

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

NOTICE OF FILING

TO: Mr. John T. Therriault	Ms. Marie E. Tipsord
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board RESPONSE IN SUPPORT OF CITGO'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 on behalf of Corn Products International, Inc., a copy of which is herewith served upon you.

Respectfully submitted,

CORN PRODUCTS INTERNATIONAL,
INC.,

Dated: January 25, 2010

By: /s/Katherine D. Hodge
One of Its Attorneys

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THIS FILING SUBMITTED ON RECYCLED PAPER

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 LOWER DES PLAINES RIVER:) (Rulemaking- Water)
PROPOSED AMENDMENTS TO 35 ILL.)
ADM. CODE 301, 302, 303 and 304)

**RESPONSE IN SUPPORT OF CITGO'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**

NOW COMES Corn Products International, Inc. ("Corn Products"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 101.500, and submits the following Response in Support of Citgo Petroleum Corporation's and PDV Midwest, LLC's ("Citgo's") Motion for a Hearing on the Impact of the Litigation before the United States Supreme Court ("Supreme Court") Relating to the Migration of Asian Carp through the Chicago Sanitary and Ship Canal ("Citgo Motion"). In support of this Response, Corn Products states as follows:

1. Corn Products agrees that the Illinois Pollution Control Board ("Board") should hold additional hearings for the purpose of receiving information on how the current uses of the Chicago Sanitary and Ship Canal ("Sanitary & Ship Canal") might be impacted by the litigation filed before the Supreme Court. *See* Citgo Motion, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendment to 35 Ill. Admin. Code 301, 302, 303, and 304*, R08-9 (Ill.Pol.Control.Bd. May 19, 2008) (rulemaking hereafter referred to as "CAWS/LDPR"). Furthermore, Corn Products urges

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the Board to consider the information gathered at such hearings when moving forward in this proceeding.

2. Citgo's request to defer hearings on water quality standards for the Sanitary & Ship Canal is appropriate. *See* Citgo Motion at 3. However, Corn Products asks that the Board defer hearings on water quality standards not only for the segment of the Sanitary & Ship Canal immediately upstream of the electric barrier, but also for the entire Sanitary & Ship Canal upstream of the electric barrier, including the stretch into which Corn Products discharges.

3. Since Citgo's Motion was filed, the Supreme Court denied the State of Michigan's Motion for a Preliminary Injunction. *Wisconsin, et al v. Illinois, Michigan v. Illinois, et al, and New York v. Illinois, et al*, 558 U.S. ___ (Jan. 19, 2010) (order denying preliminary injunction). However, the Supreme Court will still rule on the State of Michigan's Motion to Reopen and Issue a Supplemental Decree, which requests the Supreme Court:

1. Reopen Nos. 1, 2, and 3, Original, granting Michigan leave to seek a Supplemental Decree.
2. Enter a Supplemental Decree:
 - (a) Declaring that facilities constructed, maintained, or operated by the State of Illinois, the Metropolitan Water Reclamation District of Greater Chicago ("MWRDGC"), and the United States Army Corps of Engineers ("USACE") create conditions that constitute a public nuisance or are otherwise unlawful, and
 - (b) Grant a permanent injunction requiring the State of Illinois, MWRDGC, and the USACE to take all appropriate and necessary measures to expeditiously develop and implement plans to

permanently and physically separate carp-infested waters in the Illinois River Basin, the Chicago Sanitary and Ship Canal (“Sanitary & Ship Canal”), and connected waterways from Lake Michigan so as to prevent the migration of bighead carp, silver carp, or other harmful aquatic invasive species into Lake Michigan.

3. Grant the State of Michigan such other relief as the Court Determines just and proper.

Motion to Reopen and Issue Supplemental Decree at 29-30, *Wisconsin, et al v. Illinois, Michigan v. Illinois, et al, and New York v. Illinois, et al.* (U.S. Dec. 21, 2009) (hereafter referred to as “Motion to Reopen”).

4. Regardless of the fate of the Motion to Reopen, state and federal agencies have made clear that they will take actions to mitigate the risk of Asian carp from migrating into Lake Michigan. *See Agencies Accelerate Action in Response to New Test Results Suggesting Asian Carp Presences in Calumet Harbor, News Release, United States Army Corps of Engineers (“USACE”)* (Jan. 19, 2010) (hereafter referred to as “Jan. 19 News Release”). Such mitigation will likely impact both the current uses and the attainable uses of the Sanitary & Ship Canal.

5. Silver carp have been observed in the Sanitary & Ship Canal slightly south of the Lockport Lock and Dam. Motion to Reopen at 13. A series of eDNA sample results indicate that Asian carp may now be present north of the Lockport Lock, in the Calumet-Sag Channel in the vicinity of the O’Brien Lock, and in the North Shore Channel. *U.S. Army Corps of Engineers Reports New eDNA Results within the Chicago Waterway System, News Release, USACE* (Jan. 14, 2010) (hereafter referred to as “Jan. 14 News Release”).

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6. The USACE constructed an electrical dispersal barrier system in the Sanitary & Ship Canal, consisting of two barrier elements to prevent the passage of bighead and silver carp into Lake Michigan. Motion to Reopen at 17-18. The USACE has announced plans to build a third element to the dispersal barrier system. *Id.* at 18-19. Each barrier element is comprised of underwater steel cables charged with electricity. *Id.* at 17. Plans to build the newest element may be expedited in response to recent eDNA sampling results. Jan.19 News Release at 2.

7. The USACE turned off one of the barrier elements between December 2 and December 4, 2009. *Id.* at 20. To mitigate the risk that Asian carp would pass through that segment of the Sanitary & Ship Canal, the fish poison rotenone was added to an approximately 5.7 mile-long stretch of the Sanitary & Ship Canal near the barrier system. *Id.*

8. A team of state and federal agencies is considering all options to prevent the migration of Asian carp north of the electrical barrier dispersal system, including the controlled operation of existing structures, intensive fishing efforts, and potential application of fish toxicants such as rotenone. Jan. 14 News Release at 1. An article published on the Metropolitan Planning Council's website suggests that the best long term solution may be to create a permanent impediment using engineering, chemical, or biological means to eradicate anything in the water so as to "ecologically separate" Lake Michigan. Open Locks Should Lead to Open Discussions on Asian Carp Solutions, Metropolitan Planning Council (Jan. 19, 2010) (available at <https://www.metroplanning.org/news-events/blog-post/5745>) (last viewed Jan. 22, 2009).

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9. The Illinois Environmental Protection Agency ("Illinois EPA") did not consider the presence of Asian carp, new physical infrastructure or operational changes affecting water quality taken either voluntarily or as a result of litigation to mitigate the carp, the detrimental impact carp would likely have on habitat and resultant impacts on aquatic species when drafting the proposed regulations. *See* Testimony of Robert Sulski Jan. 29, 2008 Hearing Transcript, CAWS/LDPR at 83, 102 (Ill.Pol.Control.Bd. Feb. 7, 2008). Even if Illinois EPA had considered the impact of Asian carp when drafting the proposed rule, circumstances have changed such that the impact of Asian carp and response actions should be revisited.

10. Past response actions to prevent the passage of Asian carp and similar future actions will likely have a significant impact on the current uses and the attainable uses of the Sanitary & Ship Canal. Therefore, failure to hold additional hearings will materially prejudice Corn Products. Corn Products introduced information related to the uses of the Sanitary & Ship Canal in testimony heard before the Board. However, eDNA sampling results became available only recently, so Corn Products did not have the opportunity to address them at past hearings. Furthermore, aggressive response plans currently being discussed did not appear to be necessary until the newly available sampling results showed the presence of Asian carp eDNA north of the electrical dispersal barrier system. Simply put, the conditions in the Sanitary & Ship Canal have changed and are likely to change even more in the future. Accordingly, the record should be supplemented. Furthermore, since new discoveries have been made in the past few months, a thorough written study addressing the implications of the results does not exist. Only by hearing testimony directly from witnesses will the Board be able to acquire the

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information necessary to make an informed decision regarding uses on the Sanitary & Ship Canal. Therefore, mere written comments are not adequate, and additional hearings are necessary.

11. Given the new revelations that Asian carp may be present north of the invasive species electrical dispersal barrier system and that state and federal agencies plan to respond aggressively to prevent further migration, Corn Products believes it is most appropriate for the Board to hear testimony related to the impact of the Asian carp's presence and corresponding response actions taken by agencies on the uses of the Sanitary & Ship Canal. Corn Products requests that the Board allow it and other participants to introduce testimony regarding the impact of Asian carp and response actions by agencies on the current uses and attainable uses in the Sanitary & Ship Canal. Additionally, Corn Products requests that the Board solicit further testimony from Illinois EPA regarding uses in the Sanitary & Ship Canal, in light of recent developments.

12. Citgo's request to defer hearings related to water quality standards for the Sanitary & Ship Canal is appropriate since response plans to prevent the migration of Asian carp are still being formulated. Responses such as closing locks, poisoning fish, or ecologically separating Lake Michigan would drastically impact the current uses and the attainable uses in the Sanitary & Ship Canal. Corn Products requests that the Board allow time for certainty to be established regarding material and unaddressed factors impacting uses resulting both from the carp themselves, and measures taken to control them. While some might view this request as an attempt to delay this rulemaking, granting such a request is the only viable alternative that allows the Board to avoid spending valuable resources and time attempting to address matters that are fluid and

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subject to material change. With so much uncertainty surrounding future response actions and their impact on uses in the Sanitary & Ship Canal, it would be futile to speculate on the appropriate water quality standards.

WHEREFORE, Corn Products concurs with Citgo's Motion and requests that the Board grant relief requested in Citgo's Motion.

Respectfully submitted,

CORN PRODUCTS INTERNATIONAL,
INC.,

Dated: January 25, 2010

By: /s/Katherine D. Hodge

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CORN-006\Filings\Response to Citgo Motion

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached RESPONSE IN SUPPORT OF CITGO'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 upon:

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via electronic mail on January 25, 2010; and upon:

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CORN:006/Fil/NOF-COS -- Response to Citgo Mtn