

No. 11-541

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND
METROPOLITAN WATER RECLAMATION DISTRICT OF
GREATER CHICAGO, RESPONDENTS

AND CITY OF CHICAGO, ET AL.,
INTERVENORS-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF FRIENDS OF THE
EARTH CANADA IN SUPPORT OF
PETITIONERS' WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED

1. Whether investments made by the United States and Canada to restore the ecological health and fisheries of the Great Lakes should be considered in the balancing of equities.

Amicus Curiae's Response: YES.

2. Whether the Boundary Waters Treaty requires the United States Army Corps of Engineers to prevent ecological pollution of the Great Lakes boundary waters.

Amicus Curiae's Response: YES.

3. Whether this Honorable Court should grant certiorari to consider the merits of this case.

Amicus Curiae's Response: YES.

TABLE OF AUTHORITIES

CASES

<i>Amoco Prod. Co. v. Vill. of Gambell, AK</i> , 480 U.S. 531 (1987).....	4
<i>Gov't of Province of Manitoba v. Norton</i> , 398 F. Supp. 2d 41 (D.D.C. 2005).....	10-11, 13
<i>Michigan, et al. v. U.S. Army Corps of Engineers, et al.</i> , 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011).....	3, 4
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<i>Sierra Club v. Franklin County Power of Illinois, LLC</i> , 546 F.3d 918 (7th Cir. 2008).....	4
<i>State of Wisconsin v. State of Illinois</i> , 278 U.S. 367 (1929); <i>renewed motion of Michigan for preliminary injunction denied</i> , 130 S. Ct. 1934 (Mar. 22, 2010).....	2, 4-5
Trail Smelter (United States v. Canada), 3 R.I.A.A.1905 (Trail Smelter Arb. Trib. 1938).....	10
Trail Smelter (United States v. Canada), 3 R.I.A.A. 1938 (Trail Smelter Arb. Trib. 1941).....	10

U.S. STATUTES

U.S. Great Lakes Fisheries Act, 16 U.S.C. § 931,
et seq. (1956).....5

Water Resources Development Act, Nov. 9, 2007,
121 Stat. 1233.....12

TREATIES AND AGREEMENTS

Boundary Waters Treaty, U.S.-Gr. Brit., Jan. 11,
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Great Lakes Water Quality Agreement, U.S.-Can.,
Apr. 15, 1972, 23 U.S.T. 301, *amended by* 30
U.S.T. 1383 (Nov. 22, 1978), *amended by* T.I.A.S.
No. 11551 (Nov. 18, 1987).....9-10

FOREIGN STATUTES

Great Lakes Fisheries Convention Act, R.S.C.,
1985 c. F-17.....5

OTHER

Department of Fisheries and Oceans Canada, *Risk
Assessment for Asian Carps in Canada* (2004).....11

Great Lakes Commission, *Stopping the Spread of
Asian Carp: An Action Agenda for Congress*, Feb.
2010, available at http://www.glc.org/restore/pdf/2010/Carp%20fact%20sheet_March%2025_FINAL.pdf....7

Great Lakes Commission, *Priorities for Advancing Great Lakes Restoration and Economic Revitalization*, Mar. 2011, available at <http://www.glc.org/restore/pdf/GLC-LegislativePriorities-2011.pdf>.....7

Great Lakes Fishery Commission, Budget and Trust Fund, available at <http://www.glf.org/aboutus/budget.php> (last visited Nov. 12, 2011).....6

Great Lakes Fishery Commission, Program Requirements And Cost Estimates, Fiscal Year 2010, (April 2008), available at http://www.glf.org/staff/PRCE_10.pdf.....6

Great Lakes Fisheries Commission, *Sea Lamprey: A Great Lakes Invader*, available at <http://www.glf.org/lampcon.php> (last visited Nov. 12, 2011).....6

Great Lakes Fisheries Commission, *The Asian carp threat to the Great Lakes: Statement before the House Committee on Transportation and Infrastructure* (February 9, 2010), available at http://www.glf.int/fishmgmt/Hansen_testimony_aisancarp.pdf.....11

Great Lakes Restoration Initiative Action Plan, FY2010-FY2014, Feb. 21, 2010, available at http://greatlakesrestoration.us/pdfs/glri_actionplan.pdf.....7

International Joint Commission, The GLWQA Review, last updated (Oct. 31, 2011), available at http://www.ijc.org/en/activities/consultations/glwqa/synth_6.php?#52.....10

Mich. Dep't of Natural Res., *Asian Carp Fact Sheet*, 2011, available at http://www.michigan.gov/dnr/0,4570,7-153-10364_52261_54896-232231--,00.html.....6

U.S. Army Corps of Engineers, *Great Lakes and Mississippi River Interbasin Study* (2010), available at <http://www.lrc.usace.army.mil/pao/GLMRIS-StudySummary-08Nov10.pdf>.....12

U.S. Army Corps of Engineers, Mission and Vision, available at <http://www.usace.army.mil/about/pages/mission.aspx> (last visited Nov. 12, 2011).....13

U.S. Fish and Wildlife Service, *Asian Carp: Aquatic Invasive Species* (March 2006), available at <http://asiancarp.org/Documents/AsianCarp.pdf>.....11

U.S. Geological Service & U.S. Fish and Wildlife Service, *Asian Carps of the Genus Hypophthalmichthys: A Biological Synopsis and Environmental Risk Assessment* (April 2005).....11

INTEREST OF AMICUS CURIAE

Friends of the Earth Canada¹ is a non-profit Canadian organization, affiliated with its global partners, Friends of the Earth International. Friends of the Earth Canada consists of over 10,000 individual members across Canada.

Friends of the Earth Canada is concerned with preventing Asian carp from invading the Great Lakes. This organization seeks to avoid the devastating consequences which would result if Asian carp establish reproducing populations in the Great Lakes. The organization is also concerned with water levels, water quality, habitat preservation, protection of fisheries, aesthetic value of the Great Lakes and recreational use of the Great Lakes. Additionally, Friends of the Earth is concerned that the U.S. Army Corps of Engineers' (the "Corps") delay in responding to the risk of invasion by Asian carp presents an imminent threat into the Great Lakes.

INTRODUCTION

Friends of the Earth Canada submits this amicus brief in support of Petitioners', the State of Michigan, *et al.*, (heretofore "Petitioners, States") Writ of Certiorari. *Amicus Curiae* is interested in

¹ Legal representation of the *amicus curiae* has been provided at no cost through the Great Lakes Environmental Law Center and the Wayne State University Law School Transnational Environmental Law Clinic. Friends of the Earth Canada is an affiliate of the Friends of the Earth International. Friends of the Earth Canada does not operate under a share structure.

keeping Asian Carp² out of Lake Michigan and the Great Lakes. In a memorandum presented to this Court in a related matter, the Solicitor General of the United States recognized “that allowing a reproducing population of Asian carp to establish itself in Lake Michigan likely would be an irreparable injury.”³ Because Lake Michigan is hydrologically connected to Lake Huron, which is partially within the territorial boundaries of Canada, Canadians will likely be harmed by the invasion of Asian carp.

Justice Wood, writing on behalf of the Seventh Circuit below, recognized that the Plaintiff States had met their burden of showing a likelihood of success on the merits by producing sufficient evidence regarding Asian carp in the Chicago Area Waterway System (the “CAWS”) and a sufficient showing of a likelihood of irreparable harm, yet denied injunctive relief based on a balance of equities. *Michigan, et al. v. U.S. Army Corps of Engineers, et al.*, 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011). However, the Seventh Circuit failed to appropriately consider United States and Canadian investments and efforts to restore the Great Lakes, and the United States federal

² The term “Asian carp” is used to describe bighead and silver carp.

³ Memorandum for the United States in Opposition, at 43, Original Nos. 1, 2, and 3, available at http://www.supremecourt.gov/specmastrpt/Mem_for_the_US.pdf, submitted by the United States Solicitor General in February 2010 in response to State of Michigan’s Renewed Motion for Preliminary Injunction under *State of Wisconsin v. State of Illinois*, 278 U.S. 367 (1929); *renewed motion of Michigan for preliminary injunction denied*, 130 S. Ct. 1934, 176 L. Ed.2d 359, 78 USLW 3546, 2010 WL 1005936 (Mar. 22, 2010).

government's obligations to prevent biological pollution under the Boundary Waters Treaty.⁴

Amicus Curiae supports Petitioners and respectfully requests that this Honorable Court grant certiorari. In support of the Petition, *Amicus Curiae* will demonstrate that the balance of equities weighs in favor of Petitioners when considering over a half-century of restoration investments and efforts by the United States and Canada to revitalize the Great Lakes. *Amicus Curiae* will also discuss the legal obligations of the Corps pursuant to the Boundary Waters Treaty. *Amicus Curiae* prays that this Honorable Court grant Petitioners' Writ of Certiorari and hears this case on its merits.

LEGAL ARGUMENT

I. The Balance of Economic Harms Favors Petitioners' Requested Relief.

The United States and Canada have long recognized the value of the Great Lakes as the largest, accessible source of fresh water on the planet, by investing in federal protection and restoration programs. When hearing this case on appeal, the Seventh Circuit recognized that Petitioner States had met their burden for injunctive relief in all areas but one: the balance of equities.⁵ However, the Seventh Circuit failed to consider the investments made by Canada and the U.S. to restore the Great Lakes' ecological health and fisheries.

⁴ Boundary Waters Treaty, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448, T.I.A.S. No. 548, 1910 WL 19357.

⁵ *Michigan, et al. v. U.S. Army Corps of Engineers, et al.*, 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011).

Additionally, the Seventh Circuit failed to recognize the financial burden placed upon the two nations in controlling Great Lakes invasive species. Furthermore, although injured parties could claim economic damages under a nuisance theory after the harm has occurred, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”⁶ As will be further demonstrated below, the resulting economic harm if Asian carp are allowed to establish reproducing populations in the Great Lakes is far more substantial than that harm considered by the Seventh Circuit.

Asian carp present a serious threat to Canadian interests in the Great Lakes, including commercial and recreational fishing and recreational boating. The Province of Ontario estimates its value of recreational and commercial uses of the Great Lakes to be about \$650 million annually.⁷ Asian carp threaten this Canadian Great Lakes economy.

Additionally, if Asian carp establish reproducing populations in the Great Lakes, the U.S. and Canada will have to expend considerable resources to control the nuisance species. The U.S. and Canada have experienced the severe economic burden of controlling other invasive species in the

⁶ *Amoco Prod. Co. v. Vill. of Gambell*, AK, 480 U.S. 531, 545 (1987); and *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 936 (7th Cir. 2008).

⁷ Brief Of *Amicus Curiae* Her Majesty The Queen In Right Of Ontario In Support Of The State Of Michigan’s Motion For A Preliminary Injunction, *State of Wisconsin v. State of Illinois*, 2009 WL 6312592 (U.S. 2009).

Great Lakes, such as sea lamprey and zebra mussel. As evidenced by the continuing efforts to control these other aquatic invasive species, complete eradication of invasive species is virtually impossible. The Corps has a limited opportunity to prevent this initial economic harm and ongoing economic burden and should be compelled to act accordingly.

The ongoing sea lamprey control efforts by the U.S. and Canada provide a compelling example of what Asian carp control efforts may require. In 1954, the U.S. and Canada entered into a collaborative effort, known as the Convention on Great Lakes Fisheries (the “CGLF”) to control the sea lamprey.⁸ This Convention was codified in the U.S.⁹ and Canada.¹⁰ In 1955, the Great Lakes Fishery Commission (the “GLFC”) was established under the CGLF. Efforts to control the sea lamprey have been ongoing since the CGLF was signed over five decades ago, and the costs of these efforts are increasing annually. For example, from 1994-2003 the GLFC was provided with an annual average of approximately \$13.9 million¹¹ in funding to carry out its mission, which is primarily the study and population control of sea lamprey in the Great Lakes.¹² Just five years later, in 2008, the total funding for the GLFC was \$26.9 million for the

⁸ Great Lakes Fisheries Convention Act, R.S.C., 1985, c. F-17.

⁹ U.S. Great Lakes Fisheries Act, 16 U.S.C. § 931, *et seq.* (1956).

¹⁰ Great Lakes Fisheries Convention Act, R.S.C., 1985, c. F-17.

¹¹ This figure includes U.S. investment of over \$99 million and Canadian investment of over \$40 million.

¹² GLFC, Budget and Trust Fund, available at <http://www.glfc.org/aboutus/budget.php> (last visited Nov. 12, 2011).

single year, nearly double the annual average spent per year in the decade from 1994-2003.¹³ In 2010, the investment provided by the U.S. and Canada to the GLFC was \$34.6 million.¹⁴

Controlling Asian carp is likely to be far more difficult and costly. Since they are “highly prolific producing up to 1,000,000 eggs,”¹⁵ Asian carp are likely to spread at a far more rampant pace than the sea lamprey, which spawn only once in their adult lives before dying.¹⁶ As illustrated by the example of sea lamprey control, complete eradication of aquatic invasive species is practically impossible, and control costs will be continuous.

In addition to the investments made by the U.S. and Canada to protect and restore the fisheries of the Great Lakes, the U.S. has invested considerable amounts of money in a program known as the Great Lakes Restoration Initiative (“GLRI”). The U.S. budgeted \$475 million to fund the GLRI for fiscal year 2010, and \$300 million for 2011.¹⁷ President Obama has requested \$350 million for the

¹³ GLFC, Program Requirements And Cost Estimates, Fiscal Year 2010, (April 2008), available at http://www.glf.org/staff/PRCE_10.pdf.

¹⁴ \$11.6 million of which was provided by Canada.

¹⁵ Mich. Dep’t of Natural Res., *Asian Carp Fact Sheet*, 2011, available at http://www.michigan.gov/dnr/0,4570,7-153-10364_52261_54896-232231--,00.html.

¹⁶ GLFC, *Sea Lamprey: A Great Lakes Invader*, available at <http://www.glf.org/lampcon.php> (last visited Nov. 12, 2011).

¹⁷ Great Lakes Commission, *Priorities for Advancing Great Lakes Restoration and Economic Revitalization*, Mar. 2011, available at <http://www.glc.org/restore/pdf/GLC-LegislativePriorities-2011.pdf>.

GLRI for 2012.¹⁸ Addressing aquatic invasive species, including Asian carp, is a GLRI area of focus.¹⁹ Canada has initiated a similar project known as the Great Lakes Action Plan.²⁰ In 2010, Canada allocated \$16 million over two years to restore Great Lakes water quality.²¹ Funding originally allocated under the GLRI for habitat restoration projects in the Great Lakes has been redirected to support Asian carp prevention.²² By failing to immediately address the imminent threat posed by Asian carp, the Corps places these Great Lakes restoration programs at risk.

Asian carp threaten the investments made by the U.S. and Canada in restoring the ecological health and fisheries of the Great Lakes. Additionally, the ongoing economic costs of controlling Asian carp in the Great Lakes will create a tremendous financial burden on the U.S. and Canada. These economic damages should not be

¹⁸ *Id.*

¹⁹ *Great Lakes Restoration Initiative Action Plan, FY2010-FY2014*, Feb. 21, 2010, p. 22, available at http://greatlakesrestoration.us/pdfs/glri_actionplan.pdf.

²⁰ Great Lakes Action Plan, available at <http://www.ec.gc.ca/grandslacs-greatlakes/default.asp?lang=En&n=DF30B51A-1> (last visited Nov. 12, 2011).

²¹ Minister Prentice Highlights the Environment in 2010 Budget, available at <http://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=BB63CA28-000A-4D63-8C15-173E257C054E> (last visited Nov. 12, 2011).

²² Great Lakes Commission, *Stopping the Spread of Asian Carp: An Action Agenda for Congress*, Feb. 2010, available at http://www.glc.org/restore/pdf/2010/Carp%20fact%20sheet_March%2025_FINAL.pdf.

ignored and this Honorable Court should grant certiorari to consider this case on its merits.

II. U.S. and Canadian Treaty Obligations and Joint Policy Require Protective Action.

The United States and Canada have a history of joint environmental protection and management through collaborative policymaking. In 1909, the U.S. and Great Britain (on behalf of Canada) signed the Boundary Waters Treaty (the “Treaty”), to provide protection of the shared water resources of the U.S. and Canada.²³ Under the Treaty, the U.S. “agreed that the ... boundary waters [between the U.S. and Canada] and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”²⁴

The purpose of the 1909 Treaty was to ensure collaborative efforts to protect the waters shared by the U.S. and Canada. Article II of the Boundary Waters Treaty provides, in pertinent part, that the U.S. and Canada agree that:

... any interference with or diversion from [the] natural channel of [] waters [“which in their natural channels would flow across the boundary or into boundary waters”] on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal

²³ Boundary Waters Treaty, U.S.-Gr. Brit., 36 Stat. 2448.

²⁴ Boundary Waters Treaty, U.S.-Can., 36 Stat. 2448, Art. IV.

remedies as if such injury took place in the country where such diversion or interference occurs....²⁵

Article IV of the Treaty provides:

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.²⁶

Under the auspices of the Boundary Waters Treaty, the U.S. and Canada entered into the Great Lakes Water Quality Agreement (the “GLWQA”) in 1972.²⁷ The purpose of the GLWQA is to “restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem.”²⁸ Amendments to the GLWQA are currently being considered by the U.S. and Canada. Proposals for the amended GLWQA include an invasive species Annex.²⁹

²⁵ Boundary Waters Treaty, U.S.-Gr. Brit., 36 Stat. 2448, at Art. II.

²⁶ Boundary Waters Treaty, U.S.-Gr. Brit., 36 Stat. 2448, at Art. IV.

²⁷ Great Lakes Water Quality Agreement, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301, *amended by* 30 U.S.T. 1383 (Nov. 22, 1978), *amended by* T.I.A.S. No. 11551 (Nov. 18, 1987).

²⁸ *Id.*

²⁹ International Joint Commission, The GLWQA Review, last updated (Oct. 31, 2011), available at http://www.ijc.org/en/activities/consultations/glwqa/synth_6.php?#52.

The U.S. and Canada have a history of addressing environmental harms under the Boundary Waters Treaty. In 1938, a United Nations tribunal, the Trail Smelter Arbitration Tribunal, issued the first ruling under the Boundary Waters Treaty, finding Canada liable to the U.S. for transboundary air and water pollution caused by a Canadian business entity.³⁰ In 1941, the Trail Smelter Arbitration Tribunal held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”³¹ Since the ruling by the Trail Smelter Tribunal, litigation regarding transboundary environmental concerns has primarily occurred in domestic courts.³² For instance, a U.S. agency was recently compelled to complete a thorough environmental assessment to consider the “the possible transfer of non-indigenous biota” in an inter-basin water transfer project that could harm Canadian interests.³³

Asian carp are recognized as biological pollution.³⁴ Risk assessments conducted by the U.S.

³⁰ Trail Smelter (United States v. Canada), 3 R.I.A.A 1905 (Trail Smelter Arb. Trib. 1938).

³¹ Trail Smelter (United States v. Canada), 3 R.I.A.A 1938, at 1965 (Trail Smelter Arb. Trib. 1941).

³² See e.g., *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006); *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005).

³³ *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d at 54.

³⁴ See e.g., Richard D. Horan, Charles Perrings, Frank Lupi, and Erwin H. Bulte, *Biological Pollution Prevention Strategies*

Department of the Interior and the Department of Fisheries and Oceans Canada indicate that the Great Lakes provide a suitable habitat for the establishment of Asian carp populations.³⁵ Bighead carp are known to consume massive amounts of zooplankton and grow up to about sixty inches and over 100 pounds.³⁶ Silver carp are known to consume phytoplankton and can grow over three feet and up to about sixty pounds.³⁷ Plankton is at the base of the food chain in the Great Lakes. If established in the Great Lakes, Asian carp will compete directly with smaller, native species at the lower end of the food chain. Due to their large size,³⁸ Asian carp do not replace the smaller fish in the food chain which they outcompete. In areas where the carp have already become established, like the Mississippi River, they have decimated native fish populations.³⁹ This Honorable Court should find

under Ignorance: The Case of Invasive Species, Am. J. of Agric. Econ., Vol. 84, No. 5, Dec. 2002; and Bill N. McKnight, *Biological Pollution: The Control and Impact of Invasive Species* (1993).

³⁵ U.S. Geological Service & U.S. Fish and Wildlife Service, *Asian Carps of the Genus Hypophthalmichthys: A Biological Synopsis and Environmental Risk Assessment* (April 2005); and Department of Fisheries and Oceans Canada, *Risk Assessment for Asian Carps in Canada* (2004).

³⁶ U.S. Fish and Wildlife Service, *Asian Carp: Aquatic Invasive Species* (March 2006), available at <http://asiancarp.org/Documents/AsianCarp.pdf>; and GLFC, *The Asian carp threat to the Great Lakes: Statement before the House Committee on Transportation and Infrastructure* (February 9, 2010), available at http://www.glfci.org/fishmgmt/Hansen_testimony_aisancarp.pdf.

³⁷ *Id.*

³⁸ For example, Bighead carp can grow up to four feet in length and weigh up to 100 pounds.

³⁹ *Id.*

that the Boundary Waters Treaty and the GLWQA support balancing of equities in favor of Petitioner States.

III. The Merits of this Case Should be Addressed

The Corps has the capacity to act appropriately in these circumstances, without a court order, yet the Corps has chosen delay over action in conducting the Great Lakes and Mississippi River Interbasin Study (“GLMRIS”)⁴⁰ and has declined to take appropriate measures to prevent Asian carp from establishing reproducing populations in the Great Lakes.⁴¹ The Corps’ delay in completing the GLMRIS is unreasonable. U.S. courts have the authority to compel federal action where an existing duty is established.⁴² This Honorable Court should grant certiorari on this case to make determinations on the merits and address these issues which are of grave national and international concern.

The mission of the Corps is to “[p]rovide vital public engineering services in peace and war to strengthen our Nation’s security, energize the

⁴⁰ Water Resources Development Act, Nov. 9, 2007, 121 Stat. 1233.

⁴¹ The Corps proposes that it will take until 2015 to complete the GLMRIS study, which it has already had nearly four years to progress upon. U.S. Army Corps of Engineers, *Great Lakes and Mississippi River Interbasin Study* (2010), available at <http://www.lrc.usace.army.mil/pao/GLMRIS-StudySummary-08Nov10.pdf>.

⁴² See e.g., *Gov’t of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005) (ordering that an assessment of the threat of interbasin transfer of biota be incorporated in an environmental assessment under NEPA).

economy, and reduce risks from disasters.”⁴³ Since the Corps is responsible for creating, building and maintaining the waterway which artificially connects the Great Lakes Basin to the Mississippi River Basin, the Corp must take responsibility to prevent the invasion of the species into the Great Lakes.

The U.S. House⁴⁴ and Senate⁴⁵ have recognized the urgency of the situation and are considering legislation which would require the Corps to complete the study within eighteen months. The interests of the environmental community, particularly the Canadian interests presented here, have limited access to the U.S. political system, and waiting for legislation could cause further, unnecessary delay.

CONCLUSION

The Boundary Waters Treaty prohibits the pollution of the Great Lakes boundary waters. Allowing Asian carp entry to Lake Michigan will lead to biological pollution of the boundary waters and will result in harm to Canada. As an Agency of the U.S. Federal Government, the Corps is obligated to prevent this pollution, and, therefore, should be compelled to do so. Asian carp are a matter of great national and international concern. *Amicus Curiae* respectfully requests that this Honorable Court consider the supplemental arguments provided herein and grant certiorari to Petitioner States.

⁴³ U.S. Army Corps of Engineers, Mission and Vision, available at <http://www.usace.army.mil/about/pages/mission.aspx> (last visited Nov. 12, 2011).

⁴⁴ Stop Asian Carp Act, H.R. 892, 112th Congress (2011).

⁴⁵ Stop Asian Carp Act of 2011, S. 471, 112th Congress (2011).

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