenone in a section of the CSSC. (Corps Resp., Darcy Decl. ¶ 4.) In addition, the Corps is using its Section 126 authority to construct barriers between the CSSC and the Des Plaines River and Illinois and Michigan Canal to prevent Asian carp from migrating into the CSSC during flood events. (Peabody Decl. ¶ 35-36; Peabody Testimony at 270-71; Darcy Decl. ¶ 5.) The Corps is also using its Section 126 authority to install bar screens on two of the four sluice gates at the OL&D. (Peabody Decl. ¶ 42; Darcy Decl. ¶ 6.)

46. In 2009, the Corps joined with other Federal, State, local, and quasi-governmental agencies to form the Asian Carp Regional Coordinating Committee in order that the various agencies charged with addressing the Asian carp issue could coordinate their activities. (Peabody Decl. ¶¶ 13-16; Peabody Testimony at 216.)

47. There is currently legislation pending before Congress that would provide the Corps with further authority to address the migration of aquatic nuisance species through the CAWS. The Permanent Prevention of Asian Carp Act of 2010 (S. 3553 and H.R. 5625) would require the Corps to study the feasibility and best means of implementing the hydrological separation of the Great Lakes and Mississippi River basins, and prepare a final report within 18 months. Section 3013 of the Water Resources Development Act of 2010 (H.R. 5892) would amend section 3061(d) of the 2007 WRDA to require that the Corps' long-term feasibility study include a "fully developed analysis of an alternative for hydrologic separation between the Great Lakes and the Mississippi River basins." H.R. 5892 would also authorize the Corps to upgrade and/or relocate Barrier I and to construct additional barriers or other fish deterrents in the vicinity of the CAWS.

CONCLUSIONS OF LAW

1. A preliminary injunction is an "extraordinary and drastic remedy" and should only be granted when the "movant, *by a clear showing*, carries the burden of persuasion." *Goodman v. Ill. Dept. of Financial and Professional Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) (emphasis in original) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (further citation omitted)); *see also Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376 (2008).

2. In order for Plaintiffs to be awarded a preliminary injunction, they must establish that: 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in their favor; and, 4) an injunction is in the public interest. *Winter v. NRDC* at 374.

3. Not only must Plaintiffs show that they meet these elements, but they must make a heightened showing since the injunctive relief they seek is mandatory in nature. *See Att'y Gen.*

of Oklahoma v. Tyson Food, Inc., 565 F.3d 769, 776 (10th Cir. 2009); *Doninger v. Neihoff*, 527 F.3d 41, 47 (2d Cir. 2008); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994).

The Seventh Circuit has stated that “mandatory preliminary writs are ordinarily cautiously viewed and sparingly issued.” *Graham v. Medical Mutual of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997) (quoting *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978)).

4. In assessing a motion for preliminary injunction, the Seventh Circuit employs a “sliding scale” approach whereby “the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff’s position.” *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). Likewise, “the less likely it is that the plaintiff will succeed, the more the balance need weigh towards its side.” *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994) (citing *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

I. The Balance Of Equities Does Not Tip In Plaintiffs’ Favor And An Injunction Would Not Be In The Public Interest.

5. In balancing the equities and determining whether Plaintiffs’ proposed injunction is in the public interest, this Court “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. NRDC* at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

6. The public consequences to be regarded in this case include the injunction’s impacts on the public health, safety, and general welfare of the people of Chicago. Plaintiffs’ proposed preliminary injunction would impose health and safety risks on the general public, and impose burdens on the City’s ability to fulfill its police power obligations. This Court should pay particular regard to these risks and burdens while balancing the equities and assessing the public interest.

7. This Court may withhold injunctive relief when an injunction “will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate...though the postponement may be burdensome to the plaintiff.” *Weinberger v. Romero-Barcelo* at 312-13 (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

8. Although an injunction bond could compensate the City for some of the monetary costs associated with Plaintiffs’ proposed injunction, the injunction would impose immediate health and safety risks on the general public and these risks are not readily quantifiable for purposes of valuing an injunction bond. This Court may withhold injunctive relief on this basis alone. *Id.*

9. Under Illinois law, the City has a duty to preserve the community’s well-being, and also has a duty to provide fire protection to the citizens and property located within its jurisdiction. *Ozik v. Gramins*, 341 Ill. App. 3d 502, 513, 799 N.E.2d 871 (1st Dist. 2003); *Kaukas v. City of Chicago*, 27 Ill.2d 197, 201, 118 N.E.2d 700 (Ill. 1963); *Alarm Detection Systems, Inc. v. Village of Hinsdale*, 326 Ill. App. 3d 372, 380, 761 N.E.2d 782 (2nd Dist. 2001).

10. In addition, one of the essential and important functions of local government is to promote the general welfare through land-use planning, regulation, and investment. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (stating “[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.”).

11. The substantial and immediate harms from Plaintiffs’ proposed injunction on the City and other Defendants weigh very heavily in this Court’s balancing of the harms and assessment of the public interest. Under the “sliding scale” approach, Plaintiffs have not shown that the harms that they would suffer if Asian carp gain access to the Great Lakes sufficiently outweigh the substantial and immediate harms to the City and other Defendants in granting Plaintiffs’

proposed injunction. Therefore, after balancing the harms and assessing the public interest in light of the heightened scrutiny given to requests for mandatory relief and Plaintiffs' slight likelihood of success on the merits, it is evident that Plaintiffs' Motion for Preliminary Injunction should be denied.

II. This Case Presents A Political Question And Judicial Review Would Interfere With The Ongoing Efforts Of The Legislative And Executive Branches.

12. The question of how to respond to the potential invasion of Asian carp into the Great Lakes falls within the purview of the political question doctrine, which provides the Court with an independent basis for dismissing this action. The political question doctrine is "based primarily on the . . . principle of separation of powers" and it "restricts judicial review that might interfere with other branches of the federal government." *Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1053-54 (N.D. Ill. 2004) (*modified and aff'd, in part; rev'd in part and remanded*, 471 F.3d 754 (7th Cir. 2006)) (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962) and *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985)).

13. Both the legislative and executive branches of the federal government have been and continue to be actively involved in addressing the Asian carp threat, and judicial review at this time would interfere with those efforts.

14. The Supreme Court has identified six separate and independent factors, each of which provide a sufficient basis for the court to dismiss the Plaintiffs' complaint. *Id.*; *see also Conn. v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 321 (2d Cir. 2009). Four out of the six factors justifying dismissal are present in this case: two, three, four, and six.

15. The second *Baker* factor is present when there is "a lack of judicially discoverable and manageable standards for resolving . . . [the claim]." *Baker*, 369 U.S. at 217.

16. While this case is likely to be “large, complicated, . . . [and] difficult . . .” this is not the concern implicated by *Baker*. *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863, 873-74 (N.D. Cal. 2009) (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)). Instead, dismissal based on *Baker* arises when a court lacks “the legal tools to reach a ruling [or relief] that is ‘principled, rational, and based upon reasoned distinctions.’” *Kivalina* at 873-74.

17. Developing a response to the threatened invasion of the Great Lakes by Asian carp involves wide-ranging policy choices and weighing of environmental goals, technological feasibility, economic practicability, commercial development, public health and safety, and other costs and benefits that is more appropriately undertaken by the political branches of government, and concerning which federal common law nuisance cases – involving identifiable polluters and specific injuries, among other criteria – can provide little guidance. Although there is a substantial body of federal common law concerning public nuisance generally, there is no body of federal common law regarding invasive species that would provide judicially discoverable and manageable standards for this Court to apply in this case.

18. The third *Baker* factor is present when it is impossible for the court to decide the case “without [making] an initial policy determination of a kind clearly for nonjudicial discretion.” *Baker* at 217. This factor will again turn on the judiciary’s ability to make an “initial decision as to what is unreasonable in the context of” protection against invasive species. *Cal. v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, *8 (N.D. Cal. 2007).

19. This balancing is the equivalent of the judiciary making an “initial policy determination” which should be left to the political branches. *Gen. Motors Corp.* at *8.

20. Federal policy-making in both Congress and the executive branch is well underway, and judicial intervention at this time would involve both a review of prior policy-making by the

political branches with respect to Asian carp and involvement in that policy-making in the future. *See Gen. Motors Corp.* at *8 (finding additional support for conclusion that policy decisions in the area of global warming should be left with the political branches based on the fact that the political branches had already chosen to act by enacting legislation that addressed air pollution).

21. The fourth *Baker* factor is present since it is “impossib[le] [for the court to] undertak[e] [an] independent resolution without expressing [a] lack of the respect due coordinate branches of government,” and the sixth *Baker* factor is present since there is a great “potential[] of embarrassment from multifarious pronouncements by various departments on one question.” *Baker* at 217. Both factors are found when a “judicial resolution . . . would contradict prior decisions taken by a political branch . . . [and] would seriously interfere with important governmental interests.” *AEP*, 582 F.3d at 331 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

22. Due to the extensive and ongoing involvement with the Asian carp issue by Congress and a number of Federal agencies – including Congress’s grant of emergency authority to the Corps – granting Plaintiffs’ injunction would show a lack of respect by the judiciary for the manner in which the legislative and executive branches have chosen to address the Asian carp problem. In addition, it would create multifarious pronouncements by various parts of the government on how to manage the CAWS in light of the Asian carp threat. Moreover, judicial resolution of this issue at this time would frustrate and undermine the established legal and regulatory framework governing the CAWS as embodied in a multitude of court decisions, statutes, regulations, permits, and agreements binding various governmental bodies.

23. Given the Plaintiffs' slight likelihood of success on the merits, the overall balance of the harms, and the assessment of the public interest, the Plaintiffs' Motion for Preliminary Injunction should be denied.

WHEREFORE, Defendant City of Chicago respectfully requests that this Court deny Plaintiffs' Motion for Preliminary Injunction and enter an order that includes the foregoing findings of fact and conclusions of law.

Dated: October 1, 2010.

Respectfully submitted,

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