

INTEROFFICE MEMORANDUM

**METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO**

DEPARTMENT: Law **DATE:** September 29, 2010
TO: Richard Lanyon, Executive Director
FROM: Frederick M. Feldman, General Counsel
SUBJECT: Separation of Watersheds
Legal Issues

In connection with the ongoing litigation to prevent the alleged migration of Asian Carp to Lake Michigan and the Great Lakes via the Chicago Area Waterways System, it has been suggested that a permanent separation of the Lake Michigan and Mississippi River watersheds be established. Such a plan, if implemented, would have serious consequences on the District's operations.

To that end we have been requested to address three legal issues impacted by that proposal, namely: MWRD duty to protect Lake Michigan; brief discussion of the Lake Diversion cases; and, discussion of the Asian carp litigation. Our responses thereto follow.

The District's Duty to Protect Lake Michigan

The Metropolitan Water Reclamation District of Greater Chicago ("District") is a unit of local government created in 1889 by the Illinois Legislature for the purpose of protecting the quality of Lake Michigan water as a potable water supply for the City of Chicago. The first massive engineering project the District undertook in 1889 was the reversal of the Chicago River to prevent sewage discharged into the river from the City of Chicago from entering Lake Michigan. Other than executing this corporate purpose the District had no express power to regulate discharges to the waters of the State.

In 1937, the Illinois General Assembly amended the District's enabling legislation by adding Section 326aa, which expressly, but in general terms, gave the District the "...power and authority to prevent the pollution of an waters from which a water supply may be obtained by an city, village or town within the District." That section simply granted the District the power to stop pollution by filing a mandamus or injunction lawsuit in the state circuit court. No further guidelines were prescribed and the extent of the use of that law is uncertain.

In 1947, the Illinois General Assembly amended the District's enabling legislation by adding Section 7bb (42 IRS 326(bb)), which gave the District comprehensive express powers to regulate discharges to the waters of the state within the District's corporate

limit, including Lake Michigan. Pursuant to that authority, the District's Board of Trustees (now know as "Commissioners") adopted the Sewage and Waste Control Ordinance, which among other things, established numerical limits for discharges of certain materials to those waters and an administrative procedure for enforcement of those limits. That Ordinance remains in effect today and is amended periodically. In the 1970s, under the authority of the Sewage and Waste Control Ordinance, the District prosecuted steel and manufacturing companies, municipalities and other entities for unlawful discharges of contaminants into the waters of the state including Lake Michigan.

Chapter 42, Section 326 (bb) of the Illinois Revised Statutes later became Section 7 bb of Chapter 70, Act 2605 of the Illinois Compiled Statutes, and remained in effect until repealed by the Illinois General Assembly in 1997. At approximately the same time, Article III of the Sewage and Waste Control Ordinance entitled "Prohibited Wastes", Section 1, "Unlawful Discharges", was amended to provide that it was unlawful to discharge sewage, industrial waste or other wastes to any waters of the State under the jurisdiction of the District in the absence of a current and valid NPDES Permit issued by the IEPA. Section 7 of Appendix A to the Ordinance entitled "Lake Michigan" which previously provided that no discharges to Lake Michigan were permitted, was amended to provide that no discharges to Lake Michigan are permitted unless the discharges are subject to regulation under a current and valid NPDES permit issued by the IEPA. It would appear that the General Assembly and the Board of Commissioners has relegated enforcement activities related to the protection of Lake Michigan to the State of Illinois. This is attested to by the fact that an examination of District records reveals that since January 1, 2004, the District has issued a total of 22 enforcement actions to 11 different industrial users for violations of the Sewage and Waste Control Ordinance with respect to discharges to waters and none of those violations occurred lake-side of the controlling works on the Calumet or Chicago Rivers or the North Shore Channel.

Section 7aa of the District's enabling statute states, "The sanitary district has the power and authority to prevent pollution of any waters from which a water supply may be obtained by any city, town or village within the district." Accordingly, while the District's power to protect Lake Michigan still exists by virtue of Section 7aa, enforcement under that section would be more difficult since it would be by general common law, which would require establishing violations by testimony and relevant documentary evidence, rather than by more precise administrative law formerly established in the Sewage and Waste Control Ordinance.

Lake Michigan Diversion Litigation

The State of Wisconsin first filed suit against the State of Illinois in 1922 and later amended its lawsuit in 1925. In accordance with the U.S. Supreme Court ruling in 1925, the Secretary of War issued a permit to the Sanitary District to divert water from Lake Michigan via the Chicago River.

Four years after that permit was issued, several Great Lakes states filed suit against the State of Illinois in the U.S. Supreme Court. In *Wisconsin v. Illinois*, 278 U.S. 367 (1929), the Great Lakes States claimed that the District was diverting too much water from Lake Michigan. The issue in that litigation was whether the State of Illinois and the District's diversion of water injured the riparian and other rights of the other states bordering the Great Lakes by lowering lake levels. The Court held that the District could divert water to maintain navigability of the Chicago River but diversions for sanitation purposes were unlawful. Thus, the District was required to develop sewage treatment plants to deal with the sewage by means other than diversion.

A Special Master was appointed to balance the various interests of the parties and in 1930, a decree was entered in *Wisconsin v. Illinois*, 281 U.S. 179 (1930). That decree ordered the State of Illinois and the District to reduce the diversion of water from Lake Michigan to specified levels and to report on the progress of the District's sewage treatment plants operations. While the U.S. Supreme Court concluded that diversion must be reduced, Illinois was allowed to take additional water for domestic use which would be used, treated and discharged into the canal where it would eventually flow down to the Mississippi River.

In 1930 Congress passed a law allowing the water that the Supreme Court allowed to be diverted to benefit navigation to make the channel a "commercially useful waterway." There were modifications to the Decree in 1933, 1940 and 1956, which did not supersede the 1930, but merely tweaked the Decree to take isolated issues into consideration.

In December 1958, the Great Lakes States petitioned the Supreme Court to reopen the 1930 decree to require the State of Illinois and the District to return the treated effluent emanating from treatment plants to the Great Lakes basin from which it originally came in the form of domestic pumpage or to institute measures to reduce direct diversion or limit Chicago domestic pumpage to reduce the total amount of diversion of water from the Great Lakes at Chicago. In January 1959, the State of Illinois sought leave to file a complaint against the Great Lakes states of Michigan, Ohio, Pennsylvania, Minnesota, New York and Wisconsin asserting the urgent need for water for domestic use in the communities of Elmhurst, Villa Park and Lombard and the formation of the Elmhurst-Villa Park-Lombard Water Commission. These matters were consolidated. After lengthy evidentiary hearings, a superseding decree was entered in 1967, which limited the State of Illinois to a total diversion of 3,200 cubic feet per second ("cfs"), (including treated effluent and diverted storm runoff, which otherwise would go to Lake Michigan). The State of Illinois was granted the ability to decide how to apportion this total amount. See *Wisconsin v. Illinois*, 388 U.S. 426, 427 (1967). The General Assembly delegated responsibility for apportioning diversion to the Illinois Department of Natural Resources (IDNR). As part of its ruling, the Supreme Court retained jurisdiction to enter a modified or supplemental decree. It was by this retained jurisdiction provision that the several Great Lake States unsuccessfully sought to bring the current Asian carp issue directly to the Supreme Court in December 2009.

In 1980, the Court once again modified the Decree to establish a revised method of accounting for water diversion after finding that the measurements taken in the canal at Lockport were not as precise as they could be under the accounting practice in place at that time. See *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

The District's current allocation of 305 cfs (270 cfs for discretionary diversion and 35 cfs for navigational makeup) is being reduced to 136 cfs (101 cfs for discretionary diversion and 35 cfs for navigational makeup) in the year 2015. That allocation was to remain in effect until the year 2020. In September 2009, the District agreed with IDNR's proposal that the District's total diversion allocation of 136 cfs be extended to the year 2030, with the caveat that the District may petition IDNR for a change in that allocation should circumstances warrant such a request.

Asian Carp Litigation (MI, et al. v. USACE & MWRD)

On December 21, 2009, the State of Michigan filed a Motion for Preliminary Injunction in the United States Supreme Court against the State of Illinois, US Army Corps of Engineers (Corps) and the District, under the retained jurisdiction provision of the Lake Diversion cases, seeking to enjoin the District, the State of Illinois and Corps from operating the Chicago Area Waterways (CAWS) in the usual and customary manner because, Michigan argued, such operations were allowing the invasive species Asian Carp to reach the Great Lakes via the CAWS. Several other Great Lakes states and a province of Canada joined in Michigan's motion. The State of Michigan sought to have the Supreme Court order the immediate closure of the locks in the CAWS at the O'Brien Lock and Dam and Chicago River and Controlling Works, as well as the sluice gates at the O'Brien Lock and Dam, Chicago River Controlling Works, and the Wilmette Pumping Station, which directly impacts the operations of the Corps and District.

The State of Michigan requested the Supreme Court take its motion for preliminary injunction under review on the theory that it would be once again reviewing and amending the 1967 Decree governing water diversion. In the alternative, Michigan requested that the Supreme Court exercise original jurisdiction over this dispute thereby allowing Michigan to start and end its case in the Supreme Court rather than work its way through the federal court system. The Law Department, together with the Corps of Engineers and State of Illinois, engaged in an intensive briefing schedule over the Christmas holidays and on January 19, 2010, the Supreme Court denied Michigan's Motion for Preliminary Injunction. On February 4, 2010, the State of Michigan filed a Renewed Motion for Preliminary Injunction, which after further briefing, was denied by the Supreme Court on March 22, 2010. On April 26, 2010, the Supreme Court rejected Michigan's Petition for Certiorari, thereby finalizing its rejection of Michigan's claim to open the 1967 Decree or exercise original jurisdiction over the dispute.

On July 19, 2010, the states of Michigan, Wisconsin, Minnesota, Ohio and Pennsylvania filed a lawsuit against the US Army Corps of Engineers and the District together with a Motion for Preliminary Injunction requesting that the U.S. District Court for the Northern District of Illinois, Eastern Division, order the closure of the locks and

sluice gates except as needed to protect public health and safety, and other miscellaneous relief. This litigation is currently pending in Chicago, Illinois. Three days of hearings on the motion for preliminary injunction recently concluded, and following the filing of post-hearing briefs, the Court will render its decision regarding the issuance of a preliminary injunction against the Corps of Engineers and/or the District.

If you have any questions, please contact Head Assistant Attorney Ron Hill at X16583 or Senior Assistant Attorney Margaret Conway at X16587.



Frederick M. Feldman, General Counsel

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