No. 12-3800

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF MICHIGAN, ET AL.,

Plaintiffs-Appellants,

and

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
Intervenor-Appellant,

v.

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

and

CITY OF CHICAGO, WENDELLA SIGHTSEEING COMPANY, INC. and COALITION TO SAVE OUR WATERWAYS,
Intervenors-Appellees.

Appeal from the United States District Court
Northern District of Illinois, Eastern Division
Honorable John J. Tharp, Jr.

WENDELLA SIGHTSEEING COMPANY, INC. and THE COALITION TO SAVE OUR WATERWAYS BRIEF IN RESPONSE TO PLAINTIFFS-APPELLANTS APPELLATE BRIEF

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DISCLOSURE STATEMENT

Fed. R. App. P. 26.1, Circuit Rule 26.1

Intervenor–Appellee, Wendella Sightseeing Company, Inc. ("Wendella") and its counsel, hereby reaffirm the following information as filed in the Disclosure Statements previously filed with this Honorable Court (Docket #20):

Wendella does not have a parent corporation and no public company owns 10% or more of its stock.

The names of all law firms whose partners or associates have appeared for Wendella in this case or are expected to appear in this Honorable Court are:

The Law Offices of Stuart P. Krauskopf, P.C.

DISCLOSURE STATEMENT

Fed. R. App. P. 26.1, Circuit Rule 26.1

Intervenor–Appellee, Coalition to Save Our Waterways (the "Coalition") and its counsel, hereby reaffirm the following information as filed in the Disclosure Statements previously filed with this Honorable Court (Docket #20):

The Coalition does not have a parent corporation and no public company owns 10% or more of its stock.

The names of all law firms whose partners or associates have appeared for the Coalition in this case or are expected to appear in this Honorable Court are:

The Law Offices of Stuart P. Krauskopf, P.C.
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JURISDICTIONAL STATEMENT

The Plaintiffs' Jurisdictional Statement is complete and correct.

STATEMENT OF THE ISSUES

Did the District Court err in its ruling that Plaintiffs did not state a case upon which relief can be granted where: 1) Congress has enacted a series of statutes which require that the Chicago Area Waterways System ("CAWS") serve as an open navigable waterway between Lake Michigan and the Mississippi River; and, 2) the Plaintiffs' prayer for relief requests that the Court to force the United States Army Corps of Engineers ("Corps") to close navigation locks and implement plans to physically separate the CAWS, to prevent navigation between Lake Michigan and the Mississippi River?[1]

STATEMENT OF THE CASE

1. Substantive.

Plaintiffs have a long history voicing their disapproval to the courts about the construction and operation of the Chicago Sanitary and Ship Canal ("CSSC") and the attendant diversion of water from Lake Michigan. Plaintiffs now use Asian carp in pursuit of their veiled attempt to obtain full ecological separation between Lake Michigan and the Mississippi River, despite the fact that invasive species are nothing new, and that invasive species enter Lake Michigan and the other Great Lakes through similar navigation channels and structures in the Plaintiffs' respective states and other locations.

Plaintiffs' claim is based entirely on the fact that the CAWS continues to be operated as intended by Congress – as an open navigational link between the Great Lakes and Mississippi

[1] As regular users of the CAWS and the Locks, Wendella and the Coalition have focused their argument to the Plaintiffs' failure to state a cognizable claim for public nuisance, with respect to the Plaintiffs' two main requests that would end open navigation – complete separation of the CAWS from Lake Michigan and closure of the Locks. Wendella and the Coalition join in all other arguments set forth by the Corps in their Brief, including sovereign immunity and federal common law displacement.

River system. Plaintiffs do not suggest that the Corps or the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") have acted negligently, or outside of the scope of their authority. Put simply, Plaintiffs are unhappy that this navigational link exists and that Illinois diverts water from Lake Michigan. The Corps and MWRD operate the CAWS pursuant to Congress's orders, and no one but Congress can obstruct or stop navigation in the CAWS. Even taking every fact set forth by Plaintiffs as true, and viewing their Complaint in the most favorable light possible, Plaintiffs have not pled a cognizable public nuisance claim. As a result, the District Court correctly dismissed their Complaint.

As this Court noted in its Order confirming the dismissal of Plaintiffs' motion for preliminary injunction, Plaintiffs' claim under the Administrative Procedure Act is wholly dependent upon the viability of its public nuisance claim. *See, Michigan v. United States Army Corps of Engineers*, 667 F. 3d 765 (7th Cir. 2011). Because Plaintiffs have not – and cannot – state a cognizable claim for public nuisance, their APA claim must also fail.

2. Procedural.

On July 19, 2010, Plaintiffs filed their Complaint and Motion for Preliminary Injunction, seeking, among other things, closure of the Locks (as defined below) and physical separation of the CAWS from Lake Michigan. App. 32 and 34. All parties fully briefed the Motion for Preliminary Injunction and the District Court heard several days of oral argument and testimony in an evidentiary hearing. On December 2, 2010, the trial Court denied the injunctive relief. Plaintiffs appealed, and this Court affirmed the denial of the preliminary injunction on August 24, 2011.

On January 30, 2012, Defendants and Intervenors filed Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). After fully briefing the Motions to Dismiss, the

District Court dismissed Plaintiffs' action with prejudice, in a Memorandum Opinion dated December 3, 2012. Plaintiffs decided not to file an Amended Complaint.

Plaintiffs have appealed the District Court's ruling on the Motion(s) to Dismiss. As set forth below, the District Court's ruling was correct and should not be overturned by this Honorable Court.

STATEMENT OF RELEVANT FACTS

Plaintiffs correctly state that for the purpose of a 12(b)(6) motion, all facts are to be taken as true. *Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F. 3d 828 (7th Cir. 2012). Thus, for the sole purpose of this appeal, Wendella Sightseeing Company, Inc. ("Wendella") and the Coalition to Save Our Waterways (the "Coalition"), accept all facts contained in Plaintiffs' Complaint as true. In its December 3, 2012 Order (S. App. 1-46), the District Court provided an excellent summary of the background facts of this case, including the CAWS, Asian carp and the considerable efforts that have been taken by Congress, federal and state agencies, including the Corps and the MWRD, to detect and prevent the potential movement of Asian carp through the CAWS. Wendella and the Coalition refer to the District Court's statement of facts, with highlights and updates as noted below.

In 1890, the United States government enacted legislation which contained an appropriation for the building of the CSSC (the "1890 Act") Section 1; 26 Stat. 426, 449, C. 907. The CSSC is part of the CAWS, which consists of approximately 78 miles of canals and natural waterways in and around Chicago. Op. Br. 11. The express purpose of the CSSC was to open a navigable pathway between the Saint Lawrence Seaway and the Gulf of Mexico, and more specifically a navigational link between the Mississippi River System and Lake Michigan. *See*, the 1890 Act, Section 1; 26 Stat. 426, 449, c. 907, *see, also*, Rivers and Harbors Act, Pub. L. No.

71-520, 46 Stat. 918, 929, S. Doc. No. 71-126 at 5 (1930). To allow for navigation on the CSSC, three locks were built pursuant to federal statute: the Lockport Powerhouse and Lock (the "Lockport Lock"), the O'Brien Lock and Dam (the "O'Brien Lock"), and the Lock at the Chicago River Controlling Works (the "Chicago Lock," and collectively, the "Locks"). By statute, the Corps maintains the CAWS as needed to support navigation from the Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River. *See*, Energy and Water Development Appropriations Act, Pub. L. No. 97-88, § 107, 95 Stat. 1137 (1981); Supplemental Appropriations Act, 1983, Pub. L. No. 98-63,Tit. I, Ch. IV, 97 Stat. 311 (the "1981 Act and the Supplemental Act of 1983"). The Locks are also used for flood control purposes and to improve and maintain inland water quality. Vessels enter and exit the Chicago end of the CSSC through the O'Brien Lock and the Chicago Lock.

The Corps constructed and operates a series of electrical dispersal barriers intended to repel fish and stop the emigration of aquatic nuisance species through the CAWS. The dispersal barriers operate by creating an electrical field in the water of the CAWS, which repulses fish and is a deterrent to fish swimming through the electrified area. Because of the barriers' potential effect on navigation in a federal waterway, each barrier was specifically authorized by Congress as part of either standard legislation or appropriations bills. *See, e.g.*, the National Invasive Species Act, 16 U.S.C. § 4701, *et seq.*; 16 U.S.C. § 4722(i)(3) (authorizing construction of Barrier I), and Section 1135 of the Continuing Authority Program, 33 U.S.C. § 2309 (authorizing construction of Barrier II).

Congress has authorized numerous federal and state agencies to identify the location of Asian carp and prevent the spread of Asian carp. *See, e.g.,* the Water Resources Development Act ("WRDA"), Section 3061(b)(1)(D)(2007); the Energy and Water Development

Appropriations Act of 2010, P.L. 11-85 ("Section 126 Authority"); the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. 4701-4751; and the Great Lakes Basin and the Mississippi River Inter-Basin Study ("GLMRIS"), WRDA, Sec. 3061(d) (2007).

Despite the numerous ongoing acts of Congress, the Corps and numerous federal and state agencies, and despite hundreds of potential options being reviewed and assessed by the Corps and other agencies, Plaintiffs seek judicial relief to impose their own concept of how the potential threat can be prevented.

SUMMARY OF ARGUMENT

The District Court correctly found that because the conduct which Plaintiffs complain has been fully authorized by statute, Plaintiffs cannot maintain its public nuisance action. Notably, the District Court recognized that the courts cannot, under any circumstances, grant the relief sought by Plaintiffs, because the relief sought by Plaintiffs - Lock closure (on an interim basis) and complete physical separation of the CAWS (on a permanent basis) – would violate existing federal statutes.

Plaintiffs' suggestion that the District Court's ruling is an "extraordinary turnabout" from this Court's prior ruling is unfounded. Op. Br. 23. In affirming the denial of Plaintiffs' claim for injunctive relief, this Court was not asked to determine if Plaintiffs can state a claim upon which relief can be granted. This Court did express that the Plaintiffs could possibly satisfy the likelihood of success test in its claim for injunctive relief, but that standard is completely different than the standard employed by the District Court in its ruling on the Motions to Dismiss. *See*, *Michigan*, 667 F. 3d 765 (7th Cir. 2011).

Despite Plaintiffs' assertions, Congress has fully authorized the conduct which is the basis for Plaintiffs' public nuisance action. Plaintiffs attempt to obfuscate the issue by framing it

as the lack of a statutory regime for regulating the passage of Asian carp in the CAWS. But they completely ignore the statutory regime for keeping the CAWS / CSSC open which has been in place for over one hundred years. Despite Plaintiffs' claims to the contrary, it is unquestionable that keeping the CAWS / CSSC open for navigation is fully authorized by federal statute. As a result, even assuming that Plaintiffs could prove that there is an imminent threat of invasion of Asian carp, the relief sought by Plaintiffs is beyond the authority of the courts. The District Court understood this and properly ruled on this basis.

Despite their 62-page brief, Plaintiffs essentially can do no more than ask the Corps to do exactly what Congress has authorized the Corps to do. As Plaintiffs concede, they are not demanding Congressional action, which they obviously cannot do through the Courts. Plaintiffs state that they are not seeking a court order to require Congress to adopt legislation to close the waterway. Instead, they ask this Court to require the Corps to "quickly develop and seek Congressional approval of plans for hydrological separation." Op. Br. 26. Of course, this Court cannot force the Corps to recommend or implement anything at this point, since Congress has already authorized the Corps to study methods of prevention of Asian Carp and report its findings to Congress on January 6, 2014. *See*, GLMRIS website, www.glmris.anl.gov; *see, also*, Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, div. A, tit. I, subtit. E section 1538 (the "Progress Act").

STANDARD OF REVIEW

Review of the District Court's decision to grant Defendants' Motion to Dismiss is *de novo*. *Sung Park*, 692 F. 3d 828. Wendella and the Coalition agree with the Plaintiffs' statement that the Court must construe all of the Plaintiffs' factual allegations as true and must draw all reasonable inferences in the Plaintiffs' favor. *Id.* at 830. For Plaintiffs' Complaint to survive the

Motion to Dismiss, their Complaint must state a claim that is plausible on its face. *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F. 3d 614, 618-619 (7th Cir. 2007).

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN ITS GRANTING OF THE RULE 12(b)(6) MOTION

THE RELIEF SOUGHT IN PLAINTIFFS' PUBLIC NUISANCE ACTION IS UNLAWFUL

Beginning with the authorization for the building of the CSSC through the present, Congress has enacted numerous statutes which provide for an open navigable channel from the St. Lawrence Seaway to the Mississippi River. Plaintiffs incorrectly argue that there is no comprehensive statutory scheme which would preclude their action for public nuisance. As set forth below, Congress authorized the building of the CSSC and only Congress can close it. Plaintiffs fail to make a cogent argument that the statutes cited by the District Court do not regulate the continued management of an open navigable waterway along the CAWS.

Pursuant to Section 10 of the 1899 Act, the federal government has paramount control over navigable waters, and that an act of Congress is necessary to authorize any obstruction to the navigable capacity of a navigable water. *See*, *Sanitary District of Chicago v. United States*, 266 U.S. 405, 425, 45 S. Ct. 176, 178 (1925). It is of no consequence that continued congressional direction to keep the CAWS open for navigation is contained in appropriations bills.[2] The fact that Congress has appropriated funds for the continued, "interest in navigation," is determinative of the continued Congressional intent to fully authorize the Corps to maintain an open waterway. *See*, 1981 Act and the Supplemental Act of 1983.

[2] We note that the barrier system, which was funded via Congressional appropriations bills, have resulted in structures being built and placed in the waterway system to prevent the spread of Asian carp. Although the funds appropriated have been spent, the directive from Congress to build the structures is no less authoritative.

Plaintiffs do not argue that their public nuisance claim fails if the relief sought has been fully authorized by statute. Plaintiffs concur with the District Court that comment "f" to the Restatement of Torts Section 821 B(2) would defeat its claim if the alleged nuisance was fully authorized by statute ("Comment F"). Restatement 2d of Torts, Section 821B2(f). *See, e.g.*, *Transportation Company v. Chicago*, 99 U.S. 635, 640, 25 L. Ed. 336, 337 (1878) ("A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded.").

Plaintiffs' attempt to argue that Congress has not fully authorized the Corps to maintain the Locks and maintain navigation in the CAWS is clearly wrong. Plaintiffs rely entirely on *Harrison v. Indiana Auto Shredders Co.,* 528 F. 2d 1107 (7th Cir. 1975), stating that *Harrison* "is the leading case cited as the basis of Comment F." Op. Br. 31. Plaintiffs claim that *Harrison* "shows an important distinction on the meaning of 'fully authorized.'" However, nothing in *Harrison* discusses any distinction of the phrase "fully authorized." What *Harrison* does focus on is the fact that an auto shredding company was not committing a public nuisance because it complied with all zoning and permit requirements to conduct its business. *See*, *Harrison*, 528 F. 2d at 1125. In fact, the *Harrison* Court reversed an injunction against the auto shredding company, because it held they were in full compliance with the zoning and air pollution regulations. *See*, *Harrison*, 528 F. 2d at 1125-1126.

Plaintiffs confuse the issues and misapply *Harrison* by asserting that there is no statutory regime regulating the passage of Asian carp in the waterway. But, the relevant statutes prohibit disruption and obstruction of navigable waterways without Congressional approval – they do not

regulate Asian carp. *See*, 33 USCS § 401 and 33 USCS § 403. Just as in *Harrison*, Plaintiffs in this case fail to show that the Corps and the MWRD have failed to operate under the statutory authority imposed on them.

The District Court recognized that, "where a defendant's actions are specifically approved by statute or regulation, the result of such actions does not constitute a nuisance." *See*, S. App. 63. Plaintiffs ask this Court to close the O'Brien Lock and the Chicago Lock, which would effectively close the navigable waterway. App. 34. Plaintiffs also request permanent relief through complete separation of the CAWS / CSSC. App. 36. Plaintiffs mistakenly believe that the District Court's interpretation of the statutory scheme was flawed because certain statutes cited by the District Court were appropriations bills. An analysis of the full statutory scheme undermines Plaintiffs' argument and ultimately their entire case.

The creation of the CSSC was authorized by Congress under the Rivers and Harbors Acts of 1890 and 1899. In the September 13, 1890 appropriations bill, the 51st Congress authorized the construction of a canal to connect the Illinois River with the Mississippi River. Rivers and Harbors Act of 1890, 26 Stat. 426, c. 907. Subsequently, the Rivers and Harbors Act of 1899 codified the obligation and authority of the federal government, and specifically Congress, to insure that federal navigable waterways such as the CAWS remain free from obstruction. Rivers and Harbors Act of 1899, 26 Stat. 426, c. 425.

In Section 10 of the 1899 statute, Congress provided in relevant part:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited."

33 USCS § 403 (hereinafter referred to as "Section 403").

Section 403 bans any type of obstruction in a federal waterway, not merely those specifically made subject to approval by the Secretary of the Army. *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S. Ct. 884 (1960).

Section 9 of the 1899 statute, as amended by Congress in the January 12, 1983 Rivers and Harbors Act, also prohibits construction that would result in complete obstruction of the federal waterways:

> § 401. Construction of bridges, causeways, dams, or dikes generally
>
> "It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army."
>
> 33 USCS § 401 (hereinafter referred to as "Section 401").

In *Sanitary District of Chicago*, Justice Holmes delivered the opinion of the Court, affirming an injunction issued against the State of Illinois for diverting an amount of water from Lake Michigan beyond the authority directed by the Secretary of War. 266 U.S. 405, 428-429, 432. In that case, the Court construed the 1899 statute to mean that the new canal was a federal waterway and that, absent Congressional authority, no obstruction of that waterway was lawful. *Id*.

The Illinois Supreme Court has held that a similar federal waterway (the Illinois and Michigan canal) could not become unnavigable without an act of Congress. *People ex. Rel. Kerner v. McDonnell*, 362 Ill. 114 (1935).

Plaintiffs ignore Section 401 and Section 403 in their brief. There is nothing in the language of Section 401 or Section 403 that requires further interpretation. Section 401 and

Section 403 are not appropriations bills. They are still the law of the land. They are ongoing federal statutes that stand alone as a complete prohibition to obstructions of federal waterways such as the CAWS. Plaintiffs mischaracterize what Congress has authorized by stating, "… that is a far cry from mandating that 'through' navigation must be maintained in the Waterway under every circumstance and at every cost." Op. Br. 39. That assertion flies in the face of statutory and case law that has now survived for over one hundred years. *See, e.g.*, *Republic Steel,* 362 U.S. 482, *United States v. Arizona*, 295 U.S. 174, 55 S. Ct. 666 (1935), and *Sanitary District of Chicago*, 266 U.S. 405. It follows that if only Congress can authorize an obstruction of a federal waterway, then it is up to Congress – not the Corps or the courts - to close the Locks or physically separate the CAWS.

Even assuming, arguendo, that Section 401 and Section 403 do not exist, Congress has "fully authorized" continued navigation through repeated funding of the CAWS and Locks through subsequent appropriations bills. As noted by the District Court in the 1981 Act and the Supplemental Act of 1983, Congress provided the Corps with funding for the operation of the CSSC, "in the interest of navigation." S. App. 30. Congress has enacted at least two other statutes which conclusively evidence its desire to keep the CAWS as an open navigable waterway. The 1930 Rivers and Harbors Act authorized the continued diversion of water for navigational purposes in the waterway. 46 Stat. 918. Again in 1946, Congress enacted the Rivers and Harbors Act, in which Congress authorized the plan to improve navigation on the CAWS through construction of the O'Brien Lock. 60 Stat. 636.

Plaintiffs, somewhat bewilderingly, claim that "[N]one of the discussed appropriations or authorization statutes evidences a congressional intent to legally require uninterrupted operation and maintenance of the [CAWS and Locks]." Op. Br. 39. This is flatly wrong. Congressional

authorization can be found "in virtually any type of statute, including appropriations statutes," so long as Congress specifically addresses a certain project. *See, e.g.*, *Sierra Club v. Andrus*, 610 F. 2d 581 (9th Cir. 1979), reversed on other grounds, 451 U.S. 287 (1981), and vacated on other grounds, 451 U.S. 965 (1981). Ongoing approval for operation of a project after construction is completed is demonstrated by repeated Congressional appropriations indicating that Congress was aware of the project and its ongoing operations. *Id*.

The District Court did not err in recognizing that the Corps does not have the control over the CAWS and therefore the Corps cannot be the proximate cause of the potential for the alleged public nuisance that is the foundation of Plaintiffs' Complaint. Plaintiffs realize that even if the Corps is to timely deliver a plan to stop the alleged invasion, Congress might not consent to it. It is telling that Congress has expedited the due date for the Corps to provide its recommendations for prevention of Asian carp to migrate into the Great Lakes basin and the Mississippi River basin. *See*, Progress Act. Congress has had several opportunities to close the CAWS until this study is complete and it has opted not to do so.

Plaintiffs refuse to accept that Congress ultimately controls the CAWS and the CSSC, not the Defendants. The relief that Plaintiffs seek is to have the Defendants follow their directions for preventing the alleged Asian carp invasion. They say in their Brief, "Thus, Defendants' acts and omissions, not the existing statutes enacted by Congress, are the "proximate cause" of the threatened harm." Op. Br. 26. Plaintiffs continue, "The Plaintiffs do not seek an order directing Congress to approve hydrological separation or to take any other action for that matter." *Id.* However, throughout their Brief, Plaintiffs unabashedly request that the Defendants close the waterway. But the Defendants do not have the legal authority to grant the relief that is requested. The entire basis for Plaintiffs' argument that everything lies in the hands of the Corps is that

"unless the Defendants prepare a plan and submit it to Congress, separation will not happen." This conveniently ignores the fact that Congress could have simply told the Corps to separate the CAWS, or close the Locks. In fact, Congress would have to specifically request the Corps to do that. But they did not. Congress asked the Corps to study the broad range of potential options in addressing Asian carp, and to report back. *See*, GLMRIS. And the Corps is doing exactly that. The District Court understood this limitation in the Complaint and struck it accordingly.

CONCLUSION

For the reasons set forth herein, Plaintiffs have failed to set forth a cognizable claim for public nuisance against the Corps or the MWRD. Thus, Wendella and the Coalition respectfully request this Court for the entry of an Order:

A. Affirming the District Court's December 3, 2012 Order dismissing Plaintiffs' Complaint in its entirety with prejudice;

B. Assessing attorneys' fees and costs against Plaintiffs and in favor of Wendella and the Coalition; and

C. Granting Wendella and the Coalition further relief as this Court deems just and proper.

Respectfully submitted,

WENDELLA SIGHTSEEING COMPANY, INC. and THE COALITION TO SAVE OUR WATERWAYS, Intervenors,

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April 30, 2013

CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, excepting the portions described in Rule 32(a)(7)(B)(iii), the brief contains 4,052 words.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, I electronically filed the ***Wendella Sightseeing Company, Inc. and The Coalition to Save Our Waterways Brief in Response to Plaintiffs-Appellants Appellate Brief*** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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