IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATE OF MICHIGAN, STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, and COMMONWEALTH OF PENNSYLVANIA,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,

Defendants.

No. 1:10-cv-04457

Hon. Robert M. Dow, Jr.

DEFENDANT METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S POST HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant, Metropolitan Water Reclamation District of Greater Chicago ("District"), through its General Counsel, Frederick M. Feldman, submits its Post Hearing Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction as follows:

I. PLAINTIFFS HAVE NOT MET THE BURDEN OF PROOF REQUIRED TO OBTAIN MANDATORY PRELIMINARY INJUNCTIVE RELIEF

A. Plaintiffs Have Not Proven A Likelihood Of Success On The Merits Of Their Public Nuisance Claim

In their many attempts to obtain mandatory preliminary injunctive relief, Plaintiffs have continuously relegated success on the merits of their public nuisance claim to the back burner, discussing that important factor last. (Pl. Reply, p. 31.) In so doing, Plaintiffs ignore the case law which requires that parties seeking preliminary injunctive relief must demonstrate a likelihood of success on the merits. *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008). The totality of the evidence that has now been presented to this Court both in additional affidavits and hearing testimony further confirms that the Chicago Area Waterway System ("CAWS"), and Defendants' operation thereof, can in no way be considered a public nuisance.

It is uncontested that the current operation of the CAWS by the many local, state and federal agencies is vital for navigation, water diversion and flood control. It is further uncontested that if Plaintiffs' relief is granted and the District is required to install sluice gate screens and raking mechanisms, and the locks are required to be operated with bulkheads, the Chicago area will be subject to increased risk of flooding. (*See* discussion *infra* at pp. 13-14.) Thus a finding of public nuisance that would require alterations in the operations of the CAWS could have definite and certain public health and safety consequences as opposed to the mere potential for damage, at some time in the distant future, to the Great Lakes economy if relief is granted. It is unlikely that a risk-benefit analysis performed by the Court that weighed Plaintiffs' remote probability of harm against the undisputed utility of Defendants' operation of the CAWS, would be resolved in Plaintiffs' favor.

Plaintiffs have not proven the gravamen of their public nuisance claim, that is, that the CAWS is being operated as a conduit for Asian carp to enter Lake Michigan (the "Lake") in sufficient numbers to create a nuisance. In order for the CAWS to be considered a nuisance conduit for Asian carp, it must be shown that the carp are using it as such. Yet, only one Asian carp has been caught above the electric dispersal barriers, in spite of ongoing extraordinary monitoring and fishing efforts to capture them. The only other evidence of fish presence offered by Plaintiffs—limited positive eDNA results and the suggestion that fish are not being detected due to shortcomings in detection methods—even if taken as true equates at most to evidence of a very small number of individual fish above the barriers. (*See e.g.*, Chapman, "...there probably are some fish up there or have been...I do believe that number is probably very low..." (Tr. 412:16-20.); Wooley, "I feel that it is very, very, very unlikely that there are any—that there are significant numbers of Asian carp above the dispersal barrier." (Tr. 475:16-19.) In short, Plaintiffs' so-called "Asian Carp highway" has no carp traffic. Without it there can be no finding of public nuisance.

Further, Plaintiffs are not likely to succeed on the merits of their public nuisance claim where the evidence does not establish that Defendants' operation of the CAWS constitutes an unreasonable interference with a right common to the general public. *See* Restatement (Second) of Torts, § 821B(1). Rather, the evidence demonstrates the reasonableness of Defendants' actions in the CAWS with respect to Asian carp. Mr. Wooley testified regarding a multi-agency effort that has been utilizing primarily electrofishing and gill netting to detect carp. (Tr. 440:8-

12.) "We have five monitoring stations that we utilize that allow us to have routine sampling occurring in areas of the Chicago Waterway System sampled on a daily basis, on a regular basis." (Tr. 441:18-21.) Traditional sampling areas are supplemented with eDNA (*Id.* at 22-25.) About 3200 hours worth of effort in actually having people out on the water doing survey work has been expended. (Tr. 449:1-3.) He notes that "they have stretched enough gill net to go from the base of the Willis Tower to the top of the Willis Tower eight times over." (*Id.* at 6-8.) He further testified that "[w]e have sampled this area tremendously, very effectively, very efficiently, and have not come up with a single Asian carp in the Chicago Waterway System except for the one up in Lake Calumet." (*Id.* at 10-13.) It is unlikely these described efforts would be deemed "unreasonable." Moreover, this testimony demonstrates that the government agencies are taking reasonable steps toward correction of a purportedly harmful situation making any judicial intervention at this juncture premature. *See Save the Dunes Council v. Alexander*, 584 F.2d 158, 165 (7th Cir. 1978).

Plaintiffs essentially are requesting that this Court declare the operation of the CAWS a nuisance, in spite of the fact that it is being operated by federal, state and local agencies in accordance with law and provides enormous benefit to the public health and safety and economic well being of an entire region. It is unlikely that even an action for public nuisance could be stretched this far. Consequently, Plaintiffs cannot meet their threshold burden of likelihood of success on the merits.

B. Plaintiffs Have Not Proven Imminent Irreparable Harm Where Neither Species Of Carp Is Currently Asserting Significant Pressure On Lake Michigan Or Will Likely Establish Reproducing Populations In The Great Lakes

Plaintiffs' alleged imminent and irreparable harm is the comprehensive, widespread, significant impairment of commercial and sport fishing and recreational value of all the Great Lakes, if both Silver and Bighead carps ("Asian carp") establish populations in the Lake, and from there to the other Great Lakes, and tributaries thereof. Now, after days of testimony and mountains of paper, Plaintiffs, at the very most, have presented nothing more than a mere possibility that Asian carp might advance to the Lake; might possibly reproduce there; might have an adverse impact on commercial and sport fishing; and might be able to reproduce and have the same negative effects in the other Great Lakes: all at some indefinite time in the future. Proving "only…a 'possibility' of irreparable harm" is insufficient. Plaintiffs must prove "that irreparable injury is *likely* in the absence of an injunction." *See Winter v. Natural Resources*

Defense Council, Inc., 129 S. Ct. 365, 375 (2008). (emphasis added). Plaintiffs simply have not met their burden. They have cited no precedent that grants mandatory injunctive relief where the articulated harm depends upon a causal chain of events that even the experts acknowledge involves a "great deal of uncertainty."

1. The Asian carp are not currently asserting pressure on Lake Michigan.

All the evidence places the established populations of Asian carp, generally referred to as the "invasion front", south of the CAWS in the lower Illinois waterway. Equally important, the evidence indicates that those established populations have remained there for a number of years. (*See* Plaintiffs' Exhibit ("Pl. Ex.") 1, 2010 Aquatic Invasive Species Risk Assessment for the Chicago Sanitary and Ship Canal ("Risk Assessment") p. 31.) Nothing suggests sufficient numbers of Asian carp are at this time capable of breaching the barriers that are in place and asserting the necessary pressure on the Lake.

a. Established populations of Asian carp have remained well south of the CAWS in the Illinois waterway where conditions are favorable.

The invasion front of the Asian carp, defined by Dr. Lodge et al. as "a self-sustaining population", was placed at possibly near Morris, Illinois in spring 2009, and with more certainty even further south, in the Marseille Pool, based on recovery of juvenile carp there. (*See* Pl. Ex. 1, p. 32.) At hearing, Dr. Lodge was unable to answer where on the Illinois waterway in relation to the Lake, the "closest known reproducing population of Asian carp is located." (Tr. 166:14.) He was, "highly uncertain where the invasion front is." (Tr. 170:10.) However, he did agree that Asian carp have been recovered from the Illinois River using traditional methods for a decade and from the Dresden Island Pool since at least 2002, but that they have not been recovered from the next pool going north, the Brandon Road Pool. (Tr. 164:24-165:4.) Significantly, Dr. Lodge admitted that "*it was likely to be the case*" that propagule pressure decreases as one moves northward on the Illinois waterway toward the Brandon Road and Lockport Pools. (*Id.* at 165:23-166:10.) (emphasis added).

Conditions in the lower Illinois waterway appear to be ideal for Asian carp. There are numerous shallow backwaters, side channels, adjacent wetlands, and bays that provide habitat for recruitment. (*See* Pl. Ex. 1, p. 36 ¶ 2.)[1] In contrast to the lower Illinois waterway, the upper

[1] Pl. Ex. 1 provides pagination numbers for odd-numbered pages only. For citation purposes, the District shall affix the even numbers to the un-numbered pages within as if provided.

reaches of the Illinois waterway are deep channels. (*Id.* ¶ 2.) Some research indicates the Chicago Sanitary Ship Canal ("CSSC") is unsuitable habitat for Asian carp recruitment causing population sinks that must be overcome. (*Id.* ¶ 3.) Additionally, the CAWS may not provide adequate spawning habitat as they do not provide 100 kilometers of undammed and free flowing water. (District Resp., Ex. 4, ¶ 26.) Another possible indicator of less favorable conditions in the upper Illinois waterway may be found in reduced Chlorophyll-a levels. Dr. Lodge testified regarding his awareness that Chlorophyll-a concentrations drop dramatically as one moves northward on the Illinois River. As he explained, "Chlorophyll-a is a typical index that's used to indicate the abundance of phytoplankton." (Tr. 167:20-22.) Phytoplankton is considered a primary diet of Asian carp. (*See* Chapman, Tr. 380-381.)

b. Environmental DNA ("eDNA") results in the CAWS are insufficient to establish imminency of Asian carp entering Lake Michigan.

Plaintiffs frequently use the terms "invasion" or "invasion front" imprecisely, even when the context is clear that what is being discussed is the "detection front", meaning where the foremost individuals are located. The Risk Assessment explains that, "[f]or Asian Carp, the *detection front* may be considerably different than the *invasion front,* where a self-sustaining population, possibly at high abundance, can characterize the invasion front, and the detection front may be comprised of a few individuals."[2] (Pl. Ex. 1, p. 32 ¶ 1.) (emphasis in original).

Using extensive traditional sampling methods throughout the 76-mile CAWS over an extended period of time, only one Asian carp was caught above the barriers. However, based solely on positive eDNA results, the detection front is placed further north in the CAWS than traditional detection methods. In 2009, there were 17 positive samples for Silver carp and 33 for Bighead carp out of 580 samples taken above the barriers, and in 2010, there were 10 positive samples for Silver carp and zero for Bighead carp above the barriers out of 536 samples. (Corps Resp. Ex. 8, at ¶ 57.)

It should be considered that the eDNA evidence does not afford an adequate level of certainty to support a "likelihood" determination. The record contains numerous caveats regarding the efficacy and interpretation of the eDNA results. Of primary concern is that the functional relationship between the number of positives and the number of fish present in the

[2] Dr. Lodge attempts to explain the discrepancy in usage of the terms by calling the use of "invasion front" to only mean evidence of establishment, "a more stringent definition." (Tr. 113:15-17.)

system is unknown. (Pl. Ex. 1, p. 48, ¶ 1; Lodge, Tr. 115:2-7.) The eDNA from a single fish, located at the Brandon Road Lock and Dam, could produce an eDNA plume possibly capable of producing all the positive detections downstream, though that was considered unlikely. (*See* Pl. Ex. 1, p. 48, ¶ 1.) The Risk Assessment team theorizes that the presence of positive eDNA can be minimally interpreted as evidence for the presence of at least one Asian carp generally in the vicinity within two days (Pl. Ex. 1, p. 48, ¶ 1; Lodge, Tr. 53:13-24.), but even that interpretation is rife with qualifications. Dr. Lodge indicates "[o]ne also has to take into account movement, to think about how much water would have moved in a couple of days, so that would be a further qualification". (Tr. 54:2-4.) Multiple positives can come from the same fish. (Lodge, Tr. 168:17-22.) Apparently a positive hit could be tagging the same fish on the same trip, or even on a subsequent sampling trip considering the documented movement rates of Asian carp.

Further, "No way that eDNA results are never going to tell you how a fish got somewhere." (Lodge, Tr. 116:8-9.) Nor can it be determined from eDNA results if a fish entered the CAWS prior to installation of the barriers. This is consistent with the analysis of the Bighead carp captured above the electrical barrier in Lake Calumet on June 22, 2010, which suggests that the fish, estimated to be six years old, was in Lake Calumet since the early portion of its life. (Pl. Reply, Ex. A, p. 3 ¶ 5, p. 4 ¶ 1.)

c. Extensive monitoring confirms that Asian carp are not poised to enter Lake Michigan and that prevention efforts are working.

The current multi-agency monitoring program in the CAWS utilizing "traditional" monitoring methods is unprecedented and certainly not typical. (*See* generally, Wooley, Tr. Vol. 3.) Though Dr. Lodge and others had questioned the utility of these traditional methods to detect Asian carp (Pl. Motion Ex. 14, pp. 5-6 ¶¶ 6-9: Newcomb Aff. ¶ 28-30, 32.), this expressed lower confidence level did not consider the intense and large-scale monitoring efforts for Asian carp that are ongoing in the upper Illinois waterway. Dr. Lodge agrees he was not considering continuous electrofishing going on in the four extended reaches of the CAWS or five fixed site monitoring stations monitoring by electrofishing and netting on at least a biweekly basis. (Tr. 159:7-160:3.) Dr. Lodge acknowledges that "very considerable effort using traditional tools" was effective in finding live fish, when it confirmed his eDNA results. (Tr. 59:13-17.) The Risk Assessment team notes that electrofishing is at least as sensitive as eDNA results. (*See* Pl. Ex. 1, p. 6.) Further, it appears that commercial fishing, a recently added tool in the Asian carp arsenal,

may be lessening propagule pressure. General Peabody testified that reports indicate the Asian carp harvest south of the barrier had declined. (Tr. 362:20-25.)

2. Plaintiffs Have Not Shown a "Likelihood" that Asian Carp Will Establish Self-Sustaining Populations in Lake Michigan

a. The majority of invasions fail in large environments like the Great Lakes.

Though Plaintiffs go to extraordinary efforts to paint a different picture of invasion, it is well accepted that the majority of invasions in large environments like the Great Lakes do not succeed. Ninety percent of such invasions are thought to fail, and of those that do survive, 90 percent of those are thought not to be problematic. (Chapman, Tr. 393:2-4.) Significant numbers of a species must be introduced into an environment and on numerous occasions for a reproducing population to occur. Dr. Lodge explains that "[e]stablishment success is positively related to propagule pressure (the number of individuals released and/or the number of introductions). Even in intentional stocking programs ... many introduction efforts fail, even when many individuals are released simultaneously in suitable habitat." (Pl. Motion, Ex. 13, p. 23, ¶ 48.) This recognized principle of invasion biology played out specifically with respect to Asian carp in the Terek [River] region of the Caspian Sea. There, intentional stocking of Asian carp with larvae, sub-adults and adults, estimated by Mr. Chapman to be at least thousands of fish every year, took 15 years until a population was clearly established.[3] (Tr. 386:13-18.)

b. Experts agree establishment in Lake Michigan is uncertain.

It would be highly unusual to grant a preliminary injunction where the relevant experts agree that the occurrence of an event central to movants' alleged irreparable harm is subject to "a great deal of uncertainty." Yet, that is the situation here regarding establishment of a reproducing population of Asian carp in the Great Lakes. Regarding establishment, Mr. Chapman testified "[t]here's a great deal of uncertainty... we don't know whether the fish will for sure take off and establish large populations, neither do we know that they will survive." (Tr. 377:21-23.) He believes individuals will be able to survive in the Great Lakes but as to a large population,

[3] Mr. Chapman testified on cross-examination to the "possibility" that salinity of the Caspian Sea was the factor limiting successful stocking of Asian carp (though he also testified it is unclear whether salinity has a negative effect on Carp recruitment) (Tr. 431:20-432:5.) However, salinity of the northern section of the Caspian Sea is minimal. Near the Volga, Ural and Terek [rivers], the salinity is a mere 1 part per thousand. (*See* Encyclopedia Britannica Online Ed. available at http://search.eb.com/eb/article-9046072 (last visited October 1, 2010); *See also, http://www.1911 encyclopedia.org/Caspian_Sea.*

"...it's tough to say." (Tr. 377:24-378:1.) Mr. Chapman goes so far as to say that "[e]ven if we put an unlimited number in the Great Lakes, they might not be able to survive in the Great Lakes." (Tr. 413:12-15.) In summary, he concludes that "whether they can reproduce and create a self-sustaining population is "*clearly unclear*" (Tr. 413:17.) (emphasis supplied). Similarly, Dr. Lodge notes "a great deal of uncertainty about what parts of the Great Lakes might be most at risk from invasion." (Tr. 121:8-12.) He acknowledges that biologists "certainly do not know it [the probability of establishment in relation to the number of individuals] for either silver or bighead carp in Lake Michigan." (Tr. 101:5-10.)

Similar uncertainties are expressed regarding successful spawning of Asian carp in the Great Lakes. Mr. Chapman testified "...there are a number of uncertainties in that regard as well. It's possible that the fish could pull something off that we didn't expect and be able to survive, but again there's a great deal of uncertainty". (Tr. 378:22-25.) Even Plaintiffs' claimed impact of Asian carp on the Great Lakes fisheries involves "mak[ing] some guesses." (Tr. 394:2-4.) Admittedly, no one puts the carps' ability to establish in the Lake at zero. Mr. Chapman notes it is "within the range of possibility that Asian carp could establish a population in Great Lakes and become problematic" (Tr. 404:21-23.) But as required under the law, Plaintiffs are required to show more than a possibility of imminent irreparable injury.

At best, Plaintiffs have presented evidence that an extremely small number of each species of fish may be dispersed throughout the large system lakeward of the barrier. They have presented no evidence to show that fish are present in sufficient numbers that they pose an imminent threat to the Great Lakes. Mr. Chapman, an expert who published his first paper on Asian carp in 1985, opined "I do believe that the chance of establishment of a small number of fish is low in the Great Lakes, especially". (Tr. 413:10-11.)

C. The Balance Of The Harms Weigh In Favor Of The District And The Public Interest

Plaintiffs have failed to meet their heightened burden to demonstrate that the balance of the harms weighs in their favor. While their alleged harm is indeed great, Plaintiffs presented little evidence to show that those alleged harms are real. In contrast, evidence of harm to the District and to the public it serves was essentially undisputed: If this Court grants the relief requested by Plaintiffs there will almost certainly be increased flooding in the Chicagoland area. (*See* discussion, pp. 10-14 *infra.*)

This Court may properly weigh the speculative and remote nature of the Plaintiffs' harm against the District's proven harm. *See New York v. Cathedral Academy,* 434 U.S. 125, 129 (1997). The Defendants presented essentially undisputed evidence that the Chicago area will experience flooding if injunctive relief is granted. As a result, the Court is called upon to balance a significant harm that is almost certain to occur to the residents of the Chicago area, and possibly within a number of hours depending upon the severity of the storm event, against an admittedly uncertain substantial harm to the Great Lakes ecosystem and economy, but one that experts testify will take decades to actualize, *if ever*. It does not seem difficult to determine in whose favor the balance of harms tips.

II. THE DISTRICT LACKS AUTHORITY TO PERFORM MUCH OF THE REQUESTED RELIEF AND THE RELIEF THAT THE DISTRICT CAN PERFORM IS INAPPROPRIATE FOR A PRELIMINARY INJUNCTION

A. The District Lacks Legal Authority To Render Most Of The Requested Relief

Throughout the course of this and prior litigation, Plaintiffs continue to "fashion" their relief against the District as they learn the unintended serious consequences of their demands. The most recent iteration comes in the "Conclusion and Relief Requested" section of their Reply. Paragraph 1 is the only paragraph directed against the District. (Pl. Reply, pp. 53-55.) It contains subparagraphs (a) through (g), which request this Court to order the District to undertake a variety of actions, from lock closure to rotenone applications. (Pl. Reply, p. 54.) As more fully set forth in the District's Response, the District lacks the authority to render the relief requested in paragraphs 1 (a), (b), (c), (e) and (f) of Plaintiffs' Reply. (District's Resp. pp. 41-50.) Plaintiffs have introduced no evidence to the contrary.

Paragraph 1(d) of the Plaintiffs' Request for Relief would appear to be the only relief within the District's legal authority, and then only in part. Paragraph 1(d) requests the following:

> (d) Installing and continuously maintaining permanent grates or screens, along with any debris removal equipment necessary to prevent blockage or clogging of such grates or screens, on or over the openings to all sluice gates at the O'Brien Lock and Dam, the Chicago River Controlling Works, and the Wilmette Pumping Station in a manner that conforms to the specifications detailed in Appendix A to the Corps' Interim III Report (Darcy Dec, Att 2) or otherwise will be as effective at preventing Asian carp from passing through these structures as the grates or screens specified in that Report.

(Pl. Reply, p. 54)

During the hearing before the Court both the District and the Corps provided detailed testimony of the potential harms that could occur if this Court ordered the District to comply with the relief requested in Paragraph 1(d), as well as the time and expense involved in attempting to render such relief. Tellingly, Plaintiffs provided no testimony to dispute the potential harms set forth by the Defendants and even acknowledged the many obstacles that would have to be overcome. (Second Declaration of Kaveh Someah, ¶ 4.) The uncontroverted evidence establishes that Plaintiffs requested relief, to the extent it is within the District's legal authority, is inappropriate for a mandatory preliminary injunction.

B. Installation Of Screens With Automatic Raking Mechanisms On All Sluice Gates At Chicago River Controlling Works, The O'Brien Lock and Dam and the Wilmette Pumping Station Is Inappropriate Relief For A Mandatory Preliminary Injunction And May Increase The Likelihood Of Flooding

Initially, it is uncontested that the Corps owns, operates and maintains the sluice gates at the O'Brien Lock and Dam ("O'Brien"). (Tr. 342:13-18, 465:12-16, 535:13-536:5, 543:9-16; District's Response, Ex. 2, ¶ 35.) Therefore, the District cannot provide this part of the relief requested in 1(d).

The District explained in its Response that it is critical to have unobstructed flow through its sluice gates at both the Wilmette Pumping Station ("WPS") and Chicago River Controlling Works ("CRCW") in order to prevent flooding. (District's Response, Ex. 2, ¶¶ 34, 41.) The District further explained that installation of screens on sluice gates significantly increased the risk of flooding due to the potential of the screens to blind or clog. (*Id.*)

Plaintiffs have offered limited affidavit and testimonial support for their position that this Court should order the District to install screens with raking mechanisms on all sluice gates at CRCW North and South. Much of what Plaintiffs have offered is unqualified opinion and speculation that must be disregarded or given little weight. In support of their request for relief, Plaintiffs rely upon the Affidavit of Tammy J. Newcomb in which she declares that one of the most effective and immediate remedies to minimize the risk of further movement of Asian carp is to install and maintain grates or screens on or over all the openings to all of the sluice gates at O'Brien, CRCW and the WPS. (Newcomb Aff. ¶ 47(e).)

The District questions what weight, if any, this declaration should be given, seeing that Dr. Newcomb is a biologist and not an engineer. The declaration basically mimics Plaintiffs' request for relief against the District set forth in their Motion, which request for relief has since

changed. The District concurs with the Court's observation that Dr. Newcomb's affidavit, "probably went beyond her area of expertise." (Tr. 12:4-12.) The District urges the Court to scrutinize her affidavit as it indicated it would, to "look at the various conclusions that she purports to draw by filtering the various materials that she has read...and determine for myself whether the opinion that she is purporting to offer rests on some sort of knowledge that she possesses." (Tr. 12:23–13:8.) As to the need to maintain grates or screens on all the sluice gates as opined in paragraph 47(e) of her declaration, Dr. Newcomb's conclusions on this subject matter are outside her area of expertise and consequently, should be entirely disregarded by this Court, or at the very least, accorded minimal weight.

In their Reply, Plaintiffs offered the Affidavit of Kaveh Someah. Mr. Someah basically states that raking mechanisms for screens on sluice gates that will eliminate clogging or blinding are "commercially available," (Pl. Reply, Ex. B, ¶ 17.) suggesting to the reader that the District and the Corps could buy such technology off the shelf and install it virtually overnight on both existing gates as well as the remaining gates that Plaintiffs want screened. In response to Mr. Someah's Affidavit, the District acknowledged that it was aware of the use of screens with raking mechanisms on sluice gates. (Sur-Reply, Ex. 1, ¶ 20) However, the District explained the many issues that would have to be studied in order to evaluate the potential use of screens and a mechanized raking system, as well as the significant time and expense of designing and constructing such facilities at the WPS and CRCW. (*Id*, ¶¶ 26-44.)

Plaintiffs subsequently filed yet another Someah Declaration acknowledging that such systems cannot be purchased off the shelf, as well as admitting that the issues identified by the District must be addressed. (Second Declaration of Kaveh Someah, ¶¶ 2, 4.) He concluded that none of these many issues are insurmountable, despite never stating that he actually visited and studied the sites on which he opined. (*Id.*)

At the hearing, through its one witness, Dr. Lodge, Plaintiffs presented limited testimony with respect to their request for relief against the District. While the District does not dispute that Dr. Lodge may be an expert in the emerging field of eDNA science, the District questions what weight, if any, this Court should give to Dr. Lodge's testimony on sluice gates. Dr. Lodge readily admitted that he was not an engineer, had not studied the feasibility of installing grates or screens on sluice gates, did not visit the specific locations and look at those structures to determine what would be involved, and did not evaluate the impact his recommendations would

have on flooding, navigation or water quality. (Tr. 170:12-171:10.) Consequently, Dr. Lodge's testimony regarding installation of screens on all the sluice gates should be given little, if any, weight.

At the hearing, Ed Staudacher testified on behalf of the District. Mr. Staudacher provided detailed testimony how, given the current configuration of CRCW North and South, it is impossible to install screens with raking mechanisms on the existing sluice gates. (Tr. 588:23-592:5.) Additionally, Mr. Staudacher's unchallenged testimony demonstrated that with respect to the screens already installed by the District on two of the four sluice gates at CRCW South, they are consistent with what is provided for in Appendix A to the Corps' Interim III Report, and are incapable of being retrofitted with raking mechanisms. (Tr. 585:14-22.) Despite it being Plaintiffs' burden to show their requested relief is even possible, Plaintiffs barely even challenged Mr. Staudacher's professional opinion let alone come up with any evidence showing the requested relief is possible.

Next, the District addressed the actions necessary to accomplish what Plaintiffs are asking, namely, installing and continuously maintaining permanent grates or screens on all sluice gates, along with any debris removal equipment necessary to prevent blockage or clogging of such grates or screens. (Pl. Reply, p. 54, ¶ (d).) While Mr. Staudacher testified, as would any good engineer, that "Anything is possible given enough time and money," he also provided a detailed assessment of what would be involved to accomplish Plaintiffs' request for relief. (Tr. 592:6-594:4.) In his assessment, Mr. Staudacher discussed the challenging physical footprint needed at CRCW North and South, along with obtaining necessary property interests that would need to be obtained from third parties along with the design, contracting and competitive bidding procedures that would need to take place. (*Id.*) When asked how long it would take to accomplish what Plaintiffs are asking this Court to order the District to do at CRCW North and South, Mr. Staudacher's response was "Several years." (Tr. 594:5-7.)

Consequently, what Plaintiffs are asking for in essence through this preliminary injunction is ultimate relief. As discussed in the District's Response, a request for injunctive relief that does not maintain the status quo, but in effect mandates the relief ultimately sought in the complaint is improper. *Jordan v. Wolke*, 593 F. 2d 772, 774 (7th Cir. 1978). When seeking a mandatory preliminary injunction, a plaintiff must submit a detailed plan for the requested

injunctive relief and a generalized proof of the costs of such a plan. (*Id.* at 775.) In this case, Plaintiffs have done neither.

The *Jordan* case is instructive to the matter before this Court in that the Seventh Circuit reversed a mandatory injunction instructing the Milwaukee County Jail to make certain changes to jail facilities so that pre-trial detainees could have contact visitation, including the construction of new facilities. (*See Id.*) The court recognized that although the very general injunction allowed the Defendants a large measure of discretion as to how to comply with the court's order, "[w]hat the defendants might do in an effort to comply with the preliminary injunction may turn out to be either inadequate or unreasonably costly." (*Id.* at 774.) Moreover, in this case, Plaintiffs have failed to provide even a generalized proof of costs for the proposed relief to sustain the reasonableness of the temporary order. (*See generally, Id.*) The requested temporary injunctive relief of constructing new facilities, which is what the District would be required to do, from a time stand point ("Several years") combined with a currently unascertainable cost to District taxpayers, is on its face inappropriate relief under a preliminary injunction, warranting denial of Plaintiffs' Motion.

Even if this Court were to order the District to spend several years and an unknown amount of money to comply with Plaintiffs' relief, the requested relief still fails in that it does not address the increased likelihood of flooding around the Chicagoland area. Plaintiffs' catch-all language of "consistent with the protection of public health and safety" is not sufficient to overcome the specific deficiencies in their requested relief because the evidence establishes that the locks and sluice gates cannot be operated in the manner requested by Plaintiffs while at the same time preserving public health and safety. Based on Plaintiffs' request for relief, the increased likelihood of flooding could come from two sources. The first would be if the Court ordered the locks closed such that bulkheads were installed in replacement of the locks. The second is the potential for flooding if screens with rakes were ordered installed on all the sluice gates.

As was learned from the testimony of General Peabody and Mr. Cox, relative to flood control (reversing to the Lake), the difference between using locks as compared to bulkheads is substantial. While locks can be opened in a matter of minutes when it becomes necessary to reverse to the Lake to prevent flooding, at best, the removal of bulkheads can take "anywhere from four to twelve" hours and sometimes days, depending on available equipment and weather

conditions. (Tr. 362:21-363:24, 539:20-540:12.) When a reversal to the Lake is necessary to prevent flooding, Doctor Tzuoh-Ying Su ("Dr. Su") informed the Court that time is of the essence as was seen during the July 24, 2010 rain event when the water level in the Chicago River portion of the CAWS approached flood stages even with the sluice gates opened by rising more than six feet within three hours, and only stopped rising and began to drop after the lock at CRCW was opened. (Tr. 562:16-564:5.) As testified to at the hearing, if the Corps does not have the ability to open the locks, at the District's direction, in a mater of minutes, there is a severe flood risk to the City of Chicago, with the likelihood of severe property damage, transportation delays and potential loss of life. (Tr. 565:4-18.) While Plaintiffs may try and downplay the need to open the locks, the fact remains that in the past 10 years, there have been significant enough rain events to necessitate four reversals to the Lake via the CRCW lock. (Tr. 364:2-6; District Response, Ex. 2, ¶ 25.)

Additionally, Mr. Cox and Dr. Su testified as to the increased risk of flooding related to the use of screens and raking mechanisms on sluice gates. Both witnesses testified that the installation of such devices would cause a potential increase in floods due to decreased flow of floodwaters through the system. (Tr. 542:10-17, 569:22-571:6.)

CONCLUSION

To be entitled to a mandatory preliminary injunction, the Plaintiffs must introduce sufficient factual evidence to meet each of the prongs established by the Seventh Circuit. *See Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-388 (1984). At the hearing, Plaintiffs presented testimony from only one witness to supplement their previously submitted pleadings. With all due respect to Dr. Lodge, his testimony, when considered in conjunction with Dr. Newcomb, Mr. Taylor and Mr. Someah, is not sufficient to justify the grant of a preliminary injunction in Plaintiffs favor, where it will likely result in severe negative consequences to the Defendants and the residents of the Chicagoland area.

In contrast, the Defendants presented supplementary testimony from eight witnesses to show the speculative and damaging nature of Plaintiffs' requested relief. The Plaintiffs have failed to rebut what the Defendants have demonstrated, namely, that any self-sustaining population of Asian carp that may be in existence is well south of the electric barrier without any indication that it is successfully moving into the CAWS. The lack of propagule pressure of Asian carp on the Lake combined with the uncertainty of Asian carp ever establishing a self-sustaining

population in the Lake legitimately calls into question the basic premise of Plaintiffs' motion. Additionally, the relief requested against the District, ordering it to install screens with raking mechanisms on all sluice gates at CRCW and the WPS, is inappropriate relief for a preliminary injunction. Plaintiffs did nothing to challenge the District's evidence that it is impossible to install screens with raking mechanisms on the current sluice gates at CRCW North and South and the WPS, and that the possibility of constructing any such facility is several years away and hence outside the appropriate scope of relief of a preliminary injunction.

WHEREFORE, for the reasons stated herein and in the District's Response, the Plaintiffs' Motion for Preliminary Injunction should be denied.

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Respectfully submitted,

s/Frederick M. Feldman
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