



By Richard Lazarus

States Carp Over Asian Carp Invasion

The Seventh Circuit's opinion in *Michigan v. Army Corps of Engineers* is a reminder that the law of unintended consequences is one of environmental protection's most important precepts, notwithstanding its lack of formal expression in any constitutional, statutory, or regulatory provision. The law's latest victims are the state of Illinois and the city of Chicago, as they struggle to avoid an environmental catastrophe rooted in their own efforts a century ago to solve a very different kind of environmental problem.

In 1900, Chicago faced a serious public health hazard. Sewage dumped in the Chicago River had a nasty habit of flowing into Lake Michigan and washing up on the city's shores, leading to a typhoid epidemic. Chicago and Illinois constructed an artificial canal from the Chicago River to the Desplaines River, which effectively reversed the flow of the Chicago away from Lake Michigan and toward the Mississippi River. But, as alleged in a complaint filed by Missouri in 1900 with the Supreme Court, the flow reversal "sen[t] fifteen hundred tons of poisonous filth daily into the Mississippi . . . mak[ing] it unfit for drinking, agricultural, or manufacturing purposes."

In an opinion by Justice Oliver Wendell Holmes, the Supreme Court in 1906 dismissed Missouri's complaint. The Court concluded that Missouri had failed to prove causation, as

required to sustain a nuisance action. The Court applied the "strictest proof" because of the novelty of the allegations, which "depend[] upon the inference of the unseen," and because Missouri and the city of St. Louis, too, dumped raw sewage into the Mississippi.

A century later, Illinois and Chicago find themselves a victim of their earlier technological success and once again embroiled in nuisance action. But this action bears little resemblance to the one brought by Missouri decades ago. Its genesis is the same flow reversal, but the immediate problem is that the hydrological connection that caused that reversal is now allowing an invasive fish species — Asian carp — to travel in the opposite direction from downstream rivers in Missouri and Illinois into Lake Michigan.

This is no small matter. Nor, certainly, are the fish themselves. They can be three to five feet long, weigh from 60 to 150 pounds, consume as much as 40 percent of their body weight daily, reproduce at enormously rapid rates (one fish can have four million eggs), and they have a dangerous habit of leaping high into the air and injuring people in passing boats. Exploiting the artificial channels constructed to address the sewage problem, the Asian carp are on the hydrologic precipice of reaching Lake Michigan. Once in Lake Michigan, they will inevitably invade all the Great Lakes, and potentially destroy one of the world's largest freshwater resources and the billion-dollar industries dependent on those resources.

Beginning in 2009, several states bordering Lake Michigan sued Illinois and Chicago, arguing that the carp are in effect "pollutants" amounting to a nuisance. After the Supreme Court declined to hear the case in the first instance, Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin filed a complaint in district court against the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation Dis-

trict of Greater Chicago. The complaint challenged the defendants' failure to take the steps necessary to prevent the carp from entering Lake Michigan by controlling the canals, channels, locks, and dams that link the lake to Mississippi tributaries.

On August 24, the Seventh Circuit upheld the trial judge's refusal to issue a preliminary injunction. But the court's view was far more sympathetic than Holmes's 1906 ruling. The court disputed the trial court's view that the plaintiffs had only "minimal chance of succeeding on their claims." And, rejecting the defense that carp are not traditional pollutants, the appeals court held that plaintiffs had presented sufficient evidence that "the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance" and cause irreparable harm.

However, analogizing to the Supreme Court's recent ruling in *American Electric Power v. Connecticut* that EPA's authority under the Clean Air Act displaced the federal common law of nuisance, the court reasoned that preliminary equitable relief was nonetheless improper because of ongoing agency efforts to address the carp issue. Yet, the court warned that "this conclusion can be revisited" should "the agencies slip into somnolence" or in light of new information.

Should, however, the court decide in the future to fashion any equitable relief, the court would be well advised to be wary of the law of unintended consequences. After all, government officials originally promoted the introduction of Asian carp into tributaries of the lower Mississippi for environmentally beneficial purposes: to reduce "naturally" weeds, parasites, and nutrients in those waterways.

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*It's not a fish story:
an environmental
solution turns into an
environmental problem*