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-Plaintiff-Appellant,

v.

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

CITY OF CHICAGO, *et al.*,
Intervenor-Defendants-Appellees.

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

# BRIEF FOR PLAINTIFFS-APPELLANTS

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

**Cases**

**Statutes**



**Other Authorities**

**Rules**



**Regulations**

## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, the States of Michigan, Wisconsin, Minnesota, and Ohio, the Commonwealth of Pennsylvania, and the Grand Traverse Band of Ottawa and Chippewa Indians appeal from the District Court's December 3, 2012 Order dismissing Plaintiffs' Complaint (App. 3)[1] and Final Judgment entered on December 10, 2012. (S. App. 47.)

### 1. Statement concerning the District Court's jurisdiction

As alleged in paragraph 2 of the Complaint (App. 3), the District Court has federal question jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702 as this is a civil action seeking injunctive and declaratory relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the federal common law of public nuisance.

[1] Documents contained in the required Short Appendix are referenced as "S. App. [page number(s)]." Documents in the Appendix are referenced as "App. [page number(s)]." Other documents in the District Court record are referenced by their District Court page number as "R. [page number(s)]."

**2. Statement concerning appellate jurisdiction**

The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction under 28 U.S.C. § 1291, which provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

The Judgment of the District Court appealed here (S. App. 47) is a final decision, which states: "Upon dismissal of complaint and plaintiff's notice that it does not intend to file an amended complaint, the case is dismissed with prejudice." It was entered by the District Court pursuant to that Court's December 3, 2012 Memorandum Opinion and Order (S. App. 1) that granted the Defendants' motions to dismiss and the subsequent filing of Plaintiffs' Notification of Intention Not to Amend Complaint. (R. 6728.)

The Notice of Appeal was timely filed with the District Court Clerk on December 12, 2012. (R. 6734.) Under Federal Rule of Appellate Procedure 4(a)(1)(B), when the United States or a federal agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

### 3. Prior related appellate proceedings

Plaintiffs-Appellants previously appealed the December 2, 2010 Order of the District Court (R. 5040) denying their Motion for Preliminary Injunction to the United States Court of Appeals for the Seventh Circuit, *State of Michigan, et al. v. United States Army Corps of Engineers,* (7th Cir. No. 10-3891). The Court of Appeals affirmed the December 2, 2010 Order of the District Court in its Opinion issued on August 24, 2011 (Court of Appeals Docket #44) and Final Judgment entered on August 25, 2011 (Court of Appeals Docket #45). The Court of Appeals' Opinion is published at 667 F.3d 765.

## STATEMENT OF ISSUES PRESENTED

The Plaintiff States and Tribe allege that the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago are liable for a public nuisance under federal common law by continuing to operate their facilities in the Chicago Waterway in a way that now allows harmful Asian carp to invade the Great Lakes and by not doing all they can to prevent the invasion. Plaintiffs seek an injunction requiring the Corps and the District to do everything in their power to keep Asian carp out of Lake Michigan, including what is necessary to develop and implement plans to hydrologically separate the carp-infested Illinois waters from Lake Michigan as soon as possible. Despite this Court's prior ruling that Plaintiffs had shown a substantial likelihood of success on their public nuisance claim, the District Court dismissed the Complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, holding that three federal statutes fully authorize and require the Defendants' conduct and prohibit the relief requested.

1. Do the federal statutes relating to the Chicago Waterway, including the Energy and Water Development Appropriations Act of December 4, 1981, Pub. L. No. 97-88, 95 Stat. 1135, 1137, and the Supplemental Appropriations

Act of July 30, 1983, Pub. L. No. 98-63, 97 Stat. 301, 309, which appropriate money for operation and maintenance of a portion of the Waterway, preclude Plaintiffs' public nuisance claim?

2. Does the Rivers and Harbors Act, 33 U.S.C. § 401, which requires the Corps and Congress to approve the placement of certain structures in navigable waters, preclude Plaintiffs' public nuisance claim?

## STATEMENT OF THE CASE

### I. Nature of the case

Plaintiffs-Appellants, the States of Michigan, Wisconsin, Minnesota, and Ohio and the Commonwealth of Pennsylvania brought this action for declaratory and injunctive relief on July 19, 2010, in the U.S. District Court for the Northern District of Illinois against Defendants-Appellees the United States Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago. Count I of the Complaint alleges that the Corps and the District are liable for creating a common law public nuisance by operating their respective facilities in the Chicago Area Waterway System in a manner that allows harmful invasive fish species – Asian carp – to invade the Great Lakes and by failing to do everything within their control to prevent that invasion. Count II alleges that the Corps has made a series of unlawful, arbitrary, and capricious decisions regarding the Waterway that are subject to review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

## II. Proceedings and disposition below

On July 19, 2010, the States filed a Motion for Preliminary Injunction that sought two forms of mandatory injunctive relief. First, the States requested an order requiring the Corps and the District to take immediate measures including, but not limited to, temporary closure of locks and placement of other physical barriers to fish passage in the Waterway in order to minimize the movement of Asian carp into Lake Michigan. Second, the States sought an injunction requiring the Corps to expedite the completion of a congressionally authorized feasibility study of options for permanently preventing the transfer of Asian carp between the Mississippi River and the Great Lakes Basins.

Several parties sought and obtained intervention. On August 20, 2010, the District Court granted the motions of the City of Chicago, the Coalition to Save our Waterways, and Wendella Sightseeing Company to intervene as Defendants. (R. 3728.) On December 2, 2010, the Court granted the motion of the Grand Traverse Band of Ottawa and Chippewa Indians to intervene as a Plaintiff. (R. 5041.) The Grand Traverse Band adopted the States' Complaint. (R. 6435.)

The District Court heard oral argument on the preliminary injunction motion on August 23, 2010, and October 18, 2010, and conducted an evidentiary hearing on September 7, 8, and 10, 2010. The parties filed briefs and extensive supporting affidavits and documents both before and after the hearing. In a Memorandum Opinion and Order entered on December 2, 2010, the District Court denied the Motion for Preliminary Injunction in its entirety.

The States appealed the denial of the preliminary injunction to this Court on December 17, 2010. On August 24, 2011, this Court affirmed. In its Opinion this Court disagreed with the District Court's analysis of the Plaintiffs' likelihood of success on the merits but concluded that the District Court did not abuse its discretion when it denied the injunction. 667 F.3d 765, *cert. denied* ___ U.S. ___; 132 S. Ct. 1635; 182 L. Ed. 2d 246 (2012).

On January 30, 2012, Defendants-Appellants filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). (R. 6460, 6509.) Plaintiffs-Appellants filed their brief in opposition on March 22, 2012. (R. 6527.) Defendants-Appellees replied on April 5, 2012. (R. 6587, 6613, 6662.)

On June 5, 2012, the case was transferred from Judge Robert M. Dow, Jr., to the initial calendar of Judge John J. Tharp, Jr. (R. 6628.)

On September 24, 2012, the Corps filed a Supplemental Motion to Dismiss. (R. 6641.) Plaintiffs-Appellants filed their response on October 9, 2012. (R. 6658.)

On December 3, 2012, the District Court issued a Memorandum Opinion and Order granting the Motions to Dismiss. (S. App. 1.) After Plaintiffs-Appellants notified the court that they did not intend to amend their Complaint, the court entered a Judgment dismissing the case on December 10, 2012. (S. App. 47.)

## STATEMENT OF FACTS[2]

### Origin of Chicago Area Waterway System

More than 100 years ago, Chicago area sewage and industrial waste discharged into the Chicago River flowed directly into Lake Michigan, polluting water intakes for Chicago's municipal water supply. To address that problem, Illinois enacted laws creating the District and providing for construction of a new canal, now designated as the Chicago Sanitary and Ship Canal, connecting the Chicago River to the Des Plaines and Illinois Rivers and the Mississippi River Basin. The District also constructed and operated facilities to reverse the natural flow of the Chicago River away from Lake Michigan, using water diverted from the Lake to dilute and flush its wastes downstream. This artificial connection of the Great Lakes and Mississippi River Basin and

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[2] The factual background of this case was extensively described in the District Court's Memorandum Opinion and Order denying the States' Motion for Preliminary Injunction, *Michigan v. U.S. Army Corps of Engineers*, No. 10-C4457, 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010) (Dow, J.) (R. 4980) (*Asian Carp I*), and this Court's Opinion affirming that decision, 667 F.3d 765 (7th Cir. 2011) (R. 4980) (*Asian Carp II*). Because the present appeal is from the District Court's Order dismissing the Complaint under Rule 12(b)(6), and, as the District Court noted, Plaintiffs' factual allegations must be accepted as true in that context, the following statement of facts is based upon the facts alleged in the Complaint. (App. 3.)

reversal of the natural flow solved Chicago's immediate public health problem.

**Current structure of the Chicago Waterway**

In addition to its primary function as a means of managing wastewater and stormwater discharges from within the District, the Canal serves as a means of navigation. It is part of a larger Chicago Area Waterway System ("CAWS" or "Waterway") which, in turn, is part of the Illinois Waterway System connecting the Mississippi River and the Great Lakes. (R. 899-900.) The Waterway is comprised of approximately 78 miles of canals and modified streams located in Cook and surrounding counties. The Waterway consists of the Canal, the Chicago River, its North and South Branches, the Calumet Sag Channel, Lake Calumet, and the Calumet, Grand Calumet, and Little Calumet Rivers. Navigation between the Waterway and Lake Michigan occurs at Chicago Harbor in downtown Chicago and Calumet Harbor at the end of the Calumet River.

Direct connections between the Waterway and Lake Michigan exist at five locations at or near the Lake:

(a) The Wilmette Pumping Station, located where the North Shore Channel meets Lake Michigan. It is owned, operated, and maintained by the District. It includes a concrete channel, pumps, and a sluice gate.[3]

(b) The Chicago River Controlling Works in downtown Chicago where the Chicago River joins Lake Michigan. The control structure includes a concrete wall separating the river from Lake Michigan, sluice gates, and a navigation lock. The Corps is responsible for maintenance and operation of the lock. The District is responsible for operation and maintenance of the remainder of the structure and the sluice gates.

(c) The Thomas J. O'Brien Lock and Dam is located on the Calumet River and controls the flow of the water between Lake Michigan and the Little Calumet River and, thereby, the Calumet-Sag Channel. The navigational lock and dam are operated and maintained by the Corps. The sluice gates are operated by the District.

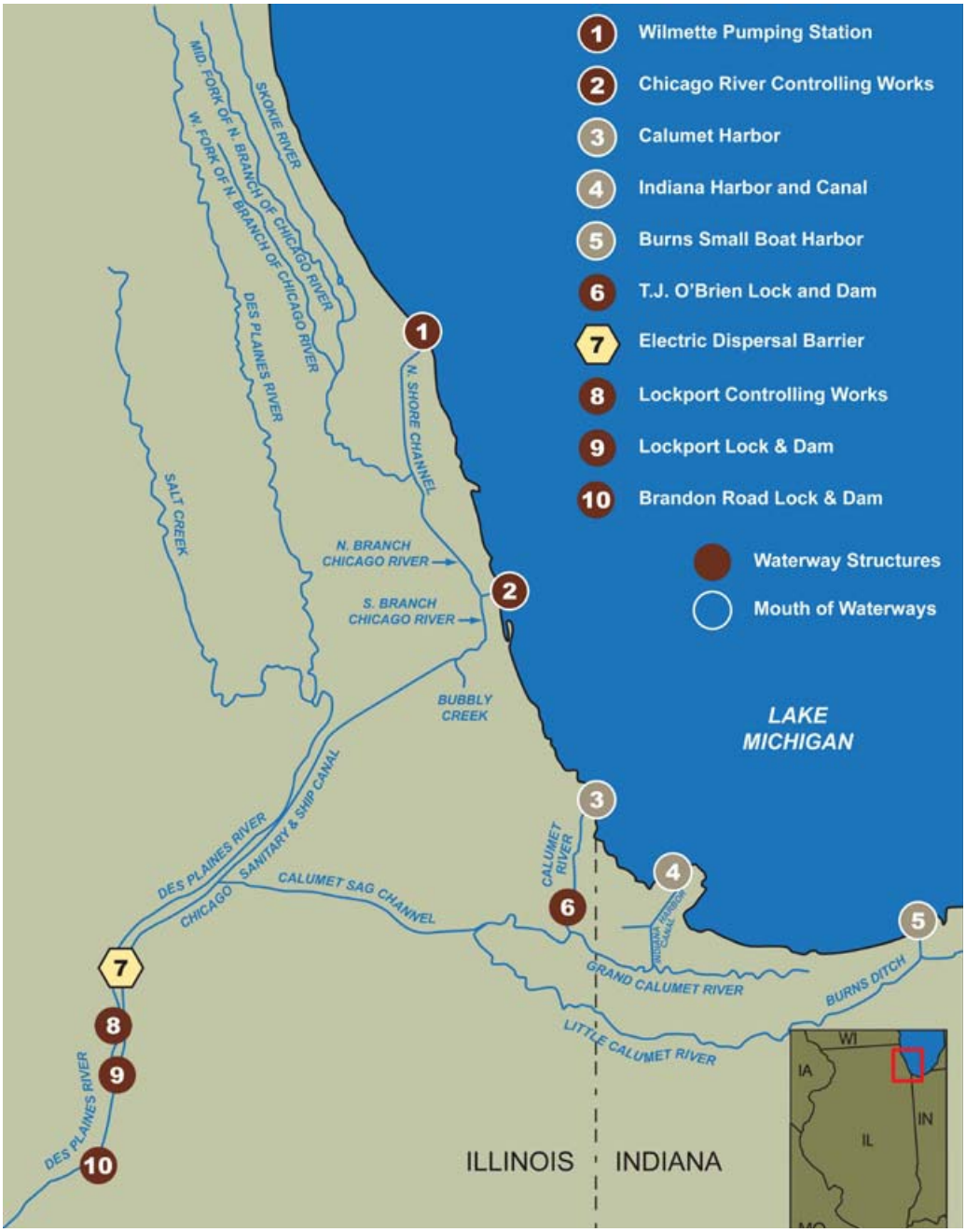
[3] A sluice gate is a moveable gate used to regulate the movement of water, if any, though an opening in a dam or similar structure, and control water levels.

(d) Indiana Harbor in Indiana. The Calumet Sag Channel connects to the Grand Calumet River, which enters Lake Michigan at Indiana Harbor.

(e) Burns Harbor in Indiana. The Calumet Sag Channel connects to the Little Calumet River, which enters Lake Michigan at Burns Harbor.

The locations of these facilities and the various elements of the Waterway are illustrated in maps prepared by the Corps in the following figure[4] (and at App. 1):

[4] See http://glmris.anl.gov/documents/docs/glmris_brochure.pdf.




**Asian carp**

Several species of carp native to Asia were imported to the United States decades ago. Two species of Asian carp are of particular concern here:

(a) Silver carp, which can grow to lengths of 3 feet and weights of 60 pounds. In the presence of motorboats or other noises, silver carp may jump up to 10 feet in the air.

(b) Bighead carp, which can grow to lengths of 5 feet and weights over 100 pounds and feed almost continuously.

Both silver and bighead carp readily adapt to varying environmental conditions, reproduce prolifically, and spread rapidly. Since escaping from ponds in the Lower Mississippi River Basin, both silver and bighead carp have rapidly migrated through and become established in rivers in the Mississippi River Basin, including the Illinois River. They aggressively consumed available nutrients, and substantially disrupted native fish populations in these rivers, damaging recreational and commercial fishing. Because of their large size and extreme jumping behavior, silver carp have injured boaters, caused property damage, and impaired recreational boating.

Federal agencies, including the Corps, have acknowledged that if Asian carp enter the Great Lakes and establish reproducing populations there, they would likely cause grave and irreversible

environmental and economic harm. (App. 12-13, 21.) This Court has also recognized that harm. *Asian Carp II,* 667 F.3d at 785-86.

Because of that concern, the Corps and other agencies have taken various actions intended to prevent or reduce the risk of such an Asian carp invasion of the Great Lakes through the Waterway. The Corps' primary defensive strategy is the operation of an electrical "Dispersal Barrier System" comprised of underwater steel cables charged with electricity that are intended to deter the passage of fish. The Corps installed and operates a series of such electrical barriers in the Waterway, slightly north of the Lockport Lock and Dam, approximately 25 miles from Lake Michigan.

**Evidence of Asian carp in the Waterway**

By 2009, silver carp were seen in the Canal, slightly south of the Lockport Lock and Dam. In 2009, the Corps began to supplement the conventional fish detection methods (netting and electrical shocking) with a program of environmental surveillance for silver and bighead carp using environmental DNA or "eDNA." In this method, samples of water are collected, filtered, and their contents analyzed for the presence of genetic material emitted or secreted by those species. Asian

carp eDNA was detected in the Illinois River where those fish were known to be present.

In November 2009, the Corps announced that Asian carp eDNA had been detected in the Waterway north (lakeward) of the electrical dispersal barrier. In December 2009, when the fish poison rotenone was applied to a portion of the Waterway in the vicinity of the electrical barrier, a dead bighead carp was removed from the Waterway at a location north of the Lockport Lock and Dam, but south of the electrical barrier.

**Plaintiffs' requests for additional action**

Since November 2009, the Plaintiff States and other interested parties have repeatedly urged the Corps and the District to take additional, comprehensive action to minimize the risk that Asian carp will migrate through the Waterway into Lake Michigan. Among other things, the States requested changes in lock and sluice gate operations to prevent fish passage, more applications of fish poison, and temporary fish barriers such as block nets. At each stage, the States also urged the Corps to speed up an ongoing feasibility study of permanent solutions and to quickly plan for permanent hydrological separation of the carp-

infested Illinois waters from Lake Michigan at strategic locations in the Waterway. (App. 15, 17, 24.) Despite additional Asian carp eDNA detections lakeward of the electrical barrier system[5] and the capture of a live bighead carp in Lake Calumet, six miles from Lake Michigan in June 2010 (App. 2), the Corps and the District failed, with very limited exceptions,[6] to take the additional actions the States requested. This lawsuit followed.

**Complaint and relief requested**

The Complaint alleges that to the extent the Defendants maintain and operate facilities in the Waterway in a manner that allows the migration of Asian carp into the Great Lakes, they are now responsible for creating a public nuisance. (Compl., ¶ 1.) In the Complaint, "Plaintiffs seek to require Defendants to take immediate and comprehensive action to abate the nuisance and to minimize the risk

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[5] As of 2010, there were positive eDNA results for silver carp at Calumet Harbor and near the Chicago Harbor. The Corps has continued to report Asian carp eDNA detections in the Waterway, past the electrical barrier system through 2012. See http://www.lrc.usace.army.mil/Missions/CivilWorksProjects/ANSPortal/eDNA.aspx.

[6] The Corps and the District did install screens designed to block the passage of adult fish in some, but not all of the sluice gates they control.

that Asian carp will migrate from the Waterway into Lake Michigan, and to implement as soon as possible, permanent measures to physically separate the carp-infested Illinois waters from Lake Michigan." *Id*.

The Complaint alleges that Defendants have failed to take all interim measures within their control to minimize the risk that Asian carp will enter Lake Michigan through the Waterway including, among other things:

- Temporarily closing the Chicago and O'Brien Locks (App. 20, 23-28; Compl. ¶¶ 61, 72-78-81);
- Applying the fish poison rotenone in areas of the Waterway that tested positive for Asian carp eDNA (App. 20, 27; Compl. ¶¶ 61, 81); and
- Comprehensively blocking all five pathways from the Waterway to Lake Michigan by installing screens on all sluice gates and deploying block nets. (App. 20, 28; Compl. ¶¶ 61, 82.)

In addition, the Complaint alleges that the Plaintiffs have repeatedly asked the Defendants to develop plans for hydrological

separation and to expedite the congressionally authorized feasibility study[7] to that end. (App. 15-17; Compl., ¶¶ 59(a), 59 (f), 59(g).) It further alleges that Defendants have repeatedly and unjustifiably refused to take the additional actions requested by the Plaintiffs. (App. 17-18, 22, 26; Compl., ¶¶ 60, 61(d), 67, 70, 76.) Count I, Public Nuisance, of the Complaint, concludes: "In sum, to the extent that the actions and omissions of the District and the Corps allow Asian carp to migrate into Lake Michigan, they have created and are maintaining a continuing public nuisance." (App. 30; Compl., ¶ 91.)[8]

**Defenses**

Although the Defendants never filed answers to the Complaint, they asserted various legal defenses at each stage of the case. Opposing the Motion for Preliminary Injunction, all Defendants argued Plaintiffs

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[7] Section 3061(d) of the Water Resources and Development Act of 2007, Pub. L. 110-114, directed the Corps to conduct "a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways." The Corps refers to this as the "Great Lakes and Mississippi River Interbasin Study" or "GLMRIS."

[8] As noted above, Count II of the Complaint sought judicial review under the APA of decisions by the Corps. Because the Plaintiffs-Appellants focus this appeal on the disposition of Count I, the second count is not further addressed here.

were not likely to succeed on the merits of their common law nuisance claim because: (1) there was no applicable federal common law of nuisance or such law had been displaced by statutes; and (2) their actions regarding the Waterway were authorized by statute and could not be a public nuisance. The Corps also argued that (3) the claim was barred by sovereign immunity; and (4) the federal government could not be sued for a public nuisance. The District Court Opinion, while denying the preliminary injunction, explicitly rejected the first and third arguments and did not base its ruling on the other two. (R. 5011, 5015.)

On interlocutory appeal, the Defendants raised all four of those legal defenses as grounds for affirming the denial of preliminary injunction and all four were briefed by the parties. This Court specifically addressed and rejected the common law displacement defense, 667 F.2d at 772, and the sovereign immunity defense, *id.* at 776, and addressed but found it unnecessary to decide the fourth issue. *Id.* at 774. While this Court did not specifically discuss the second issue (conduct "authorized by statutes" cannot be a public nuisance), it held that the States had shown a "good or even substantial likelihood of

success on the merits of their public nuisance claim" *id.*, but ultimately affirmed the denial of the preliminary injunction on other grounds. *Id.* at 795-796.

**Proceedings on Motions to Dismiss**

After this Court upheld the denial of the preliminary injunction, the Defendants-Appellants moved to dismiss under Rule 12(b)(6). (R. 6460, 6509.) They again raised each of the four legal defenses noted above. The District Court held that it was bound by this Court's legal rulings on the common law nuisance displacement and sovereign immunity issues. (S. App. 16.) It also rejected the Corps' argument that the federal government could not be sued for public nuisance. (S. App. 18-23.) The District Court dismissed the Complaint solely on the basis of its conclusions that: (1) the Defendants' actions with respect to the Waterway were fully authorized, indeed required by statute, therefore could not be deemed "unreasonable" and a public nuisance; and (2) that the relief requested by Plaintiffs is unlawful. (S. App. 2-3, 28-36.)

## SUMMARY OF ARGUMENT

It is undisputed that preventing Asian carp in the Illinois River from invading Lake Michigan and the rest of the Great Lakes is "paramount in avoiding ecologic and economic disaster." *Asian Carp II,* 667 F.3d at 781. On interlocutory appeal, this Court held that the Plaintiffs had shown "a good or even substantial likelihood of success on the merits of their public nuisance claim." *Id.* at 786. The case is before this Court again because the District Court nonetheless held that there is *no legal possibility* that the same public nuisance claim can succeed, and dismissed the Complaint under Rule 12(b)(6).

That extraordinary turn-about is unwarranted and must be reversed. Neither Plaintiffs' Complaint nor the statutes upon which the Defendants and the District Court rely have changed. Instead, the District Court seized upon two 30-year-old appropriations acts[9] and Section 401 of the Rivers and Harbors Act,[10] all of which Defendants had cited at every stage of this case, and erroneously concluded that Defendants' "actions or omissions are required by federal statute," and

[9] The Energy and Water Development Appropriations Act of December 4, 1981, Pub. L. 97-88, 95 Stat. 1135, 1137, and the Supplemental Appropriations Act of July 30, 1983, Pub. L. No. 98-63.

[10] 33 U.S.C. § 401.

the relief requested by Plaintiffs "would directly contravene statutory mandates and prohibitions." (S. App. 3.) In so holding, the District Court both misinterpreted the applicable statutes and failed to read the Complaint in the light most favorable to Plaintiffs.

First, neither the 1981 and 1983 appropriations acts, nor any other statute or regulation cited by Defendants, requires the Defendants to allow Asian carp to pass through the Chicago Waterway into Lake Michigan. Nor do these laws "mandate" the Defendants to "sustain" uninterrupted navigation through the portions of the Waterway to which they apply. Instead, by their terms, they allow, but do not require, the expenditure of appropriated funds for specified purposes related to navigation.

Second, the District Court did not, as Rule 12(b)(6) requires, read the Complaint in the light most favorable to the Plaintiffs. The gravamen of the Complaint is that the Defendants are failing to do everything within their respective control to prevent the Asian carp invasion. That includes, among other things, refusing Plaintiffs' requests for additional interim measures and to expedite and focus the congressionally authorized feasibility study. That study is an essential

step in developing plans to permanently block the Asian carp invasion through hydrological separation at key locations in the Waterway.

The Complaint requested several specific forms of relief as well as "such other relief as the Court determines just and proper." (App. 36.) And, with respect to hydrologic separation, the Plaintiffs do not ask the Court to simply order the Defendants build hydrological barriers. Rather, the Complaint seeks an order requiring them to "take *all appropriate and necessary measures* to expeditiously develop and implement plans to permanently and physically separate the carp-infested . . . Illinois River basin and [the Waterway] from Lake Michigan." (App. 36.) (Emphasis added.) The statutes pertaining to the Waterway cited by the District do not prohibit the Defendants from promptly developing such plans. And the most recent and specific statute on the subject – Section 1538 of the 2012 Progress Act[11] – specifically invites it. Thus, the threatened Asian carp invasion of the Great Lakes is not, as the District Court found, "the inevitable by-product of the defendants' compliance with requirements set forth in valid statutes." (S. App. 24.)

[11] Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141; 126 Stat. 405.

Third, Section 401 of the Rivers and Harbors Act does not preclude Plaintiffs' public nuisance claim. It does not prohibit the hydrological separation that is the Plaintiffs' ultimate goal. Instead, the Act requires congressional consent to, and Corps approval of, plans before certain structures may be built in navigable waters, including the Waterway. Plaintiffs' requested relief – an injunction requiring the Defendants to quickly develop and seek congressional approval of plans for hydrological separation – is fully consistent with the Rivers and Harbors Act and other relevant statutes. Those are critical next steps within the Defendants' control that are essential to avert the threatened invasion. Until the Corps develops a separation plan, there will be nothing for Congress to consent to. Thus, Defendants' acts and omissions, not the existing statutes enacted by Congress, are the "proximate cause" of the threatened harm.

Finally, the relief requested by Plaintiffs would not, as the District Court suggested (S. App. at 29-30, n. 16), violate the constitutional separation of powers. The Plaintiffs do not seek an order directing Congress to approve hydrological separation or to take any other action, for that matter. The requested injunction is directed to the Defendants

and the activities within their control, not Congress. And, as a legal matter, a judicial determination based on federal common law is plainly not binding upon Congress, which remains free to abrogate or displace the common law.

But, taking the allegations in the Complaint as true, as they must be under Rule 12(b)(6), unless the Defendants are required to perform activities within their control that are a necessary prerequisite to hydrological separation, the threatened Asian carp invasion will occur. As both the District Court and this Court have noted, "the magnitude of the potential harm here is tremendous, and the risk that this harm will come to pass may be growing with every passing day." 667 F.3d at 785.

The Judgment of the District Court should be reversed and the case remanded for trial on the merits of Plaintiffs' public nuisance claim.

## ARGUMENT

### I. The statutory provisions related to the Chicago Waterway and Asian carp do not preclude Plaintiffs' public nuisance claim.

The District Court held that two 30-year-old appropriations acts involving part of the Chicago Waterway[12] not only authorize but affirmatively require the Corps to "sustain through navigation" in the Waterway from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River. (Opinion at 30.) The Court held these statutes bar Plaintiffs' public nuisance claim because Plaintiffs ultimately seek hydrological separation in the Waterway. The Court reasoned that continued operation and maintenance of the Waterway to support "through" navigation is authorized by statute, and that activity cannot be deemed "unreasonable" and a common law nuisance. The Court concluded the appropriations acts legally prohibit the Corps from taking the actions sought by Plaintiffs. On that basis, and its interpretation of the Rivers and Harbors Act, 33 U.S.C. § 401, discussed in II, *infra*, the

[12] The Energy and Water Development Appropriations Act of December 4, 1981, Pub. L. 97-88, 95 Stat. 1135, 1137, and the Supplemental Appropriations Act of July 30, 1983, Pub. L. No. 98-63.

District Court dismissed the Complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The District Court's analysis of this issue

- misinterpreted the appropriation acts;
- failed to consider the Complaint and relief requested as a whole and construe them in the light most favorable to Plaintiffs; and
- ignored the most recent and relevant statute that requires the Corps to expeditiously address hydrological separation.

Accordingly, the District Court's decision should be reversed.

### A. Standard of Review

This Court reviews de novo a district court decision granting a motion to dismiss under Rule 12(b)(6). *Peters v. West*, 692 F.3d 629, 632 (7th Cir. 2012). In reviewing a complaint under that rule, "the court must construe all of the plaintiff's factual allegations as true, and must draw all reasonable inferences in the plaintiff's favor." *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011). The plaintiff's allegations are "construe[ed] in the light most favorable to him, as the non-moving party." *Id.* at 209. The complaint must contain allegations that "state a

claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570; 127 S. Ct. 1955; 167 L. Ed. 2d 929 (2007).

Review of a district court's interpretation of a statute is a matter of law which is reviewed de novo. *Berneisen v. Motorola, Inc.*, 656 F.3d 701, 704 (7th Cir. 2011) (citing *Walker v. United Parcel Service,* 240 F.3d 1268, 1277 (10th Cir. 2001)).

## B. Analysis

### 1. The Defendants' acts and omissions regarding the Asian carp threat in the Waterway alleged in the Complaint are neither "fully authorized," nor "required" by the appropriations acts.

The District Court correctly noted that to state a claim for public nuisance, Plaintiffs must identify acts or omissions by Defendants that cause "a substantial and unreasonable interference with a right common to the general public . . . ." *Asian Carp II*, 667 F.3d at 771 (citing Restatement (Second) of Torts § 821B). In holding that the Defendants' acts and omissions were "fully authorized" and therefore not "unreasonable," the District Court repeatedly relied upon Comment F to § 821B regarding the "effect of compliance." (S. App. at 24, 26, 31, 36.) But like the Corps, the Court selectively quoted from, and

misapplied Comment F. Read in context, the Restatement Comment and the supporting cases make clear that whether a particular statute bars a nuisance claim depends upon the specific authority the statute confers, its interpretation and its comprehensiveness.

> Although it would be a nuisance at common law, conduct that is *fully authorized* by statute, ordinance or administrative regulation does not subject the action to tort liability. Aside from the question of the validity of the legislative enactment, *there is the question of its interpretation.* Legislation prohibiting some but not other conduct is not ordinarily construed as authorizing the latter.
>
> * * *
>
> In addition, if there has been established a *comprehensive* set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations." [Emphasis added.]

The leading case cited as the basis of Comment F, *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1975), shows an important limitation on the meaning of "fully authorized." There, specific and comprehensive zoning and air pollution control regulations existed and applied to the activities alleged to be a nuisance. Because the evidence showed that the defendant fully complied with those applicable standards, this Court reversed an injunction requiring the business to cease operation. *Id.* at 1123, 1125.

Here, as this Court previously found, 667 F.3d at 780, there is no statutory regime regulating the passage of Asian carp in the Waterway, let alone a comprehensive one. A proper, textual interpretation of the appropriations acts cited by the District Court shows that they do not fully authorize, let alone require, the Defendants' acts and omissions at issue here.

### 2. The 1981 and 1983 statutes simply appropriated funds to the Corps for operation and maintenance of a portion of the Waterway.

#### a. 1981 Act

The Energy and Water Development Appropriations Act of December 4, 1981, Pub. L. 97-88, 95 Stat. 1135, 1137, appropriated funds to the Corps for the fiscal year ending September 30, 1982. Title I appropriated $1,008,335,000 to the Corps for general operation and maintenance of civil works projects. The language relevant to the Chicago Waterway, § 107, states:

> *Funds* herein or hereinafter made available to the Corps of Engineers – Civil for operation and maintenance of the Illinois Waterway *shall be available* to operate and maintain the Chicago Sanitary and Ship Canal portion of the Waterway in the interest of navigation. [Emphasis added.]

In the construction of this or any other statute, the court's "'analysis begins with the language of the statute.' Specifically, we begin by looking broadly at the structure of the statute to acquire an understanding of the activity that it regulates. 'Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute[ ] . . .'" *Senne v. Village of Palatine, Illinois*, 695 F.3d 597, 601 (7th Cir. 2012) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438; 119 S. Ct. 755; 142 L. Ed. 2d 881 (1999), and *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486; 126 S. Ct. 1252; 163 L. Ed. 2d 1079 (2006).

By its terms, the 1981 Act simply provides that funds appropriated for operation and maintenance of the Illinois Waterway[13] may be used to operate a designated portion of the Chicago Waterway – the Chicago Sanitary and Ship Canal – "in the interest of navigation." It does not address, let alone "fully authorize," the passage of Asian carp

[13] The Illinois Waterway is a series of rivers and canals that extend from the Mississippi River to Chicago and Calumet Harbors on Lake Michigan. It includes the Chicago Area Waterway System, one part of which is the Chicago Sanitary and Ship Canal. (R. 899-900.) See maps at p. 14, *supra,* and App. 1, 2.

or other invasive species though continued routine operation of the Canal.

Nor, by its terms, does the Act *require* the Corps to maintain the Canal or preserve navigation in it. While the word "shall" appears in the statute, that "shall" requires only that funds be available for specified purposes. The statute does not mandate any conduct of any kind by the Corps. Notably, the Act does *not* provide that the Corps "shall operate" the Waterway or "shall maintain navigation." Thus, it was not, and is not, a statutory mandate to maintain uninterrupted navigation, throughout the Chicago Waterway, or even in the Chicago Sanitary and Ship Canal, as the Defendants and the District Court would have it. Rather, the 1981 Act merely provides that certain appropriated funds "shall be available "for specified purposes.

Additionally, even if the 1981 Act were a statutory mandate to maintain uninterrupted navigation (which it is not), the Act applies only to the life of the funds allocated therein. Unless they specify otherwise, appropriations bills are controlling only for a limited period. *Cobell v. Norton*, 428 F.3d 1070, 1075-1076 (D.C. Cir. 2005). Specifically, there exists the presumption that appropriations bills

apply only in the fiscal year for which they are enacted. *Building & Construction Trades Dept., AFL-CIO v. Martin*, 961 F.2d 269, 273-274 (D.C. Cir. 1992).

Nothing rebuts that presumption here. The 1981 Act does not, by its terms, apply beyond the life of the funds appropriated therein. As noted above, it provides that "Funds herein or hereinafter made available to the Corps of Engineers – Civil for operation and maintenance of the Illinois Waterway shall be available to operate and maintain the Chicago Sanitary and Ship Canal portion of the Waterway in the interest of navigation." Pub. L. No. 97-88, 95 Stat. 1137 § 107.

The terms "herein" and "hereinafter" apply only to the text of the appropriations bill itself. "Herein" means "in this thing (such as a document, section, or matter)." Black's Law Dictionary 731 (7th ed. 1999). Similarly, "hereinafter" means "later in this document." *Id.*

The First Circuit Court of Appeals has held that the word "hereinafter" refers only to within the text of the document itself, and is not synonymous or interchangeable with the word "hereafter." *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 225-226 (1st Cir. 2003).

When the 1981 Act refers to funds "herein or hereinafter made available to the Corps of Engineers," it means that the Act only operates for the life of those specific funds. It does not continue to operate after those funds have been exhausted. That would only be the case if it used the word "hereafter," which it does not. Therefore, the general proposition that an appropriations bill is a temporary bill with a limited life span controls, and does not provide the Corps with authority to do anything once those specifically allocated funds have been spent.

**b. 1983 Act**

The second appropriation statute cited by the District Court is the Supplemental Appropriations Act of July 30, 1983, Pub. L. No. 98-63. It does nothing more than make the funds identified in the 1981 Act available for operation and maintenance of other structures in a portion of the Waterway. It provides, in relevant part:

> *Section 107 of Public Law 97-88* pertaining to operation and maintenance of the Chicago Sanitary and Ship Canal of the Illinois Waterway in the interest of navigation *includes* the Control Structure and Lock in the Chicago River, and other facilities as are necessary to sustain through navigation from Chicago Harbor of Lake Michigan to Lockport in the Des Plaines River. [Emphasis added.]

Again, by its terms and in context, this act merely clarifies the scope of activities for which certain appropriated funds may be spent. Specifically, it expanded that scope to include operation and maintenance of the Chicago Lock[14] and other facilities that facilitate navigation from Chicago Harbor,[15] through the Sanitary and Ship Canal, to Lockport. The 1983 Act merely authorizes expenditure of appropriated funds on facilities needed to "sustain through navigation" in the specified area. It does not support the District Court's conclusion that the Corps is required by this statute to maintain uninterrupted navigation there, and certainly not throughout the Waterway. Rather, like its 1981 predecessor, the 1983 Act simply makes appropriated funds available for designated purposes.

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[14] As the Corps explained in its June 2010 "Interim III" Report, "[t]he Chicago Harbor Lock was built by the District in 1938 to accommodate existing navigation and comply with a 1930 Supreme Court decree regarding the amount of Lake Michigan water diverted at Chicago. In the Supplemental Appropriations Act of 1983, . . . Congress transferred the operation and maintenance responsibilities for the Chicago lock to the Corps and in 1984 the Corps and the [District] entered into a Memorandum of Agreement with regard to the operation of the lock and controlling works for purposes of navigation, water quality and for flood control . . ." (R. 894-895.)

[15] The Corps describes the Chicago Harbor at: http://www.lrc.usace.army.mil/Portals/36/docs/navigation/chicago.pdf.

And, like the 1981 Act, the 1983 appropriation provision neither addresses nor fully authorizes the movement of harmful invasive species such as Asian carp through the Canal.

It is also indisputable that the 1981 and 1983 statutes apply only to the Sanitary and Ship Canal to Chicago Harbor portion of the Waterway. Those acts do not apply to the remainder of the Chicago Waterway, e.g., the North Shore Channel, Calumet-Sag Channel, O'Brien Lock and Dam, Calumet River, Little Calumet River, and Grand Calumet River. (See maps at p. 14, *supra*, and App. 1, 2.)

Another statute cited by the Corps (R. 6493) but not discussed by the District Court, the 1946 Rivers and Harbors Act, 60 Stat. 634, simply authorized the Corps to implement a plan to improve navigation in the Illinois Waterway and Calumet River that ultimately included construction of the O'Brien Lock and Dam. The 1946 Rivers and Harbors Act provides, in relevant part:

> That the following works of improvement of rivers, harbors and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:

* * *

> Illinois Waterway and Grand Calumet River, Indiana and Illinois; House Document Number 677, Seventy-ninth Congress . . .

Again, this statute is an authorization to construct and operate portions of the Chicago Waterway, but not a legal mandate to "sustain . . . through navigation" anywhere in the Waterway. By its terms, it plainly does not regulate or authorize the passage of Asian carp through the Waterway.

Appellants do not dispute that through the appropriations acts Congress intended to facilitate navigation in parts of the Illinois Waterway and was willing to fund activities that would benefit it. But that is a far cry from mandating that "through" navigation must be maintained in the Waterway under every circumstance and at every cost.

None of the discussed appropriations or authorization statutes evidences a congressional intent to legally require uninterrupted operation and maintenance of the facilities in a manner that would violate generally applicable law, or to cause grave environmental and economic harm. And, since each of these statutes was enacted decades ago, long before the threatened Asian carp invasion existed, they cannot

be reasonably interpreted as "fully authorizing," let alone mandating, the Defendants' acts and omissions in the face of that new threat.

The cases cited by the District Court, in addition to Restatement (Second) of Torts § 821B, Comment F, as support for its conclusion that the Defendants' conduct is authorized by statute, and therefore cannot be deemed unreasonable or a public nuisance (S. App. 31), are inapposite or unpersuasive. First, this is not a case like *North Carolina ex rel. Cooper v. T.V.A.*, 615 F.3d 291, 301 (9th Cir. 2010), where the emission of air pollutants that formed the basis of the plaintiff's public nuisance claim were specifically permitted under a comprehensive regulatory scheme, the Clean Air Act, 42 U.S.C. § 7401 *et seq*. Asian carp have not been specifically permitted to exist in or pass through any waters of the United States, let alone the Waterway.

Second, this is not a case where the plaintiffs are asking the court to "order agencies to ignore constitutionally valid statutes." *Klene v. Napalitano*, 697 F.3d 666, 668 (7th Cir. 2012). While the 1981 and 1983 appropriations acts are constitutionally valid, they do not fully authorize or "require" the Defendants' actions and omissions here,

including, but not limited to, allowing Asian carp to pass through the Waterway and failing to quickly plan for hydrologic separation

Finally, *Smith v. Tennessee Valley Authority*, 436 F. Supp. 151, 154 (E.D. Tenn. 1977), is neither controlling nor persuasive. There, the court held, with minimal analysis, and apparently in the absence of argument to the contrary, that a federal statute authorizing construction of a power plant precluded a public nuisance claim based on blasting associated with the construction. Again, no federal statute requires the operation of the Waterway, authorizes the passage of Asian carp, or precludes the relief Plaintiffs request here.

In sum, none of the Waterway statutes or regulations[16] cited by Defendants or the District Court bars the public nuisance claim.

[16] As the District Court correctly held (S. App. at 35, n. 18), the regulations cited by the District, 33 C.F.R. § 207.420, 33 C.F.R. § 207.425, regarding water levels in the Waterway do not necessarily conflict with hydrological separation and, in any event, present a question of fact not susceptible to resolution under Rule 12(b)(6).

### 3. The Complaint alleges that the Defendants' acts and omissions with respect to the current operation of the Waterway, including the Corps' failure to expedite planning for hydrological separation, contribute to the common law public nuisance – the threatened Asian carp invasion of the Great Lakes.

As noted above, the Complaint alleges, among other things, that the Plaintiffs have repeatedly asked the Defendants to develop plans for hydrological separation and to expedite and focus the completion of the congressionally authorized GLMRIS to that end. (App. 3, Compl., ¶¶ 59(a), 59 (f), 59(g).) It further alleges that Defendants have repeatedly and unjustifiably refused to take the additional actions requested by the Plaintiffs. (App. 3, Compl., ¶¶ 60, 61(d), 67, 70, 76.) Count I, Public Nuisance, of the Complaint, concludes: "In sum, to the extent that the actions and omissions of the District and the Corps allow Asian carp to migrate into Lake Michigan, they have created and are maintaining a continuing public nuisance." (App. 3, Compl., ¶ 91.)

Under Rule 12(b)(6), the District Court was required to accept these allegations and any reasonable inferences from them as true, and to construe them in the light most favorable to Plaintiffs. *Virinich*, 664 F.3d 209, 212. Read in the context of the Complaint as a whole, these

allegations could reasonably (and therefore should) be read as statements that the Defendants' failure to expedite planning for hydrological separation was prolonging the ongoing risk that more Asian carp would invade Lake Michigan through the Waterway, until a reproducing population is established, causing grave and irreversible harm. The District Court essentially ignored this aspect of the Complaint. Instead, it focused only on the ultimate *result* sought by Plaintiffs – implementation of hydrological separation. And, as seen below, it similarly failed to construe Plaintiffs' request for relief in the light most favorable to Plaintiffs.

#### 4. Plaintiffs' Complaint seeks to require the Defendants "to take all appropriate and necessary measures to expeditiously develop and implement plans" for hydrological separation, acts which are within the Defendants' control.

The District Court correctly noted that the central and ultimate goal of Plaintiffs' Complaint is the hydrological separation of the carp-infested Illinois waters from Lake Michigan and the rest of the Great Lakes. But, contrary to the Court's suggestion (S. App. 24, 33), the relief requested is based on acts or omissions within the Defendants' control.

Paragraph 1 of Plaintiffs' Request for Relief seeks "a Preliminary injunction enjoining the Defendants to immediately take *all available measures within their respective control,* consistent with the protection of public health and safety, to prevent the migration of bighead and silver carp through the Waterway into Lake Michigan . . ." (App. 33; emphasis added.)

Paragraph 2 seeks "a preliminary injunction requiring the Corps to expedite the preparation of a feasibility study, *pursuant to its authority under Section 3601 of the Water Resources Development Act of 2007*, developing and evaluating options for the permanent physical separation of the Waterway from Lake Michigan at strategic locations so as to prevent the transfer of Asian carp or other invasive species between the Mississippi River Basin and the Great Lakes Basin." (App. 35; emphasis added.)

Paragraph 3 seeks "a Permanent Injunction requiring the District and the Corps to take *all appropriate and necessary measures to expeditiously develop and implement plans* to permanently and physically separate carp-infested waters in the Illinois River Basin and the Waterway from Lake Michigan so as to prevent the migration of

bighead carp, silver carp, or other harmful aquatic invasive species into Lake Michigan." (App. 36; emphasis added.)

In sum, each element of the relief requested pertains to things that the Defendants could, but have so far failed to do, that are needed to prevent Asian carp from invading the Lakes. As discussed above and in II. B.1 below, neither the 1981 and 1983 appropriations acts nor the Rivers and Harbors Act legally preclude the hydrological separation that Plaintiffs ultimately seek.

### 5. The appropriations acts do not make it unlawful for the Corps to expeditiously develop plans for hydrological separation in the Waterway as Plaintiffs request.

Even assuming, arguendo, that the appropriations acts "fully authorize" the Defendants' continued operation of their respective Waterway facilities in their current form, the plain language of those statutes does not prohibit the Corps from expeditiously developing a plan for hydrological separation as the Plaintiffs repeatedly requested before and since they filed suit. Nor do those statutes in any way prohibit the Defendants from taking "appropriate and necessary measures . . . to implement" plans for hydrological separation, including

seeking congressional approval of the plans to the extent required by the Rivers and Harbors Act. As discussed above, reading the allegations of the Complaint as a whole in the light most favorable to Plaintiffs, expedited planning for hydrological separation is essential to prevent the threatened Asian carp invasion of the Great Lakes.[17]

**6. The District Court flatly erred in finding that "Congress . . . has not yet directed the Corps to consider the question of hydrologic separation." The most recent and specific statute pertaining to the Waterway, Section 1538 of the 2012 Progress Act, specifically *requires* the Corps to expedite and focus the feasibility study on the Waterway and to address permanent hydrological separation.**

In response to Plaintiffs' argument that more recent and specific statutes evidence a Congressional policy that the Corps' should not allow passage of Asian carp through the Waterway (R. 6552), the District Court stated: "Congress authorized the Corps to conduct a feasibility study to prevent the spread of aquatic nuisance species, for example, but it *has not yet directed the Corps to consider the question of*

[17] At a minimum, the relationship between the timing and scope of the planning process and the likely timing of the threatened Asian carp invasion of Lake Michigan is a question of fact, not amenable to resolution in the context of a Rule 12(b)(6) motion.

*hydrologic separation,* much less authorized that separation." (S. App. 34; emphasis added.) The intermediate statement and the court's analysis of this issue are plainly wrong. They ignore the most recent and relevant statute, Section 1538 of the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405.[18] That provision is entitled "Asian Carp." It defines "hydrological separation" as:

> *a physical separation on the Chicago Area Waterway System that—*
>
> > *(A) would disconnect the Mississippi River watershed from the Lake Michigan watershed;* and
> >
> > (B) shall be designed to be adequate in scope to prevent the transfer of all aquatic species between each of those bodies of water. [Emphasis added.]

Section 1538 requires the Secretary of the Army, acting through the Chief of Engineers, to expedite the study authorized by section 3061(d) of the Water Resources Development Act of 2007,[19] complete the report

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[18] That statute was enacted in July 2012, discussed by Plaintiffs and the Corps in connection with the Corps' Supplemental Motion to Dismiss (R. 6641, 6661) and even noted elsewhere in the District Court's Opinion with respect to the Corps' mootness argument. (S. App. 28.)

[19] This is the so-called GLMRIS study.

within 18 months of enactment, and focus the study on the Chicago Waterway, including hydrological separation:

> In expediting the completion of the study and report under paragraph (1), *the Secretary shall focus on—*
>
> > *(A)* the prevention of the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins, *such as through the permanent hydrological separation of the Great Lakes and Mississippi River Basins;* and
> >
> > (B) the watersheds of the . . . rivers and tributaries associated with the Chicago Area Waterway System. [Emphasis added.]

And finally, underscoring the urgency of the Asian carp threat to the Great Lakes, Section 1538(b)(1)(B) provides:

> if the Secretary determines a project is justified in the completed report*, proceed directly to project preconstruction engineering and design.* [Emphasis added.]

In sum, while Congress has not yet required the Corps to implement permanent hydrological separation in the Waterway, it has ordered the Corps to expedite and focus its study on that course of action and authorized immediate planning for it. The critical element of Plaintiffs' requested relief – taking steps within the Defendants' control that are needed to develop and implement plans for hydrological separation as

soon as possible – is not "prohibited" by statute. It is specifically authorized.[20]

## II. The Rivers and Harbors Act does not bar Plaintiffs' public nuisance claim.

### A. Standard of Review

The standard of review is stated above in I. A.

### B. Analysis

#### 1. The Rivers and Harbors Act does not prohibit the hydrological separation that Plaintiffs ultimately seek, but instead only requires the Corps and Congress to approve plans for construction of certain structures in the Waterway before they are built.

In ruling on the Motions to Dismiss, the District Court worked backward from the Plaintiffs' ultimate goal of hydrological separation. Instead of considering the Complaint as a whole and the entire request for relief, the District Court treated it as requesting an order simply directing the Defendants to build hydrological barriers in the

[20] As the District Court correctly found, Section 1538 does not moot this or any other aspect of Plaintiffs' Complaint. (S. App. 28.) First, it is by no means certain that the Corps will actually meet the deadline established by Congress. Moreover, as Plaintiffs-Appellants argued in the District Court, the manner in which the Corps is undertaking the study is not consistent with Congress' apparent intent. (R. 6666 – 6667.)

Waterway. As explained in section 2 below, that is not an appropriate reading of the Complaint under Rule 12(b)(6).

Having framed the issue as whether Defendants could construct such barriers, the District Court then held that the Rivers and Harbors Act, 33 U.S.C. § 401, prohibits such construction and therefore precludes Plaintiffs' public nuisance claim. (S. App. 28-29.) Once again, the District Court both misread the Complaint and misapplied a statute as it relates to Plaintiffs' Complaint. The Rivers and Harbors Act does not prohibit construction in navigable waters. It merely conditions construction on congressional and Corps approval:

> 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* . . . the dam or dike *shall have been* submitted to and *approved by the Chief of Engineers and Secretary of the Army*.

33 U.S.C. § 401 (emphasis added).

The District Court correctly noted that Plaintiffs do not dispute that: (1) implementation of a plan for hydrological separation would necessarily require the construction of some new structure(s) in the

Waterway;[21] (2) the Waterway is navigable; and (3) under the Rivers and Harbors Act, such structure(s) could not be built until the plans were approved by the Corps and Congress consented to the construction. But that does not mean that the relief requested in the Complaint is, as the District Court found, "unlawful." (S. App. 23, 28.)

### 2. Plaintiffs' Complaint seeks to require the Corps to take "all appropriate and necessary measures to expeditiously develop and implement plans" for hydrological separation.

Plaintiffs' Complaint as a whole and paragraph 3 of the Relief Requested (App. 36) are properly understood, particularly in the context of a motion to dismiss under Rule 12 (b)(6), as asking the Defendants to do everything within their legal authority to achieve, as soon as

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[21] Like dams or dikes, such structures would be physical barriers to the passage of water containing Asian carp and other aquatic invasive species at strategic locations in the Waterway. While they would require some changes in navigation, e.g., transferring cargoes or vessels over or around the barriers, they would not end it. For example, the recently released report for the Great Lakes Commission and Great Lakes and St. Lawrence Cities Initiative, Restoring the Natural Divide: Separating the Great Lakes and Mississippi River Basins in the Chicago Area Waterway System (2012), shows that such hydrologic separation is feasible and "can be achieved while also maintaining or enhancing water quality flood management and transportation." http://www.glc.org/caws/pdf/CAWS-PublicSummarymediumres.pdf, at p. 4.

possible, hydrological separation. It would include both developing a plan which the Corps itself and the Secretary of the Army would approve, and then seeking congressional approval. The Corps' development of a separation plan in consultation with the District is not unlawful. On the contrary, it was first invited by Section 3061(d) of the Water Resources Development Act of 2007, and is now specifically authorized by Section 1538 of the 2012 Progress Act.

Once such a plan is developed, the Corps' submission of it to Congress for its approval is likewise fully consistent with the Rivers and Harbors Act itself. The Act does not constrain the substantive content of the plan; it merely requires congressional consent. As noted above, the Act provides for approval of a plan by the Chief of Engineers (the head of the Corps) and the Secretary of the Army. Indeed, it has apparently long been typical under prior statutes for the Corps to seek congressional approval of plans for civil works.[22]

[22] See, e.g., Act of July 24, 1946, 60 Stat. 634.

### 3. The District Court mistakenly held that Congress, not the acts and omissions of the Defendants, is the "proximate cause" of the threatened Asian carp invasion.

The District Court brushed aside Plaintiffs' argument that the Corps could seek and obtain congressional authorization for implementation of separation plans to the extent required by the Rivers and Harbors Act (R. 6554) with a factually and legally flawed discussion of "proximate cause":

> But an unapproved plan will not stop the carp. If Congressional authorization is required before separation can be implemented, then the Corps' failure to effect that separation cannot be the proximate cause of the alleged nuisance. Only Congress, not the Corps, can authorize the action that the plaintiffs allege is necessary to abate the Asian carp nuisance.

(S. App. at 29; footnote omitted.)

No plan, whether approved or not, will alone suffice to "stop the carp" if it is not implemented. But, far more important here, the gravamen of the Complaint is that the carp cannot and will not be stopped unless the Corps first develops a plan for hydrological separation. Until the Corps develops such a plan, there will be nothing for Congress to consent to, and nothing to be implemented.

In the meantime, the Corps' acts and omissions in rejecting Plaintiffs' requests to take additional interim measures and to expedite the feasibility study and planning process, as alleged in the Complaint, are daily increasing the risk of carp invasion of the Great Lakes by delaying the actual physical separation. As this Court observed, "invasive carp are knocking on the door to the Great Lakes . . . the threat is substantial and . . . may be increasing with every day that passes." 667 F.3d at 786.

The District Court's legal analysis of proximate cause is wrong. Indeed, the District Court's reasoning implausibly concludes that Congress, by enacting the Rivers and Harbors Act in 1946, proximately caused, more than a half century later, the imminently threatened Asian carp invasion of the Great Lakes.

As this Court recently observed in *United States v. Lareneta*, 700 F.3d 983, 990 (7th Cir. 2012), while the meaning of "proximate cause" is unclear,[23] it is conventionally understood to mean something that

[23] Both the Second and Third Restatement of Torts avoid the term "proximate cause" and instead refer, respectively, to "legal cause" and "scope of liability." See Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Ch. 6 Special Note on Proximate Cause (2010).

directly produces an event causing harm and but for which the event would not occur:

> A more difficult question is what "proximate cause" actually means . . .The conventional definition of proximate cause was and remains "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Spicer v. Osunkoya*, 32 A.3d 347, 351 (Del.2011); see also *State v. Jackson*, 287 Ga. 646, 697 S.E.2d 757, 759 (2010); *Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 666 (8th Cir. 2009); *Pickett v. RTS Helicopter*, 128 F.3d 925, 929 (5th Cir.1997).
>
> * * *
>
> The current edition of *Black's Law Dictionary* (9th ed. 2009) attempts an updating: it defines proximate cause as . . . "2. A cause that directly produces an event and without which the event would not have occurred." *Id.* at 250.

Applying these principles here, and accepting Plaintiffs' allegations as true, the acts and omissions of the Corps, not congressional enactments, are the "proximate cause" of the impending disaster that Plaintiffs' seek to avert.

- The Defendants' continued routine operation of the Waterway allows Asian carp to enter the Great Lakes.
- Unless hydrologic separation is implemented, the invasion and resulting grave harm will occur.
- Separation cannot be implemented until a plan is approved by the Secretary of the Army and consented to by Congress.

- The Corps has specific authority to develop a separation plan and submit it to Congress for its approval, but has failed to do so expeditiously and the continuing delay is increasing the likelihood of the invasion.
- Unless the Defendants prepare a plan and submit it to Congress, separation will not happen and the invasion and harm to the Great Lakes will occur.

In sum, the threatened Asian carp invasion is the direct result of the Defendants' acts and omissions, and without their conduct, the invasion will not occur.[24]

Finally, the District Court's cursory analysis of proximate cause erroneously presupposed that there can be only a single proximate cause of the harm that Plaintiffs' seek to avert and that it must be Congress because Congress would still need to consent to a hydrological separation plan after the Corps approved it. As this Court recently

[24] It is possible, of course, that Congress might not consent to a separation plan once it is submitted. But that should not, in the context of a Rule 12(b)(6) motion, be assumed. That is particularly true, where, as here, Congress has specifically directed the Corps to quickly focus on hydrological separation, and proceed, if warranted, directly to pre-construction engineering and design. Moreover, the speculative possibility of congressional disapproval cannot relieve the Defendants of their responsibility for their present and continuing failure to take all measures within their control that are needed to prevent the harm.

observed in *Whitlock v. Brueggemann*, 682 F.3d 567, 583 (7th Cir. 2012), there may be multiple proximate causes of an injury:

> [T]here is no rule demanding that every case have only one proximate cause. To the contrary, "multiple proximate causes are often present" and "an actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause." Rest. 3d Torts § 29 cmt. b. Thus it does not matter that other acts are also proximate causes of the ultimate violation, or that some of those acts may be taken by an actor who is absolutely immune.

Thus, even though it is possible that Congress will not consent to a separation plan if and when the Corps submits one for its approval, the Defendant's failure to timely develop and submit such a plan will nonetheless be a proximate cause of the Asian carp invasion of the Great Lakes.

#### 4. The relief sought by Plaintiffs does not violate the constitutional separation of powers.

The District Court held that the relief requested by Plaintiffs "could be construed as a judicial directive to Congress," (S. App. at 29, n. 16) and thereby violate the Constitutional principle of separation of powers. That holding is wrong for several reasons.

First, the plain language of the Request for Relief in the Complaint shows that Plaintiffs are not asking the Court to "order"

Congress to adopt legislation. Rather, the Complaint seeks an injunction to compel the Corps to use its existing statutory authority in 2007 WRDA, § 3061(d), and the 2012 Progress Act, to take steps necessary to abate the nuisance. The requested injunctive relief would require action by the Corps, not Congress.

Second, in the context of a Rule 12(b)(6) motion, the Court was required to construe the Complaint in the light most favorable to Plaintiffs. Its critical reliance on the observation that the proposed injunction "*could* be construed as a judicial directive to Congress" (S. App. at 29, n. 16) is not consistent with the standard of Rule12(b)(6) requiring the complaint to be construed in the light most favorable to the plaintiff.

Third, a determination by the District Court that, as currently operated, the Waterway is a public nuisance would not violate the constitutional separation of powers. Such a determination has not been precluded by Congress. As this Court held, Congress has not displaced the common law in this area. 667 F.3d 780. For that same reason, the common law nuisance determination would not, of course, be binding upon Congress. Congress is free to displace or abrogate federal common

law, which is subject to the paramount authority of Congress. *Id*. at 777.

Fourth, the cases cited by the District court regarding separation of powers (S. App. 30) do not support its conclusion here. The relief Plaintiffs request does not ask the Court, as in *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001), to "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." As explained above, the actions by Defendants that Plaintiffs seek to compel have not been prohibited by Congress. Nor does the relief Plaintiffs request against Defendants conflict with legislative immunity or the independent performance of the legislative function as in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980). Moreover, Plaintiffs' Complaint does not ask the District Court to order Congress to do anything, let alone "enact legislation" as discussed in *Smith & Lee Assocs., Inc. v City of Taylor*, 102 F.3d 781, 797 (6th Cir. 1996), or to adopt certain rules as mentioned in *Lewis v. District of Columbia Judiciary*, 534 F. Supp. 2d 84, 85 (D.C. Cir. 2008).

Finally, this is not a situation like *Wisconsin v. Duluth*, 96 U.S. 379, 387 (1877), cited by the District Court (S. App. 33), where citizens of one state sought to enjoin the ongoing construction of a project already approved by Congress. There, the Supreme Court held that Congress had, through that legislation, occupied the field and that consequently the Court would not issue the requested injunction. Here, by contrast, the appropriations acts in question neither mandate the continued operation of the Chicago Waterway, nor authorize the passage of Asian carp through it. And while Congress has not yet ordered hydrological separation, it has directed the Corps to consider it on a more expedited basis. The injunction Plaintiffs seek is focused on the Defendants' actions within the scope of existing statutory authority. Thus, the relief Plaintiffs request would not conflict with or invade congressional authority.

## CONCLUSION AND RELIEF REQUESTED

Plaintiffs-Appellants' Complaint states a legally viable claim based on common law public nuisance. The Corps' and the District's acts and omissions regarding Asian carp in the Chicago Waterway – especially their failure to quickly develop plans for hydrological separation – are not fully authorized, let alone "required" by applicable statutes. The Defendants' continuing failure to take all measures within their control that are essential to prevent the Asian carp invasion is a proximate cause of the looming ecologic and economic disaster. The relief requested by Plaintiffs seeks to compel necessary actions by the Defendants, consistent with both applicable statutes and the constitutional authority of the judiciary. The District Court Judgment dismissing the Complaint under Rule 12(b)(6) is manifest error.

Accordingly, the Plaintiffs-Appellants respectfully request that this Court reverse the December 10, 2012 Final Judgment of the

District Court dismissing the Complaint, and remand this case to the District Court for trial on the merits of the public nuisance claim.

Respectfully submitted,

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Dated: February 19, 2013

# ADDENDUM – RELEVANT STATUTES

# 33 U.S.C. § 401

§ 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. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

ACT OF JULY 24, 1946
60 Stat. 634
(Excerpts)

AN ACT

Authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:

* * *

Illinois Waterway and Grand Calumet River, Indiana and Illinois; House Document Numbered 677, Seventy-ninth Congress;

# ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT OF DECEMBER 4, 1981

Pub. L. No. 97-88, Title 1, 95 Stat. 1135
(Excerpts)

PL 97-88 (HR 4144)
DECEMBER 4, 1981

An Act making appropriations for energy and water development for the fiscal year ending September 30, 1982, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1982, for energy and water development, and for other purposes, namely:

## TITLE I—DEPARTMENT OF DEFENSE—CIVIL

### Department of the Army

### CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, beach erosion, and related purposes.

* * *

### OPERATION AND MAINTENANCE, GENERAL

For expenses necessary for the preservation, operation, maintenance, and care of existing river and harbor, flood control, and related works, including such sums as may be necessary for the maintenance of harbor channels provided by a State, municipality or other public agency, outside of harbor lines, and serving essential needs of general commence and navigation; administration of laws pertaining to

preservation of navigable waters; surveys and charting of northern and northwestern lakes and connecting waters; clearing and straightening channels; and removal of obstructions to navigations; $1,008,355,000, to remain available until expended.

* * *

Sec. 107. Funds herein or hereinafter made available to the Corps of Engineers—Civil for operation and maintenance of the Illinois Waterway shall be available to operate and maintain the Chicago Sanitary and Ship Canal portion of the Waterway in the interest of navigation.

SUPPLEMENTAL APPROPRIATIONS ACT OF JULY 30, 1983
Pub. L. No. 98-63, Ch. IV, 97 Stat. 301
(Excerpts)

An Act
Making supplemental appropriations for the fiscal year ending September 30, 1983, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply supplemental appropriations for the fiscal year ending September 30, 1983, and for other purposes, namely:

* * *

CHAPTER IV

DEPARTMENT OF DEFENSE—CIVIL

DEPARTMENT OF THE ARMY

Corps of Engineers—Civil

GENERAL INVESTIGATIONS

For an additional amount for "General Investigations" $10,000,000, to remain available until expended.

* * *

Section 107 of Public Law 97-88 pertaining to maintenance and operation of the Chicago Sanitary and Ship Canal of the Illinois Waterway in the interest of navigation includes the Control Structure and Lock in the Chicago River, and other facilities as are necessary to sustain through navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River.

WATER RESOURCES DEVELOPMENT ACT OF 2007
Pub. L. No. 110-114

SEC. 3061. CHICAGO SANITARY AND SHIP CANAL DISPERSAL BARRIERS PROJECT, ILLINOIS.

(d) Feasibility Study.--The Secretary, in consultation with appropriate Federal, State, local, and nongovernmental entities, shall conduct, at Federal expense, a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways.

MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT
Pub. L. No. 112-141

SEC. 1538. ASIAN CARP.

(a) DEFINITIONS.—In this section:

(1) HYDROLOGICAL SEPARATION.—The term "hydrological separation" means a physical separation on the Chicago Area Waterway System that—

(A) would disconnect the Mississippi River watershed from the Lake Michigan watershed; and

(B) shall be designed to be adequate in scope to prevent the transfer of all aquatic species between each of those bodies of water.

(2) SECRETARY.—The term "Secretary" means the Secretary of the Army, acting through the Chief of Engineers.

(b) EXPEDITED STUDY AND REPORT.—

(1) IN GENERAL.—The Secretary shall—

(A) expedite completion of the report for the study authorized by section 3061(d) of the Water Resources Development Act of 2007 (Public Law 110–114; 121 Stat. 1121); and

(B) if the Secretary determines a project is justified in the completed report, proceed directly to project preconstruction engineering and design.

(2) FOCUS.—In expediting the completion of the study and report under paragraph (1), the Secretary shall focus on—

(A) the prevention of the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins, such as through the permanent hydrological separation of the Great Lakes and Mississippi River Basins; and

(B) the watersheds of the following rivers and tributaries associated with the Chicago Area Waterway System:

(i) The Illinois River, at and in the vicinity of Chicago, Illinois.

(ii) The Chicago River, Calumet River, North Shore Channel, Chicago Sanitary and Ship Canal, and Cal-Sag Channel in the State of Illinois.

(iii) The Grand Calumet River and Little Calumet River in the States of Illinois and Indiana.

(3) EFFICIENT USE OF FUNDS.—The Secretary shall ensure the efficient use of funds to maximize the timely completion of the study and report under paragraph (1).

(4) DEADLINE.—The Secretary shall complete the report under paragraph (1) by not later than 18 months after the date of enactment of this Act.

(5) INTERIM REPORT.—Not later than 90 days after the date of enactment of this Act, the Secretary shall submit to the Committees on Appropriations of the House of Representatives and Senate, the Committee on Environment and Public Works of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives a report describing—

(A) interim milestones that will be met prior to final completion of the study and report under paragraph (1); and

(B) funding necessary for completion of the study and report under paragraph (1), including funding necessary for completion of each interim milestone identified under subparagraph (A).

## CERTIFICATE – RULE 32(A)

Certificate Concerning Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook. In addition, this brief complies with the document requirements of Fed. R. App. P. 32(a)(7) because it does not contain more than 14,000 words. This brief contains 11,464 words.

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**PROOF OF SERVICE**

I certify that on February 19, 2013, I electronically filed the Brief for Plaintiffs-Appellants with Required Short Appendix and Plaintiffs-Appellants' Appendix with the Clerk of the Court using the ECF System, which will provide electronic notice and copies of such filing to the parties of record. Additionally, two true and correct copies of the Brief and one true and correct copy of the Appendix are being placed in the United States mail, postage prepaid, to their address of record (designated below).

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## CIRCUIT RULE 30(D) STATEMENT

Pursuant to Seventh Circuit Rule 30(d), I hereby state that all materials required by Rules 30(a) and (b) are included in Plaintiffs-Appellants' Required Short Appendix or in the additional one-volume Plaintiffs-Appellants' Appendix.

*/s/ Robert P. Reichel*
Robert P. Reichel

**PLAINTIFFS-APPELLANTS' REQUIRED SHORT APPENDIX**

**TABLE OF CONTENTS**

Plaintiffs-Appellants, pursuant to Federal Rule of Appellate Procedure (F.R.A.P.) 30, and Seventh Circuit Rule 30(a), supply the following portions of the record below for inclusion in the Required Short Appendix:

**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,** | ) | **No. 10 C 4457** |
| | ) | **Judge John J. Tharp, Jr.** |
| **Plaintiffs,** | ) | |
| **GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS** | ) | |
| **Intervenor-Plaintiff,** | ) | |
| **v.** | ) | |
| **UNITED STATES ARMY CORPS OF ENGINEERS and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,** | ) | |
| **Defendants,** | ) | |
| **CITY OF CHICAGO, COALITION TO SAVE OUR WATERWAYS, and WENDELLA SIGHTSEEING COMPANY, INC.** | ) | |
| **Intervenor-Defendants.** | ) | |

## MEMORANDUM OPINION AND ORDER

A group of states bordering the Great Lakes seeks an order requiring the U.S. Army Corps of Engineers ("Corps") and Metropolitan Water Reclamation District of Greater Chicago ("District") to take action—including immediately creating physical barriers in the waterways connecting Lake Michigan and the Mississippi River Basin—to prevent bighead and silver carp (collectively, "Asian carp") from migrating into Lake

Michigan. The plaintiffs argue that the defendants' failure to install physical barriers to physically separate the waterways will cause a public nuisance—namely, invasion of the Asian carp—resulting in grave and irreversible environmental and economic harm to the entire Great Lakes region.

Many organizations, including the Corps, are actively working to stop Asian carp from migrating into the Great Lakes watershed. The plaintiffs acknowledge that the defendants and others are taking steps to prevent Asian carp from reaching Lake Michigan, but they argue that the defendants are not doing enough. They attribute the looming disaster to the man-made hydrologic connection of the Chicago Area Waterway System ("CAWS") and Lake Michigan and maintain that nothing short of severing that connection will adequately mitigate the threat of carp infiltration of the lake. The "central and ultimate relief sought" by their complaint is a permanent injunction requiring hydrologic separation of these bodies of water.

The defendants' motions to dismiss the lawsuit for failure to state a claim are currently before the Court. Plaintiffs have asserted claims under the federal common law of public nuisance and under the Administrative Procedure Act ("APA"). To state a claim for injunctive relief, the plaintiffs must set forth specific acts or omissions that the defendants have taken (or will take) that have resulted (or will result) in a public nuisance (here, infiltration of the Asian carp into Lake Michigan) or otherwise cause a legal wrong or violation of law. As will be seen, however, the primary action that plaintiffs demand to abate the nuisance alleged—hydrologic separation of the CAWS from Lake Michigan—lies outside of the limits of the Corps' congressionally-delegated authority to act. Specifically, Congress has enacted statutes requiring the Corps to sustain through

navigation between Lake Michigan and the Des Plaines River in the Mississippi River Basin and prohibiting any party from constructing a dam in any navigable waterway (including the CAWS) without Congress's prior consent. These statutes preclude the Corps from taking the actions that plaintiffs believe necessary to prevent the Asian carp from reaching Lake Michigan.

The defendants' motion therefore presents the question of whether harms arising from actions or omissions that are required by a federal statute can constitute a public nuisance. Though mindful of, and alarmed by, the potentially devastating ecological, environmental, and economic consequences that may result from the establishment of an Asian carp population in the Great Lakes, the Court is nevertheless constrained to answer the question in the negative. In the absence of a constitutional violation (and none is here alleged), it is not the province of the courts to order parties to take action that would directly contravene statutory mandates and prohibitions, and the common law recognizes that actions required by law do not give rise to liability for nuisance. If the plaintiffs want to remove these congressional impediments to hydrologic separation and to replace them with effective barriers between the waterways, they must do so by means of the legislative process, not by alleging that the Corps' acts and/or omissions, required by federal statutes, violate federal nuisance common law and therefore justify an override of those statutes by the courts. Plaintiffs' complaint, therefore, is dismissed.[1]

[1] The intervenor-plaintiff Grand Traverse Band of Ottawa and Chippewa Indians adopted the plaintiffs' allegations, Dkt. 211 ¶ 2, and therefore its complaint is also dismissed. Because the intervenor-plaintiff's complaint is substantially identical to the plaintiffs' complaint, all of the Court's rulings with respect to the plaintiffs apply with equal force to the intervenor-plaintiff.

The Court will, however, grant the plaintiffs leave to re-plead their claims. To the extent that the plaintiffs can, consistent with their obligations under Rule 11, plead causation based on acts or omissions of the defendants that are not explicitly required by law, they may be able to state a viable nuisance claim (or APA claim founded on nuisance as a legal wrong). As the Seventh Circuit held in affirming this Court's denial of plaintiffs' motion for preliminary injunction, Congress has not occupied the field of environmental management of invasive species generally, or of the Asian carp specifically, so completely as to have displaced the common law; there may be room in which the plaintiffs can still maneuver. But while it has not displaced the common law entirely, Congress plainly has precluded the "central and ultimate relief sought" by the plaintiffs in the present complaint and for that reason the complaint, as currently stated, must be dismissed.

**FACTS**

The Court assumes familiarity with the underlying facts of the case, which are set forth in detail in the order denying the plaintiffs' motion for preliminary injunction, *Michigan v. U.S. Army Corps of Eng'rs*, No. 10 C 4457, 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010) (Dow, J.) (Dkt. 155) (*Asian Carp I)*, and the Seventh Circuit's opinion affirming that decision. 667 F.3d 765 (7th Cir. 2011) (*Asian Carp II)*. However, because the Court's previous opinion included facts outside of the pleadings (submitted for purposes of the plaintiffs' motion for preliminary injunction), which the Court cannot

consider on these Rule 12(b)(6) motions to dismiss, the Court will briefly restate the necessary facts as alleged in the complaint.[2]

**1. Development of the Chicago Area Waterway System**

More than 100 years ago, facing sewage and industrial waste problems caused by the discharge of human and industrial waste from the rapidly growing city of Chicago into Lake Michigan, Illinois created the District in order to construct the Chicago Sanitary and Ship Canal ("Canal") connecting the Chicago River and the Great Lakes Basin to the Illinois River and the Mississippi River Basin. The basic solution to the health hazards arising from discharge of Chicago's wastes into Lake Michigan was to reverse the flow of the Chicago River, pushing the waste away from the lake, through the sanitary canal, and ultimately into the Mississippi River. This project, which has been hailed as one of the greatest engineering feats of all time,[3] doubtless has done much over the ensuing 100 years to protect the Great Lakes watershed from pollution and has been critical to the growth of Chicago as one of the nation's largest cities and commercial centers. *See, e.g., Asian Carp II*, 667 F.3d at 767-68.[4]

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[2] For the purposes of the motion to dismiss, the Court accepts the plaintiffs' factual allegations as true. *See Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011).

[3] In 2000, the American Society of Civil Engineers named the Chicago wastewater system one of the "Monuments of the Millennium." *See* http://www.asce.org/PPLContent.aspx?id=2147486103 (last viewed 12/3/2012).

[4] As one might imagine, however, those on the receiving end of Chicago's waste flows did not view the creation of the District and Canal with enthusiasm. To the contrary, they sued to stop the diversion of waste into the Canal, claiming that the project created a public nuisance because it would transport Chicago's sewage downstream to Missouri and beyond. The Supreme Court overruled Illinois' demurrer, which asserted lack of jurisdiction and that the state could not obtain equitable relief, but ultimately rejected Missouri's public nuisance claim on the merits. *See Missouri v. Illinois*, 200 U.S. 496 (1906); *Missouri v. Illinois*, 180 U.S. 208 (1901).

The Canal is used to manage wastewater discharges from within the District, for flood control, and also as an avenue of waterborne transportation. As a direct result of the Canal and associated infrastructure created, operated, and maintained by the District and the Corps, there are multiple connections through which fish can move from the waters of the Illinois and Des Plaines Rivers into Lake Michigan. Those connections include the Lockport Lock, sluice gates[5] in the Lockport Dam, the O'Brien Lock, sluice gates in the O'Brien Dam, the Chicago Lock, sluice gates in the Chicago River Controlling Works, and the sluice gate at the Wilmette Pumping Station.

**2. Introduction of Asian Carp**

The plaintiffs allege that invasive Asian carp have used or will use the Canal and other portions of the CAWS to migrate into Lake Michigan. Plaintiffs concede that the Asian carp have not yet developed a sustainable population in the lake, but assert that they soon will. Asian carp are not native to this country, but were imported into the United States for various reasons, including for experimental use in controlling algae in aquaculture and wastewater treatment ponds. As issue here are silver carp, which can grow to weights of sixty pounds and in the presence of motorboats may jump up to ten feet in the air, and bighead carp, which can grow to weights over one hundred pounds. Both species of Asian carp feed almost continuously, can readily adapt to varying environmental conditions, reproduce prolifically, and spread rapidly. The Asian carp escaped from ponds in the lower Mississippi River Basin, and have migrated through and become established in the rivers in the Mississippi River Basin, including the Illinois River. Because of their voracious appetites, the Asian carp substantially disrupt and

[5] A sluice gate is a barrier used to control water levels and flow rates in a river or canal.

displace native fish populations, impairing recreational and commercial fishing. And because of their jumping behavior, silver carp can injure boaters and cause property damage, impairing recreational boating.

**3. Attempts to Block the Asian Carp From Reaching Lake Michigan**

The Corps has taken a number of steps to prevent the Asian carp from reaching Lake Michigan. Primarily, the Corps has relied on an electrical "Dispersal Barrier System," comprised of underwater steel cables charged with electricity, that is intended to deter the passage of invasive species. The first portion of that system, Barrier I, is located slightly north of the Lockport Dam, approximately 25 miles from Lake Michigan, and has been in operation since 2002. In early 2009, the Corps activated a second electrical barrier, Barrier IIA, approximately 1,300 feet downstream (*i.e.*, farther away from Lake Michigan) from Barrier I. The plaintiffs allege that Barrier IIA is operating at an electrical setting below its full design capacity, and must be turned off periodically for maintenance. (A third barrier, Barrier IIB which is located between Barriers I and IIA, is now operational although it had not yet been completed at the time the complaint was filed).

In addition to operating the Dispersal Barrier System, the Corps has also selectively applied rotenone (a fish kill agent) and temporarily closed the locks at times when the Dispersal Barrier System has been shut down for maintenance. The Corps has also performed environmental DNA ("eDNA") testing to determine whether Asian carp have advanced beyond the Dispersal Barrier System, and has applied additional rotenone in some areas where eDNA has indicated that the carp may be present. And the Corps has used fish nets in various locations to search (unsuccessfully) for Asian carp. All of the

Corps' efforts are designed to keep Asian carp from moving above the Dispersal Barrier System anywhere in the entire CAWS, including the Canal and the Illinois and Des Plaines Rivers.

Despite the Corps' efforts, by 2009 Asian carp "were observed in the Canal." Cmplt. ¶ 32. These sightings prompted the Corps to begin a program of environmental surveillance for Asian carp using the eDNA method of analyzing water samples for the presence of genetic material emitted or secreted by Asian carp. eDNA testing has (accepting the plaintiffs view) indicated that Asian carp are present in the Canal north of the Lockport Lock and the Dispersal Barrier System, which means (according to the complaint) that at least some carp have infiltrated the CAWS and only the system of locks, dams, and pumping stations stands between them and Lake Michigan. In December, 2009, a bighead carp was recovered from the Canal in this same vicinity. In June, 2010, a bighead carp was recovered six miles from Lake Michigan in Lake Calumet, which is part of the CAWS and is connected to Lake Michigan via the Calumet River.

The plaintiffs have urged the defendants to take additional action to prevent Asian carp migration, including requesting that the Corps change its lock and water control operations and implement plans to physically separate the carp-invested waterways from Lake Michigan. In response, the Corps released a number of statements regarding its plans to prevent Asian carp from reaching Lake Michigan. The most significant of these statements is a report issued in June 2010 entitled Interim III, Modified Structures and Operations, Illinois & Chicago Area Waterways Risk Reduction Study and Integrated Environmental Assessment ("Interim III"). In the Interim III report, the Corps proposed

to install screens in some sluice gates at the O'Brien Lock, but it rejected closing the locks except intermittently on a case by case basis because the Corps states that there is no "evidence that there is an imminent threat that a sustainable population of Asian carp may establish itself if the locks are not closed." Cmplt. ¶ 73. The Corps further concluded that "there is no individual or combination of lock operation scenarios [sic] will lower risk of Asian carp establishing self-sustaining populations in Lake Michigan to an acceptable level." *Id.* The plaintiffs find fault with the Interim III report, alleging that some experts who were consulted in conjunction with the report concluded that closing the locks would reduce the chances of Asian carp infiltrating Lake Michigan, but that for the purposes of the Interim III report they were not allowed to consider or recommend closing the locks on a long-term or permanent basis.

**4. Procedural History**

The plaintiffs filed this claim for injunctive and declaratory relief on July 19, 2010, shortly after the Corps issued the Interim III report, and moved for a preliminary injunction the same day.[6] The case was originally assigned to Judge Dow, who denied the motion for a preliminary injunction on December 2, 2010, after extensive witness testimony, argument, and briefing regarding the motion. In holding that the plaintiffs had demonstrated, at best, "very modest" and "minimal" likelihood of success on their nuisance and APA claims, respectively, *Asian Carp I*, 2010 WL 5018559 at *16, *21,

[6] The plaintiffs had previously filed, on December 21, 2009, a motion for preliminary injunction with the Supreme Court of the United States, invoking original jurisdiction in the Supreme Court pursuant to Decrees entered in 1930 and 1967 related to the quantity of water that Illinois is allowed to divert from Lake Michigan. The Supreme Court denied the plaintiffs' motion without opinion on January 19, 2010. *See Michigan v. Illinois*, 130 S. Ct. 1166 (2010).

Judge Dow addressed several of the arguments at issue on the motion to dismiss. But he addressed those arguments in the context of ruling on a preliminary injunction motion, where the Court was called on only to assess the "likelihood" that the plaintiffs' claims would succeed. Judge Dow did not need to resolve those arguments definitively. Most significantly, with respect to the present ruling, Judge Dow discussed at some length that, in view of statutory requirements authorizing the Corps to operate the CAWS and to sustain through navigation between the CAWS and Lake Michigan, it would be "difficult to conclude that the Corps has created a public nuisance by acting in accordance with its statutory mandates." *Id.* at *24. Because ruling on the preliminary injunction motion did not require it, however, Judge Dow did not definitively hold that the plaintiffs could not succeed on their nuisance claim on that basis.

The plaintiffs appealed Judge Dow's ruling to the Seventh Circuit, which affirmed the denial of a preliminary injunction on August 24, 2011. In affirming Judge Dow's ruling, the Court of Appeals definitively addressed, and rejected, several legal issues advanced by the defendants in support of Judge Dow's ruling, specifically holding that sovereign immunity did not bar the plaintiffs' claims and that Congress had not displaced the federal common law of public nuisance by its limited legislative actions concerning the subjects of invasive species generally, or the spread of Asian carp specifically. *Asian Carp II*, 667 F.3d at 774-78. The Seventh Circuit did not, however, resolve two arguments raised in the district court, namely whether a common law claim for public nuisance can ever be maintained against a federal agency and the question, discussed at length by Judge Dow, of whether the plaintiffs can maintain a cause of action for public

nuisance where statutes preclude the action alleged to be necessary to prevent the nuisance.

Following the Seventh Circuit's affirmance of denial of the preliminary injunction motion, the defendants moved to dismiss the complaint on January 30, 2012. Shortly after briefing on the motion to dismiss was completed the case was transferred to this Court's docket on June 1, 2012, as part of the Court's standard process of reassigning cases to comprise the initial docket of newly appointed judges. The Corps submitted a "Supplemental Motion to Dismiss" in late September (Dkt. 237), to which the plaintiffs responded on October 9, 2012. Dkt. 240.

**5. Relief Requested**

The plaintiffs argue that the risk of Asian carp migrating into Lake Michigan exists because the District, beginning with completion of the Canal over 100 years ago, connected the Great Lakes basin to the Mississippi River basin. Cmplt. ¶ 15 (the "man-made connection of the Great Lakes Basin with the Mississippi River basin . . . sowed the seeds of the present dispute by allowing…invasive species…to migrate"). The complaint alleges that, in maintaining and operating the CAWS in a manner that preserves the hydrologic connection between the CAWS and Lake Michigan, the defendants have allowed or will allow the migration of Asian carp into the lake. *See, e.g.*, Cmplt. ¶ 1 (defendants "have created and maintained . . . facilities within the CAWS that link Illinois waters . . . to Lake Michigan . . . . To the extent those facilities are maintained and operated in a manner that allows the migration of Asian carp into the Great Lakes and connected waters, they constitute a public nuisance"); ¶ 89 ("the present risk that Asian carp . . . will migrate into Lake Michigan exists precisely because the District created and

implemented the diversion project and because the District and the Corps are maintaining and operating the infrastructure of that project in a manner that allows those fish to migrate").

Since the plaintiffs allege that the defendants' creation, maintenance, and operation of the CAWS has caused the threat that the Asian carp will establish themselves in the Great Lakes, it is not surprising that "the central and ultimate relief sought by Plaintiffs is a declaratory judgment that a common law public nuisance exists and a permanent injunction requiring the Defendants to 'expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the CAWS from Lake Michigan.'" Supp. Resp. (Dkt. 240) at 6. Until this permanent separation of these waterways can be implemented, the plaintiffs seek a permanent injunction requiring the defendants "to immediately take all available measures within their respective control, consistent with the protection of public health and safety, to prevent the migration of bighead and silver carp through the CAWS into Lake Michigan." Cmplt. at 31. These intermediate steps include:

> (a) Using the best available methods to block the passage of, capture or kill bighead and silver carp that may be present in the CAWS, especially in those areas north of the O'Brien Lock and Dam.
>
> (b) Installing block nets or other suitable interim physical barriers to fish passage at strategic locations in the Calumet River between Lake Calumet and Calumet Harbor.
>
> (c) Temporarily closing and ceasing operation of the locks at the O'Brien Lock and Dam and the Chicago River Controlling Works except as needed to protect public health and safety.
>
> (d) Temporarily closing the sluice gates at the O'Brien Lock and Dam, the Chicago Controlling Works, and the

> Wilmette Pumping Station except as needed to protect public health or safety.
>
> (e) Installing and maintaining grates or screens on or over the openings to all the sluice gates at the O'Brien Lock and Dam, the Chicago River Controlling Works, and the Wilmette Pumping Station in a manner that will not allow fish to pass through those structures if the sluice gates are opened.
>
> (f) Installing and maintaining block nets or other suitable interim physical barriers to fish passage as needed in the Little Calumet River to prevent the migration of bighead and silver carp into Lake Michigan, in a manner that protects public health and safety.
>
> (g) As a supplement to physical barriers, applying rotenone at strategic locations in the CAWS, especially those areas north of the O'Brien Lock and Dam where bighead and silver carp are most likely to be present, using methods and techniques best suited to eradicate them and minimize the risk of their movement into Lake Michigan.
>
> (h) Continue comprehensive monitoring for bighead and silver carp in the CAWS, including resumed use of environmental DNA testing.

*Id*. at 32-33. Several of these measures are intended, to the extent possible, to sever the hydrologic connection between the waterways immediately. The plaintiffs acknowledge, for example, that the locks "are not designed as barriers to fish passage and may allow some water to pass through them," but maintain that "it is indisputable that when the locks are closed they are far less likely to allow the passage of fish than when they are opened." Cmplt. ¶ 72.

**DISCUSSION**

The plaintiffs argue that by refusing to physically separate the Illinois River from Lake Michigan, the defendants have caused a public nuisance and have also violated several laws; those violations, they assert, provide them with a common law action for

public nuisance and entitle them to judicial review (and remedy) pursuant to the APA. It is important to stress that this litigation is now before the Court on the defendants' motions to dismiss, rather than on a motion for preliminary injunction, which the Court decided in a previous opinion. For purposes of *this* motion, the Court's task is to determine whether the plaintiffs have stated a claim for public nuisance under federal common law or under the APA, *not* whether it is likely that Asian carp will reach Lake Michigan absent relief, whether the requested relief would reduce or eliminate that likelihood, or whether the costs of the proposed remedy outweigh its potential benefits. Accordingly, for purposes of evaluating the motion to dismiss, the Court assumes that the defendants' operation of the CAWS creates a grave risk that Asian carp will reach (or have already reached) Lake Michigan and that the arrival of carp in the lake threatens the public with grave environmental and economic harm. Cmplt. ¶¶ 87, 89. The question presented by the defendants' motion is not whether those facts are true but whether the defendants, by their acts and/or omissions, are liable for creating the risk of imminent ecologic and economic disaster the plaintiffs have alleged.

## I. The Seventh Circuit Has Already Determined that the Corps' Sovereign Immunity Has Been Waived and that the Asian Carp Statutes Do Not Displace Federal Common Law.

In its opposition to the plaintiffs' motion for a preliminary injunction, the Corps argued that the plaintiffs could not succeed on the merits of their claims because sovereign immunity barred their suit. The plaintiffs countered by arguing that the APA waives sovereign immunity for this claim, and the Seventh Circuit agreed that the United States has waived sovereign immunity. *See Asian Carp II*, 667 F.3d at 774-76. The Corps also argued that Congress has displaced the common law of public nuisance as it relates to Asian carp because it has enacted legislation that speaks directly to the problems

caused by invasive species generally and Asian carp specifically. *See American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) ("*AEP*"). But the Seventh Circuit rejected that argument as well, holding that congressional action addressing these problems has not been sufficiently comprehensive to displace the federal common law. *Asian Carp II*, 667 F.3d at 777-80.[7]

The Corps acknowledges that the Seventh Circuit has already decided that sovereign immunity has been waived, MTD Br. (Dkt. 218) at 17, and that "Congress ha[s] not displaced the common law of public nuisance with respect to invasive species generally or Asian carp in particular," *id.* at 9. The Seventh Circuit's ruling on these issues would seem to foreclose reargument, but the defendants proceed anyway, asserting that "findings made at the preliminary injunction stage do not bind the district court as the case progresses." Reply Br. (Dkt. 230) at 2; *Asian Carp II*, 667 F.3d at 782. They acknowledge that rulings on "pure issues of law" at the preliminary injunction stage are binding later in the litigation, but argue that the Seventh Circuit's decisions relating to sovereign immunity and displacement were not pure issues of law, but rather mixed questions of law and fact. Reply Br. (Dkt. 230) at 4. They do not, however, explain what

[7] The Seventh Circuit identified the following statutes (including several appropriations statutes) as the universe of statutes enacted by Congress that bear directly on this issue: Aquatic Nuisance Prevention and Control Act, 16 U.S.C. §§ 4701 *et seq.*; Water Resources Development Act, 33 U.S.C. §§ 2201 *et seq.*; Department of Defense and Full-Year Continuing Appropriations Act 2011, Pub. L. No. 112-10, §§ 1101(a)(2), 1104, 1106, 125 Stat. 38, 103 (Apr. 15, 2011); Energy and Water Development and Related Agencies Appropriations Act 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2845, 2853 (Oct. 28, 2009); District of Columbia Appropriations Act of 2005, Pub. L. No. 110-114, § 3061(b)(1), 121 Stat. 1121 (Nov. 8, 2007); Pub. L. No. 98-63, 97 Stat. 301, 311 (July 30, 1983); Pub. L. No. 97-88 § 107, 95 Stat. 1135, 1137 (Dec. 4, 1981); Pub. L. No. 79-525, 60 Stat. 634, 636 (July 24, 1946). These statutes collectively will be referred to as "the Asian carp statutes."

facts the Seventh Circuit relied upon in making these rulings, and for good reason: there were none.

The Seventh Circuit plainly considered and resolved the questions of sovereign immunity and statutory displacement of the common law as "pure issues of law." In deciding whether sovereign immunity barred suit, the Seventh Circuit examined only the interplay between the APA and the FTCA, 28 U.S.C. § 1346(b). It held that the FTCA does not forbid tort claims for injunctive relief and therefore that it does not negate the APA's waiver of sovereign immunity. This is a purely legal question that is not affected by the facts of the case. *Asian Carp II*, 667 F.3d at 774-76. Similarly, the Seventh Circuit found that congressional efforts to curb the migration of Asian carp are not yet so pervasive as to suggest an intention to displace the common law nuisance scheme. *Id.* at 778-79. Therefore, statutes have not displaced the common law tort of public nuisance. This finding also depends only on the statutes and the common law, not the facts of the case. Because the Seventh Circuit's rulings on sovereign immunity and statutory displacement of the common law are pure issues of law, they are binding on this Court, notwithstanding that these rulings were made in the context of reviewing a ruling on a preliminary injunction motion.

The defendants also claim that the Court should revisit the Seventh Circuit's holding with respect to sovereign immunity because one of the cases the Seventh Circuit relied upon, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), has since been reheard *en banc* and is no longer precedential authority in the Ninth Circuit. Though *Veterans for Common Sense* was indeed reheard *en banc*, that alone is not a compelling reason to revisit the Seventh Circuit's holdings. *Veterans for Common Sense*

was but one of several cases the Seventh Circuit relied upon in finding that sovereign immunity was waived. *Asian Carp II*, 667 F.3d at 774-76. The Seventh Circuit relied on it most heavily to confirm that the "final agency action" requirement of the APA does not limit the waiver of sovereign immunity, a point that the defendants have never contested. *Id.* at 775. And the Seventh Circuit's rationale for why sovereign immunity is waived, including the court's examination of the relevant statutes, remains valid, even in the wake of the Ninth Circuit's vacation of *Veterans for Common Sense*. The Asian carp statutes have not displaced the tort of common law nuisance for invasive species generally or Asian carp specifically.

**II. The Plaintiffs Fail to State a Public Nuisance Claim.**

In addition to its sovereign immunity and statutory displacement arguments, rejected above, the Corps raises two additional arguments for dismissing the plaintiffs' public nuisance claim.[8] It argues that (i) parties cannot bring public nuisance suits against the federal government; and (ii) that Congress has statutorily prescribed the Corps' actions in the CAWS and proscribed separation of the waterways. MTD Br. (Dkt. 218) at 20-27. In affirming denial of the preliminary injunction, the Seventh Circuit considered but declined to rule on the first argument because the parties had not thoroughly briefed the issue, and because it ultimately concluded that preliminary relief was not warranted in any event. *Asian Carp II*, 667 F.3d at 773-74. The Seventh Circuit did not, however, address the question of whether the plaintiffs had stated a viable claim for public nuisance in light of statutes that preclude the defendants from taking the actions alleged

[8] The District joins the Corps' arguments, and makes additional arguments of its own, which the Court addresses below.

to be necessary to prevent the nuisance. While assuming for purposes of reviewing the denial of the preliminary injunction that the plaintiffs' common law claim could proceed, the Court of Appeals expressly left open the question of whether the plaintiffs could state a public nuisance claim. *Id*. at 774.

The Court's analysis of these issues is informed by the Seventh Circuit's definition of a public nuisance as "a substantial and unreasonable interference with a right common to the general public, usually affecting the public health, safety, peace, comfort, or convenience." *Asian Carp II*, 667 F.3d at 771 (citing Restatement (Second) of Torts § 821B). Upon review, this Court concludes that it is possible, based on appropriate facts and circumstances, for a plaintiff to state a common law cause of action for public nuisance against a federal agency. These plaintiffs, however, have failed to state such a claim in this case because it would be unlawful for the defendants to take the action that the plaintiffs allege is necessary to prevent the Asian carp from reaching Lake Michigan, namely hydrologically separating the CAWS from the lake. If, as the plaintiffs allege, failure to sever the connection between these bodies of water is the cause of the nuisance, then the threat of invasion by the carp, by definition, does not constitute an "unreasonable" interference with the public welfare and therefore does not constitute a public nuisance.

**A. A Public Nuisance Claim May Be Stated Against a Federal Agency.**

Because claims for public nuisance seek "to vindicate the interest of the sovereign in protecting the public interest," and because the United States is deemed to act in the public interest, the defendants assert that, even where the government has waived sovereign immunity, parties cannot bring public nuisance claims against the federal government or its agencies. Reply Br. (Dkt. 230) at 15. As the Seventh Circuit explained,

this theory harkens back to the "ancient origins" of the doctrine of public nuisance, where "the term described the criminal act of infringing on the rights of the Crown, [and] at least during that era, no one would have contemplated that the King or Queen could be the source of a nuisance." *Asian Carp II*, 667 F.3d at 773 (internal citation omitted). The defendants submit that even today, though public nuisances are no longer treated only as crimes, they are still considered intrusions on the public welfare. MTD Br. (Dkt. 218) at 20-21. The United States, it argues, is the guardian of the public welfare, and frequently sues in its capacity as the protector of the public interest. As such, according to the Corps, plaintiffs cannot bring public nuisance claims against federal agencies, which by definition are carrying out activities deemed to be in the public interest.[9]

So far as the Court (or the defendants, apparently) have been able to find, however, no court has ever held that public nuisance claims cannot run against the United States. In fact, it appears that no court (other than the Seventh Circuit earlier in this litigation) has even discussed the issue.[10] *See Asian Carp II*, 667 F.3d at 773 ("[O]ut of all public nuisance decisions we have identified from either the Supreme Court or the

[9] This concept is distinct from the concept of sovereign immunity. *Asian Carp II*, 667 F.3d at 773. The doctrine of sovereign immunity speaks to the question of whether a plaintiff is precluded from asserting a claim against the defendant, but says nothing about whether the claim itself is legally sufficient. *Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998) ("At its core, sovereign immunity deprives the courts of jurisdiction *irrespective of the merits of the plaintiff's claim*.") (emphasis added). In making this argument, the defendants assert that, putting aside any question of sovereign immunity, the claim itself is invalid because action taken by the federal government, by definition, must be deemed to be in the public interest and therefore plaintiffs cannot establish that the alleged nuisance constitutes a public harm.

[10] In its opinion affirming denial of the preliminary injunction, the Seventh Circuit noted that the parties had given only "cursory" attention to the question of whether the United States can be sued for a public nuisance. The parties' briefs on the question in the context of the defendants' motion to dismiss do not advance the discussion any further. None identifies any precedent addressing this question directly.

Courts of Appeals that involve a federal agency as a defendant, none contains a whisper of discussion about whether the claim runs against the United States."). But several courts, including the Supreme Court, have considered public nuisance claims against the federal government or its agents, and have seemed to contemplate, without explicitly deciding, that a public nuisance claim may lie against the federal government. In *AEP*, for instance, the plaintiffs brought public nuisance claims against, among other defendants, the Tennessee Valley Authority, a federally owned corporation. 131 S. Ct. at 2532. Though the Court ultimately held that the public nuisance tort of air pollution had been displaced by enactment of the Clean Air Act, the Court never hinted that a federal agency could not commit a public nuisance.[11] *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 4 n.3 (1981), is another case in which the Supreme Court dismissed public nuisance claims against the Corps and the EPA on statutory displacement grounds, and as in *AEP* the Court did not mention any other impediment to bringing the claims against a federal agency. *See id.* at 21-22. Many other courts have decided public nuisance claims against federal agencies without mentioning whether the agencies are inherently immune. *See, e.g., North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010); *Committee for Consideration of Jones Falls Sewage*

[11] The Corps argues that *AEP*, as well as other cases, actually "do discuss whether public nuisance claims can be brought against federal agencies." Reply Br. (Dkt. 230) at 16. That statement is misleading at best. Although the cited cases discuss whether those plaintiffs raised valid claims against federal defendants, they *do not* discuss the argument that the defendants advance here, namely whether it is impossible for plaintiffs to state a public nuisance claim against federal agencies because their actions, by definition, are in the public interest and cannot therefore be deemed to cause any "unreasonable" interference with the public welfare.

*Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976) (public nuisance claim against EPA); *Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976).[12]

Drawing inferences from the absence of discussion in a case can be a misleading interpretive methodology (*see Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011), noting that courts "often let issues pass in silence" and discouraging inferences based on a court's silence), but for what it is worth, it stands to reason that if a cause of action for public nuisance could not exist against a federal agency, courts would not need to dismiss such actions on the grounds of statutory displacement or sovereign immunity. And if there were a rule that shielded federal agencies from nuisance suits, it would also stand to reason that some court, somewhere, would have invoked it. None ever has. This Court is not inclined, then, to resurrect a doctrine that, along with notions about divine rights and other detritus of monarchy, does not appear to have survived the Revolution.

Beyond the dearth of precedent for the Corps' argument, there does not seem to be a compelling reason to insulate federal agencies from potential public nuisance suits. The federal government needs no judicial assistance to protect itself from such suits. If Congress deems it appropriate to do so, the government can amend the scope of the APA's sovereign immunity waiver. Alternatively, Congress can achieve essentially the same result by enacting legislation that is sufficiently comprehensive to occupy the field and thereby displace any role for the common law doctrine of public nuisance. But

[12] Missouri's original challenge, in 1900, to the potentially untoward effects of the creation of the Canal and the CAWS was also in the form of a claim for public nuisance, though no federal agency was named in the suit. *Missouri v. Illinois*, 180 U.S. 208 (1901).

Congress has not carved public nuisance claims out of its sovereign immunity waiver (nor has it occupied the field of environmental regulation of invasive species by enacting a comprehensive legislative scheme that address the problem presented in this case), facts that suggest that Congress itself has not deemed the prospect of such suits particularly problematic. Indeed, creating a broad judicial exemption from public nuisance claims for the federal government would, so far as may be discerned from its scope as set forth in the APA, effectively countermand the breadth of the waiver that Congress has deemed to be appropriate. That is not this Court's prerogative.

Even if judicial creation of a secondary level of quasi-immunity for federal agencies were not objectionable, the premise on which the defendants' argument is based is open to question. The "agency as guardian of the public welfare" assumption on which it is founded is a frequent subject of debate and criticism from many quarters—legislative, judicial, and academic. In an ideal world, an administrative agency would represent the interests of citizens and always maximize the public welfare, but "the world is not ideal." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 499 (7th Cir. 2011). Rival concerns that agencies necessarily focus on a narrow field and may therefore be oblivious to the broader implications of their actions, or are vulnerable to "capture" by regulated entities, or are prone to institutional biases and self-preservation, provide ample reason to question the legitimacy of a doctrine premised, essentially, on agency infallibility.[13] Even

[13] *See, e.g., Adkins*, 644 F.3d at 499 (noting that "regulatory agencies are subject to the phenomenon known as 'agency capture'"); *Wood v. General Motors Corp.*, 865 F.2d 395, 418 (1st Cir. 1988) (describing agency capture as the "undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public"). *See also, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly*

crediting regulators with the best of intentions, that an agency acts to promote public welfare in a particular manner, or arena, does not necessarily imply that such actions cannot adversely affect public welfare in other ways, and perhaps to a degree sufficient to constitute a public nuisance, *i.e.*, an unreasonable interference with the rights of the community at large. In a case where a plaintiff may plausibly claim that the agency's action has caused an unreasonable interference with the public welfare, those allegations suffice to state a claim for public nuisance and the Court therefore declines to carve out an exemption to application of federal common law for federal agencies. If there are policy reasons to exempt federal agencies from such suits, it is up to Congress to assess them and to determine whether the scope of its sovereign immunity waiver should be revisited.

**B. The Defendants' Actions Are Fully Authorized by Statute, and the Requested Relief Is Unlawful.**

To state a claim for public nuisance, the plaintiffs must identify acts or omissions by the defendants that cause "a substantial and unreasonable interference with a right common to the general public, usually affecting the public health, safety, peace, comfort, or convenience." *Asian Carp II*, 667 F.3d at 771 (citing Restatement (Second) of Torts §

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*Partisan Age*, 61 DUKE L.J. 1671 (2012) (describing and positing the potential adverse implications of "blood sport" administrative decision-making relating to high-profile public policy issues); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21-23 (2010) (summarizing reasons creating risk of agency capture by regulated interests); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 451-52 (2010) (addressing theory that agencies cater to narrow interest group preferences rather than broader public interests); Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1282-1304 (2006) (describing and critiquing dominant theories critical of regulatory efficiency and public welfare maximization by means of administrative law).

821B). The Restatement sets out factors to consider in deciding whether an interference is unreasonable, including "(a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect . . . . Restatement (Second) of Torts § 821B(2). "It is only when . . . conduct is unreasonable, in the light of its social utility and the harm which results, that it amounts to a nuisance." William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418 (1942).

It follows, then, that where a defendant's actions are specifically approved by statute or regulation, the result of such actions does not constitute a nuisance. "Although it would be a nuisance at common law, conduct that is fully authorized by statue, ordinance or administrative regulation does not subject the actor to tort liability." Restatement (Second) of Torts § 821B cmt. f. Stated another way, conduct authorized, or required, by statute cannot ***cause*** a public nuisance. As will be seen, the defendants' operation of the CAWS, and maintenance of the hydrologic connection between the CAWS and Lake Michigan is not only lawful, it is also specifically authorized, and in fact required, by statute. Therefore, even if the defendants' actions would otherwise suffice to constitute a public nuisance—*i.e.*, to cause substantial harm to the general public—that harm is not "unreasonable"—and therefore cannot constitute a nuisance—because it is the inevitable by-product of the defendants' compliance with requirements set forth in valid statutes.

Conceding that the Seventh Circuit's opinion does not expressly address the defendants' argument that the complaint fails to state a nuisance claim for this reason, plaintiffs assert that the opinion "implicitly" rejects the proposition because the court held that they had shown a "good or even substantial likelihood of success on the merits of their public nuisance claim." MTD Resp. Br. (Dkt. 229) at 11 (quoting *Asian Carp II*, 667 F.3d at 786). Nowhere in the Seventh Circuit's opinion, however, did the court even advert to, much less, address, the question of whether the Corps' failure to separate the CAWS from Lake Michigan was authorized, or required, by federal law. As noted above, the Court of Appeals simply assumed that the plaintiffs could state a claim for public nuisance and based its decision affirming denial of the preliminary injunction not on that basis but on its conclusion "that a preliminary injunction would cause significantly more harm that [sic] it would prevent." *Asian Carp II*, 667 F.3d at 789.

Similarly, when the court stated that the plaintiffs were permitted to pursue the Corps for nuisances "caused by their operation of a manmade waterway between the Great Lakes and Mississippi watersheds," the statement was made in the context of the court's rejection of the premise that nuisance law did not apply to the defendants because the carp were invading of their own volition; as the court appropriately noted, creating and maintaining the conditions that allow the invasion is sufficient participation to be liable for a nuisance arising from the existence and operation of the CAWS. That point, however, does not resolve the question of whether the carp invasion constitutes a nuisance—*i.e.*, an "unreasonable" interference with the public welfare—where the acts alleged to be the cause of the invasion were taken in compliance with statutory mandates and the acts alleged to be necessary to prevent the nuisance are forbidden by law. The

Seventh Circuit's opinion considered whether the United States has waived sovereign immunity for nuisance claims, whether Congress has displaced the common law on the subject of invasive species, and whether acts by federal agencies can ever be considered to constitute public nuisances, but it did not address the question of whether public harm that can be prevented solely by actions that Congress has barred can constitute a public nuisance.[14] That is the question before this Court on the present motion and the one this Court answers in the negative. The plaintiffs have not alleged specific actions that the defendants have taken or failed to take—other than actions directly authorized and required by statute and omissions to take actions forbidden by law—that cause a public nuisance.

**1. The Plaintiffs Demand Physical Separation of Lake Michigan From the CAWS.**

The plaintiffs allege that the defendants have maintained a public nuisance by allowing conditions in which Asian carp are likely to migrate to Lake Michigan. Cmplt. ¶ 90. Specifically, plaintiffs allege that the defendants have allowed the possibility of Asian carp infiltration by refusing to close the O'Brien and Chicago locks, failing to apply rotenone in areas that have tested positive for Asian carp eDNA, failing to provide any

[14] The Seventh Circuit did, at one point in its opinion, state that "all sides agree that if invasive carp were to achieve a sustainable population in the Great Lakes, the environmental and economic impact would qualify as an unreasonable interference with a public right." *Asian Carp II*, 667 F.3d at 781. That statement, however, was made in the context of assessing the magnitude of the potential harm that would result if Asian carp reach Lake Michigan, and is accurate to that extent; none of the parties disputes that grave economic and environmental problems could result from failing to prevent the carp from reaching the lake. But, as evidenced by the defendants' motion to dismiss, that does not mean that the defendants agree that "the environmental and economic impact" of a carp invasion would qualify as a public nuisance (*i.e.* an ***unreasonable*** interference); again, "conduct that is fully authorized by statute" does not give rise to liability for public nuisance. Restatement (Second) of Torts, § 821B cmt. f.

temporary barrier to fish passage between Lake Michigan and the Little Calumet River, and failing to accelerate evaluation of permanent separation of the CAWS from the Great Lakes. *Id.* ¶ 61. In more general terms, the plaintiffs argue that "[b]y creating and maintaining conditions through which these injurious species are likely to enter the Great Lakes"—*i.e.*, refusing to physically separate the CAWS from Lake Michigan—"the District and the Corps will cause severe and foreseeable injury to public rights." *Id.* ¶ 90. They argue that "the Corps [is] under a duty to deny the carp access to the Great Lakes," and propose that the defendants do so through "hydrologic separation of the carp-infested waters of the Illinois River from Lake Michigan" by placing physical barriers at strategic locations within the CAWS. MTD Resp. Br. (Dkt. 229) at 15, 19.

The plaintiffs essentially allege that the defendants must do whatever it takes to keep the Asian carp out of Lake Michigan. As the plaintiffs see it, if the defendants maintain and operate the CAWS "in a manner that allows the migration of Asian carp into the Great Lakes and connected waters, they [cause] a public nuisance." Cmplt. ¶ 1. According to the plaintiffs, the defendants must operate the CAWS in a manner eliminates the possibility that Asian carp can reach the Great Lakes, or cease operating it at all. MTD Resp. Br. (Dkt. 229) at 15.

It is important to note that, although some portions of the plaintiffs' requested relief would not involve physically separating the waterways, the gist of their claim is that the defendants' failure to sever the hydrologic connection between them causes the public nuisance. *See* Mot. Prelim. Injunct. (Dkt. 9) at 2 ("The Complaint seeks a judgment requiring Defendants to implement, as soon as possible, permanent measures to physically separate the Asian Carp-infested Illinois waters from Lake Michigan."); Supp.

Resp. (Dkt. 240) at 6 ("the central and ultimate relief sought by Plaintiffs" is an injunction "requiring the Defendants to expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin and the CAWS from Lake Michigan"). As the Court understands the present complaint, the plaintiffs do not allege that taking only intermediate steps short of physical separation would be sufficient to abate the Asian carp nuisance; they maintain that nothing short of a complete separation of these water systems will suffice.[15] To that end, they seek closure of the locks until permanent physical barriers between the CAWS and Lake Michigan can be constructed. The problem with this argument, which the plaintiffs cannot avoid, is that separating the waterways would require the defendants to violate several existing statutes.

**2. Multiple Statutes Prohibit Physical Separation Of The CAWS from Lake Michigan.**

The Rivers and Harbors Act prohibits entities, including the Corps and other federal agencies, from placing barriers in canals and navigable rivers, such as the CAWS,

[15] The defendants argue that the Progress Act, which requires the acceleration of the Great Lakes and Mississippi River Interbasin Study (the "GLMRIS" study), a study intended to explore options and technologies to prevent Asian carp and other aquatic nuisance species from transferring between the Mississippi River basin and the Great Lakes basin, moots the portions of the plaintiffs' request that seeks an injunction expediting that same study. Supp. MTD (Dkt. 237) at 2-3; Cmplt. p. 33 ¶ 2 (seeking injunction requiring Corps to expedite the preparation of feasibility study). But the complaint, and the plaintiffs' briefs, clearly indicate that the plaintiffs are not satisfied merely with an accelerated GLMRIS timeline. Supp. Resp. (Dkt. 240). Rather, they want the defendants to physically separate Lake Michigan from the CAWS as soon as possible. Therefore, the Progress Act does not moot the plaintiffs' complaint as a whole. And though the plaintiffs would apparently be satisfied with the speed of the GLMRIS study if the Corps meets the Progress Act deadline, the plaintiffs' specific request for an expedited timeline is not "moot" simply because Congress has imposed a similar deadline. The Corps has not yet released the GLMRIS study, and therefore it remains possible that the Court would need to issue an order requiring the Corps to meet the deadline requested by the plaintiffs and demanded by Congress.

without congressional approval. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) (applying the Rivers and Harbors Act to the Calumet River); *United States v. Arizona*, 295 U.S. 174, 183-84 (1935) (Rivers and Harbors Act prohibition on dams applies to federal and state actors as well as to private actors). It states, in relevant part:

> 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 . . . (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army.

33 U.S.C. § 401. The Corps argues that a barrier hydrologically severing the bodies of water is a dam under the Rivers and Harbors Act, and that Congress has not given approval for such a dam. MTD Br. (Dkt. 218) at 25. The plaintiffs do not dispute that the Rivers and Harbors Act applies to the CAWS. Nor do they dispute that the Act requires the defendants to obtain congressional approval before separating the CAWS from Lake Michigan, or that the defendants have not yet received such approval. Rather, they argue that (if the Court grants the injunction) the Corps could "seek and obtain congressional authorization for implementation of such plans to the extent required by statute." MTD Resp. Br. (Dkt. 229) at 19. But an unapproved plan will not stop the carp. If Congressional authorization is required before separation can be implemented, then the Corps' failure to effect that separation cannot be the proximate cause of the alleged nuisance.[16] Only Congress, not the Corps, can authorize the action that the plaintiffs allege is necessary to abate the Asian carp nuisance.

[16] Because congressional approval is required to hydrologically separate the CAWS from Lake Michigan, granting the proposed injunction could be construed as a judicial directive to Congress. It would violate the constitutional principle of separation of powers

In addition to the Rivers and Harbors Act, Congress has also specifically spoken regarding the Corps' duty to operate and maintain the CAWS in the interests of navigation. Congress appropriated funds to the Corps "to operate and maintain the Chicago Sanitary and Ship canal portion of the Waterway in the interest of navigation." Energy and Water Development Appropriations Act of December 4, 1981, Pub. L. 97-88, 95 Stat. 1135, 1137. It later clarified that the Corps was to use funds to maintain and operate the Chicago Lock "and other facilities *as are necessary to sustain through navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River*." Supplemental Appropriations Act of July 30, 1983, Pub. L. 98-63, 97 Stat. 301, 309 (emphasis added). Somewhat disingenuously, the plaintiffs argue that the Corps could preserve navigation "in" the CAWS even with hydrologic separation. But the Supplemental Appropriations Act does not require the Corps just to preserve navigation "in" the CAWS, but rather requires the Corps to preserve "through navigation" between Lake Michigan and the Des Plaines River. *Id.* Plainly, this requires the defendants to maintain and operate the CAWS in a manner that allows ships and other vessels to transit

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for a court to direct Congress to enact legislation the Court deems necessary to abate a public nuisance. *See United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (U.S. 2001) ("A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited."); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980) (invoking legislative immunity "to insure that the legislative function may be performed independently without fear of outside interference"); *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 797 (6th Cir. 1996) ("Federal Courts do have jurisdiction and power to pass upon the constitutionality of Acts of Congress, but we are not aware of any decision extending this power in Federal Courts to order Congress to enact legislation.") (quoting *Skillken & Co. v. City of Toledo*, 528 F.2d 867, 878 (6th Cir. 1975)); *Lewis v. Dist. Of Columbia Judiciary*, 534 F. Supp. 2d 84, 85 (D.D.C. 2008) (separation of powers doctrine precludes courts from compelling Congress to adopt certain rules).

between these two bodies of water. Hydrologic separation, of course, would not permit "through navigation" and would therefore contravene the text and purpose of the appropriations acts.

The defendants' compliance with these statutory requirements cannot give rise to a public nuisance. Only an "unreasonable" interference with public welfare can constitute a public nuisance. Restatement § 821B(1). And where the alleged cause of the putative nuisance is an act or omission required by law, the identified harms flowing from that action do not, by definition, constitute a public nuisance. *Id.*, cmt. f. *See also, e.g.*, *North Carolina*, 615 F.3d at 309-10 (operation of TVA power plants under permits required by Congress and the EPA cannot be deemed a public nuisance); *Smith v. Tennessee Valley Auth.*, 436 F. Supp. 151, 154 (E.D. Tenn. 1977) (construction blasting not a public nuisance where project authorized by federal legislation). "Judges must not order agencies to ignore constitutionally valid statutes," *Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012), even in the name of abating conduct that some may deem to create a public nuisance.

Mischaracterizing the Corps' position, the plaintiffs assert that the Corps argues that so long as it fulfills its obligation to sustain navigation, it is not liable for any nuisance. MTD Resp. Br. (Dkt. 229) at 13. Rather, the Corps argues that it *cannot deviate from* its statutory mandate in order to prevent a potential nuisance. MTD Br. (Dkt. 218) at 26-27. While the difference between these formulations is subtle, it is important. Under the Corps' argument (and the Court's holding), it is not immune from suit for all manner of damages caused by its operation of the CAWS merely because it is required to operate the CAWS. Rather, it is immune only for those harms that are unavoidable if it is to

fulfill its statutory mandate. If, for example, the Corps maintained navigation in the CAWS in an unreasonably noisy manner, it might be liable for nuisance due to the excessive noise, assuming that the implementation of noise abatement strategies would not preclude it from fulfilling its statutory obligations (allowing navigation and keeping the waterways free of unauthorized dams). But here, the facts pleaded in the plaintiffs' complaint establish that the Corps can successfully prevent the Asian carp nuisance only by disregarding its statutory duty to sustain through navigation between the CAWS and Lake Michigan. The complaint therefore fails to state a claim for public nuisance because the conduct allegedly causing public harm is required by statute. In such a case, the alleged nuisance, by definition, is not an "unreasonable interference."

Plaintiffs insist that the Corps "cannot sit idle when the duty to act arises" (begging the question of when such a duty arises), but they provide no basis on which the defendants would be authorized to effect the hydrologic separation the plaintiffs seek absent Congressional authorization. Indeed, their primary argument to justify disregard of these explicit statutory requirements is that "*circumstances have changed* since these enabling statues were enacted." MTD Resp. Br. (Dkt. 229) at 14 (emphasis in original). But federal agencies do not have license to disregard congressional directives whenever they believe that *circumstances have changed* (even if they have changed enough to warrant italicization) and the plaintiffs' suggestion in this regard borders on the frivolous.

The examples the plaintiffs provide to buttress their argument add nothing. Take "the vacant property owner" they posit (MTD Resp. Br. (Dkt. 229) at 15). Should vagrants occupy vacant property and create a nuisance, they argue, the property owner has a duty to deny them access to the property. Fair enough, but how? A fence might be a

solution, but if zoning laws do not permit the owner to install a fence at all, or permit only a fence that would not be effective in denying the determined vagrants access to the property, the property owner is not free to disregard those laws and, as the Restatement reflects, his omission to take an action that violates those zoning laws would not give rise to nuisance liability. The city council's zoning ordinance, not the property owner's failure to design or build a fence, would be the proximate cause of the public harm arising from the vagrant's occupation of the land.

Like the owner of the property who does not control whether he may build a fence to exclude third parties, the Corps does not control whether it may physically separate the waterways. The key to liability for nuisance is not ownership, but control. *In re Resource Tech. Corp.*, 662 F.3d 472, 475 (7th Cir. 2011); *see also Wilder Corp. v. Thompson Drainage & Levee Dist.*, 658 F.3d 802, 806 (7th Cir. 2011) (a claim for nuisance does not lie against a party who has no control over the cause of the nuisance); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (for public nuisance to be actionable, "the defendant must exert a certain degree of control over its source"). Congress, not the defendants, controls the question of whether the CAWS may be separated from Lake Michigan and this Court has no authority to require Congress to effect that separation, even where it may be necessary to prevent harms to third parties. *Cf. Wisconsin v. Duluth*, 96 U.S. 379, 387 (1877) (rejecting Wisconsin's claim for injunctive relief to bar operation of a canal by Duluth, Minnesota, where operation of canal was authorized by congressional appropriations, and holding that if "Congress, in the exercise of a lawful authority, has adopted and is carrying out [a canal project], this court can have no lawful authority to forbid the work").

The plaintiffs also seek to bolster their demand for action by the Corps by pointing to recent statutes authorizing the Corps to implement additional measures "to prevent aquatic nuisance species from dispersing into the Great Lakes." MTD Resp. Br. (Dkt. 229) at 17 (citing Energy and Water Development and Related Agency Appropriations Act of 2010, Pub. L. 111-85; 123 Stat. 2845, 2853; Energy and Water Development Appropriations Act of 2012, Pub. L. 112-74, 125 Stat. 786, 857) ("2012 Act"). But these measures did not, as the plaintiffs suggest, provide sweeping powers to the Corps to disregard existing statutory constraints. As the Seventh Circuit observed in holding that Congress had not displaced the common law in this area, "neither the Corps nor any other agency has been empowered actively to regulate the problem of invasive carp." *Asian Carp II*, 667 F.3d at 780.[17] Congress authorized the Corps to conduct a feasibility study to prevent the spread of aquatic nuisance species, for example, but it has not yet directed the Corps to consider the question of hydrologic separation, much less authorized that separation. Nor has it suggested in any way that the authorized emergency measures include hydrologic separation or closing the CAWS to navigation. To the contrary, the explanatory statement by the Congressional Conference Committee on the 2012 Act advised that "[t]he conferees do not consider hydrologic separation of the Great Lakes Basin from the Mississippi River Basin to be an emergency measure authorized by

[17] As Judge Dow's opinion adverts, *see Asian Carp I*, 2010 WL 5018559, *24 n.22, there is no inconsistency between a holding that Congress has not entirely displaced the operation of the common law with respect to issues pertaining to the problem of invasive species infiltrating the Great Lakes and one that recognizes that the defendants cannot violate express statutory requirements in the name of abating a common law public nuisance. The displacement holding reflects only that Congress has not evinced an intention to occupy the field to the exclusion of the common law, not that the common law trumps any statutory mandate that may affect that field.

this Act." 2012 Joint Explanatory Statement of the Committee of Conference regarding the Energy and Water Development and Related Agency Appropriations Act, H.R. Rep. No. 112-331, Division B at 431 (2011). This explanatory statement, as plaintiffs point out, is not part of the statute. But combined with the statute's silence regarding hydrologic separation, it plainly rebuts the plaintiffs' assertion that Congress has by more recent legislation authorized the Corps to disregard existing statutory requirements that preclude hydrologic separation. The only inference to be drawn from Congress's activity in this area is that (rightly or wrongly) Congress has not yet deemed hydrologic separation to be necessary.

The Court therefore concludes that applicable statutes preclude the defendants from taking the action alleged to be necessary to prevent the carp from infiltrating Lake Michigan.[18] The defendants' compliance with these statutory mandates and their maintenance of the hydrologic connection between the CAWS and Lake Michigan is lawful and reasonable, even if it results in harm to third parties such as the plaintiffs. *See*

[18] The District notes that, besides the statutory prohibitions on physically separating the waterways, federal regulations require it to maintain certain water levels in the CAWS and to manage sanitary, waste, and storm water, conduct flood control, and maintain the area waterways. District MTD (Dkt. 221) at 2; 33 C.F.R. 207.420; 33 C.F.R. 207.425. But these regulations do not, standing alone, completely prohibit the District from physically separating the waterways. For example, there is no logical reason why completely separating the waterways would *necessarily* prevent the District from maintaining the CAWS at appropriate water levels. The District would presumably argue that it could not maintain the required water levels if the CAWS is severed from Lake Michigan. That, however, is a question of fact not susceptible to resolution at the motion to dismiss stage. The same goes for the District's other duties; it is not clear, as a matter of law, that hydrologic separation would necessarily prevent the District from maintaining water quality or managing waste water. Therefore, unlike the Corps' and District's statutory requirements, discussed above, the District's obligation to perform its regulatory duties does not necessarily mean (as a matter of law) that it cannot physically separate the CAWS from Lake Michigan. However, the District (like the Corps) is prohibited from severing the respective waterways by the Rivers and Harbors Act.

*Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914) ("the legislature may legalize what otherwise would be a public nuisance"); *TVA*, 615 F.3d at 310 ("[a]n activity that is explicitly licensed and allowed by . . . law cannot be a public nuisance"). An interference caused by failure to violate a statute cannot be an "unreasonable interference," Restatement § 821B, cmt. f., and the plaintiffs cannot, therefore, state a valid claim for public nuisance on the basis of the defendants' failure to implement the action the plaintiffs deem essential to abating the risk that the Asian carp will infiltrate Lake Michigan, that is, severing the hydrologic connection between the lake and the CAWS.

**3. The Plaintiffs Have Leave to File an Amended Complaint.**

As explained above, the plaintiffs have not alleged any specific failures by the defendants to take *lawful* actions that have caused or will cause a public nuisance. Conceivably, the plaintiffs could amend the complaint to remedy that failure, though to do so they will have to allege that the defendants' failure to take steps short of full hydrologic separation suffice to cause the nuisance, *i.e.*, the severe threat that the carp will reach the lake. The Court is skeptical that the plaintiffs can do so. While the injunctive relief the plaintiffs seek includes intermediate actions that do not implicate the statutory mandates to preserve through navigation and to keep the waterways clear of dams not authorized by Congress, their complaint does not allege that the defendants failure to take only those actions is sufficient to create the risk that the carp will reach the lake (*i.e.*, to cause the alleged nuisance). Plaintiffs, for example, want the defendants to use rotenone more often, but they do so as a means of enhancing the efficacy of lock closures as an interim step to severing the hydrologic connection between the waterways. The present complaint does not allege that the failure to use rotenone more frequently, or

the failure to take the other intermediate steps collectively, constitutes a proximate cause of the alleged nuisance (*i.e.*, that the failure to take those intermediate actions, rather than the maintenance of the hydrologic connection, is the cause of the risk that the carp will reach the lake).[19]

Nevertheless, the Court will afford the plaintiffs the opportunity to amend their complaint. As Judge Dow previously advised in *Asian Carp I*, however, 2012 WL 5018559, *24 n.22, the plaintiffs "must come to grips" with the fact that this Court cannot order the defendants to do what Congress has barred them from doing. Unless Congress alters the relevant statutes, an amended complaint will not succeed if it asks for an order requiring hydrologic separation (whether temporary or permanent) or any other action that is prohibited by statute. To state a valid claim, the plaintiffs must identify actions (or failures to act) that are within the scope of the defendants' Congressionally-authorized discretion.

**III. The Plaintiffs' Fail to State an Administrative Procedure Act Claim.**

In Count II of their complaint, the plaintiffs allege that the Corps (but not the District) has violated the APA. Under 5 U.S.C. § 702, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 706(1) provides that a court may "compel agency action unlawfully withheld or unreasonably delayed . . . ." A court may also "[h]old unlawful and set aside agency actions, findings

[19] To see this, consider whether an injunction requiring those actions (but not lock closure) would satisfy the plaintiffs that the alleged nuisance—carp in the lake—had been abated sufficiently. Based on the allegations of the present complaint, it surely would not; the plaintiffs' theory is not that severing the connection between the waterways is gilding the lily but rather that it is essential to preventing the carp from reaching the lake.

and conclusions found to be– (a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2). "Agency action" is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13). Only "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[20] 5 U.S.C. § 704; *Lujan v. National Wildlife Federation,* 497 U.S. 871, 882 (1990) ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'").

The parties first contest which of the Corps' actions constitute "final actions" as required for APA review. The parties also dispute whether the plaintiffs have suffered a "legal wrong" because of the Corps' actions. Finding that the plaintiffs have not sufficiently alleged that the Corps caused them to suffer a "legal wrong," the Court dismisses Count II of the complaint.

**A. The Only "Final Action" at Issue is the Corps' Interim III Decision.**

Agency action is "final" when two conditions are satisfied. "First, the action must mark the 'consummation' of the agency's decisionmaking process –it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (internal citation omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178.

[20] "Agency action[s] made reviewable by statute" are also reviewable under the APA, but no one claims that this provision implicates any of the Corps' actions here. 5 U.S.C. § 704.

The plaintiffs identify four agency actions that, they claim, are "final": (1) the Corps' Interim III report; (2) the Corps' operation of the CAWS in a manner that contributes to the migration of Asian carp through the Caws to Lake Michigan; (3) the Corps' operation of the Dispersal Barrier System; and (4) the Corps' refusal to take additional action such as applying rotenone, permanently installing screens in all sluice gates, installing physical barriers in the Little Calumet River, and expediting plans to permanently separate the CAWS from Lake Michigan. Cmplt. ¶¶ 73-80, 100. The Corps concedes that the Interim III report is a final agency action, but submits that none of the other actions are final. MTD Br. (Dkt. 218) at 13. In affirming denial of the preliminary injunction, the Seventh Circuit agreed with the Corps, stating in dicta that other than the Interim III report, the other "'actions' are not discreet at all; and those that might be so classified do not represent the final outcome of any decisionmaking process by the Corps." *Asian Carp II*, 667 F.3d at 787.

The Seventh Circuit did not definitively rule on the issue (finding it unnecessary to do so in view of its holding that the plaintiffs' APA claim was contingent upon its public nuisance claim), but the plaintiffs have not presented any compelling argument for why the Corps' day-to-day actions are "final agency actions" under the APA. They assert that whether an agency action is final is a question of fact, but "[w]hether federal conduct constitutes final agency action within the meaning of the APA is a legal question." *Colorado Farm Bureau Federation v. United States Forest Service*, 220 F.3d 1171, 1173 (10th Cir. 2000). It is plain from the face of the complaint that, with the exception of the Interim III Report, the acts and omissions on which the plaintiffs base their APA claim do not constitute final agency action. Rather, they describe day-to-day actions that do not

mark the "consummation" of any agency decisionmaking process and that do not "determine" any "rights or obligations." It is the plaintiffs' burden to allege facts that, taken as true, establish that the agency has taken final action. *Id.* Here, the facts they allege are sufficient only to establish the counter-proposition. Accordingly, the Court agrees with the Corps and the Seventh Circuit that only the Interim III report is a final agency action. In any event, this question is not dispositive, because neither the Interim III Report nor any of the other putative final actions identified by the plaintiffs provides a right of review under § 702.

**B. The Plaintiffs Have No Right of Review under § 702.**

Only persons suffering a legal wrong, or who are otherwise adversely affected or aggrieved within the meaning of another federal statute may assert a § 702 claim. The plaintiffs allege that they have a right of review both because they have suffered a "legal wrongs"—namely, a public nuisance—as a result of the Corps' final actions and that the Corps' actions and omissions in failing to eliminate the potential migration of the Asian carp into Lake Michigan have violated three statutes: the Lacey Act, the Nonindigenous Nuisance Prevention and Control Act, and the Water Resources Development Act.[21] None of these alleged wrongs gives rise to an APA claim, however.

[21] The Seventh Circuit's opinion says that "the states have not alleged that the Corps's actions failed to comply with some statutory provision." *Asian Carp II*, 667 F.3d at 787. The plaintiffs do, however, allege in their complaint that the Corps violated the Lacey Act and the Nonindigenous Aquatic Nuisance Prevention and Control Act (Cmplt. ¶ 88-89); the Seventh Circuit's incorrect statement is likely attributable to the fact that the plaintiffs did not discuss those allegations in their preliminary injunction briefs in that court, arguing instead that their APA claim is "free-standing." *Asian Carp II*, 667 F.3d at 787 The Seventh Circuit rejected that contention, but in their briefing on the motion to dismiss, the plaintiffs clearly argue that the Corps violated these statutes, along with the Water Resources Development Act. MTD Resp. Br. (Dkt. 229) at 25-29. The Court will therefore address these arguments.

**1. Public Nuisance**

As explained in detail above, the complaint does not state a claim for public nuisance. Therefore, the plaintiffs have not alleged that the Corps' actions caused them to suffer a "legal wrong" in the form of a public nuisance. *See Asian Carp II*, 667 F.3d at 787 ("[T]he states' APA claim [based on an allegation that the Corps' final actions have caused them a legal wrong] against the Corps sinks or swims (so to speak) with its public nuisance theory."). The plaintiffs, however, have leave to re-plead their public nuisance claim, and if they do so and properly allege a public nuisance claim, they may also state a claim for violation of the APA. Therefore, the APA claim, like the public nuisance claim, is dismissed without prejudice.

**2. Nonindigenous Aquatic Nuisance Prevention and Control Act**

The plaintiffs also fail to allege sufficiently that the Corps violated the Aquatic Nuisance Prevention and Control Act (the "Act"). The Act states:

> Whenever the Task Force determines that there is a substantial risk of unintentional introduction of an aquatic nuisance species by an identified pathway and that the adverse consequences of such an introduction are likely to be substantial, the Task Force shall, acting through the appropriate Federal agency, and after an opportunity for public comment, carry out cooperative environmentally sound efforts with regional, State and local entities to minimize the risk of such an introduction.

16 U.S.C. § 4722(c)(2).

The first impediment to plaintiffs' claim is that they fail to allege the prerequisite to statutory violation. The Act requires action only when "the Task Force determines that there is a substantial risk of unintentional introduction of an aquatic nuisance species." *Id.* The plaintiffs do not allege that the Task Force (of which the Corps is allegedly a

member) has made such a determination. If the Task Force has not made this determination, then the Act imposes no duty to take any preventive action.

But even if the Task Force were to determine that there is a substantial risk that the Asian carp will be introduced to Lake Michigan through the CAWS, the Act creates only a broad statutory mandate that would require, at most, that the Corps "carry out cooperative environmentally sound efforts . . . to minimize the risk of such an introduction." *Id.* The Supreme Court has held that "courts are not empowered [under the APA] to enter general orders compelling compliance with broad statutory mandates" like that set forth in the Act. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). If this Court were to enter a general order under the Act's highly generalized requirements, it would ultimately have to supervise the parties and determine exactly which efforts are "environmentally sound" and which "minimize the risk of an introduction." *Id.* at 66-67. "The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA." *Id.* at 67; *see also id.* at 64 (an APA claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*") (emphasis in original). Therefore, the Court cannot find that the Corps has violated the Aquatic Nuisance Prevention and Control Act.

**3. Lacey Act**

The plaintiffs also allege that the Corps violated the Lacey Act, a statute prohibiting, among other things, the interstate transport of "any fish . . . taken, possessed, transported, or sold" in violation of any law of the United States or of any state. *See* Cmplt. ¶ 102(b). The plaintiffs presumably mean to allege that the Corps has specifically violated 16 U.S.C. § 3372, a provision of the Lacey Act stating that "[i]t is unlawful for

any person . . . [to] transport . . . in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State."[22] "The term 'transport' means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment." 16 U.S.C. § 3371(k).

There are at least two dispositive problems with this allegation. First, the plaintiffs fail to allege facts showing that the Corps "transported" Asian carp as that term is defined in the Lacey Act. Rather, they have alleged only that the Corps "contribute[s] to the threatened interstate movement" of Asian carp by operating the CAWS. Cmplt. ¶ 102(b). The plaintiffs do not allege, as is required for a violation of the Lacey Act, that the Corps moves, conveys, carries, or ships Asian carp by any means. 16 U.S.C. § 3371(k). The plaintiffs, therefore, fail to state a claim that the Corps has violated the Lacey Act.

Second, to violate the Lacey Act, the fish "transported" must previously have been "taken" within the meaning of the statute. *See United States v. Romano*, 137 F.3d 677, 681-83 (1st Cir. 1998) (reversing conviction where wildlife had not been "taken" prior to unlawful purchases); *United States v. Carpenter*, 933 F.2d 748, 750 (9th Cir. 1991) (reversing conviction based on unlawful hunting of migratory birds not previously "taken"). "[T]o violate the Lacey Act a person must do something to wildlife that has already been 'taken or possessed' in violation of law." *Carpenter*, 933 F.2d at 750. Even if the Corps could be deemed to be transporting the Asian carp, that act would not violate

[22] A regulation promulgated under authority of the Lacey Act also directly prohibits "[t]he importation, transportation, or acquisition" of Asian carp. 50 C.F.R. §16.13(a)(2). Because the plaintiffs do not plausibly allege that the Corps has engaged in the "importation" or "acquisition" of Asian carp, whether the Corps has violated either the statute or the regulation turns on whether the Corps "transported" Asian carp.

the Lacey Act because the carp have not previously been "taken or possessed in violation of" any law.

**4. Water Resources Development Act–GLMRIS Study**

Finally, the plaintiffs argue that the Corps has unilaterally redefined and altered the scope of the GLMRIS study in violation of its congressional mandate. In the Water Resources Development Act of 2007, Congress directed the Secretary of the Army to conduct "a feasibility study of the range of options and technologies available to prevent the spread of aquatic nuisance species between the Great Lakes and Mississippi River Basins through the Chicago Sanitary and Ship Canal and other aquatic pathways." Pub. L. 110-114 § 345(d). In response, the Corps has made preliminary public comments stating, in effect, that it "will explore options and technologies . . . that could be applied to *prevent or reduce the risk* of [Asian carp] transfer between the basins through aquatic pathways." 75 Fed. Reg. 69984 (Nov. 16, 2010) (available at http://www.gpo.gov /fdsys/pkg/FR-2010-11-16/pdf/2010-28824.pdf) (emphasis added); *see also* Inventory of Available Controls for Aquatic Nuisance Species of Concern, Chicago Area Waterway System at 2 (available at http://glmris.anl.gov/documents/docs/ANS_Control_Paper.pdf) ("Prevent includes the reduction of risk to the maximum extent possible, because it may not be technologically feasible to achieve an absolute solution."). The plaintiffs claim that the Corps is "rewriting the language of [the] statute" and "lowering the bar to encompass mere 'risk reduction,'" and that these actions violate the Water Resources Development Act. MTD Resp. Br. (Dkt. 229) at 29.

The plaintiffs claim cannot succeed for several reasons. First, the Corps' preliminary statements regarding its study are inarguably *not* final agency actions. Because the Corps has not yet taken any final action regarding the GLMRIS study, APA

review is unavailable at this time. Second, the Corps' statements indicate that it is following the Congressional directive. Defining "prevent" to mean reducing the risk to the maximum extent possible is entirely reasonable. The only way the Corps could ever achieve 100% certainty that Asian carp would not infiltrate the Great Lakes is to eradicate the entire species worldwide, an action that is neither technologically feasible nor (in all likelihood) desirable. Therefore, the Corps' statements regarding the GLMRIS study do not violate any statute and do not provide a basis for APA review.

* * *

For all of these reasons, the Court grants the defendants' motions to dismiss. Count I of the complaint is dismissed without prejudice. Count II is dismissed without prejudice insofar as the APA claim depends on the public nuisance claim. But because the plaintiffs cannot amend their complaint to remedy their claims that the Corps violated the Aquatic Nuisance Prevention and Control Act, the Lacey Act, or the Water Resources Development Act, Count II is dismissed with prejudice insofar as the APA claim is predicated upon a violation of one or more of those statutes.

If the plaintiffs do not amend their claims by January 11, 2013 (whether because they cannot do so consistent with their obligations under Rule 11 or simply because they opt to stand on their existing complaint), the Court will dismiss this case. At that point, the plaintiffs will have the option to appeal the dismissal of their claims in the Seventh Circuit. Alternatively, the plaintiffs may at any time prior to January 11 file with the Court a notice of their intention not to amend their complaint further, in which case the Court will promptly dismiss the case, allowing an appeal to be filed sooner, rather than later.

Date: December 3, 2012

John J. Tharp, Jr.
United States District Judge

# UNITED STATES DISTRICT COURT

**for the**

## Northern District of Illinois

State of Wisconsin, State of Michigan, State of Minnesota, State of Ohio, Commonwealth of Pennsylvania
*Plaintiff*

v.

United States Army Corps of Engineers, Metropolitan Water Reclamation District of Greater Chicago
*Defendant*

Civil Action No. 10c4457

**JUDGMENT IN A CIVIL ACTION**

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____ ), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____

☒ other:

Upon dismissal of complaint and plaintiff's notice that it does not intend to file an amended complaint, this case is dismissed with prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☒ decided by Judge John J. Tharp, Jr. on a motion for dismissal of complaint.

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Date: Dec 10, 2012

Thomas G. Bruton, Clerk of Court

/S/Alberta Rone
Alberta Rone, Courtroom Deputy