UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF OHIO, STATE OF WISCONSIN, and COMMONWEALTH OF PENNSYLVANIA,	)	
Plaintiffs,	)	Case No. 1:10-cv-04457
v.	)	
	)	Hon. Robert M. Dow, Jr.
UNITED STATES ARMY CORPS OF ENGINEERS and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Defendants.	)	

COALITION'S POST HEARING BRIEF

The Coalition to Save Our Waterways ("Coalition") files this post-hearing brief urging this Court to deny the States' Motion for Preliminary Injunction to shut the Chicago and O'Brien Locks. This decision would effectively close the 100-year-old Chicago Area Waterway System ("CAWS") to navigation despite the importance of the CAWS to the area's economy and the billions of dollars spent by the United States to develop and improve it. The States ask this Court to make an impossibly momentous and far-reaching decision, yet as documented by the briefs submitted, the merit hearing, and most importantly, the three days of factual hearings, the States' motion has no basis in law or in fact and should be denied.

I. THE STATES' MOTION SHOULD BE DENIED BECAUSE IT HAS NO LEGAL BASIS.

As the Coalition demonstrated in its initial Response to the States' Motion (Document # 105, "Response"), the States' motion should be denied as a matter of law. The States have no legal grounds to claim that the Army Corps of Engineers ("Corps") and the Metropolitan Water Reclamation District ("MWRD") operate a public nuisance by not closing the CAWS and

O'Brien Locks to prevent the migration of Asian carp. The Supreme Court has held, however, that a public nuisance cannot be brought when the government specifically allows the activity to occur. (Response at 12-16.) Here, the operation of the CAWS for navigation has been a stated and funded goal of the United States for many years. Further, Congress directly authorized the Corps to take certain actions to respond to the Asian Carp issues and authorized a broad multi-agency task force to study the issues and propose additional measures. (Response at 14-15.) In light of these actions, and absent other Constitutional concerns that have not been expressed here, courts have no authority to override Congress' specific directions by finding that the current operations constitute a public nuisance.

The States also ask this Court to overrule the Corps' decision not to close the locks as expressed in its June 2010 Dispersal Barrier Efficacy Study Interim III ("Interim III Report," Response at Ex. 1), claiming that the Corps' action was unlawful, arbitrary and capricious under the Administrative Procedure Act. Yet, as also documented by the Coalition's Response, the Corps' action was not precluded by any laws cited by the States (Response at 17–19) and cannot be deemed unlawful. Further, as documented by the Interim III Report itself, the Corps carefully considered its options, sought the advice of experts, received and reviewed public comments, and provided a thorough and reasoned basis for its decision. The States alleged only that the Corps did not do what the States wanted, which, of course, is not proof of an arbitrary and capricious action. For all of these reasons, this Court should deny the States' motion as a matter of law.

II. THE STATES' MOTION SHOULD BE DENIED BECAUSE IT HAS NO FACTUAL BASIS.

The three days of hearings held by this Court on September 7, 8 and 10 demonstrated clearly and convincingly that the States had no factual basis for their motion and that their motion should be denied. As stated in the Response, to obtain a preliminary injunction, the States must show: (1) that they are likely to succeed on the merits; (2) that they will suffer

irreparable harm in the absence of relief; (3) that the balance of equities tips in the States' favor; and (4) that an injunction is in the public interest. (Response at 11.) While the court did not require the parties to put on their full cases, the States received an opportunity to present their best evidence. Even doing so, the States failed to meet any of the elements for preliminary relief.

A. The States are not likely to succeed on the merits.

Testimony adduced during the factual hearings failed to heal any of the serious defects in the States' case. If anything, the hearings demonstrated just how baseless their claims were.

B. The States did not prove their nuisance claims or their claim of imminent hazard.

The States' nuisance claims rested primarily on two specific factors: (1) that eDNA "evidence" showed that numerous Asian carp had advanced into the CAWS beyond the electric barriers such that Asian carp entry into Lake Michigan was imminent; and (2) that by operating the CAWS to allow navigation, the Corps and MWRD were exposing the Great Lakes to a serious threat of harm from Carp migration. The States failed to prove both factors.

The States' eDNA claim rested on the testimony of Dr. Lodge from Notre Dame University. Dr. Lodge was retained by the Corps to develop and implement a new eDNA methodology to provide real-time documentation for the presence of Asian carp and to improve the speed and reliability of traditional fishery methodology, including electrofishing and netting. Even before Dr. Lodge testified, his claims generated substantial doubts. The Corps determined that, contrary to his claims, Dr. Lodge's eDNA findings showed no evidence of the presence of live fish. The Corps also decided to transition the eDNA sampling and analysis away from his Lab and to do the work with their own resources. (T. 221.)[1] The Coalition described in its Response how Dr. Lodge's eDNA findings were unreliable and failed to meet the *Daubert*

requirements. (Response at 22-25.) When it became clear that he would testify, the Coalition moved to strike his affidavit and bar his testimony on the same grounds. (Documents #107, 108.) The court took this motion under advisement pending his actual testimony.

Dr. Lodge's testimony did nothing to improve the reliability of his findings under *Daubert*. The Coalition's *Daubert* motion was based on the failure of Dr. Lodge to make his data available for scientific and peer review, that his work had not been published, that he had not identified a rate or margin of error, and that his work had no public acceptance. During his testimony, Dr. Lodge did not provide any information that would remotely ameliorate any of these important failings.

Dr. Lodge has still not made any of his data public and has testified that he was withholding it from the public pending publication in a scientific journal. Dr. Lodge claimed that he had provided some of the data to the Corps, but could not remember what data was actually provided. (T. 180.) General Peabody testified that the Corps did not have Dr. Lodge's raw data. (T. at 291.) Dr. Lodge presented a report that he had delivered to the Corps in July, which included some information, but no actual data after September 2009. (States Ex. 1.)

Since the data is not publicly available, it has not been subject to any public peer review. General Peabody testified that Dr. Lodge's methodology was undergoing an internal peer review at the Corps consistent with its regulatory process, but the review is not expected to be completed until later this fall. (T. 129.) Dr. Lodge did not state when he expected his work to be published.

Dr. Lodge claimed that the EPA audit of his laboratory (the "Audit"), which was published in February 2010, constituted a type of peer review. (T. 117.) Such a claim, however,

[1] The Coalition will cite to the factual hearing transcript as "T. __." The transcript pages are numbered sequentially from all three days of hearings.

lacks merit. The EPA did not look at his collected data, but rather at the lab's methodology. (Response at 24.) Obviously the Audit provided no peer review of data obtained after it was completed in February of 2010. More importantly, EPA clearly and explicitly disavowed any intent to evaluate whether his findings demonstrated the presence of live carp. (Response Ex. 9, page 9; T. at 224.)

Even if the Audit did constitute some type of peer review, it was not particularly favorable. In his testimony, Dr. Lodge acknowledged that a "scientific method" requires results to be reproducible, but that the Audit determined that his results up to that time were not reproducible because his lab failed to keep sufficiently detailed records. (T. 178.) The Audit also noted that he was not using sequence analysis confirmation methodology to verify the DNA identification. (*Id.*) Despite the fact that Dr. Ficetola used this methodology in his work on bull frogs (on which Dr. Lodge relied), it was not until after the Audit recommended this practice that Dr. Lodge began to use it,. Of course, without another EPA Audit, some type of peer review, or the release of Dr. Lodge's data, no one can review the results of this verification process.

Dr. Lodge also refused to testify regarding any statistical evaluation of the quality of his data, including a rate or margin of error. Dr. Lodge prevaricated when asked whether he had performed any statistical evaluation or used any methodology to determine a margin of error in his data. (T. 174, 187, 188.) His refusal to acknowledge or testify to any statistical analysis of his data was particularly troublesome since he stressed that it was the "repeated pattern of positive results over time" that supported his findings. It is unclear how he was able to identify a verifiable pattern without statistical evaluation of the hundreds of eDNA samples taken. Since the States bear the burden of proof for documenting the reliability of his work, his prevarications only proved that the *Daubert* standard was not met.

The States could not demonstrate that his work was accepted by the rest of the scientific community. His immediate peer, Dr. Ficetola, testified that he would need to see Dr, Lodge's data before resolving his many questions regarding Dr. Lodge's work. (Ficetola Aff.; T. 238, 239.) Tellingly, the group of scientists most familiar with his work, those working with him at the Corps, determined that his eDNA findings did not demonstrate the presence of live carp and made the further decision to transfer future eDNA work away from his lab.

Finally, his findings are unsupported by the sampling efforts designed to locate actual Asian carp. Despite the positive eDNA hits he identified, extensive sampling and fishkill data collected by the government response teams identified no Asian carp, dead or alive, in the CAWS above the barrier. They did identify one bighead carp in Lake Calumet, but it was not clear that this individual fish had transited the CAWS. (T. 467.) While Dr. Lodge sought to rationalize the lack of corroborative evidence by claiming that the Asian carp was difficult to catch, Charles Wooley from Fish and Wildlife testified directly to the vast experience of his crews in catching Asian carp and their extensive efforts to do so here. (T. 442-43, 497-500.) In light of Mr. Wooley's testimony, Dr. Lodge's excuse for why the sampling never corroborated the eDNA findings is untenable.

As proof of the validity of his work, Dr. Lodge noted the one Asian carp found in June in Lake Calumet. The one Asian carp, however, proves the opposite proposition. Dr. Lodge had not collected any positive eDNA data in that area in six months and several prior positive samples were positive only for silver carp, not the bighead carp actually found. (T. 172.) Nothing in his data predicted the presence of a live bighead carp in that area. Thus, that finding provides no support for his work.

Dr. Lodge's response to the challenges of the reliability of his testimony can be summed up in two words: "Trust me." Dr. Lodge dismissed all challenges to his methodology and findings by relying on the qualified approval of his lab practices in the EPA Audit or by describing quality control activities which could not be verified due to the lack of reported data. No other scientist would accept Dr. Lodge's mere words without data and neither should this Court. As this court held in another matter, "'nothing in *Daubert* or the Federal Rules of Evidence requires a court to admit opinion evidence that is connected to the existing data only by the *ipse dixit* of the expert.' In other words, 'an expert who supplies nothing but the bottom line, supplies nothing of value to the judicial process.'" *Martinez v. City of Chicago*, No.: 07-cv-422, 2009 U.S. Dist. LEXIS 98920, at *19 (N.D. Ill. Oct. 23, 2009) (internal citations omitted).

As a result, Dr. Lodge's eDNA findings cannot be considered reliable under *Daubert* and his testimony should be stricken. He presented no data, no peer review, no publication, no indication of support from the scientific community, and his findings were contradicted by the corroborative evidence. Without the eDNA findings, the States have no evidence that the Asian carp present an immediate threat of entering Lake Michigan through the CAWS.

The States also failed to prove the other prong of their nuisance case and claim of imminent hazard that the migration of Asian carp into Lake Michigan would have an immediate and devastating impact on the Great Lakes environment. The States claimed that the Asian carp would eat voraciously, breed at a much higher rate than existing fish, and outcompete with the existing fish for resources. As a result, the migration of the Asian carp would quickly and inexorably result in catastrophic damage to the existing commercial and sports fishery.

The States presented no live witnesses in support of this claim. The States proffered the affidavit of Dr. Tammy Newcomb (Document #11), which quoted from a number of studies

conducted by others, but primarily relied on the discussions of the impact of the Asian carp on the fisheries of the Illinois and Mississippi Rivers. Intervening Defendant Wendella moved to strike Dr. Newcomb's affidavit, a motion which the court also has taken under advisement.

Dr. Newcomb's affidavit was thoroughly rebutted by the testimony of Mr. Duane Chapman and the affidavit of Dr. Sandra Cooke. Mr. Chapman is a biologist with the US Geological Service who concluded that it was not remotely certain what impact the Asian carp would have on the Great Lakes, if any (T. 377.) He testified that invasive species need to enter the waters in sufficient numbers to form a self-sustaining population, that 90% of invasions fail, and that 90% of the ones that succeed do not become problematic for existing species. (T. 393.) He testified that it took fifteen years and thousands of fish to intentionally create a self sustaining population of Asian carp in the Caspian Sea. (T. 386.) He identified several specific factors, including: temperature, lack of nearby spawning areas, and uncertain food resources, which may limit the ability of the Asian carp to establish a sustaining population in the Great Lakes. (T. 389-97.)

Wendella proffered the affidavit of Dr. Sandra Cooke, who was present in court on September 8 and prepared to testify. Dr. Cooke developed a bioenergetics model for demonstrating the nutrition needs of the Asian carp and the insufficiency of available food resources in Lake Michigan to meet those needs. Based on her findings, she thought it was unlikely that the Asian carp could develop a large population in the open waters of the southern part of Lake Michigan.

The ultimate result is that there is very little certainty as to what will happen if Asian carp get to Lake Michigan, if anything. There is substantial competent evidence that the entry would have no impact. While the States claim that the impact would be immediate and devastating, the

information presented in support of that claim cannot be sustained in light of the direct testimony from Mr. Chapman and the experience and expertise of Dr. Cooke. Since the States have the burden of proof in this proceeding, their claim therefore fails.

In short, the States have not met their burden with respect to any component of their nuisance claim or their claim of an imminent risk. Without the eDNA findings there is no basis to show that there are a substantial number of Asian carp in the CAWs and Charles Wooley's testimony that the traditional fisheries methods show no Asian carp in the CAWs is unrebutted. The claim that Asian carp are transiting the CAWs in sufficient numbers to threaten a sustainable population in Lake Michigan is completely unsupported as is the claim that their presence would immediately damage the Great Lakes . As a result, this court should deny the States' motion for preliminary injunction to the extent it is based on a claim of nuisance or an imminent hazard.

C. The Army Corps' decision not to close the locks was not unlawful, arbitrary and capricious.

The Coalition's Response demonstrated that the Corps' decision was not unlawful. (Response at 17-19.) The Response also documented that the Interim III Report proved that the Corps' action represented a reasoned choice among alternatives and that the Corps made that choice after evaluating comments from all stakeholders. As a result, the Corps' determination not to close the locks was not arbitrary and capricious. (Response at 19-21.)

Testimony presented at the factual hearings fully supports such a conclusion. Other than Dr. Lodge, the States presented no witnesses regarding the Corps' actions and Dr. Lodge's testimony only indirectly addressed the Corps' determination not to close the locks. No States' witness testified that the Corps and other ACRCC other activities would either be insufficient to prevent the Asian carp from migrating into the CAWS or would be less effective than closing the locks to navigation. In contrast, all of the United States' witnesses testified to the extraordinary

efforts by the Corps and the other involved agencies to involve appropriate experts, gather information and make a thoroughly reasoned decision based on that information. As the Coalition stated in its Response, this process was the very antithesis of an arbitrary and capricious action.

Through cross-examination, the States sought to imply that the Corps was not taking sufficient actions with respect to the Asian carp (*i.e.* T. 408) and that closing the locks was the only possible approach. Yet the answers to these questions contradicted the States' central premise that the Corps was not doing enough and that the locks needed to be closed. General Peabody testified to the many efforts being made to prevent the Asian carp from reaching Lake Michigan, including the optimization of the existing electric barrier, the construction of an additional barrier, construction of a barrier between the Sanitary and Ship Canal and the Des Plaines River, and encouraging commercial fishermen to fish heavily for Asian carp in the lower Des Plaines and upper Illinois Rivers. General Peabody also testified to the ongoing investigation efforts to determine the presence or absence of Asian carp in the CAWS.

No state witness did or could testify that the Corps' decision was unsupported by the factual record, or that the decision failed to consider the alternatives to, or ramifications of, its decision. The States' claim that the Corps' decision was arbitrary and capricious has no basis in law or fact and their motion should be denied.

D. The States did not show that the equities favor a public interest or injunction.

The States case rested entirely on a showing of the imminence danger of the Asian carp to the Great Lakes, and paid very little attention to the impact of that decision on the Midwest region. The States argued in their initial papers that the economic impact would be minor and amended their original claim to indicate that the locks could be closed "except as necessary to protect public health and welfare," which appeared to mean that they could be opened to prevent

flooding. However, the actual operators of the locks testified to the difficulty of limiting their operations or relying on bulkheads, as the States sought, and the necessity of moving quickly to respond to precipitation events. (T. 536-44, 558-68.) The States presented no testimony, expert or otherwise, as to how the locks would be operated under the injunction they proposed.

The States also presented no live testimony regarding the economic impact of the injunction they sought. In contrast, the Coalition presented the testimony of Professor Joseph Schwieterman, a noted expert in transportation economics from DePaul University. Professor Schwieterman testified to the extraordinary impacts that closing the locks would have on the Chicago area economy. He testified regarding his April 2010 report, which found more than $1.2 billion annually in direct spending on activities associated with the operation of the Chicago and O'Brien locks, including commercial shipping, recreational boating, commercial cruises, and tours and municipal protection. (Coalition Ex. 2, Table 1.) He further determined through a more intensive economic analysis that the actual impact of closing these two locks would be close to $4.7 billion. (Coalition Ex. 2, Table 3.) These impacts include the diminished commercial shipping and tourist cruises, additional costs to maintain highways as a result of increased traffic, flood and municipal protection, and property value loss.

Professor Schwieterman also testified to findings from a recently released study on the Economic Impacts of Water Borne Shipping on the Indiana Lake Shore by Martin Associates. (Coalition Proposed Ex. 3.) He reviewed the methodology and findings and noted that the study identified the economic impact specifically associated with the O'Brien locks, which is heavily used by commercial traffic from the Port of Indiana. (T. 623-28.) Professor Schwieterman testified that the Indiana Report found that ultimate economic input for the Port of Indiana associated with the locks was more than $1.9 billion. (*Id.*)

Professor Schwieterman acknowledged that his study was limited in its evaluation of the impacts because he had not had the time or resources to evaluate a key component of that impact, namely the loss of businesses and jobs, if the locks should be closed. (T. 633-34.) He estimated that those impacts would be two to three times higher than the impacts he calculated. For the commercial shipping industry, this would run to more than $285 million per year. Professor Schwieterman also acknowledged that he had not evaluated the impact if the closure of the Chicago and O'Brien locks resulted in diminished flow such that the Lockport Locks would be closed as well, although he did note that the Lockport locks handle more than two and one half times the amount of freight as the O'Brien locks. (T. 637-38.) If this occurred, Professor Schwieterman stated that the Sanitary and Ship Canal would cease to have value as a transportation asset and that it was a key part of the Midwest transportation system. (*Id.*)

While the States claim that the value of the Great Lakes Fishery is $7 billion (which Dr. Newcomb sourced to trade association study from 2008 in her affidavit), they provided no testimony regarding the extent and timing of potential impacts resulting from Asian carp presence in the Great Lakes. They provide no support whatsoever for the concept that the entire fishery would be wiped out by the Asian carp, but leave the court with an "all or nothing" approach, arguing that one live carp in Lake Michigan will result in $7 billion in damages. In reality, their claim of economic damage is entirely speculative and contingent on numerous factors that may not happen for years, if at all. In contrast, the impacts outlined by Dr. Schwieterman will begin the moment this Court issues its injunction.

Neither the equities nor the public interest support the States' case. The Corps witnesses testified to the massive efforts being made to control Asian carp and that those efforts appear to be successful in that they believe there to be potentially so few carp in the CAWs that there is a

low risk of establishing a sustainable population in Lake Michigan, let alone the Great Lakes. (T. 298.) They continue to investigate the waterways, build barriers, and study different approaches to further controls. No States witness testified that these combined efforts would be insufficient to protect the Great Lakes or that closing the locks except for flood control would provide significantly greater protection. Despite the certain and enormous social and economic impacts, there is simply no showing that closing the Chicago and O'Brien locks to navigation will have any impact in reducing this risk further.

III. CONCLUSION

As the Coalition stated in its Response, Congress recognized the Asian carp issue and delegated authority to the Corps to construct the Barriers, to investigate options, and to take action which the Corps has done and continues to do. In taking their action, the Corps has worked with numerous other agencies' experts, including the EPA, the U.S. Fish and Wildlife Service, the U.S. Geologic Survey, and the Illinois Department of Natural Resources. In seeking this injunction, the States are asking this court to ignore specific Congressional action and to substitute its judgment for the Corps and all of these other agencies. While the States vehemently denied this during the merit hearing, their entire case rests on the proposition that neither Congress nor the Corps nor these other agencies took the proper actions in response to the Asian carp and that this Court should step into their shoes and act on the States' behalf. Yet given the opportunity to support this extraordinary demand, they presented the testimony of one scientist who refused to even present his data and whose information falls well short of the Supreme Court's requirements for scientific testimony. The States' motion had no legal support and now has no factual basis. Therefore, this Court should deny the States' motion.

WHEREFORE, for the reasons stated in this Brief, the Coalition respectfully requests this Court to deny the States' motion for preliminary injunction.

Dated: October 1, 2010

Respectfully submitted,

THE COALITION TO SAVE OUR WATERWAYS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of October, 2010, a copy of the foregoing COALITION'S POST HEARING BRIEF was filed electronically. Notice of this filing will be sent to the following attorneys by operation of the Court's electronic filing system:

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