
In The
Supreme Court of the United States
October Term, 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <p style="text-align:right"><i>Complainants,</i></p> v. STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <p style="text-align:right"><i>Defendants,</i></p> UNITED STATES OF AMERICA, <p style="text-align:right"><i>Intervenor.</i></p>	No. 1 Original
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METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S RESPONSE AND APPENDIX TO MICHIGAN'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

On December 21, 2009, the State of Michigan ("Michigan") filed a Motion for Preliminary Injunction ("Motion") seeking injunctive relief against the U.S. Army Corps of Engineers, ("Corps"), the State of Illinois ("Illinois") and the Metropolitan Water Reclamation District of Greater Chicago ("District"). The relief originally requested by Michigan would have affected the District and millions of residents in the Chicago area by enjoining the District from alleviating flooding. The District alleviates flooding by reversing the flow of the Chicago Area Waterway System ("CAWS") to Lake Michigan ("Lake") via the use of sluice gates and locks along the Lake. In addition, the relief sought by Michigan would have eliminated the District's ability to take water from the Lake for navigational and water quality purposes. (Dist. Resp. to Mot. for Prelim. Inj. pp. 19-24.) Michigan alleged that the relief sought was necessary to ensure that the Asian carp, an invasive species, did not make its way into the Lake. (Mot. for Prelim. Inj. p. 24.) The District filed its response to Michigan's Motion on January 5, 2010, opposing the Motion based upon public health and safety concerns that could arise if this Court granted the relief sought by Michigan. (Dist. Resp. to Mot. for Prelim. Inj. pp. 14-17.) On January 19, 2010, this Court denied Michigan's Motion.

Michigan has now filed what it calls a "Renewed Motion for Preliminary Injunction" ("Renewed Motion"). The Renewed Motion, which is more in the nature of a motion for reconsideration or a reply brief, is based upon what Michigan deems changed circumstances. (Renewed Mot. p. 1.) Michigan states that since this Court's original denial of injunctive relief, the Corps has discovered the existence of one positive Asian carp environmental DNA ("eDNA") sample lakeward of the O'Brien Locks and one positive eDNA sample from Calumet Harbor. Michigan's Renewed Motion further alleges that the Corps and Illinois have failed to take action to stop the Asian carp from entering the Lake since Michigan filed its original Motion. (Renewed Mot. pp. 3-4.) Michigan's Renewed Motion scales back the relief sought from the District, apparently in response to the public health and safety concerns raised by the District and the other parties in response to Michigan's original Motion. (Renewed Mot. pp. 38-39.)

The District is pleased that Michigan acknowledges the public health and safety issues implicated in its original request for relief, and is appreciative that Michigan has amended the relief sought in its Renewed Motion to allow for reversals to the Lake to avoid flooding. However, at this time, the relief sought by Michigan in its Renewed Motion would eliminate the District's ability to take water from the Lake as necessary to maintain appropriate water levels for navigation and to maintain the health of the

aquatic community in the CAWS. Consequently, the District requests that Michigan's Renewed Motion be denied.

The two positive eDNA samples cited by Michigan still leave the Petitioner woefully short of meeting the necessary requirements for issuance of a preliminary injunction. In fact, to the best of the District's knowledge, as of the date of the filing this response (i.e. February 24, 2010), no actual Asian carp have been found lakeside of the electrical barrier. (Dist. App. II p. 4.) Because Michigan has alleged very little else that is new, the District will not rehash the facts, law and arguments set forth in its original response. Rather, the District requests that its original response setting forth the factual background and analyzing the legal issues be incorporated herein by reference. (See Dist. Resp. to Mot. for Prelim. Inj.) The District will limit this response primarily to the relief now sought by Michigan against the District.

FACTS

As stated above, the District requests that the facts set forth in the District's response to Michigan's original Motion be incorporated herein by reference. The only additional facts added by the District are contained in the attached affidavit of Edward J. Staudacher and primarily pertain to the District's efforts to prevent fish passage to the Lake when the District takes water from the Lake. (Dist. App. II pp. 3-4.) The District will briefly discuss these facts in the body of its argument.

ARGUMENT

A. The District's Current Operations Limit Reversals to the Lake to Instances Where Flooding is Imminent and Reversal is Necessary to Protect Public Health and Safety.

In the District's response to Michigan's original Motion, the District explained why, even if Michigan was able to establish that it was entitled to a preliminary injunction, the District lacked authority to provide most of the relief requested. (Dist. Resp. to Mot. for Prelim. Inj. p. 31.) In effect, the sole relief sought by Michigan that the District had legal authority to provide pertained to the operation of the sluice gates at the O'Brien Lock and Dam, the Chicago River Controlling Works ("CRCW") and the Wilmette Pumping Station. (Id. at 15.) Michigan requested that this Court order the District to operate the sluice gates "in a manner that will not allow fish to pass those structures into Lake Michigan." (Dist. Resp. to Mot. for Prelim. Inj. p. 23.)

The District explained that due primarily to the volume of the flow discharging to the Lake during a reversal, there was no way for the District to operate the sluice gates in a manner that precludes fish from passing to the Lake from the CAWS. (Dist. Resp. to Mot. for Prelim. Inj. p. 16.) Consequently, the relief sought by Michigan amounted to an absolute prohibition on utilizing the sluice gates. The District noted that granting such relief would impact the Chicago area in two ways. Most importantly, during extreme rain events, the District needed the ability to reverse the flow

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of the CAWS and discharge storm water into the Lake. (Id. at 16-17.) If the District were precluded from reversing the CAWS to the Lake, public health and safety would be at risk due to the potential for massive flooding throughout the Chicago area. (Id. at 17.)

The other impact of granting Michigan the relief requested is that it would have precluded the District from taking discretionary diversion water from the Lake. The inability to take Lake water would affect both water quality and navigation on the CAWS. (Id. at 24-25.)

In its Renewed Motion, Michigan claims that the parties engaged in a “patent distortion” of its original request for relief. (Renewed Mot. p. 25.) The District denies it distorted Michigan’s requested relief in that the expansive relief sought by Michigan was clear and unambiguous. Nevertheless, the District will refrain from further commenting on this statement because in its Renewed Motion, Michigan has revised its request for relief as relevant to the District. Apparently recognizing the potentially devastating consequences that an absolute closure of the sluice gates and locks could have upon the Chicago area during an extreme wet weather event, Michigan’s new prayer relief requests the following:

- (a) Temporarily closing and ceasing operation of the locks at the O’Brien Lock and Dam and the Chicago Controlling Works except as needed to protect public health and safety.

- (c) Temporarily operating the sluice gates at the O'Brien Lock and Dam, the Chicago Controlling Works, and the Wilmette Pumping Station in a manner that will not allow fish to pass those structures into Lake Michigan except as needed to protect public health or safety.

(Renewed Mot. p. 38.)

This request for relief, as it pertains to the District's use of the sluice gates for reversals to the Lake, is consistent with the District's current operations. Therefore, there is no reason to enjoin the District from doing what it already does. As noted in the District's original response, the District only reverses to the Lake as a last resort in order to prevent flooding and thereby protect public health and safety. (Dist. Resp. to Mot. for Prelim. Inj. p. 16.)

Similarly, although the District does not control the locks, the District has requested the Corps to open the locks to alleviate rising floodwaters when the sluice gates could not adequately relieve the CAWS. Within the past ten years, the District requested the Corps to open the locks to allow for such reversals to the Lake on three occasions. (Id.) The District's interpretation of Michigan's request for relief would continue to allow the Corps to open the locks under such circumstances. Once again, because this

is consistent with the District's current operations, there is no need to enjoin the District.

B. Granting Michigan's Request for Relief will Negatively Impact Navigation and the Aquatic Community in the CAWS.

While Michigan's requested relief would not impact the District when reversing to the Lake to protect public health and safety, it would adversely affect the District's ability to take discretionary Lake water diversion for navigation and to maintain water quality. At present, the District does not have the capability to prevent fish passage from the CAWS to the Lake when taking discretionary diversion waters at the CRCW and the O'Brien Lock and Dam. (Id. at 24-26.) If the District were unable to take its allotment of discretionary Lake water, certain reaches of the Chicago River, the Little Calumet River and the North Shore Channel likely will stagnate. As set forth in the District's response to Michigan's original Motion, 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. Resp. to Mot. for Prelim. Inj. p. 25.)

Lack of diversion for navigational purposes will also impact commercial navigation and recreational users of the CAWS. (Id.) 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. (Id.) 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. (Id.) Low water levels and stagnant conditions may give rise to nuisance odors along the waterways, thereby adversely affecting the livability of nearby neighborhoods. (Id.)

Notwithstanding Michigan's claims that everyone has been sitting on their respective hands since it filed its original motion approximately 60 days ago, the District has been evaluating the feasibility of constructing bar screens at the O'Brien Lock and Dam and the CRCW that could be used to limit fish passage to the Lake during times when the District is taking water from the Lake. (Dist. App. II p. 4.) Typically, the District takes water from the Lake via its sluice gates at three lakefront locations between the months of May and October. (Id.) The District is in the process of designing, building and testing a trial bar screen at a single sluice gate at the O'Brien Lock and Dam. (Id.) The bar screen is intended to prevent adult fish from entering the Lake. (Id.) The sluice gate will be operated in a manner whereby the District

will seek to maintain a flow sufficient to prevent juvenile fish from entering the Lake. (Id.)

Assuming that the trial bar screen is effective, additional bar screens will be installed at several of the sluice gates at both the O'Brien Lock and Dam and the CRCW. (Id.) At the O'Brien Lock and Dam, two of the existing four sluice gates will be equipped with bar screens. (Id.) The remaining two sluice gates will remain closed for Lake water diversion purposes unless operational needs dictate otherwise, in which case additional bar screens will be installed on the remaining two gates. (Id.) At the CRCW, there are two sets of four sluice gates. If the trial bar screen is effective, the current plan is to install bar screens on two of the sluice gates, while the remaining sluice gates will remain closed for Lake water diversion purposes unless operational needs dictate otherwise. (Dist. App. II p. 5.)

Presuming that the trial bar screens are effective and the District moves forward with the installation of the additional bar screens at both the O'Brien Lock and Dam and the CRCW, absent unforeseen circumstances, it is anticipated that the bar screens will be installed at both locations before Lake water diversion resumes in June of 2010. (Id.) With respect to the Wilmette Pumping Station, which is the third location at which the District takes Lake water, the District anticipates pumping the water because, as noted in the District response to Michigan's original Motion, the District

takes considerably less water at this location than at the O'Brien Lock and Dam and CRCW and has pumps already in place. (Dist. Resp. to Mot. for Prelim. Inj. p. 5.) In addition, building a bar screen for the sluice gate at the Wilmette Pumping Station presents various issues due to the size of the gate. (Dist. App. II p. 5.)¹

Until such time as the District confirms the viability of restricting fish passage to the Lake while taking discretionary diversion waters, the District continues to oppose any restrictions that limit or prohibit its ability to take water from the Lake due to the aforementioned adverse consequences on navigation and water quality.

C. Michigan's New Claims of Imminency and Inaction do not Support Granting Michigan's Motion for Preliminary Injunction.

The District takes issue with Michigan's claims that the danger of the Asian carp is more imminent today than it was when this Court denied Michigan's motion on January 19, 2010. Extensive electrofishing and netting operations are being conducted by the Illinois Department of Natural Resources and the United States Fish and Wildlife Service throughout the CAWS in an effort to locate Asian carp. (Id.) As of the date of filing this response (i.e. February 24, 2010), to the best of the District's knowledge and

¹ As stated in the District's original response, it is unlikely that bar screens could be utilized during reversals to the Lake due to the magnitude of such releases. (Dist. App. II p. 5.) Therefore, the District would remove the bar screens on the sluice gates when reversing to the Lake. (Dist. Resp. to Mot. for Prelim. Inj. p. 16.)

belief, no Asian carp have been confirmed in the CAWS lakeside of the electric barriers. (Id.)

In addition, the District has not reversed to the Lake since Michigan's original Motion was filed. (Dist. App. II p. 5.) The District is unaware of any facts that make the situation more imminent today than in December, 2009.

The District further finds Michigan's claims of inaction against the parties in general, and the Corps in particular, as insulting. In addition to the District's previously described ongoing efforts to prevent fish passage while taking water from the Lake, the District has cooperated with other participating agencies assembled to develop both a short-term and long-term plan of action. (Id.) The Draft Asian Carp Control Strategy Framework that resulted from these meetings is posted at <http://www.asiancarp.org/>. (Id.) In addition, the District has allowed the Illinois Department of Natural Resources to utilize the District's land as a staging area for Asian carp related activities along the CAWS, and has granted the Corps a five-year right-of-entry for its use in constructing a 13-mile barrier between the Chicago Sanitary and Ship Canal and the Des Plaines River. (Dist. App. II pp. 4-5.)

While the District will defer to the Corps to elaborate on the additional measures it has taken to address Asian carp in the CAWS, the District

commends the Corps for its diligent efforts in coordinating the response and developing both a short-term and long-term plan.

CONCLUSION

Michigan's Renewed Motion for Preliminary Injunction sets forth very little that is new, and certainly nothing that warrants this Court to reverse its prior order denying Michigan's request for a preliminary injunction. Therefore, the District requests that this Court deny Michigan's Renewed Motion for Preliminary Injunction.

Respectfully submitted,

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

METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO
Frederick M. Feldman, General Counsel
Ronald M. Hill, Head Assistant Attorney
Margaret T. Conway, Senior Assistant Attorney
Brendan O'Connor, Senior Assistant Attorney

Dated: February 24, 2010

APPENDIX

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In The
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AFFIDAVIT OF EDWARD J. STAUDACHER

1. My name is Edward J. Staudacher. I make this affidavit based upon my personal knowledge as well as information supplied to me by members of my staff under my supervision. If called upon as a witness, I can testify competently to the contents of this affidavit.

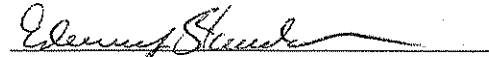
2. I am currently employed by the Metropolitan Water Reclamation District of Greater Chicago ("District") as a Supervising Civil Engineer in the District's Waterways Section. I have held this position since 2008. In my current position, I oversee the navigational, flood control

and diversions for water quality for the Chicago Area Waterway System ("CAWS") that are within the District's statutory authority.


3. I have been employed by the District since 1998. I have been actively involved in various areas of the District's operations including, but not limited to, the treatment processes, such as the collection systems, solids handling and treatment plant operations.
4. I received my Bachelor of Science Degree in Engineering from the University of Illinois in 1995 and a Juris Doctorate from Chicago Kent College of Law in 2004. I am a licensed professional engineer in the State of Illinois.
5. The District normally plans to begin diverting water from Lake Michigan ("Lake") to the Chicago Area Waterway System via sluice gates at the Wilmette Pump Station in May and the O'Brien Lock and Dam and Chicago River Controlling Works ("CRCW") in June, although additional diversion is occasionally required at other times throughout the year. All diversions typically end in October.
6. The District is evaluating the feasibility of constructing bar screens at the O'Brien Lock and Dam and the CRCW that could be used to limit fish passage to the Lake during times when the District is taking water from the Lake.
7. The goal is to build a bar screen that will prevent adult fish from swimming into the Lake, while operating the associated sluice gates in a manner that will seek to maintain sufficient flow to prevent juvenile fish from entering the Lake.
8. The current plan is to design, build and test a single bar screen at the O'Brien Lock and Dam. Based on information gathered during testing and assuming the success of the test bar screen, additional bar screens will be constructed and installed at the O'Brien Lock and Dam and the CRCW.
9. There are four sluice gates at the O'Brien Lock and Dam. Assuming that the trial bar screen is effective, two of the sluice gates will be equipped with bar screens while the other two gates will remain closed. If operational needs dictate, additional bar screens may be installed on the remaining two sluice gates.

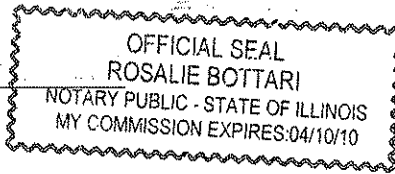
10. There are two sets of four sluice gates at the CRCW. Assuming that the trial bar screen is effective, the current plan is to install bar screens on two of the sluice gates. If the bar screens are successful, the sluice gates without bar screens will remain closed during Lake water diversions. If operational needs dictate, additional bar screens may be added.
11. Due to the risk of flooding, the bar screens will be removed from all sluice gates utilized during Lake reversals in order that floodwaters can exit the CAWS to the Lake unobstructed.
12. With respect to the Wilmette Pumping Station, which is the location where the District takes diversion water for the North Shore Channel, the District anticipates pumping the water from the Lake due to the availability of pumps and problems associated with building a bar screen for the large sluice gate.
13. Assuming that the trial bar screen is effective and the District moves forward with the installation of the additional bar screens at both the O'Brien Lock and Dam and the CRCW, absent unforeseen circumstances, it is anticipated that the bar screens will be installed at both locations before Lake water diversion resumes in June of 2010.
14. Extensive electrofishing and netting operations are being conducted by the Illinois Department of Natural Resources and the United States Fish and Wildlife Service throughout the CAWS in an effort to locate Asian carp. As of February 24, 2010, to the best of my knowledge and belief, no Asian carp have been confirmed in the CAWS lakeside of the electric barriers.
15. The District has not reversed to the Lake since June 19, 2009, which is prior to the filing of Michigan's original Motion for Preliminary Injunction.
16. The District has met and cooperated with other participating agencies assembled to develop both a short-term and long-term plan of action. The Draft Asian Carp Control Strategy Framework that resulted from these meetings is posted at <http://www.asiancarp.org/>.
17. The District has allowed the Illinois Department of Natural Resources to utilize the District's land as a staging area for Asian carp related activities along the CAWS, and has granted a right-of-entry to the

Army Corp of Engineers for its use in constructing a 13-mile barrier between the Chicago Sanitary and Ship Canal during heavy rain events.


Edward J. Staudacher

Subscribed and sworn to before me this
24th day of February, 2010


Notary Public



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October Term, 1966

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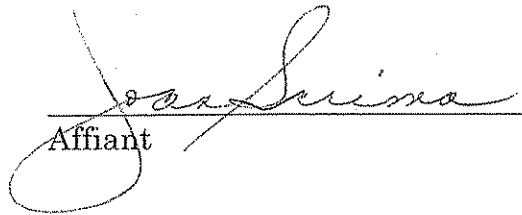
AFFIDAVIT OF SERVICE

I, Joan Scrima, of lawful age, being duly sworn upon my oath state that I did, on the 24th day of February, 2010, send out from the Metropolitan Water Reclamation District of Greater Chicago, 100 East Erie, Chicago, Illinois, 60611, 12 packages containing 1 copy of the METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S RESPONSE TO MICHIGAN'S RENEWED MOTION FOR PRELIMINARY INJUNCTION and APPENDIX. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following, and where available, copies were sent by e-mail pdf attachment:

SEE ATTACHED SERVICE LIST

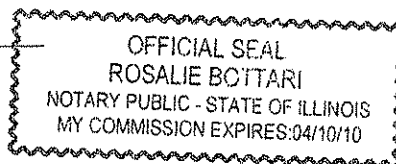
To be filed for:

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Attorney of Record
Ronald M. Hill
Margaret T. Conway
Brendan O'Connor
Attorneys for District


Affiant

Signed and sworn to before me this
24th day of February, 2010


NOTARY PUBLIC



SERVICE LIST

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