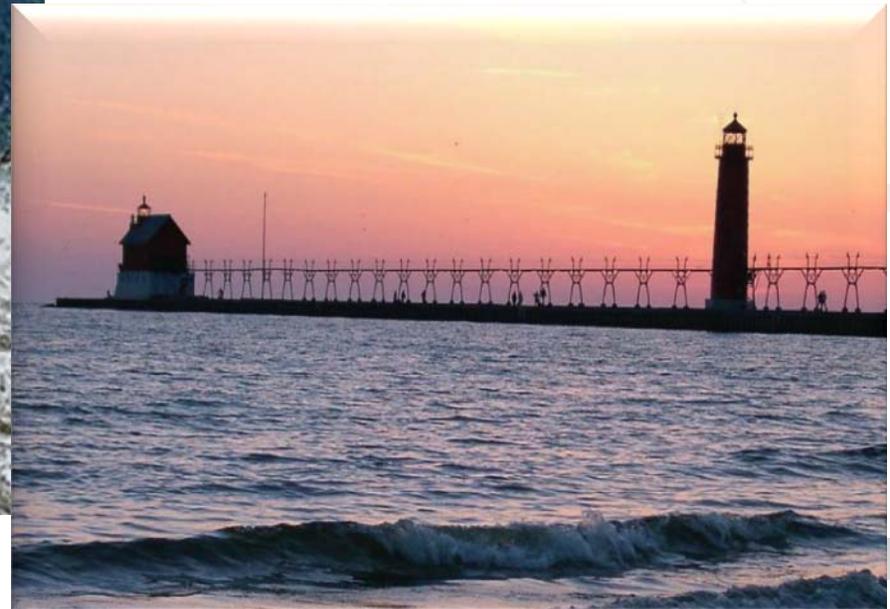


Asian Carp Litigation

Peter Manning

Michigan Department of Attorney General



Bighead Carp



Bighead carp grow up to five feet long and 110 pounds, and can eat 40% of their body weight daily.

Bighead Carp



Silver Carp



Silver carp may grow to over three feet long and 60 pounds, and are known for leaping from the water, sometimes severely injuring boaters.

Silver Carp



Why Are We Worried?

- The United States Environmental Protection Agency:

“Due to their large size, ravenous appetites, and rapid rate of reproduction, these fish could pose a significant risk to the Great Lakes Ecosystem.”

<http://www.epa.gov/glnpo/invasive/asiancarp/>

- The United States Army Corps of Engineers:

“The prevention of an interbasin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecologic and economic disaster.”

http://www.lrc.usace.army.mil/pao/ANS_Dispersal_Barrier_Efficacy_Study-Interim_I_Public.pdf

Areas Likely Impacted In MI

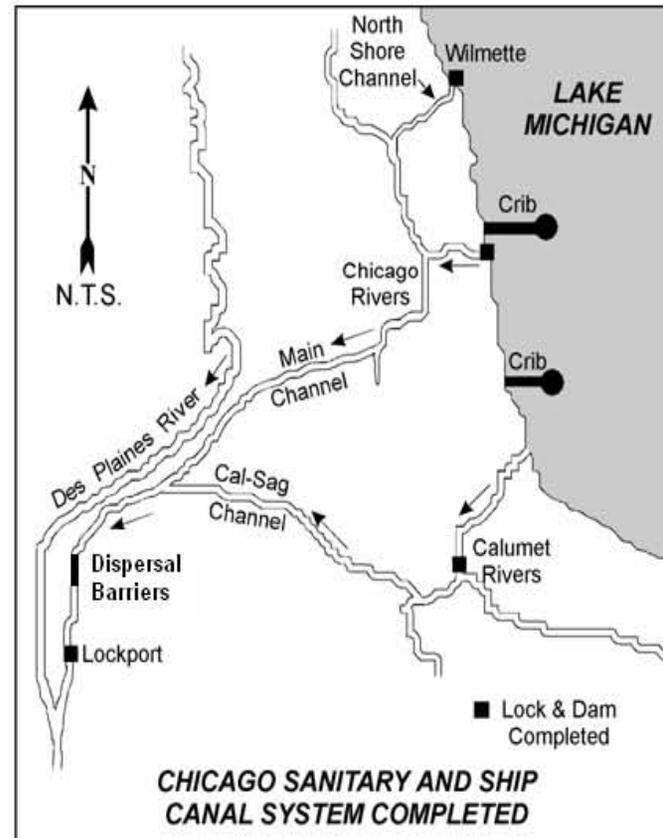
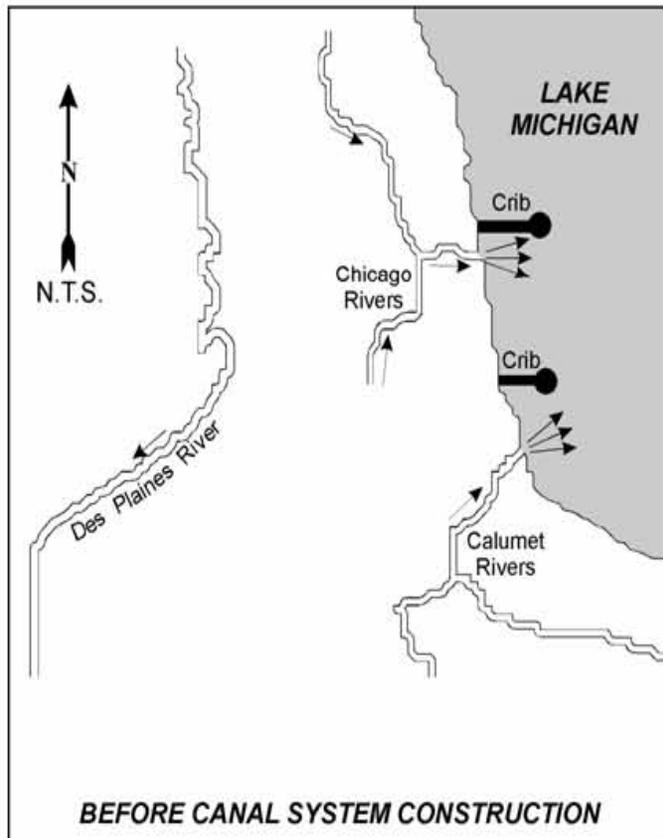


How Asian Carp Came To The U.S.

- Imported to clean aquaculture and wastewater facilities in the 1970's
- Likely escaped into the Mississippi during flooding events
- Steadily marched north up the Mississippi, and into every major tributary river
- In some parts of these rivers, Asian carp are the dominant species



How The Basins Were Connected: Chicago Before And After



Why Did Chicago Connect The Basins?

- To manage their waste and sewage
- In the late 1800's waste from the Chicago River was going into Lake Michigan and contaminating their water supply
- They reversed the flow of the Chicago River and connected it to the Mississippi River system
- This diversion currently takes 3.2 billion gallons of water a day from Lake Michigan
- The diversion was the subject of a 1920's Supreme Court case brought by Michigan and others against Illinois - the "Diversion Case"

Pathways for the Carp: The C.A.W.S.



The Parties Responsible for the C.A.W.S.

- The State of Illinois
 - Created the entity that operates the waterway system for Chicago's sewage disposal.
 - By common law and statute owns and is responsible for fish in its waters.
- The U.S. Army Corps of Engineers
 - Operates the locks in the waterway system.
 - Exercises authority over navigable waters.
- The Metropolitan Water Reclamation District of Greater Chicago
 - Created and operates the waterway system.
 - Owns the water control structures and operates the sluice gates.

Timeline

- Asian carp threat to Great Lakes has been a concern for over a decade
- Summer 2008 – second electrical barrier put into operation
- Summer of 2009 – experts still believe Asian carp are 20 miles from Lockport Lock and dispersal barrier
- Late November 2009 – eDNA results show that carp may be past barrier
- Early December 2009 – poisoning results in dead carp past Lockport Lock. Positive eDNA results just south of O'Brien Lock
- December 21 – we file our action in the U.S. Supreme Court

The Legal Forums

- Two possible forums for seeking relief
 - The United States Supreme Court
 - Federal District Court
- Advantages of Supreme Court action
 - Army Corps already a party to the Diversion Case
 - Illinois is a necessary party because of its authority over waters and fish
 - The waterway system is the subject of the prior action
- Advantages of a district court action
 - Court has to assume jurisdiction – at least initially
 - Better equipped to handle a trial involving complicated factual issues

Supreme Court Action

- Petition to reopen “Diversion Case” or, in the alternative, to hear a new original action
- Claims
 - Common law public nuisance
 - Challenge under federal APA
- Wisconsin, Minnesota, New York, Ohio, and Pennsylvania file briefs in support
- Ontario files amicus in support

Supreme Court Action, cont.

- January 19, 2010 - Supreme Court denies request for preliminary injunction
- Same day Corps announces new positive eDNA samples in the CAWS
- February 4, 2010 - Michigan files renewed motion for preliminary injunction
- February , 2010 – Draft “Asian Carp Control Strategy Framework” issued
- March 21, 2010 - Supreme Court denies renewed motion for preliminary injunction
- April 26 – Supreme Court denies request to reopen the Diversion case or hear a new original action
- No determination of the merits

District Court Action

- May 19, 2010 - AG's from Michigan, Wisconsin, Minnesota, Ohio and Pennsylvania send letter to Corps requesting information and asking for action
- June 4, 2010 – Corps issues “Interim Reports” on modifying operation of structures (including locks) in the CAWS and long term separation study
- June 8, 2010 – Corps responds to AGs’ letter
- June 25, 2010 live bighead carp found in Lake Calumet, 5 miles from Lake Michigan
- July 19, 2010 lawsuit filed in federal district court by same five states against the Corps and the Water District

District Court Action, cont.

- Defendants
 - Corps
 - Water District
- Intervening Defendants
 - City of Chicago
 - Coalition to Save Our Waterways
 - Wendella Sightseeing Company
- Intervening Plaintiff – Grand Traverse Band of Ottawa and Chippewa Indians
- Claims are the same as Supreme Court action
 - Public nuisance
 - Challenge under the federal APA

District Court Action, cont.

- Relief sought
 - Close the locks at Chicago Controlling Works and O'Brien Lock
 - Operate “sluice gates” so that carp can't pass through
 - Erect barriers in other waterways to prevent carp migration
 - Locate and eradicate carp in the waterway system
 - Provide for permanent ecological separation of the Mississippi and Great Lakes Basins.

The Primary Issues

- Scope of sovereign immunity waiver in the APA
- Whether there is a final reviewable action under the APA
- Imminence of the harm
- Balancing of the harms
 - Economic impact
 - Public health and safety impacts

District Court Action, cont.

- September 7-10 hearing on our request for preliminary injunction
- Court relying on declarations filed by the parties
- Limited live testimony
- States subpoena Dr. David Lodge, Corps' eDNA expert
- Most of the testimony is directed to the imminence of the harm and economic impacts

Significant Dates

- Closing briefs were filed on October 1, 2010
- Oral argument heard on October 18, 2010
- Court will provide written opinion and has indicated that it will be issued before December 6, 2010.