

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



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**BILL SCHUETTE**  
ATTORNEY GENERAL

January 28, 2015

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army  
for Civil Works  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Secretary Darcy:

This is in response to the U.S. Army Corps of Engineers' request for comments on its proposal to study the construction of additional measures at the Brandon Road Lock and Dam in Joliet, Illinois to prevent the upstream movement of Asian carp and other harmful invasive species into the Chicago Area Waterway and the Great Lakes. At the outset, I commend you for directing the Corps to specifically address this issue.

As stated in my March 31, 2014 comments on the Corps' Great Lakes Mississippi River Interbasin Study (GLMRIS) Report, and parallel comments from the Directors of the Michigan Departments of Natural Resources, Environmental Quality, and Agriculture and Rural Development, the State of Michigan urges the Corps to take interim measures, such as those recommended by the Great Lakes Commission<sup>1</sup> needed to minimize the risk of Asian carp invasion of the Great Lakes until an effective permanent solution is in place.

The Commission's recommendations included: "design, engineer and construct modifications to the Brandon Road lock and dam structure to reduce the risk of one-way transfer (into Lake Michigan), including additional electric barriers at the entrance and exit of the lock, use of fish deterrents, modifications to the gates on the dam, and other technologies."<sup>2</sup> As the Corps itself has noted, the Brandon Road site has several advantages, and that "[o]peration of the lock at this location currently provides the only known aquatic pathway that allows transfer of

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<sup>1</sup> Great Lakes Commission, Resolution: Preventing the interbasin transfer of Asian carp and other invasive species March 5, 2014)

<http://glc.org/files/main/resolutions/FINAL-GLC-Resolution-GLMRIS-20140305.pdf>.

<sup>2</sup> *Id.*

Mississippi River ANS [aquatic nuisance species] to the Great Lakes through the CAWS [Chicago Area Waterway System].”<sup>3</sup> Thus, the Brandon Road location is a logical “choke point” for reducing the risk of Asian carp moving upstream.

While we support the Corps’ proposal to specifically evaluate and develop additional control measures at Brandon Road, we wish to emphasize several points.

First, such measures are only interim steps. They may serve as a “bridge” in time to reduce risks until an effective permanent remedy—hydrologic separation—is implemented, but they are not a substitute for it. As detailed in our March 31, 2014 comments on the January 2014 GLMRIS Report, both the Report itself and a wide range of expert analyses support the conclusion that hydrologic separation, such as that described as Alternative 6 in the Report, is the most effective means of achieving the goal set by Congress: “prevent[ing] the spread of aquatic nuisance species between the Great Lakes and the Mississippi River Basins through the Chicago Sanitary and Ship Canal . . .”<sup>4</sup> By their very nature, the additional interim measures to be considered at Brandon Road would not meet that goal. Although they could reduce the risk of invasive species moving in one direction (upstream), they are not intended to and could not prevent the movement of harmful species downstream. Moreover, in contrast to hydrologic separation, none of the technologies that the Corps proposes to evaluate at Brandon Road (e.g., electrical or other behavioral “barriers” to fish passage) can reliably and completely exclude the passage of Asian carp and other invasive species.

Second, time is of the essence. Today, several years after Asian carp were found in the Waterway just below the Corps’ electrical barrier system (near Lockport in 2009) and far past it (in Lake Calumet in 2010), the Corps is still relying primarily on that technology to deter the passage of Asian carp. And, despite the installation of an additional electrical barrier and changes in operational settings, sampling in the Waterway from 2010 through late 2014 has repeatedly detected Asian carp environmental DNA at many locations past the electrical barriers, including some at the edge of Lake Michigan. For example, in the most recent results, released in January 2015, ten percent tested positive for silver carp DNA.<sup>5</sup> Moreover, information disclosed by the Corps and the U.S. Fish and Wildlife Service showed that the electrical barriers are not stopping the

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<sup>3</sup> GLMRIS, Brandon Road Study Area, <http://glmr.is.anl.gov/brandon-rd/study/>.

<sup>4</sup> Section 3061(d) of the Water Resources and Development Act of 2007, Pub. L. No. 110-114.

<sup>5</sup> See <http://www.fws.gov/midwest/fisheries/eDNA/Results-chicago-area.html>.

movement of all fish and that fish could be transported beyond the electric barriers when barges moved through them.<sup>6</sup> In sum, the Corps' existing electrical barrier system cannot be relied upon to prevent the movement of Asian carp through the Chicago Waterway into Lake Michigan. With each day that this situation continues, the risk that enough Asian carp will enter the Lake to trigger the establishment of a reproducing population increases. Thus, it is imperative that the Corps move as quickly as possible to design and implement measures to reduce that risk.

Third, against this background, the Corps should not defer additional action until it completes further study of all potential control measures for Brandon Road. Instead, the Corps should proceed in phases, and prioritize those risk-reduction measures that can be most quickly designed and implemented. For example, the Corps could expeditiously design and install technologies (e.g., underwater cameras and/or sonar) to monitor, in real time, for the presence of Asian carp within the Brandon Road Lock. The results of that monitoring could then be used to guide immediate responses, such as changes in lock operations or selective application of fish poison. Similarly, priority should be given to developing measures that could be used to safely flush water and fish from the lock as needed. These types of near-term measures could be implemented even before the Corps completes its evaluation of and potential construction of an electrical barrier in a new, engineered channel downstream of the Brandon Road Lock.

Finally, the Corps need not wait for further Congressional authority before taking any additional action at Brandon Road, or elsewhere in or near the Chicago Waterway. Instead, it should use its existing legal authorities to the fullest extent possible in order to expedite action. For example, the Corps has had, since 2012, authority to "proceed directly to project preconstruction engineering and design"<sup>7</sup> of measures identified in the GLMRIS process. In addition, the Corps has authority

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<sup>6</sup> Summary of Fish-Barge Interaction Research and Fixed Dual Frequency Identification Sonar (DIDSON) Sampling at the Electric Dispersal Barrier in Chicago Sanitary and Ship Canal U.S. Army Corps of Engineers (December 2013): <http://www.lrc.usace.army.mil/Portals/36/docs/projects/ans/docs/Fish-Barge%20Interaction%20and%20DIDSON%20at%20electric%20barriers%20-%202012202013.pdf>.

<sup>7</sup> Section 1538(b)(1)(B) of Moving Ahead for Progress in the 21<sup>st</sup> Century Act, Pub. L. No. 112-141.

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army  
for Civil Works  
Page 4

under Section 1039(c)(1) of Water Resources Reform and Development Act of 2014<sup>8</sup> to take action to prevent the movement of Asian carp through the Waterway. And to the extent that any additional Congressional authority is needed to implement other interim measures at Brandon Road, the Corps should expeditiously request it.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink that reads "Bill Schuette". The signature is written in a cursive style with a long horizontal stroke extending from the end of the name.

Bill Schuette  
Attorney General

WDS/RPR/neh

CPBE3/ENRA Assignment Control/2009Cases/Asian Carp/  
Comments-GLMRIS-Brandon Road/  
Mich AG Comments-Brandon Road 01.30.15

<sup>8</sup> Pub. L. No. 113-121.