



# Metropolitan Water Reclamation District of Greater Chicago

100 East Erie Street  
Chicago, IL 60611

## Legislation Text

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**File #:** 10-0249, **Version:** 1

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### **TRANSMITTAL LETTER FOR BOARD MEETING OF FEBRUARY 18, 2010**

#### COMMITTEE ON REAL ESTATE

Mr. Richard Lanyon, Executive Director

Authority to grant to the United States Army Corps of Engineers a 5-year right-of-entry upon District land located in Cook, Will, and DuPage Counties for a 13-mile stretch where the Des Plaines River and the Chicago Sanitary and Ship Canal flow alongside each other for the purpose of constructing a continuous barrier designed to prevent the Asian Carp moving in a flood event from the Des Plaines River into the Chicago Sanitary and Ship Canal

Dear Sir:

The United States Army Corps of Engineers ("USACE") has advised the District that it will be immediately taking steps to construct a barrier along the Des Plaines River ("River") for a 13-mile stretch in Cook, Will, and DuPage Counties where the River and the Chicago Sanitary and Ship Canal ("CSSC") run alongside one another. The USACE reports that the purpose of the barrier is to prevent Asian Carp in the River moving in a flood event from the River to the CSSC north of the electric barrier and then having clear passageway into Lake Michigan.

The proposed barrier, which will run for a continuous 13-miles, will be constructed near the bank of the River at the subject locations. Much of the land is owned by the District some of which is leased to others. The USACE has been advised, and any grant to it will expressly provide, that the District's grant is conditioned upon the USACE also obtaining the consent of any District lessee, permittee, grantee, or other party having a legal interest or right to use any of the involved land.

The USACE proposes to initially obtain a 5-year right to enter upon the subject lands to construct the barrier. Thereafter, it will be seeking a perpetual interest in all of the subject lands. It has apparently decided to obtain the necessary land rights in two stages due to the urgency to start construction of the barrier within the next few months, and acquiring a perpetual interest is more complicated and time consuming due to issues of land valuation and compensation for the taking. Accordingly, so that it can get its project started it proposes to move as afore-mentioned.

As is customary with the USACE, it is unwilling to provide the protections and assurances that the District typically requires for a party to use or enter upon its lands. Most notable is its inability to agree to indemnify the District, or any other party for that matter, due to Federal Laws which prohibit it from obligating itself to liabilities for which funds have not been specifically appropriated. However, for unpaid liabilities a party may sue in the Federal Court of Claims.

It appears that this 13-mile barrier will be constructed by several different private contractors. The District has indicated that a condition of any private contractor entering unto District land to perform work for the USACE the contractor must provide the District evidence that it has procured and maintains liability insurance coverage naming the District as an additional insured in coverage amount of not less than 4 million dollars or the amount of coverage provided for the benefit of the USACE, whichever amount is greater. The District

additionally requested that the private contractors be required to indemnify the District against any claims or liability. However, the USACE has been unwilling to cede to that demand as it claims that under its contract with the private contractors such a provision would ultimately allow reimbursement from the USACE and would therefore run afoul of the USACE undertaking a possible liability for which no appropriation has been made.

Any grant of entry would also require that the District's police department be provided advance notice of what private contractors will be accessing District land and that any work on District land be coordinated with the District's Maintenance and Operations ("M&O") Department to ensure no interference with District facilities and operations. The proposed grant of entry also contemplates that federal personnel or private contractors would be from time to time patrolling the area for security and maintenance inspections related to the barrier.

The USACE has advised that its plans have not been finalized but preliminary plans have been reviewed by the District's M&O Department and it has no objections to the plans presented for its review.

It should again be emphasized that the grant of entry proposed by the USACE does not provide the typical contractual protections a landowner would expect from another party expecting to use its lands. Except for the longstanding reciprocal working relationship between the USACE and the District under similar "bare-boned" agreements without major problems, the approach being pursued by the USACE would be very problematic. Stated differently, any protections provided to the District is not as much in the legal document as it is in history and custom of dealings between the parties.

As a side note, the USACE has indicated that this project is considered a federal emergency and where necessary it will take legal action to acquire the needed interests in land. This grant of entry suggests that the parties can cooperatively work together to resolve any issues presented as the USACE attempts to respond to what it considers a threat to public health and safety.

It is requested that the Executive Director recommend to the Board of Commissioners that it authorize and approve the grant to the United States Army Corps of Engineers of a 5-year right-of-entry upon District land located in Cook, Will, and DuPage Counties for a 13-mile stretch where the Des Plaines River and the Chicago Sanitary and Ship Canal flow alongside each other for the purpose of constructing a continuous barrier designed to prevent the Asian Carp moving in a flood event from the Des Plaines River into the Chicago Sanitary and Ship Canal.

It is further requested that the Executive Director recommend to the Board of Commissioners that the Chairman of the Committee on Finance and the Clerk be authorized and directed to execute said grant after same is approved by the General Counsel as to form and legality.

Requested, Frederick M. Feldman, General Counsel, FMF:CL:rg

Recommended, Richard Lanyon, Executive Director

Respectfully Submitted, Terrence J. O'Brien, Chairman Committee on Real Estate Development

Disposition of this agenda item will be documented in the official Regular Board Meeting Minutes of the Board of Commissioners for February 18, 2010