

Electronic Filing - Received, Clerk's Office, February 3, 2010

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND)
EFFLUENT LIMITATIONS FOR THE) R08-9
CHICAGO AREA WATERWAY SYSTEM) (Rulemaking – Water)
AND THE LOWER DES PLAINES RIVER:)
PROPOSED AMENDMENTS TO 35 ILL.)
Adm. Code Parts 301, 302, 303 and 304)

NOTICE OF FILING

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

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Midwest Generation L.L.C.'S Reply in Support of Citgo Motion for a Hearing Relating to the Migration of Asian Carp, copy of which is herewith served upon you.

Dated: February 3, 2010

MIDWEST GENERATION, L.L.C.

By /s/ Susan M. Franzetti
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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ADM. CODE 301, 302, 303, and 304)

MIDWEST GENERATION L.L.C.'S REPLY IN SUPPORT OF CITGO MOTION FOR A HEARING RELATING TO THE MIGRATION OF ASIAN CARP

Midwest Generation L.L.C. ("Midwest Gen") hereby submits this reply to supplement its response to the Citgo Petroleum Corporation and PDV Midwest, LLC 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 Motion for Hearing"). In further support of Citgo's Motion for Hearing and Midwest Gen's response in support of that motion, Midwest Gen is submitting for the Board's information and consideration the attached February 2, 2010 document issued by the Asian Carp Regional Coordinating Committee ("ACRCC"), a group of federal, state and municipal governmental entities, entitled "Navigation Industry Engagement: Unified Approach to Modified Lock Operations." This document identifies additional actions which are being considered to prevent the migration of Asian carp through waters that are the subject of this rule-making (the "UAA waters").

The proposed actions identified by the ACRCC include several that would potentially, significantly affect aquatic life in various areas of the UAA waters. Under the action category termed "Modify Waterway Operations (MWRD)," the proposed actions include "Investigate possibility of modifying water quality to distress/kill AC [Asian carp]." According to the ACRCC, this action is associated with the Stickney Treatment Plant Outfall and the Calumet Treatment Plant Outfall, both of which are located in the UAA waters. As the Board is aware, the Stickney Plant effluent is the predominant source of flow in the Chicago Sanitary and Ship Canal ("CSSC"). Hence, any modifications to the water quality of the Stickney Plant's effluent to control the migration of Asian carp in the CSSC would have the potential to significantly change water quality within the CSSC.

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Under the category termed “Establish Control (Kill) Zones (IDNR/FWS),” there are two proposed actions. One is to “identify areas & establish plans for ‘spot treatment’ using piscicide.” The included map of the applicable waterbodies shows five areas, all of which are UAA waters, which are proposed “control (kill) zones.” All of these zones are in areas that are in addition to the approximately six-mile stretch of the CSSC that was the subject of the December 2009 authorized fish kill zone. One proposed “control (kill) zone” is a multi-mile stretch of the CSSC just north of that area. The second proposed action is to “Identify areas and establish plans for intensive fishing operations (nets/shock).” These areas appear to be associated with three of the proposed “control (kill) zones,” including the proposed zone that encompasses the northern portion of the CSSC. Similarly, under the heading “Guide AC into Control Zones (IDNR/FWS),” there is a proposed action to “herd fish into designated control zones – directional boat mounted; electro-fish; nets.” Clearly, these proposed actions to engage in controlled fish kills or intensive fishing and herding operations also may have a potentially significant affect on the UAA waters aquatic life use issues.

The attached ACRC document is further evidence that much is changing and quickly regarding the actions to be taken by state and federal agencies in response to the presence and continuing migration of the Asian carp within the UAA waters. It is also indisputable evidence that the proposed actions being considered include some that would significantly affect the aquatic life within various areas of the UAA waters. Contrary to the contentions of opponents to Citgo’s Motion, these developments are not of “highly dubious relevance.” (*See, e.g.*, January 25, 2010 Reply by the Environmental Law & Policy Center) These developments are clearly relevant to fundamental issues at the heart of this rule-making, including the nature of the fish community that is to be protected by the proposed aquatic life use designations. Clearly, if official “control (kill) zones” are going to be established within UAA waters, this governmentally-sanctioned “use” needs to be addressed in the aquatic life use designation to be adopted for those waters. Similarly, if there are going to be changes authorized to the water quality of the effluent that makes up over half of the flow in the CSSC, those changes need to be considered before the Board proceeds to hold hearings concerning the appropriate water quality standards for the CSSC.

Given the direct link between the unprecedented governmental developments concerning the control of the Asian carp migration and the critical aquatic life use issues involved in this

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rule-making, it is simply incredible for other parties to characterize the Citgo Motion for Hearing and the supporting requests by other stakeholders to this proceeding as mere delay tactics. As shown by the identification of the ACRCC members on the front page of the attached document, these proposed actions are being identified for consideration by just about every government agency who has a role in addressing the future of the aquatic community in the UAA waters (e.g., the United States Environmental Protection Agency, the Illinois Department of Natural Resources, the U.S. Fish and Wildlife Agency) as well as their authorized uses generally (e.g., the City of Chicago, the Metropolitan Water Reclamation District of Greater Chicago and the Chicago Park District). Opponents of the Citgo Motion would have this Board, who is vested with an equally critical role in addressing aquatic life issues, remain totally in the dark and without any opportunity to coordinate its future actions with those of other, related government agencies. Such a recommended strategy simply defies logic and is not consistent with sound environmental rule-making procedures.

Lastly, in brief response to the unfair and unsubstantiated accusation that supporters of the Citgo Motion for Hearing have been delaying this proceeding, Midwest Gen wishes to note for the record that the proponents of such comments conveniently ignore that they have actively engaged in causing any such alleged "delay" by presenting numerous hearing witnesses, filing extensive lists of questions for witnesses presented by other parties and posing yet additional questions to witnesses during the hearings that have been held by the Board. In truth, the hearing record to date has been necessitated and justified by the broad scope of this proposed rule-making, its unprecedented nature as the first UAA rule-making in Illinois and the potentially enormous economic impacts that it may have on regulated parties. Having so actively participated in the hearings to date, without complaint that they were mere tools of delay, it appears that the underlying purpose of opposing any hearings on the Asian carp migration control developments may well be to prevent the introduction of relevant evidence that could significantly change the Board's findings regarding the appropriate use designations and water quality standards for certain UAA waters.

As Midwest Gen has previously stated, regardless of the outcome of the State of Michigan's Supreme Court Petition, the issue of the effect of the migration of the Asian carp into UAA waters and the government-sanctioned changes it is causing will remain a significant and critical issue for the determination of aquatic life use designations. The recent developments

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since the filing of the Citgo Motion for Hearing further serve to underscore the validity of this conclusion. Midwest Gen respectfully urges the Board to hold a hearing to hear relevant evidence concerning the presence of Asian carp and the efforts to control their migration in UAA waters. These recent developments show that the absence of consideration of the issues these developments give rise to threatens to materially prejudice Midwest Gen in this proceeding. Neither Midwest Gen nor any other regulated party should be compelled to proceed with the submission of its hearing evidence concerning water quality standards under the proposed rules without the Board first hearing material evidence regarding how present and future plans for federal and state governmental action in UAA waters will or may affect the aquatic community that is supposed to be protected by those proposed standards. In sum, before the Board proceeds to consider proposed rules that may require regulated parties to expend tens or hundreds of millions of dollars to achieve compliance, so that certain fish may reside in UAA waters, it should be reasonably certain that other government action is not going to countermand that effort in order to serve the greater need of protecting the Great Lakes.

Respectfully submitted,
MIDWEST GENERATION, L.L.C.

By /s/ Susan M. Franzetti
One of Its Attorneys

Date: February 3, 2010

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Attachment

**Navigation Industry Engagement:
Unified Approach to Modified Lock Operations**

**Asian Carp Regional Coordinating Committee
(ACRCC)**

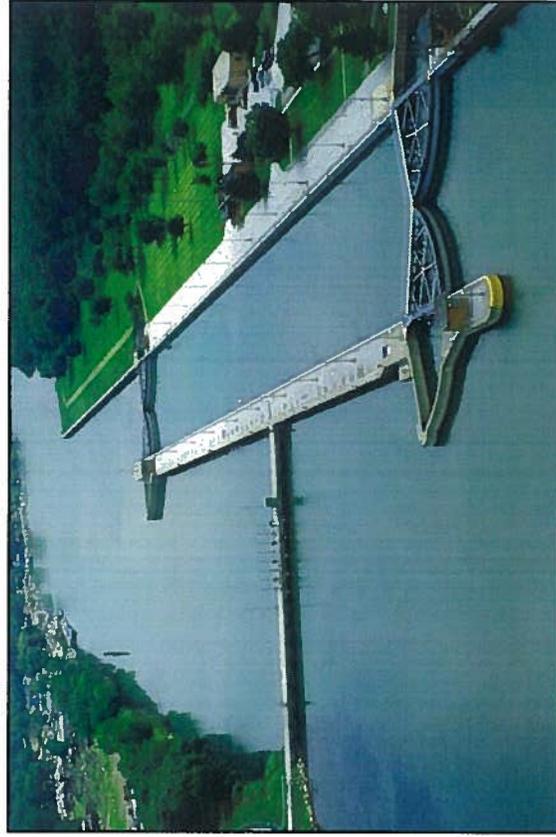
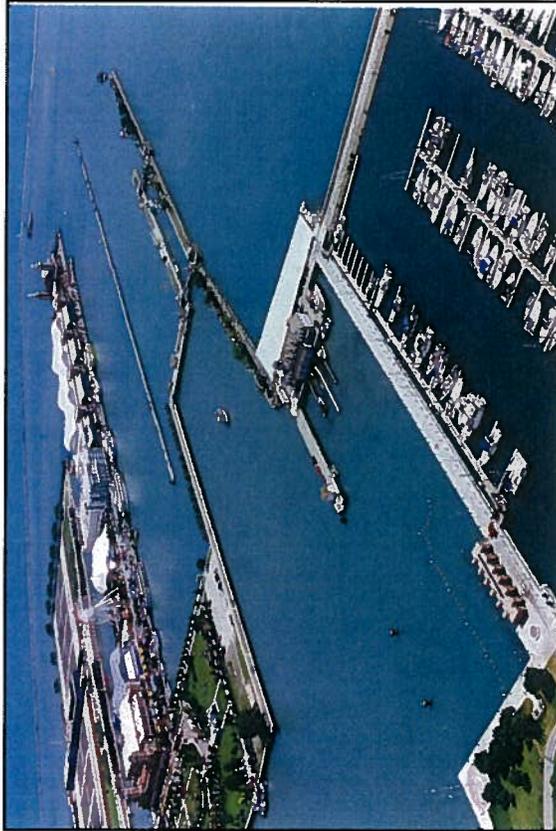
2 February 2010

Navigation Industry Engagement:

Unified Approach to Modified Lock Operations

Asian Carp Regional Coordinating
Committee (ACRCC)

2 February 2010



United States Coast Guard
U.S. Department of Homeland Security



Modified Lock Operations to impede AC Migration

Background: On 12 Jan 10 agencies discussed changing the manner in which existing CAWS structures (Locks & Dams; Gates; Pumping Stations) are used to impede the migration of Asian Carp into the Great Lakes.

Intent: Multi-agency collaboration with all participants bringing to bear the full extent of their authorities, capabilities and resources. In order to Recommend Intermittent Lock Operations.

USACE must have a Comprehensive Plan that includes:

- Establishing Kill Zones
- Addressing Uncontrolled Pathways
- Modifying Sluice Gates and Control Works
- Modifying Operations to Minimize the need for Constant, Uninterrupted Flow of Traffic through Locks.

Goals:

- Impede AC Migration
- Sustain Emergency Use
- Sustain Quantity of Commercial / Recreational Navigation Traffic – Operate Locks on Planned, Intermittent Schedule)



Modified Lock Operations

Modify Waterway Operations (MWRD)

- Lower water levels in advance of storms
- Retrofit sluice gates with screens
- Use pumps instead of opening gates at Wilmette Pumping Station
- Investigate possibility of modifying water quality to distress / kill AC

Establish Control (Kill) Zones (IDNR/FWS)

- Identify areas & establish plans for "spot treatment" using piscicide
- Identify areas and establish plans for intensive fishing operations (nets / shock)

Guide AC into Control Zones (IDNR/FWS)

- Herd fish into designated control zones – directional boat mounted; electro-fish; nets
- Stationary directional barriers – Chicago and O'Brien Locks – deny access through locks

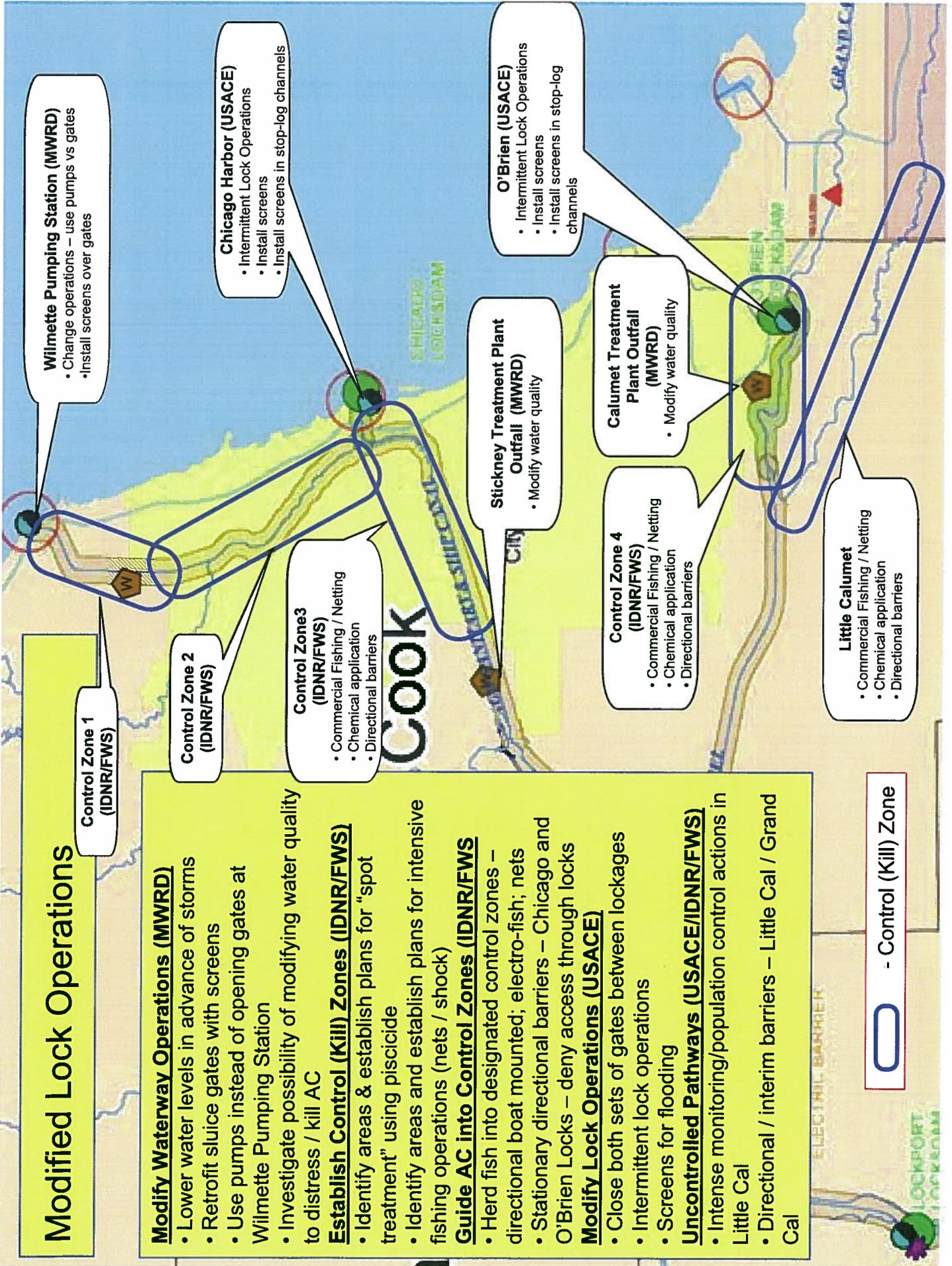
Modify Lock Operations (USACE)

- Close both sets of gates between lockages
- Intermittent lock operations
- Screens for flooding

Uncontrolled Pathways (USACE/IDNR/FWS)

- Intense monitoring/population control actions in Little Cal
- Directional / interim barriers – Little Cal / Grand Cal

- Control (Kill) Zone



Wilmette Pumping Station (MWRD)

- Change operations – use pumps vs gates
- Install screens over gates

Chicago Harbor (USACE)

- Intermittent Lock Operations
- Install screens
- Install screens in stop-log channels

O'Brien (USACE)

- Intermittent Lock Operations
- Install screens
- Install screens in stop-log channels

Stickney Treatment Plant Outfall (MWRD)

- Modify water quality

Calumet Treatment Plant Outfall (MWRD)

- Modify water quality

Control Zone 1 (IDNR/FWS)

Control Zone 2 (IDNR/FWS)

Control Zone 3 (IDNR/FWS)

- Commercial Fishing / Netting
- Chemical application
- Directional barriers

Control Zone 4 (IDNR/FWS)

- Commercial Fishing / Netting
- Chemical application
- Directional barriers

Little Calumet

- Commercial Fishing / Netting
- Chemical application
- Directional barriers

Modified Lock Operations

Facts:

- Will Allow for Public Health and Safety (Emergency Response Operations / Flooding)
- NEPA – Assessment of Impacts; Public Review Period
- Can accomplish the means to check / reduce the threat
- Multi-Agency collaboration needed to make effective
- Must show benefit to actions taken
- Looking at all ideas – everything on the table

Assumptions:

- All obstacles can be overcome
- Can develop scenarios to meet intent and satisfy goals
- Will address bypasses – Little Calumet and Grand Calumet



Modified Lock Operations - Scenarios

Scenario Development:

- Scenario Intent – Intermittent Operations with considerations of Impacts to Total Net Cargo
- Decisions not yet made on Lock Closures – all scenarios for consideration are hypothetical
- Scenarios center around Asian carp (AC) reduction actions:
 - What will be done to kill AC?
 - How long will those actions take?
 - How often must they be repeated?
- Need your inputs how you could modify operations to minimize lockages:
 - How quickly could those modifications be accomplished?

How would you operate while AC reduction actions were taken if locks were:

- Closed 21 days / Open 7 days
- Closed 10 days / Open 5
- Closed 5 days / Open 10



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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation L.L.C.'S Reply in Support of Citgo Motion for a Hearing Relating to the Migration of Asian Carp was filed electronically on February 3, 2010 with the following:

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Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, or sent electronically on February 3, 2010 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti