

**MICHIGAN ATTORNEY GENERAL COMMENTS  
ON ASIAN CARP CONTROL STRATEGY FRAMEWORK**

**Overview**

In a nutshell, this document is largely "more of the same." For the most part, it reiterates the positions repeatedly taken by the federal government since last December after eDNA data showed Asian carp had moved far beyond the electrical barrier, and into the vicinity of the O'Brien Lock. On the one hand, it correctly acknowledges the grave threat posed to the Great Lakes, and rhetorically, at least, the urgent need for action. It also includes some important and potentially useful proposals for short term actions to locate and remove at least some Asian carp in the Chicago Waterway lakeside of the barrier.

But at the same time, it falls well short of being a "comprehensive approach" (ES 4) based on "the best science available," (ES- 2) to prevent the establishment of Asian carp populations in Lake Michigan. It fails to systematically use all science-based management options to prevent the bighead and silver carp that are already above the barrier from entering the Lake through all points of potential entry. Among other things, the Framework categorically rejects one of the most obvious means of actually minimizing the ongoing threat of Asian carp migration into Lake Michigan - temporarily closing the O'Brien and Chicago Locks (for more than a few days at a time) - and proposes no action whatsoever to cut off other acknowledged carp pathways into the Lake such as the Little Calumet River. Overall, there is a major disconnect between the sweeping rhetoric and the limited reality.

As in its previous public statements and Supreme Court filing, the government tries to rationalize its selective action by:

- Unjustifiably downplaying the significance of the eDNA data,
- Falsely suggesting that the temporary lock closure sought by Michigan would cause flooding and economic havoc,
- Suggesting that because temporary lock closure alone would not block all carp movement it is somehow not worth pursuing,

- Insisting that more study is needed before taking even such interim measures, and
- Assuming that, no matter what, commercial navigation through the locks must continue.

Overall, the Framework appears to assume that the federal government has several more months (if not years) to do further studies and incrementally tinker with locks and control structures on a part time basis before Asian carp become visibly established in Lake Michigan. And, especially in the critical near term, the Framework operates from the unsupported premise that commercial navigation through the locks must continue, irrespective of the imminence of the threat of Asian carp migration into the Lake and the existence of the Secretary of the Army's statutory authority under Section 126<sup>1</sup> to take temporary measures to prevent such migration.

### **Positive Aspects of the Framework**

On the positive side, the Framework does acknowledge the serious threat to the Great Lakes posed by Asian carp in the Chicago Area Waterway System:

- It properly recognizes that the migration of Asian Carp through the waterway may be "the most acute AIS [aquatic invasive species] threat facing the Great lakes today." (p. 1) and could "cause great economic damage to the Great Lakes commercial, sport and tribal fisheries collectively valued at more than \$7B annually..."(p.4).
- It acknowledges that "following introduction of Asian Carp into the Great Lakes basin, controlling their spread throughout these areas would be nearly impossible (p.5).
- It acknowledges that ". . . we cannot wait for perfect certainty and must act preemptively with comprehensive measures to prevent carp from becoming established in the Great Lakes or their tributaries" (p. 1).

The Framework also proposes some important short term actions directed to locating and reducing the numbers of Asian carp present in the Chicago Area Waterway System above the electrical barriers. Section 2.1.1 briefly describes "Targeted [Asian carp] Removal" lakeside of the electrical barrier based on eDNA tests and apparently, conventional monitoring methods such

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<sup>1</sup> Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126 123 Stat. 2845, 2853 (2009)

as electrofishing and netting (see p 13). The Framework proposes starting such activities in February, but the details and timing are not spelled out. Sections 2.1.2 similarly describes "enhanced" eDNA testing, contract commercial fishing and conventional monitoring in "high risk" locations in the waterway (pp. 13-12). Timely public disclosure of such efforts, including the timing, location, methods, and results is important to build a common base of knowledge upon which control efforts can be based and evaluated is essential. The very recent disclosure of such activities on February 16<sup>th</sup> <sup>2</sup>is a positive step in that direction that should be continued and expanded. Section 2.1.3 reiterates previously announced proposals to improve laboratory capacity to speed up eDNA testing (pp. 13-14). These are all important and potentially useful steps in the near term.

The Framework also proposes to fund additional scientific research on means of delivering toxicants to Asian carp, controlling their movement and disrupting their reproduction (pp. 17-20). It reiterates the planned completion of various other projects, including upgrading the electrical barrier and building a surface barrier between the Des Plaines River and the Canal to block carp movement around the barrier during floods (pp.17, 22). Again, these are positive steps, but may not produce useful results for months or even years.

### **Negative Aspects of the Framework**

The Framework, like the government's position in its Supreme Court filing, remains fundamentally flawed. It is not, as the government claims, based on the "best science available" (p. ES-2), nor is it truly "comprehensive" (ES-4).

A truly scientific approach would, among other things, systematically consider all the existing pathways through which Asian carp are moving, or threaten to move from the waterway into the Lake and then immediately implement available measures to minimize such movement.

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<sup>2</sup>See

<http://www.asiancarp.org/RegionalCoordination/documents/Mediaadvisoryfor2.17CarpEventChicago.pdf>

Dr. David Lodge, who has overseen the collection of the eDNA data, and who is acknowledged in the Framework as "one of the leading scientists" on the subject of invasive species (p. ES-2) flatly stated, on January 4, 2010, that "there remains an *urgent need to reduce the probability that both silver or bighead carp individuals can enter Lake Michigan.*" (Lodge Declaration, U.S. App. 134a.) In his February 9, 2010 testimony before the House Subcommittee on Water Resources and Environment, Dr. Lodge addressed the subject of "Science- based management actions for the Chicago canal" as follows, listing measures to prevent carp from entering the Lake as the first priority:

Given the goal shared by all federal agencies to prevent an invasion of the Great Lakes by either silver carp or bighead carp, *any* management action that reduces the likelihood of individuals of either species entering the lake should be seriously considered. *First, while other options are considered, I recommend that urgent attention be given to any management action that will prevent the silver and bighead carp that are currently above the barrier from entering Lake Michigan.* Second, options for eradicating or at least dramatically reducing the numbers of the individuals above the barrier should also be considered. Third, the operation and maintenance of the two existing barriers, and the plans for the third barrier, should be fine-tuned as much as possible to maximize effectiveness against fishes moving in either direction (barrier IIA was designed to be more effective against species moving northward). Fourth, a surveillance program needs to be established in the Great Lakes to locate and determine the extent of any Asian carp presence in the Great Lakes, targeted perhaps at the tributaries most likely to support spawning of the carps. This should be coupled with development of methods that would allow any fish detected to be contained, and eradicated. Fifth, other deterrents to fish movement should be considered to augment the barriers. Sixth, the Mississippi River basin and the Great Lakes basin should be permanently separated ecologically, as agreed among many agencies, stakeholders and experts at the 2003 canal summit in Chicago (Brammier et al. 2008). It is not only Asian carp we should be thinking about, but the hundreds of potentially harmful species (many of them completely unaffected by electrical current) in both basins, the damages from which would be suffered by us and our children in perpetuity (p. 11, emphasis added).

Instead of systematically focusing on the fact that there remain multiple pathways through which individual Asian carp in the Waterway can enter the Lake, including, most readily, the O'Brien and Chicago Locks and possibly the Little Calumet River, and then taking immediate, interim measures to minimize the movement of the Carp through each of those open pathways, the

Framework proposes nothing to block the movement of carp through the Little Calumet River where it recognizes that no barrier of any kind now exists (p. 7) and arbitrarily starts from the assumption that the O'Brien and Chicago Locks must remain open to commercial navigation at all costs (p. 15).

The Framework's failure to propose any measure to control carp movement through the Little Calumet River is particularly puzzling and completely unexplained. The fact that the Little Calumet connects the Calumet –Sag Channel to Lake Michigan at Burns Harbor has been repeatedly acknowledged by the government and appears on the face of the Framework itself (pp. ES-1, 7). In contrast to the Grand Calumet River, where temporary physical barriers have been installed as part of a separate environmental remediation project, it is undisputed that no control structure of any kind exists in the Little Calumet that would block fish passage. To the extent, if any, that federal or Illinois officials are concerned that flooding might result from construction of a physical barrier in the Illinois segment of the Little Calumet River, there is no apparent reason why some sort of permeable structure such as a block net, that would allow water, but not most fish to pass, could not be installed.

The Framework itself nowhere undertakes any sort of systematic analysis of the other multiple pathways through which Asian carp imminently threaten to pass into the Lake, including the sluice gates at the Wilmette Pumping Station, the Chicago Controlling Works, and the O'Brien Dam, the Chicago Lock and the O'Brien Lock. Section 2.1.4 of the Framework and subsequently released slides briefly refer to studying the possibility of "addition of screens to sluice gates and bulkheads" (pp. 16). The Framework elsewhere briefly and similarly refers to "considering installing grates in the bulkhead slots in the locks and block the potential migration of any Asian carp that may be present while allowing water levels to subside" in the event of future flooding (pp7-8). Presumably, such structures would allow the sluice gates to pass water

for water level and flood control purposes, while reducing the likelihood of the passage of fish. Such measures could potentially be highly beneficial in reducing the risk of carp migration. As such, they merit serious, expedited consideration and implementation, rather than vague references to possible implementation months from now in a "Phase 3" of the Corps' "Efficacy Study" (pp. 15-16).

The Framework devotes considerable, albeit seriously misleading, attention to the subject of possible closure of the O'Brien and Chicago Locks (pp. 6-9). But it does not do so in a systematic and objective manner. Instead, the Framework's entire discussion of lock closure and of its proposed study of "Modified Structural Operations" (pp15-16) is internally inconsistent and little more than a tortured effort to rationalize the government's pre-ordained conclusion that the locks must not be closed for more than a few days at time, if at all. On the one hand, the Framework repeats the canard that because the locks are not completely watertight, they are not "by themselves... completely effective" in blocking the passage of all fish, implying that closure therefore is not warranted (pp 7, 24). Of course, this ignores the indisputable fact that minimizing the opening of the locks will, "reduce the probability that individual [carp] can enter Lake Michigan" as Dr. Lodge urges. It is also at odds with the Corps' own suggestion that intermittently closing the locks at least part of time would be beneficial (pp 15-16).

Moreover, the Framework resurrects the unfounded arguments that temporary lock closure would cause flooding or other harm to public health and safety. It ignores the fact that the Chicago and O'Brien Locks are only very rarely<sup>3</sup> opened for flood control purposes. The Framework also improperly conflates permanent lock closure (p. 8) with the temporary lock closure urged by Michigan as one of a series of immediate measures to minimize the risk of carp

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<sup>3</sup> According to the Corps of Engineers, the Chicago lock has been opened in response to severe rain events on only 8 occasions in the last 55 years, and the O'Brien Locks have been opened for that reason on only 4 occasions in the last 45 years. (U. S. App. 100a)

migration into the Lake. The Framework also ignores the fact that Michigan has emphasized that exceptions to such temporary, interim lock closure can and should be made if needed, for flood control, emergency response, or as otherwise required to protect public health and safety.

Finally, the Framework distorts the significance of the Chicago and O'Brien Locks in the context of the local and national economies. It wrongly implies that closure of the O'Brien Locks would disrupt the movement of approximately 14 million tons of cargo each year (p. 6). That figure, which pertains to the Calumet River erroneously suggests that all such Calumet River traffic transits the O'Brien Lock. In fact, The Corp's own data indicates that less than half that volume of cargo- approximately 7 million tons- transited the O'Brien Lock in 2008. Similarly, the Framework's statement that the Chicago Lock is the nation's second busiest (p. 7) ignores the fact that in 2008, only 39 loaded barges carrying approximately 100, 000 tons of cargo (mainly sand and gravel) moved through that Lock. Moreover, according to the Corps' own data, the 2008 vessel traffic consisted of 34,000, not 50,000 vessels (p. 7), mainly recreational watercraft. The Framework repeats the government's assertions that temporary lock closure would cause serious economic harm on the order of \$192 million (p. 8). Those assertions and even more extreme claims of economic harm made by the State of Illinois are unsupported, and have been flatly discredited by the recent report prepared by Dr. John Taylor submitted by Michigan in connection with its Renewed Motion for Preliminary Injunction.<sup>4</sup> Thus, the federal government's approach to the issue of lock closure in the Framework has little to do with fact, logic, or science, let alone the "best science available."

With respect to "Long-Term Actions," Section 2.2.2 of the Framework does propose continuation of the already planned "Inter-basin Transfer Study" regarding options to reduce the

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<sup>4</sup> *Chicago Waterway System Ecological Separation: The Logistics and Transportation Related Cost Impact of Waterway Barriers*, John C. Taylor, PhD and James L. Roach, February 2, 2010 Appendix to Renewed Motion for Preliminary Injunction, 34a-55a.

risk of aquatic invasive species transfer between the Mississippi River and Great Lakes Basins. Unfortunately, the Framework suggests that even an initial, interim feasibility study focused on Asian carp and the Chicago Area Waterway System would not be completed until sometime in 2012. Such a schedule is simply not commensurate with the significance of the continuing threat of inter-basin movement of Asian carp and other aquatic invasive species through the Chicago Area Waterway System. The gravity of the threat demands that planning for and implementation of permanent physical separation of the Asian carp infested waterway from the Great Lakes proceed as expeditiously as possible. To the extent that additional funding and resources are needed to accelerate those tasks, they should be re-allocated from other funding sources referred to in the Framework and all necessary Congressional authorizations should be promptly requested.

### **Conclusion**

In sum, while the Framework does contain some positive elements, it is neither comprehensive nor adequate, particularly with respect to "short term" measures needed to minimize the risk that Asian carp will migrate into Lake Michigan and other connected waters of the Great Lakes, as well as the timing of "long term" measures to ecologically separate the Waterway from the Great Lakes.<sup>5</sup>

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<sup>5</sup> The foregoing comments are not intended to be exhaustive, but rather to highlight some of our key concerns. The absence of specific comments on any other aspects of the Framework should not be understood as concurrence, or in any way a waiver of Michigan's right to dispute or provide additional comments on the Framework.