

Five States Open Second Phase of Asian Carp Litigation

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When [the U.S. Supreme Court ruled against the State of Michigan](#) in its quest to stop Asian carp from migrating into Lake Michigan, many declared an end to litigation over the invasive species. However, the State of Michigan (along with Wisconsin, Minnesota, Ohio, and Pennsylvania) today filed a second lawsuit--this time in federal district court in Illinois.

In their [Complaint for Injunctive and Declaratory Relief](#) filed in the U.S. District Court for the Northern District of Illinois, Case No. 10-CV-04457, the states sued the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago. The gist of the complaint is that the defendants have failed to do enough to prevent the migration of Asian carp into Lake Michigan. Count I of the complaint alleges public nuisance in that the defendants' failure to prevent the migration of Asian carp "will cause enormous and irreversible harm to the use and enjoyment and the other public rights in those waters." Count II of the complaint alleges that the Army Corps of Engineers' actions and failure to act were not in accordance with federal law.

The states will look for an early victory on a [motion for preliminary injunction](#), which requests the following:

"1. Enter 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 CAWS into Lake Michigan, including, but not necessarily limited to, the following:

(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.

"2. Enter 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 CAWS 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. Specifically, the Corps should be required to:

(a) Complete, and make available for public comment, within six months, an initial report detailing the progress made toward completion of the evaluation.

(b) Complete, and make available for public comment, within twelve months, a second, interim report detailing the progress made toward completion of the evaluation.

(c) Complete, and make available for public comment, within eighteen months a final report detailing the results of the evaluation and recommendations for specific measures to permanently physically separate the CAWS from Lake Michigan at strategic locations to prevent the migration of bighead carp, silver carp or other harmful invasive species between the CAWS and the Great Lakes."

A hearing on the motion for preliminary injunction is scheduled before Judge Robert M. Dow, Jr. on July 28th in Chicago.

Stay tuned to the Illinois Environmental Law Blog for more news and developments.