

Federal Court Denies Motion to Immediately Close Locks to Prevent Infiltration of Asian Carp

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(Originally published at: <http://illinoisenvironmentallaw.blogspot.com/2010/12/federal-court-denies-motion-to.html>)

The U.S. District Court for the Northern District of Illinois recently denied a motion for preliminary injunction in *Michigan v. U.S. Army Corps of Engineers, Case No. 10-cv-04457*, which is a case brought by five States to prevent the infiltration of Asian carp into the Great Lakes. The plaintiffs' motion for preliminary injunction included a request to "temporarily clos[e] and ceas[e] 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."

In a nutshell, the Court held that "Plaintiffs have not met the high burden necessary to obtain a mandatory preliminary injunction. In the face of multi-agency efforts to prevent Asian carp migration – efforts that have only increased and expanded in the months since this lawsuit was filed – Plaintiffs have not shown either a sufficient likelihood of success on the merits of their substantive claims or a sufficient prospect of irreparable harm absent the requested injunction."

Specifically, the Court held that plaintiffs have "a minimal chance of success on the merits" of their Administrative Procedure Act claims: "[T]he evidence does not support the view that the Corps' actions were wrong at all, much less arbitrary and capricious. In fact, there is no evidence that Asian carp have entered Lake Michigan through the [Chicago Area Waterway System], that the barrier system has not operated with reasonable effectiveness, or that the operation of the O'Brien Lock has adversely affected Plaintiff's interests." The Court also held that plaintiffs have "a very modest likelihood of success" on their public nuisance claim, given that "the current evidence shows that (1) only one Asian carp has been discovered above the barrier; (2) at most, crediting the eDNA testing, only a small number of individual Asian carp exist above the electric barrier; (3) there is no basis for concluding that the electric barrier has been breached at all, much less in any significant way; (4) the closest known population of Asian carp in any significant numbers is in either the Brandon Road pool (south of Joliet), or more likely, in the Dresden Island pool (near Morris, many miles below the barrier); (5) the best estimate of the location of any juvenile (or 'young of year') Asian carp is even further downstream in the Marseilles area; and (6) the potential for the establishment of a self-sustaining population in the CAWS above the electric barrier or in Lake Michigan remains an unknown."

In considering whether plaintiffs have proven irreparable harm, the Court discounted the testimony of plaintiffs' expert: "[T]he centerpiece of Plaintiffs' claim of irreparable harm is Dr. Lodge's testimony based on the positive eDNA results that he reported above the electric barrier, along with the discovery of a single live fish in Lake Calumet and one dead fish found (below the barrier) in the December 2009 rotenone event. Yet the eDNA results and those few fish, amongst the hundreds of thousands of pounds of fish collected, do not establish the requisite likelihood of imminent or irreparable harm. Nor does the state of the eDNA science permit a

reasonable inference that live Asian carp are in the canal system above the barrier in numbers that present an imminent threat. Negative eDNA results comprise a super-majority of the results when compared to the number of samples taken."

Finally, the Court held that plaintiffs did not carry their burden of showing that the balance of the harms weighed in their favor. In fact, the Court held that the balance of the harms actually weighed in the favor of the defendants: "Indeed, based on the evidence of record, the harms associated with the potential for increased flooding and sanitary issues and the economic hardships associated with the requested relief outweigh the more remote harm associated with the possibility that Asian carp will breach the electronic barriers in significant numbers, swim through the sluice gates and locks, and establish a sustainable population in Lake Michigan."

Note that this is not the end of the case. Instead, the Court denied plaintiff's motion for preliminary injunction, which is a request for temporary relief before discovery and a trial on the merits occur. However, considering the Court's conclusions regarding the plaintiffs' expert witness, this is a big blow to the plaintiffs' case.

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