UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

STATE OF MICHIGAN, ET AL.,	
Plaintiffs,	Case No. 10-c-4457
v.	Hon. Robert M. Dow Jr.
UNITED STATES ARMY CORPS OF ENGINEERS, ET. AL.,	
Defendants.	

FEDERAL DEFENDANT'S
POST-PRELIMINARY INJUNCTION HEARING BRIEF

Plaintiffs' preliminary injunction request asks the Court for various forms of mandatory emergency relief. Plaintiffs ask this Court to interfere in the ongoing discretionary actions of a federal agency under a novel theory of federal common law, without invoking the appropriate waiver of sovereign immunity for tort actions, the Federal Tort Claims Act ("FTCA"). To the extent Plaintiffs have properly invoked the Administrative Procedure Act ("APA") to seek review of final agency action, they fail to show the Corps has acted contrary to its grants of authority from Congress, or in an arbitrary and capricious manner. Second, Plaintiffs do not establish imminent, irreparable injury. As confirmed by multiple agencies' experts, any Asian carp that are in the Chicago Area Waterway System ("CAWS") likely exist in very low numbers and do not present an imminent threat to Lake Michigan. It is uncertain whether a sustainable population of Asian carp could establish itself in Lake Michigan by way of the CAWS and, if they could, what impacts would result. Third, Plaintiffs' proposed injunction would threaten public safety in addition to imposing economic harms. Nor would Plaintiffs' requested relief meaningfully assist the multi-agency effort to prevent Asian carp migration. In short, Plaintiffs are not entitled to an injunction.

I. Plaintiffs have not demonstrated a likelihood of success on the merits

Plaintiffs plead their claims under two headings: the purported federal common law of nuisance and the APA. Neither claim is likely to succeed on the merits. Fed. Def. Opp. at 18-35. Plaintiffs' Complaint does not set forth a proper waiver of sovereign immunity for a public nuisance claim, federal law occupies the field and precludes courts from formulating federal common law rules, and principles of nuisance law bar Plaintiffs' claims. Id.; see also Transcript 86:12-89:11. Plaintiffs' APA claim likewise fails because Plaintiffs have not set forth a statutory standard by which to measure the federal defendant's conduct against or which Plaintiffs claim the federal

defendant has violated. See Transcript 96:6-99:3; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); see also San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 883 (D. Ar. 2003).

Plaintiffs rely upon Trudeau v. FTC, 456 F.3d 178, 186-187 (D.C. Cir. 2006), for the proposition that the APA waiver of sovereign immunity is not limited to suits brought under the APA. Regardless of whether Plaintiffs seek monetary damages or injunctive relief, the FTCA, 28 U.S.C. § 2671 et seq., provides the waiver of sovereign immunity for all tort claims, including claims for public nuisance. Fed. Def's Opp. at 20-25; Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs, Case No. 02-CV-22778, Slip Op. 11, n.5 (S.D. Fl. 2003); United States v. Olin Corporation, 606 F.Supp. 1301, 1312 (N.D. Al. 1985). The reach of Section 702's waiver for non-APA claims is limited to claims under the Constitution or claims meeting the very restrictive criteria for remedying ultra vires actions. Trudeau, 456 F.3d at 189-190 (Section 702 waives sovereign immunity for "nonstatutory" ultra vires and Constitutional claims); Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1233 (10th Cir. 2005); Commonwealth of P.R. v. United States, 490 F.3d 50, 58-60 (1st Cir. 2007); Small v. Astrue, No. 08-cv-01864-LTB-KLM, 2009 WL 2134345, *7-8 (D. Colo. July 14, 2009) (Due Process). Plaintiffs make no ultra vires or constitutional claims and thus, they cannot proceed under the APA waiver.

Non-statutory review is limited to a very narrow range of cases, in which the burden is almost insurmountable, and never applies if administrative remedies exist. Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge 166, AFL-CIO v. Griffin, 590 F. Supp. 2d 171, 176 (D.D.C. 2008). Moreover, claims cannot proceed against the federal government under the APA waiver even in *ultra vires* claims where there is no delegated authority and constitutional claims (which are not present

here), where it "will require affirmative action by the sovereign." United Tribe of Shawnee Indians v. U.S., 253 F.3d 543, 548 (10th Cir. 2001).

II. Plaintiffs Have Not Demonstrated Imminent Irreparable Harm

Plaintiffs have failed to establish that the extraordinary, mandatory injunctive relief they seek is necessary to prevent irreparable harm from occurring. As demonstrated during the September 7-10, 2010, hearing, the Federal Defendant (in conjunction with its state and federal partners on the Asian Carp Regional Coordinating Committee ("ACRCC")) has reasonably concluded that 1) only a low number of individual Asian carp exist above the electric barrier, 2) there is no evidence that the electric barrier has failed and 3) the potential for the establishment of a self-sustaining population in the CAWS above the electric barrier or in Lake Michigan is not imminent in a legal sense and remains an unknown based on the characteristics of these fish. Furthermore, contrary to Plaintiffs' claims that the situation is at a "critical juncture" that merits the drastic relief they seek, Federal Defendant's filings and testimony have established, largely unaddressed by Plaintiffs, that the current intensive inter-agency efforts, which even Plaintiffs acknowledge are unusual in their scope, are addressing the threat posed by Asian carp to the Great Lakes. See Chapman 419:10-17.

Plaintiffs' claim of imminent irreparable harm relies almost entirely on the meaning they draw from positive eDNA results above the electric barrier coupled with the discovery of a single live fish in Lake Calumet. See generally Newcomb Decl.; see also generally Lodge Testimony. Indeed, this is the evidence Plaintiffs proffer to carry their burden "that irreparable injury is likely" -- not just possible -- "in the absence of an injunction" See Winter v. NRDC, 129 S. Ct. 365, 374-375. Based on this evidence, Plaintiffs argue that the electric barrier must have failed, and because the locks remain open to water traffic, Asian carp can migrate into the Lake, and thus, fish are on the

cusp of establishing a breeding population in Lake Michigan. Plfs. Brief at 23-31. Contrary to Plaintiffs' arguments, the eDNA results and one fish found, amongst the hundreds of thousands of pounds of fish collected, do not establish the requisite likelihood of imminent harm.

The state of the eDNA science does not yet permit anyone to conclude that live Asian carp are in the canal system in numbers that present an imminent threat.[1] Negative eDNA results comprise a super-majority of the results when compared to the number of samples taken. See Plfs. PI Ex. 2. For example, in 2010, out of 536 samples taken, 10 were positive for silver carp and none were positive for bighead carp. Quarles Decl. ¶ 57; Plfs. PI Ex. 2. A positive eDNA result may correspond to a live fish, a dead fish, or simply the presence of fish mucus, feces, urine, or other cells. Id.; Lodge 114:24-116:4 (acknowledging that a limitation of eDNA is that there is no way of measuring the relative abundance of fish producing the detection signal and no way to tell the number of fish). Dr. Lodge may believe that a positive eDNA result shows "multiple" live fish, but at the current time, that prediction cannot be confirmed or even supported by other evidence.[2] Testimony from other individuals with extensive expertise in Asian carp biology and in assessing populations of Asian carp established that if Asian carp are in the CAWS above the barrier, they are there only in low numbers; numbers that are effectively being assessed and managed by the aggressive inter-agency effort. Wooley 474:25-475:20; Chapman 412:17-24.

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[1] Contrary to Plaintiffs' representation, Plfs. Brief at 46-47, the EPA did not conduct a peer review of the eDNA research, but merely completed a quality control audit. Plfs. Ex. 14 at ¶¶ 16-17. The Corps has contracted with an independent entity to peer review the eDNA scientific method and should have the results in December 2010. Peabody Decl. ¶ 33; Lodge 116:14-23. The eDNA method has not been published and no independent labs have replicated the results.

[2] Dr. Lodge also testified that he not only has a scientific interest in proving that eDNA equates to live fish but he also has a pecuniary interest in that he has helped found a commercial enterprise that intends to offer eDNA sampling and processing services. Lodge 51:7-15.

In an apparent attempt to explain the lack of positive eDNA results where the one live fish was ultimately found, Plaintiffs sought to establish through Dr. Lodge that negative eDNA results do not mean absence of fish. Lodge 82:13-83:5. In direct contradiction, on cross examination, Dr. Lodge explained that he does draw conclusions from negative eDNA results as to whether fish are present. Specifically, he stated that he disagreed with the May rotenone action because of negative results that followed positive results, negative results which he believes indicated a lack of Asian carp. Lodge 130:10-14.[3] This inconsistency in Dr. Lodge's testimony highlights the uncertainty of what eDNA results indicate and underscores the lack of foundation for the relief Plaintiffs seek. See also Lodge 68:8-13 (positives over different years indicate fish), 70:23-25, 71:1-7 (negatives predict absence of fish), 83:3-6 (negatives do not correlate to absence of fish), 67:21-25, 68:1-7 (positives six months later indict fish presence despite intervening negatives).

Further, the eDNA results for the sampling from Lake Calumet (where the one fish above the barrier was found) have all been negative, Peabody Decl. ¶ 15; Plfs. PI Hearing Ex.2, and in areas below the electric barrier where live fish are known to be abundant the results are not always positive. Plfs. Ex. 14 at ¶ 24 The live fish caught in Lake Calumet also does not equate to a sustainable population of fish above the electric barrier, nor does it show any alleged failure of the barrier. That one fish's origins are unknown. Chapman Decl. ¶¶ 28-29. No one knows if the fish swam across the electric barriers, was carried to the location via ballast water or a bait bucket, or released above the electric barrier by a third party. Chapman Decl. ¶¶ 29-33.

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[3] Dr. Lodge testified that there were two intervening negative sampling results, Lodge 130:10-14. This is factually incorrect. There was only one preceeding sampling trip, on April 15, 2010. The second negative sampling result was from a sample taken on May, 20, 2010, the morning of the rotenone action. See Plfs. PI Ex. 2 (results for LCALN with asterisk indicating that the May 20, 2010 event occurred on the "day of rotenone effort").

Nor have Plaintiffs offered any evidence whatsoever that the electric barrier fails to effectively deter Asian carp migration. These allegations, made in their reply brief for the first time, are unsupported by any relevant facts or expert testimony. In contrast, Federal Defendant has explained at length, via declarations and oral testimony, the Corps' empirically well-documented conclusion that the electric barrier is working to effectively deter Asian carp and is not simply an experiment of unknown efficacy as Plaintiffs contend. There exists a laborious and painstaking process by which the Corps has designed and implemented, and continues to evaluate and fine tune the components of the barrier. Peabody 226:12-229:20, 267:4-269:22; Peabody Decl. ¶ 22; Quarles Decl. ¶¶ 9-38; see generally Shea Decl. The ACRCC's many other efforts, including the Corps' construction of the barrier along the Des Plaines River and with the I&M Canal, complement and ensure the efficacy of the barrier. Peabody 269:23-271:15.

In contrast to the Plaintiffs' complete reliance on eDNA results as the indicator of imminent irreparable injury, other evidence points to a low number of Asian carp individuals in the CAWS above the electric barrier. In the past year, the resource agencies have conducted 3,200 hours worth of surveying and placed miles of nets in the CAWS. Wooley 448:24-449:13; Rogner Decl. ¶ 17. The ACRCC Monitoring subcommittee has established five fixed site monitoring stations within the CAWS, from which sampling events are conducted weekly. Wooley 462:10-463:9. As Mr. Wooley and Dr. Lodge explained, the value of electrofishing and netting depends on the level of effort and combination with other tools. Wooley 489:9-14 (the shortcomings of the traditional methods can be overcome by frequency, repetition and utilizing various tools and certain combinations); Lodge 119:16-18 (acknowledging that in the case of rare species, increasing the sampling effort makes the traditional methods effective). Even Plaintiffs' counsel has described the effort here as "extensive."

Wooley 489:17.[4] Additionally, larval fish tows in the CAWS have not turned up any larval Asian carp. Wooley 463:18-464:21.

The December 2009 rotenone event, which poisoned 5.7 miles of waterway below the electric barrier resulted in the discovery of only one Asian carp. Wooley Decl. ¶¶ 22-28. The May rotenone event near the O'Brien lock was conducted in an area where multiple positive eDNA samples had been collected, and no Asian carp were found out of 130,000 pounds of fish recovered. Id. ¶¶ 43-44. Dr. Lodge attempted to discredit the May rotenone event and lack of discovery of any Asian carp by claiming that fish sank to the bottom and were not seen. Lodge 154:4-15. That is incorrect. The ACRCC accounted for such a possibility by utilizing underwater cameras and divers to ensure that all dead fish were collected. Wooley 445:25-446:14.

Putting all of the evidence together -- the eDNA results (both positive and negative), the extraordinary electrofishing and netting activities above the electric barrier, the lack of fish recovered during the rotenone activities, the one fish discovered in Lake Calumet, the larval fish tows, the evidence that the electric barrier is effectively deterring fish migration, the scientific opinions of the risk assessment panel, and the efforts to reduce propagule pressure below the electric barrier -- one must conclude that the numbers of Asian carp above the electric barrier are low.

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[4] Plaintiffs attack the traditional sampling efforts by claiming those efforts result in only a small percentage of the actual fish present being captured and that these particular fish are hard to capture. Lodge 30:15-31:1 (discussing the Sass article). The author of the article relied upon by Dr. Lodge in criticizing traditional sampling efforts sat on the Fish and Wildlife risk assessment panel. Compare Lodge 30:16 with Wooley 485:23-25. All of the experts on the risk assessment panel (including Sass) stated that a self-sustaining population of Asian carp exists below the electric barrier and not above electric barrier. Dkt. No. 47-4. Moreover, "you can catch them [Asian carp]." Chapman 437:2-3.

Furthermore, Plaintiffs have failed to establish that Asian carp are positioned to establish a breeding population above the electric barrier. Nor have Plaintiffs shown that the fish is on the verge of establishment in Lake Michigan as would be required to support the relief requested. Mr. Chapman explains that there is "no evidence as yet that [Asian carps have entered the Great Lakes in sufficient numbers to establish a successful breeding population]" or that they are close to doing so. Chapman Decl. ¶ 12. Indeed, single bighead carp have been caught in Lake Erie on multiple occasions and there is no indication that the species has established itself. Chapman 384:10-385:10.

The science behind the management of invasive species looks at forecasting the introduction and establishment of that invasive species. Lodge 108: 3-7. In order to predict whether a species can successfully invade an area, scientists look at the potential pathways, the characteristics of the species, whether food would be abundant, whether the species could reproduce in the area, and how temperature would affect the species. Lodge 108:8 - 109:18; see generally Chapman. Asian carp primarily eat plankton. Chapman 380:13-21. One expert (Dr. Susan Cooke) has modeled areas of Lake Michigan and labeled those areas a "plankton desert." Id. 380:22-381:2. As part of its efforts to address the threat posed by Asian carp, the USGS is conducting alternative food studies to determine if Asian carp can survive on other food in the Great Lakes. Id. 381:3-382:13.

Likewise, whether Asian carps can survive and reproduce in the Great Lakes is uncertain. Chapman 377:18-378-1; Lodge 121:8-12. Asian carp are thought to require 100km length of turbid river to spawn. Chapman 378:11-25. Based on the length required, 22 rivers and tributaries have been identified in the United States' regions of the Great Lakes as potential reproductive habitat; further research is being done to confirm those findings. Id. 379:15-380-12. It is anticipated that the lower temperatures of the Great Lakes will slow down reproduction. Id. 382:16-384:9.

Of importance to the question of timing, Mr. Chapman explains that the establishment of a fish population depends on the number of fish present and invaders usually require multiple introductions. Chapman 385:23-386:18, 393:2-4 ("Ninety percent of invasions are thought to fail . . . ."). The best information available provides evidence that if such an invasion [of Asian carp into the Great Lakes] does occur, it will probably take many years (possibly one to three decades) for the population to become problematic, based on the history of Asian carp invasions, models of invasive species and the size of the Great Lakes. Chapman 386:19-390:12; Wooley 469:16-24 (discussing the risk assessment experts estimations that it could take up to 25 years for the establishment of an Asian carp population in Lake Michigan).[5]

Likewise, "[t]he potential for damage [to the Great Lakes] is high (although not as high as some would have it -- the complete destruction of all fisheries in the Great Lakes is extremely unlikely) but the level of certainty that any damage will occur is low." Chapman Decl. ¶ 27; Chapman 392:14-394:13. The potential and level of any harm is unknown and cannot form the basis for a preliminary injunction. In short, Plaintiffs cannot demonstrate imminent, irreparable harm where "[i]t is impossible to predict with precision whether Asian carps will be able to adapt, produce a large population, and become problematic in the Great Lakes." Chapman Decl. ¶ 9.

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[5] The FWS Risk Assessment posed a yes or no question as to whether there was an "imminent" threat that Asian carp would establish a self-sustaining population in Lake Michigan. As explained by Wooley and Chapman, the scientists who responded yes were uncertain as to that answer, the question represented a "snapshot" as to February 2010, and the actions being taken by the ACRCC should reduce that risk. Chapman 391:5-25, 392:1-13, 432:20-433:10, 436:2-12.; Wooley 470:5-470:24, 516:11-25. Furthermore, the use of "imminence" in that assessment in no way equates to the legal standard applicable here.

III. An Injunction Would Harm The Public Interest

As set forth in the Corps' Opposition to Plaintiffs' Motion, the locks and sluice gates at the Chicago River Controlling Works and O'Brien Lock and Dam are used to relieve flooding, expedite responses to search and rescue and law enforcement emergencies, transport cargo, and promote recreation. Fed. Def. Opp. at 39-49. Plaintiffs fail to make the heightened showing necessary to establish that their requested mandatory injunctive relief would be superior to the multi-agency efforts to prevent a self-sustaining population of Asian carp from becoming established in the Great Lakes, much less that imposing these harms and risks upon the public would be in the public interest.[6] See Heckler v. Lopez, 463 U.S. 1328, 1333-1334 (1983); Jordan v. Wolke, 593 F.2d 772, 774 (7th Cir. 1978) (holding mandatory injunction requiring "structural modifications . . . and . . . increased personnel" inappropriate where Plaintiffs failed to carry their "burden of proof as to the matters of 'unreasonable expenditures' and 'allocation of scarce financial resources'").

A. Installing bulkheads would impose risks and harm upon the public.

Plaintiffs' Motion failed to specify any plan for "closing and ceasing operation of the" Chicago and O'Brien locks. See, e.g., Motion at 32. Plaintiffs' Reply proposes that bulkheads be immediately and indefinitely installed to close both locks. Reply at 25-26. This new proposal for mandatory relief compounds the problems posed by Plaintiffs' initial proposal.

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[6] Neither Plaintiffs' Reply nor their testimony responds to the Corps' arguments that accelerating and predetermining the results of the Great Lakes and Mississippi River Inter-Basin Study ("GLMRIS") would be inappropriate. Fed. Def. Opp. at 47; Peabody 276:2-10. Likewise, Plaintiffs failed to provide any support for a mandatory injunction requiring the application of rotenone. Fed. Def. Opp. at 49. To the contrary, it is inappropriate to apply rotenone in many situations. Wooley 445:6-17; see also, Lodge 130:9-14.

Plaintiffs maintain that they seek relief that is "consistent with the protection of public health and safety." Reply at 21. Nonetheless, Plaintiffs do not explain how the locks' important public health and safety functions could be maintained if this Court grants Plaintiffs' proposed mandatory injunctive relief. See Lodge 125:11-17; 170:12-171:10. To the contrary, Plaintiffs' proposal that the Corps install bulkheads at both locks and station a barge and crane at each lock to remove the bulkheads, if necessary, would: 1) increase flood risks; 2) divert millions of dollars from necessary Corps projects; and 3) delay critical Coast Guard missions. When coupled with the certain economic harms that would be caused by Plaintiffs' proposed relief, these consequences of installing bulkheads at the Chicago and O'Brien locks harm the public interest.

The Corps must repair the Chicago lock by temporarily installing bulkheads during the less-risky winter months - or risk a failure that would leave the Corps unable to relieve flood waters. Abou-el-Seoud Decl. ¶ 5; Peabody 285:2-13. It is taking extraordinary steps to minimize the risk of flooding during the repair by stationing a barge and crane at the Chicago lock at a cost of at least "$12,000 a day." Peabody 283:20-21. The Corps plans to begin removing the bulkheads as a precautionary measure based upon weather forecasts, meaning that bulkheads may have to be removed even if the lock is not ultimately used for flood control. Peabody 343:17-344:10; 365:15-366:8.[7] Even so, it takes hours longer to remove bulkheads than it does to conventionally open the lock, Peabody 362:21-363:9; Cox 540:3-12, and it is impossible to remove the bulkheads under certain weather conditions. Peabody 363:16-19.

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[7] In the event that the Court is inclined to grant Plaintiffs' proposed mandatory injunction, it is imperative that the Corps retain the discretion to respond to forecasted and actual rain events by removing the bulkheads as possible and as the Corps deems appropriate. Additionally, any such order must take into account the fact that it would take at least "six months" to obtain and position a crane capable of installing and removing bulkheads at O'Brien. Cox 538:13-539:19.

The July 24, 2010 Chicago rainstorm illustrates the risks posed by Plaintiffs' proposal. The Corps had to use the Chicago lock to relieve flood waters within "three hours" of the time when the water levels in the CAWS began to rise, and opened those locks immediately upon request from the MWRD. Su 564:12-23; 565:7-18. The rainstorm "would have caused significant flooding in . . . if the Chicago sluice and lock gates had not been opened quickly." Peabody Decl. at ¶ 55(a); Su 566:2-16. The Corps' plan to take extraordinary steps to minimize flood risks during its repair of the Chicago lock during the less-risky winter months does not establish that both locks could be bulkheaded indefinitely without imposing unreasonable flood risks . See Abou-el-Soud, ¶ 3.

Plaintiffs' proposal would also impose risks upon the public beyond Chicago, as it would divert scarce Corps resources from other needed projects. Plaintiffs' proposed installation of bulkheads and cranes at both locks would require the diversion of millions of dollars of limited Corps' resources to mitigate the flood risk posed by installing bulkheads. Peabody 340:1-12. Such expenditures will "have a direct impact" on the Corps' ability to conduct critical repairs at other facilities – increasing the risk of lock failures because these projects "will not get done." Peabody 284:1-25; 285:24-286:3; 341:11-25; Cox 557:1-11. Similarly, dedicating the Corps' limited supply of bulkheads to O'Brien would reduce the Corps' ability to respond to emergencies on the Mississippi, which has greater need for the bulkheads. Cox 536:9-538:6. Plaintiffs fail to make the heightened showing necessary for a mandatory injunction reallocating the Corps' resources. See Heckler, 463 U.S. at 1333-1334.

Plaintiffs appear to recognize that delaying Coast Guard responses to search and rescue and law enforcement missions would impose unacceptable risks upon the public. Reply at 27-29. Plaintiffs' revised proposal would increase the Coast Guard's response times for some of these

missions by effectively terminating navigation through the locks. Fed. Def. Opp. at 43-44. Plaintiffs' only response - to suggest that the Coast Guard should be able to fulfill its missions if both locks are closed because it plans to cope with the scheduled repair of the Chicago lock this winter -- is not persuasive. Reply at 28-29; See Heckler, 463 U.S. at 1333-1334. The Coast Guard recognizes that a temporary interruption of its use of the Chicago lock, and resulting increase in response times during the less-busy winter season, is necessary because the Corps' repair of the lock will promote public safety in the future by providing for faster response times. Barndt ¶¶ 49-50, 54-55, 60. Closing both locks indefinitely would result in more delays, for a longer period of time, during busier times of year than those imposed by the necessary Chicago repairs. See Barndt ¶¶ 46, 54.[8]

Installing bulkheads would also end commercial and recreational navigation through the locks. Plaintiffs' expert, Dr. John Taylor, considered only a few of the many economic issues raised by such closures. See Reply at 30; Moyer Decl. ¶¶ 19, 21; Savage Decl. ¶ 19 (Attached as Exhibit 1 to Moyer Decl.). The Corps intends to study these economic impacts more fully in GLMRIS. Peabody Decl. ¶ 56(c); Peabody 277:12-23. Plaintiffs have failed to fully consider the economic costs of their proposed relief, much less prove that imposing such costs is in the public interest.

B. Installation of screens on all sluice gates at O'Brien would impose additional flood risks upon the public.

Plaintiffs propose additional mandatory relief that would compound the risks posed by installing bulkheads at both locks - installing screens on all sluice gates at the O'Brien, Chicago, and

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[8] Plaintiffs make the extraordinary suggestion that these risks could be avoided if the Coast Guard established one or two stations on the riverward side of the locks. Reply at 29. The Coast Guard is not a defendant and Plaintiffs do not address that the Coast Guard would have to acquire land for, construct, and staff any new stations. Plaintiffs do not address the Coast Guard's inability to staff a new, full-time station without "decreasing the . . . response capabilities" of other stations and imposing risks on other areas of Lake Michigan. Barndt ¶ 62.

Wilmette structures. Plaintiffs suggest that the Corps attempt to address the flood risks posed by the screens by installing raking machines to remove debris from the screens. Reply at 23-24.

Plaintiffs' proposal to install sluice gate screens is particularly inappropriate for preliminary injunctive relief because it would require a modification of the dam to install raking machines at O'Brien. See Jordan, 593 F.2d at 774. Such a project would take at least one year to complete. Cox 543:9-21. Even if the Corps had funds for both the machines and the modification, Plaintiffs have failed to establish that raking machines would adequately remove debris from screens under flood conditions at O'Brien. Cox 550:6-551:11; 552:10-21; 557:12-22.

Moreover, installing sluice gates screens would increase flood risks if coupled with the proposed bulkheading of the locks. Screens reduce the flow of water through sluice gates regardless of whether they are blocked by debris. Therefore, the locks would have to be used more quickly and frequently if more screens are installed. Su Decl. ¶ 16; Su 565:19-23; 569:19-571:4. This increased reliance on the locks to relieve flood waters would impose additional risks upon the public if coupled with Plaintiffs' proposal to install bulkheads in both locks, which would increase the amount of time required to open the locks. Plaintiffs fail to establish that such relief is appropriate.

C. Installation of multiple block nets in the Calumet and Little Calumet Rivers would impose additional flood risks upon the public.

Plaintiffs similarly fail to establish that it is in the public interest to install block nets and/or physical barriers in the Calumet and Little Calumet Rivers. Reply at 26-27 (asserting, without support, that block nets "are far less likely to contribute to flooding than fixed, impermeable structures."). Plaintiffs compound the risks posed by their initial request for single block nets in each river by proposing that multiple, parallel block nets be installed in each river. Id. Each block net

installed would increase flood risks, as the nets would catch the "great deal of debris" that flow through the CAWS during flood conditions. Peabody 357:23-359:3; Su Decl. ¶ 17; Su 566:21-567:10. While the Corps continues to study the possibility of using block nets to fight Asian carp, it has been unable to identify a barrier that would be effective at impeding Asian carp without inducing flooding. Peabody 358:17-359:3; Peabody Decl. ¶ 58. As with Plaintiffs' proposed mandatory relief requiring the installation of bulkheads and sluice gate screens, Plaintiffs fail to establish that block nets or interim barriers would not increase flood risks.

D. Plaintiffs' relief would impose costs without producing discernible benefits.

Plaintiffs similarly fail to establish that their proposed relief is likely to improve upon the Corps' and ACRCC's efforts to prevent the establishment of Asian carp in the Great Lakes. Reply at 26. Plaintiffs appear to assume that their relief will be effective because "fish cannot swim through physical barriers . . . if the openings are smaller than the fish." Lodge 97:14-16. Even if bulkheads are installed at the locks, imposing all of the above-discussed risks upon the public, it would not eliminate the need to open, and allow water to flow through, the locks. Peabody 343:17-344:10; 365:15-366:8; Cox Decl. ¶¶ 6-7. Moreover, installing screens on all sluice gates as proposed by Plaintiffs would require the locks to be opened with greater frequency. As six of the seven experts who participated in the Fish and Wildlife Risk Assessment panel determined, limiting lock openings is unlikely to "statistically reduce the likelihood of Asian Carp passing through the locks." Darcy, Attach. 2 at 52; Id. Appendix D at Section V. In short, Plaintiffs' proposed relief would impose certain harms and increased risks upon the public in exchange for unlikely benefits. They have failed to prove that their proposed mandatory injunction is in the public interest.

CONCLUSION

Based on the above, the federal defendant respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,
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