

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
WATER QUALITY STANDARDS AND	)	
EFFLUENT LIMITATIONS FOR THE	)	
CHICAGO AREA WATERWAY SYSTEM	)	R08-9
AND THE LOWER DES PLAINES RIVER:	)	(Rulemaking-
Adm. Code Parts 301, 302, 303 and 304	)	Water)

**NOTICE OF FILING**

To: John Therriault, Clerk  
 Illinois Pollution Control Board  
 James R. Thompson Center  
 100 West Randolph Street - Suite 11-500  
 Chicago, IL 60601

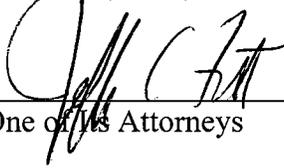
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 SERVICE LIST

Please take notice that on January 7, 2010, we filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached Motion for a Hearing on the Impact of the Litigation before the United States Supreme Court Relating to the Migration of Asian Carp Through the Chicago Sanitary and Ship Canal, a copy of which is served upon you.

CITGO PETROLEUM CORPORATION, and  
 PDV MIDWEST, LLC, Petitioners

By:   
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**MOTION FOR A HEARING ON THE IMPACT OF THE LITIGATION BEFORE THE UNITED STATES SUPREME COURT RELATING TO THE MIGRATION OF ASIAN CARP THROUGH THE CHICAGO SANITARY AND SHIP CANAL**

CITGO PETROLEUM CORPORATION, and PDV MIDWEST, LLC, operate and own, respectively, a refinery in Lemont Illinois. (The “Lemont Refinery”) The Lemont Refinery is affected by the proposed regulations submitted by the Agency and has participated in this rulemaking, both in asking questions of the Agency, and in presenting testimony on the uses of the segment of the Chicago Sanitary and Ship Canal (“Ship Canal”) into which the refinery discharges. The Lemont Refinery submits the following Motion.

1. Recent events have created a very unusual situation. The Lemont Refinery urges the Board to investigate the current status of third party litigation before the United States Supreme Court. The Board should hold an additional hearing for the purposes of receiving information on the current “uses” of the Ship Canal, how those uses might be changed by the recent litigation filed before the Supreme Court, and to consider this information in managing this docket going forward.

2. Other states bordering the Great Lakes have recently filed suit in the United States Supreme Court against the State of Illinois, the Metropolitan Water Reclamation District of Greater Chicago, and the U.S. Army Corps of Engineers. (Michigan Motion to Reopen and for A Supplemental Decree, filed Dec. 21, 2009; Michigan Motion for a Preliminary Injunction, filed Dec. 21, 2009.) The motions brought by the State of Michigan seek to force a stronger approach to isolating the Great Lakes from the threat of an Asian carp invasion through the Chicago Area Water System, and in particular the Ship Canal.<sup>1</sup> The states of Minnesota, Ohio,

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<sup>1</sup> Asian carp are an invasive species of fish that dominate and displace native ecosystems. (See 50 C.F.R. Part 16, Injurious Wildlife Species; Silver Carp and Largescale Silver Carp, 72 Fed. Reg. No. 131 (July 10, 2007); “Asian Carp Management Invasive Species Coordination”, available at <http://asiancarp.org/rapidresponse/greatlakethreat.htm> (last accessed, January 5, 2010).) Asian carp are also a danger to boaters, due to their size and ability to jump out of the water. Id. These invasive carp have been moving up the Mississippi River towards Lake Michigan, via, various waterways, and perhaps including the Ship Canal (See U.S. Fish & Wildlife Service “Asian Carp-An Aquatic Nuisance Species” March 2004, available at <http://www.asiancarp.org/Documents/AsianCarp.pdf> (last accessed, January 5, 2010); Risk

and Wisconsin have also filed briefs with the Supreme Court in support of Michigan's motions; the States of Indiana and New York and the Canadian Province of Ontario either have filed or will soon file similar supporting briefs.

3. These parties argue that the steps taken so far by the Defendants are insufficient and that there is a very significant threat that the Asian carp will migrate into Lake Michigan and destroy native species.<sup>2</sup> The motion for a preliminary injunction filed by Michigan would fundamentally change how the Ship Canal and other Chicago waterways are used and have been used; it asks the Supreme Court to order the implementation of seven specific protections:

- a) "Closing and ceasing operation of the locks at the O'Brien Lock and Dam and the Chicago Controlling Works.
- b) Operating the sluice gates at the O'Brien Lock and Dam, the Chicago Controlling Works, and the Wilmette Pumping Station in a manner that will not allow fish to pass those structures into Lake Michigan. This should include maintaining the waterways at the lowest level possible that is still consistent with protecting against serious threats to public health and safety, and limits opening the gates except as required to prevent significant flooding that threatens public health or safety.
- c) Installing interim Barriers or structures as needed in the Grand and Little Calumet Rivers to prevent the migration of bighead and silver carp into Lake Michigan.
- d) Installing interim Barriers or structures between the Des Plaines River and the Chicago Sanitary and Ship Canal to prevent bighead and silver carp from entering the Canal from the Des Plaines River during a flood event.

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Reduction Study Fact Sheet Environmental DNA (eDNA), U.S. Army Corps of Engineers, September 18, 2009, available at [http://www.lrc.usace.army.mil/pao/eDNA\\_FactSheet\\_20090918.pdf](http://www.lrc.usace.army.mil/pao/eDNA_FactSheet_20090918.pdf) (last accessed, January 5, 2010); Illinois Department of Natural Resources FAQs November 13, 2009, available at <http://dnr.state.il.us/pubaffairs/2009/November/faqs.pdf> (last accessed, January 5, 2010).)

<sup>2</sup> In response to the threat that Asian carp might enter the Great Lakes via the Chicago Area Waterway System's connection to Lake Michigan, various measures have been taken to keep these carp away. Among such measures have been: environmental DNA surveillance, a series of underwater electric barriers, and a systematic poisoning of the Ship Canal (See Risk Reduction Study Fact Sheet Environmental DNA (eDNA), U.S. Army Corps of Engineers, September 18, 2009, supra; "Chicago Sanitary and Ship Canal Aquatic Nuisance Species Dispersal Barriers," U.S. Army Corps of Engineers, August 27, 2009, available at [http://www.lrc.usace.army.mil/projects/fish\\_barrier/index.html](http://www.lrc.usace.army.mil/projects/fish_barrier/index.html) (last accessed, January 5, 2010); Illinois Department of Natural Resources Bighead Asian Carp Press Release December 3, 2009, available at <http://dnr.state.il.us/pubaffairs/2009/December/asianCarp3Dec2009.htm> (last accessed, January 5, 2010); Illinois Department of Natural Resources Asian Carp Rapid Response Press Release December 6, 2009 (Accessed at: <http://dnr.state.il.us/pubaffairs/2009/December/asiancarpwrapup.html> (last accessed, January 5, 2010).

- e) **Operating the existing Electrical Dispersal Barrier System at full operating power and expediting completion of the proposed Barrier IIB.**
- f) **Comprehensively monitoring the Chicago Sanitary and Ship Canal and all connected waterways for the presence and location of bighead and silver carp using the best available methods and techniques.**
- g) **Eradicating any bighead or silver carp discovered in these waters.”**

(Michigan Motion for Preliminary Injunction, pp. 28-29 (emphasis added)). In its Response to the Motion, the State of Wisconsin emphasizes the importance of the three measures in bold above as being “most important to Wisconsin”. (State of Wisconsin’s Response to State of Michigan’s Motion for Preliminary Injunction, pp 1-2.) Obviously, if these measures were ordered by the Court, it would have a direct affect on the uses and water quality standards of the Ship Canal, particularly in the vicinity of the Lemont Refinery.

4. At this point, we do not know how the Supreme Court will respond. Regardless of the Supreme Court’s immediate handling of this case, it seems quite unlikely that the issue will go away. The states who have sued or supported this suit are not going to let the matter drop. The matter may stay in the Supreme Court, or be referred by the Court to a federal district court, as it did in the case Illinois brought against the City of Milwaukee. *Illinois v Milwaukee*, 406 U.S. 91 (1972).

5. The orders sought by the other petitioning states will have a direct effect on Ship Canal uses, particularly at the Lemont Refinery’s outfall. The Lemont Refinery is located 1 mile upstream from the electric barriers. Due to the proximity of the barriers, the Army Corps of Engineers have held numerous stakeholder meetings at the Lemont Refinery. The other petitioning states seek regular injections of fish poison into the Ship Canal to ensure that Asian carp have not bypassed the electric barriers. See paragraphs (f) and (g) of the Proposed Preliminary Injunction submitted by Michigan, and the Wisconsin Response in support, cited above. If these measures—or other measures sought by other states—continue, then the use and water quality standards along the stretch of the Ship Canal that the Lemont Refinery utilizes for its outfall will vary.

6. We urge the Board to hold a hearing on the impact of the United States Supreme Court litigation on this proceeding. The documentation already submitted to the Supreme Court is extensive, and we chose not to further burden this docket by submitting copies of the papers filed so far.<sup>3</sup> We ask that the Board defer hearings on water quality standards for the Ship Canal (at least the segment immediately upstream of the electric barrier, and other bodies of water in the CAWS that the Board deems appropriate); the scope of further hearings might well be tailored to what water quality standards can be considered now, and what should be deferred until the outcome of the Supreme Court case is apparent.

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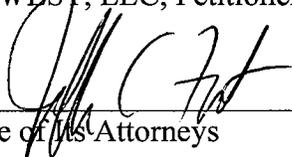
<sup>3</sup> For example, Michigan’s Motion to Reopen and for a Supplemental Decree numbers 79 pages, with a 142-page appendix. Its Motion for a Preliminary injunction numbers another 39 pages. The supporting brief of the State of Wisconsin is 14 pages long, and that of Ohio is 6 pages long.

WHEREFORE, the Lemont Refinery respectfully requests that the Board schedule a hearing on the impact of the possible migration of Asian carp and the resulting inter-state litigation.

Dated: January 7, 2010

Respectfully submitted,

CITGO PETROLEUM CORPORATION, and  
PDV MIDWEST, LLC, Petitioners

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 7th day of January, 2010, I have served electronically the attached Motion for a Hearing on the Impact of the Litigation before the United States Supreme Court Relating to the Migration of Asian Carp Through the Chicago Sanitary and Ship Canal and Notice of Filing upon the following person:

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and by U.S. Mail, first class postage prepaid, to the following persons:

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