

**State of Michigan
State of Minnesota
State of Ohio
Commonwealth of Pennsylvania
State of Wisconsin**

May 19, 2010

Major General John W. Peabody
Commander and Division Engineer
Great Lakes and Ohio River Division
United States Army Corps of Engineers
550 Main Street, Room # 10032
Cincinnati, OH 45202-3222

Dear General Peabody:

Re: Asian Carp Control Strategy Framework

Three months ago, the United States Army Corps of Engineers (USACE) and other federal and Illinois officials released a "Draft Asian Carp Control Strategy Framework." The "Draft Framework" identified a series of "short term" and "long term" actions being taken by the "Asian Carp Regional Coordinating Committee" (RCC) to prevent migration of Asian carp to the Great Lakes. You have personally emphasized the significance of this "Framework" in various public statements, including, notably, your February 24, 2010 sworn declaration filed in the Supreme Court.

On May 5, 2010, the RCC issued an updated version of the Framework. It states: "This version differs from the first draft released in February 2010 in that it contains new actions either now underway or whose efficacy will be assessed in 2010. It also includes updated milestones based on activities conducted to date, and a Responsiveness Summary addressing public comments received over the last several months." The same day, the RCC issued a press release announcing plans for additional monitoring for Asian carp in some portions of the Chicago Area Waterway System (CWS).

We are writing to you for four reasons. First, we again urge the USACE and the other agencies participating in the RCC to take more comprehensive and effective action, and to act more quickly. Given the eDNA evidence that has been collected, the migration of Asian carp remains an immediate and dire threat to the Great Lakes. The RCC's response must be commensurate with the urgency and magnitude of that threat. Second, we are requesting that

you provide us with more specific information about what is and is not being done, and why. An open exchange of information is needed to make the decision making process transparent to all of the Great Lakes states and provinces who are greatly impacted by your decisions, but have not been included in making them. Third, the RCC should operate on a genuinely *regional* basis, actively seeking and considering substantive input from environmental and natural resource agencies throughout the Great Lakes about Asian carp control actions to be taken in the CAWS. Finally, we would like to reiterate the specific actions we believe should be taken in addition to those already announced by the RCC.

Exercise of Emergency Authority under Section 126

The federal government has asserted broad legal authority under Section 126 of the 2010 Energy and Water Development Appropriation Act to take emergency action, ranging from closure of locks to killing fish, to prevent the migration of Asian carp through the Chicago Area Waterway System (CAWS) into the Great Lakes. So far, it appears that based on your recommendation, the Assistant Secretary of the Army has used that congressionally granted authority only once to take action intended to prevent Asian Carp from dispersing in the Great Lakes. In January 2010, Assistant Secretary Darcy approved the USACE's plan to construct physical "barriers" between the Chicago Sanitary and Ship Canal (CSSC) and the Des Plaines River and I & M Canal intended to prevent the movement of Asian carp during floods. While useful, that step is inherently limited. It does nothing to address Asian carp that eDNA evidence shows have already moved lakeward of the electrical barrier system in the CSSC or others that are likely to swim directly through it.

Moreover, because of the grave threat posed by Asian carp to the Great Lakes, and the federal government's claim that Section 126 is its principal legal authority for taking immediate measures to combat it, the USACE's recommendations on whether, when and how to exercise this authority should be open to public scrutiny. Accordingly, we hereby request that the Department of the Army promptly provide copies of any and all documents, whether in written or electronic form, created since the enactment of Section 126 relating to any recommendation by the USACE to exercise or not to exercise Section 126 authority to address potential Asian carp migration in the CAWS and the reasons for such recommendations.¹

In that regard, it appears that USACE has made a series of decisions to *not* recommend the exercise of emergency authority under Section 126. In each instance, it has tried to justify the decision because no Asian carp bodies have been observed or recovered in the CAWS lakeward of the electrical barrier. For example, in December, 2009, the USACE decided to reopen the O'Brien Lock after netting and electrofishing in the area did not collect any Asian carp. Similarly, in opposing both of Michigan's motions for preliminary injunctions in the Supreme Court, the USACE emphasized that "the FWS and IDNR have so far been unable to confirm the eDNA results by finding any live or dead Asian carp above the fish barrier system" (February 24, 2010 Declaration, p 14a) and asserted that absent such fish sightings, there was no basis for emergency action to close locks. The May Framework similarly indicates that the USACE has again determined that negative fishing results and the limited number of recent positive eDNA tests somehow establish that such immediate action under Section 126 is not warranted. (May Framework, p ES-1). Those decisions were and remain unjustified. As noted

¹ If necessary, please treat this as a request under the Freedom of Information Act, 5 U.S.C. § 552.

below, the absence of fish sightings and nettings does not negate the significant and imminent threat indicated by the eDNA data, particularly in view of the urgent need to minimize the migration of Asian carp into Lake Michigan.

Finally since the Department of the Army's legal authority under Section 126 is scheduled to expire in less than six months, please document any efforts to obtain an extension of the Act's authority. Also, please explain how, in the absence of such an extension, the USACE proposes to take all necessary actions to block the movement of Asian carp into Lake Michigan.

Fish Netting, Electrofishing and Poisoning

The first "short term" actions identified in the Draft Framework included conventional monitoring for Asian carp, with nets and electrofishing and application of the fish poison, Rotenone, in the CAWS. (Draft Framework, pp 13-14.) No Rotenone has been applied anywhere in the CAWS since December 1-2, 2009 when it was used during a temporary shutdown of the electrical barrier. A March 29, 2010 press release issued by the RCC described netting and electrofishing efforts over a six week period and emphasized that no Asian carp were observed or collected.

The fact that Asian carp were not observed in that conventional monitoring effort does not mean that no Asian carp were present or that continuing positive eDNA detections lakeward of the electrical barrier are somehow not "valid." As Dr. David Lodge has explained, small populations of Asian carp cannot readily be observed by conventional sampling methods and it is not surprising that they have not been collected in areas where their eDNA has been detected near the leading edge of their invasion in the CAWS. [January 4, 2010 Declaration, US App, 115a, 129a]

Mr. Duane C. Chapman, a federal Research Fish Biologist similarly observed:

[Asian carps] are more net-averse than most native fishes. When at low densities, adult Asian carps *are amazingly difficult to capture with any standard fisheries technique*. Because of these characteristics, small populations can exist without detection. Small numbers of fish could expand over very large distances in the Great Lakes before conditions that precipitate a large population increase are encountered by the fish. [February 25, 2010 Declaration US App, 82a-83a. (emphasis added)]

On May 5, 2010, the RCC issued another press release, reiterating that no Asian carp had been found above the electrical barrier during the earlier netting and electrofishing operation, and announcing that additional conventional monitoring efforts were planned in the north Branch of the Chicago River on May 11-14, 2010. This was apparently prompted by another recent positive eDNA sample result in that vicinity disclosed by the USACE on April, 30, 2010.

The May 5, 2010 press release also announced a plan to apply Rotenone in a portion of the CAWS for the first time since early December, 2009. Specifically, the release stated that Rotenone would be applied on or about May 20, 2010, in a two mile stretch of the Little Calumet River, approximately one mile downstream from the O'Brien Lock and Dam. This is a positive, albeit overdue, action. Unfortunately, this public statement does not identify planned applications of Rotenone at any other locations in the CAWS where Asian carp eDNA has been detected, including the Grand Calumet River, Calumet Harbor and the North Branch of the Chicago River. Nor have any details of the "Three Month Monitoring Plan" referenced in the press release been publicly disclosed. Similarly, no details or even the text of the "2010 monitoring plan targeted for release April 30, 2010" (May Framework, p. 24) have been made public.

Modified Structural Operations

The other principal "short term" actions newly identified in the Draft Framework involved changes in lock, sluice gate and pumping operations – referred to as "Modified Structural Operations" to "impede" Asian carp migration. (Draft Framework, 11, 15-16.) Both the Draft Framework and your Second Declaration stated that the "concept development" would be completed and recommendations made by "Early March 2010." (Declaration, p 10.) If, in fact any concept has been selected and a recommendation for such action has been made, they have not been made public. The USACE solicited public comment on how extensive an *environmental assessment* would be needed to evaluate certain technologies – "acoustic deterrents, air bubble curtains, and strobe lights" – that might be used as "in-stream barrier/deterrent[s]." But no actual proposal describing the use of such technologies has been publicly released, or even recommended.

Notwithstanding the statement in the Draft Framework that "most elements" of "modified structural operation" would be underway by April 30, 2010," there is no evidence that *any* affirmative "modified structural operation" has been chosen, let alone implemented. Indeed, under the May Framework, the "Modified Structural Operations" have now slipped from "short term actions" to "long term actions" and the "goal" is now to complete "concept development" by June 2010, with "full implementation" targeted for "end of 2010." (May Framework, pp19-20)

Additional Physical Barriers

The Draft Framework (pp 16, 24) briefly referred to the possibility of installing fine mesh screens in line with the sluice gates at the Chicago and O'Brien Locks to deter adult fish passage. This concept was also briefly described by Metropolitan Water Reclamation District of Greater Chicago (MWRDGC) Supervising Civil Engineer Edward J. Staudacher in his February 24, 2010 Declaration filed in opposition to Michigan's Renewed Motion for Preliminary Injunction. According to that Declaration, the MWRDGC intended to conduct a test of a single "bar screen" in a sluice gate at the O'Brien Lock and Dam, and if successful, install additional screens in sluice gates at the O'Brien and Chicago River Controlling Works.

To date, neither the MWRDGC nor the RCC have disclosed or documented that any such screens have been tested or installed. In fact, the updated Framework only briefly asserts that USACE is considering the possibility of installing "grates" in sluice gates (p 8), but no such action is identified, let alone established as a specific goal and timeline, in any of the short term and long term actions proposed in the body of the May Framework.

Although the Draft Framework itself failed to identify any measures to control the potential migration of Asian carp from the CAWS through the Little Calumet River, your February 24, 2010 Declaration stated that in its evaluation of "modified structural operations," "USACE is considering whether there are any near term mechanisms that could be implemented in the Little Calumet River to impede Asian carp passage." (§ 20.) Other than noting that "the Corps would have to consider the potential impacts to flooding that such structures might have," neither the Draft Framework, your Declaration, the May Framework or any other publicly released document describes the nature of this "evaluation," alternatives considered, or recommendations. For example, there is no discussion of the possibility, suggested in Michigan's comments on the Draft Framework, of immediately installing block nets in the Little Calumet River, as a preliminary measure, that would allow water, but not larger fish, to pass and thereby avoid any flooding impacts. The "Responsiveness Summary" appended to the May Framework neither acknowledged nor responded to Michigan's comments in that regard. Again, even if some evaluation has been performed, no concrete action has been taken to date.

One of the "long term" actions identified in the May Framework, the "Final Efficacy Study Report" vaguely refers to "considering measures to control access to Lake Michigan through the Little Calumet and Grand Calumet Rivers." (May Framework p. 18). Whatever any such measures under consideration may be, the USACE plans to merely study them for the remainder of this year and at least part of 2011. (p.18)

In sum, apart from the already planned improvements in the electrical dispersal barrier system, and the construction of a barrier between the CSSC and the Des Plaines River and I & M canal, relatively little concrete action has been taken under the Framework since February to prevent the migration of Asian carp into Lake Michigan. Even the limited "modified structural operations" proposed by the Corps as an alternative to lock and sluice gate closure, have yet to be implemented as initially described in the Framework. And, significantly, the critical *first* step toward a permanent solution – a feasibility study evaluating permanent ecological separation of the CAWS from the Great Lakes – remains, under the May Framework (pp 18-19), years away from completion.

Requested Actions

Further delay, is unacceptable. We reiterate our prior demands that the federal government, including the USACE, and the other federal, Illinois, and local agencies participating in the RCC immediately take all measures within their control, consistent with the protection of public health and safety, to : (a) minimize the risk of Asian carp migration through the CAWS into Lake Michigan, and (b) expedite planning for and implementation of a permanent physical separation of the CAWS from Lake Michigan at strategic locations, to reliably prevent the movement of Asian carp and other aquatic invasive species between the Illinois River basin and the Great Lakes.

Specifically, necessary short term actions include:

1. Applying Rotenone at *all* locations in the CAWS where eDNA tests have indicated the presence of Asian carp, including, but not limited to, the Grand Calumet River and Calumet Harbor above the O'Brien Lock and Dam and the North Branch of the Chicago River;
2. Closing the O'Brien and Chicago Locks except as needed to protect public health and safety;
3. Closing sluice gates in the Chicago lock and Dam, the Chicago Controlling Works and the Wilmette Pumping Station except as needed to protect public health and safety;
4. Installing fine mesh screens or other physical barriers at each of the sluice gates in those structures to minimize the risk of Asian Carp passage if the sluice gates are opened for health or safety reasons; and
5. Installing block nets or other physical barriers in the Illinois segment of the Little Calumet River to minimize the risk of Asian carp passage.

In addition, planning for a permanent solution should be accelerated. Options for physically separating the CAWS from Lake Michigan at strategic locations to cut off inter-basin movements of aquatic invasive species should be identified, evaluated and implemented as soon as possible. There is no good reason to delay the first step-completion of a feasibility study-until 2012 as proposed in the Framework.

As noted above, the USACE and other participants in the RCC need to provide far more complete and timely information to the public about the actions they are taking under the Framework. Occasional press releases and cryptic postings of eDNA data maps are not enough. Much is at stake here. The details of and reasons for the federal government's actions (and decisions not to act) must be open to the public. In addition to responding to the specific questions relating to the exercise of Section 126 authority raised above, we are requesting that the Department of the Army and the United States Fish and Wildlife Service provide the documents identified in the list attached to this letter within 30 days.

Finally, the Asian Carp Regional Coordinating Committee should function on a truly regional basis. Each of our respective states' environmental and natural resource agencies has responsibility for and substantial scientific expertise in, the protection of the fisheries and other aquatic resources of the Great Lakes. Several of these agencies provided personnel and material resources, such as stocks of Rotenone, in support of the Illinois Department of Natural Resources and the Fish and Wildlife Service during fish poisoning and monitoring operations in December, 2009. But such a limited, operational role is not sufficient. We urge the RCC to actively involve agency experts from each of the Great Lakes states and provinces in evaluating, selecting and implementing measures to prevent the migration of Asian carp through the CAWS into the Lakes.

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We sincerely hope that the participants in the RCC will promptly consider and act upon our requests outlined above, but reserve our respective rights to take further action as needed.

Sincerely,

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