

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

To: ALL COUNSEL OF RECORD  
(Service List Attached)

**PLEASE TAKE NOTICE** that on the 25<sup>th</sup> day of January, 2010, I electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, **Response by Metropolitan Water Reclamation District of Greater Chicago to 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.**

Dated: January 25, 2010.

**METROPOLITAN WATER  
RECLAMATION DISTRICT OF  
GREATER CHICAGO**

By: /s/ Fredric P. Andes  
One of Its Attorneys

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CHICAGO AREA WATERWAY SYSTEM )  
AND THE LOWER DES PLAINES RIVER: )  
PROPOSED AMENDMENTS TO 35 Ill. )  
Adm. Code Parts 301, 302, 303 and 304 )

**RESPONSE BY METROPOLITAN WATER RECLAMATION  
DISTRICT OF GREATER CHICAGO TO 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**

The Metropolitan Water Reclamation District of Greater Chicago (“the District” or “MWRDGC”), by its attorneys Barnes & Thornburg LLP, hereby submits its Response to the Citgo Petroleum Corporation and PDV Midwest, LLC’s 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 (the “Motion for Hearing”). In support of its Response, the District states as follows:

**ARGUMENT IN SUPPORT OF MOTION**

The District supports the Motion for Hearing. The recent events related to the presence of Asian carp in the Chicago Sanitary and Ship Canal (the “Ship Canal”) and other parts of the Chicago Area Waterways System (the “CAWS”) are highly relevant to this proceeding, and a hearing is necessary to present facts related to these events to the Board. These events concern not only the pending litigation in the Supreme Court – there are numerous other activities related to the carp issue that are being undertaken or planned by government agencies, including the U.S. Army Corps of Engineers (the “Corps”). The actions that are being taken or that will be taken by the courts and agencies could have a tremendous impact on the Board’s ultimate

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decision as to the uses that are appropriate and attainable for the CAWS, and as to the water quality standards that are needed in order to attain and maintain those uses.

These issues – as to both the carp-related activities and their impacts on the Board's water quality standard decisions - are complex. The parties involved in this rulemaking will likely have significantly differing viewpoints on these issues – as is exemplified by the pleading that has been filed by several parties objecting to even holding an additional hearing. *See* Environmental Law and Policy Center, *et al.*, Objection to the Motion of Citgo Petroleum for a Hearing on the Impact of Asian Carp Litigation (filed January 20, 2010). Given those differing viewpoints, and the complex scientific issues that will be raised by the fact witnesses and experts involved in the carp issue, the only practical way for the Board to come to an informed decision would be to conduct a hearing, during which there would be the opportunity for testimony and questions. Mere submittal of written comments would be wholly inadequate, particularly for such an important and complex issue. Failure to hold a hearing would deprive the District and other parties of a full and fair opportunity to present and discuss relevant information before the Board. That, in turn, would make it more likely that the Board's ultimate decision in this rulemaking will result in designated uses and water quality standards that are scientifically flawed. That outcome would materially prejudice the District and other parties whose facilities would be subject to those new requirements.

As noted above, it is critical to note that the carp-related issues, and their possible impact on this rulemaking, are being addressed right now through ongoing activities in the courts, Congress, and Federal and State agencies. As to the courts, the case brought by the Michigan Attorney General in the Supreme Court is still active. The fact that the Court has denied the Michigan request for a preliminary injunction does not resolve that case. The Court still has to

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decide Michigan's motion to reopen the existing consent decree concerning the Ship Canal. That motion requests extremely broad relief that goes well beyond the Canal – including closing of locks at several locations in the CAWS, including in the North Shore Channel and the Cal-Sag Channel, and restrictions on future diversions of water involving Lake Michigan. *See* State of Michigan's Motion to Reopen and for Supplemental Decree, filed before the U.S. Supreme Court on December 21, 2009. And even if the Court decides to reject the motion and not hear the case, Michigan is expected to refile the case in a lower court.

As to Congress, key committees are already holding hearings concerning the carp issue, and a Congressman from Michigan has introduced legislation that would accomplish the same basic results as are being requested by the Michigan Attorney General's motion in the Supreme Court. *See* H.R. 4472, 111<sup>th</sup> Cong. (2010).

Finally, as to agency activities, the Corps and other Federal, State and local agencies, along with other stakeholders, are involved in a high-priority, intensive process to assess the carp situation, develop potential measures to remedy the problem, and implement feasible actions as rapidly as possible. At this point, some of the actions being considered include:

- An ongoing efficacy study to determine the need for and location of additional barriers and impediments, including possible temporary lock closure in concert with proactive fish management measures; this option would include study of physical separation for the Little and Grand Calumet Rivers and fish detecting systems;
- Temporary lock closure/operational control;
- Permanent lock closure;
- Possible additional Rotenone treatment, when required for maintenance shutdown of electric barriers;
- Temporary closure of the Cal-Sag Channel between O'Brien Lock and Dam and Lockport Lock and Dam, allowing for eDNA degradation and flush of system with uncontaminated water followed by eDNA retest;

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- An efficacy study for the creation of toxic zones within the Ship Canal at the District's Stickney Plant and Calumet Plant using plant effluent;
- Targeted removal of Asian carp within CAWS, including identification, containment and removal using toxicants, nets, etc.; and
- An experimental application of pheromone/micromatrix toxicant delivery system in selected locations in Cal-Sag Channel/Ship Canal.

It is obvious that some of these measures, if implemented in the Ship Canal or other parts of the CAWS, could drastically affect the kind of designated uses and water quality standards that would be appropriate for those reaches. For instance, if Rotenone or other toxicants are used for segments of the CAWS, that action would result in the destruction of large numbers of fish. That would certainly bear on the issue of whether those segments should at the same time be assigned new, more stringent water quality goals, designed to bring about an improved fish community from the one that existed before the toxicants were applied and eliminated that community. Similarly, if "toxic zones" are to be created, by discharge of additional levels of various pollutants from the District's plants or other facilities located along the CAWS, then it would be inconsistent to, at the same time, adopt new, more stringent uses and standards that would make those increased discharges illegal. None of these possible impacts were considered in the UAA studies that were used by Illinois EPA to develop the proposed standards that are the subject of this rulemaking, and there has been no testimony on these topics to date – for the simple reason that the various carp-related activities being considered have only arisen in the last few weeks. In order to assess the possible impacts on the future course of this rulemaking, the Board needs to consider submittals of testimony and pre-filed questions, and then conduct a hearing to gather and analyze relevant information.

In that hearing process on these issues, the Board would hear from various parties that have already provided witnesses in this rulemaking. The Board may also want to invite

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testimony from other entities that are not currently parties here, including Federal and/or State agencies that are involved on a day-to-day basis with assessing and addressing the Asian carp concern regarding the CAWS. The testimony would need to focus on several key issues: (1) the presence of Asian carp and alleged detection of Asian carp eDNA in various reaches of the CAWS; (2) actions that have already been taken or which are underway to address the problem; (3) possible carp-related actions that are either being planned or being considered; and (4) the possible impacts of different scenarios on the Board's eventual decisions as to designated uses and water quality standards for the CAWS.

In its Motion for Hearing, Citgo raises the possibility of a deferral of this rulemaking or some aspects thereof. The District believes that during the hearing process, it would make sense for the Board to consider possible deferral of all or a portion of this rulemaking while the carp-related actions are being taken. It may be that after certain carp-related issues are resolved, the Board would be able to make better-informed, definitive decisions about the proper uses and standards. It would be extremely inefficient, on the other hand, if the Board were to move ahead with the rulemaking, make decisions based on assumptions as to how the carp issues will be resolved, and then have to reopen the rulemaking and reverse its actions if those issues are not resolved in the way that the Board assumed would happen. The issue of possible deferral of the rulemaking would, then, be an appropriate topic for the carp-related hearing, since the propriety of deferral will depend to a large extent on the specific evidence that is presented to the Board as to the carp issue that is being and will be addressed.

A response to Citgo's motion has been filed by the environmental groups that are parties to this rulemaking. See Environmental Law and Policy Center, *et al.*, Objection to the Motion of Citgo Petroleum for a Hearing on the Impact of Asian Carp Litigation (filed January 20, 2010).

In that Objection, those parties contend that the Board should move ahead with the rulemaking, ignoring the current controversy concerning the carp and refusing to consider the possible impacts of that issue on the water quality standards for the CAWS. In making that argument, they contend that the Board can simply consider those issues in three years, when it is required to review the standards that it adopts in this proceeding. That argument ignores reality. As those parties are well aware, reviews of water quality standards occur in Illinois very rarely – certainly not every three years. Moreover, even if the Board were actually to review the standards in three years, the regulated parties would have had to spend those three years taking steps to come into compliance with the new standards. As testimony in this rulemaking has already demonstrated, those compliance costs will run into hundreds of millions of dollars, just in those first three years. To require the parties to incur those costs, even though the later review of standards may determine that they are not appropriate to incur, is an enormous waste of public and private resources. That waste can be avoided by the simple step of holding a hearing now, so the Board can hear testimony and questions on these critical issues before it makes a decision on the proposed standards.

### **CONCLUSION**

For all of the reasons stated above, the District supports the Motion for Hearing, and specifically suggests that the Board should schedule a hearing, during which testimony can be provided and questions can be raised. The hearing should be focused on the following issues: (1) the presence of Asian carp and alleged detection of Asian carp eDNA in various reaches of the CAWS; (2) actions that have already been taken or which are underway to address the problem; (3) possible carp-related actions that are either being planned or being considered; and (4) the

possible impacts of different scenarios on the Board's eventual decisions as to designated uses and water quality standards for the CAWS.

Dated: January 25, 2009.

**METROPOLITAN WATER RECLAMATION  
DISTRICT OF GREATER CHICAGO**

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One of Its Attorneys

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**PROOF OF SERVICE**

The undersigned, a non-attorney, certifies, under penalties of perjury pursuant to 735 ILCS 5/1-109, that I caused a copy of the forgoing, **Response by Metropolitan Water Reclamation District of Greater Chicago to 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**, to be served via First Class Mail, postage prepaid, from One North Wacker Drive, Chicago, Illinois, on the 25<sup>th</sup> day of January, 2010, upon the attorneys of record on the attached Service List.

/s/ Barbara E. Szynalik

Barbara E. Szynalik