

How a Bill Doesn't Become a Law:

Asian Carp and Closure of the Chicago Area Waterway

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Most American Government texts emphasize how a bill becomes a law, leaving the impression that successful enactment is the norm. In reality, thousands of bills are introduced in each legislative session but only a few dozen to a few hundred become law and we can learn as much, or even more, about the legislative process from studying the failures as we can from the successes. This case study concerns the effort by the Michigan Congressional delegation to force closure of the Chicago Area Waterway, a canal and river system that links the Mississippi River watershed to the Great Lakes watershed, in order to prevent invasive Asian carp from migrating into Lake Michigan.

Asian Carp: Invasion and Response

The 50,000 non-native species that have invaded the United States impose costs of nearly \$150 billion per year.¹ Invasive species now “dominate the food webs of the Great Lakes [causing] profound ecological and economic impacts.”² Asian carp, voracious feeders whose diet overlaps extensively with native fish, were introduced into the U.S. in the mid-20th century to control vegetation and improve water quality in aquaculture ponds. In recent years they have successfully outcompeted native species in many areas of the upper Mississippi River basin,³ accounting in some areas for 95% of the local biomass.⁴ The effects of Asian carp are not only ecological, but human, as fishermen lose access to favored species and the now-famous jumping carp (the Silver carp species) can cause physical harm to boaters and damage to their equipment. The carp have established themselves in the Chicago Area Waterway (CAW), and now threaten to invade the Great Lakes.⁵

Historically the Mississippi River basin and the Great Lakes basin were separate watersheds, but in Illinois this separation was breached by the Illinois and Chicago Rivers, part of the CAW. The Chicago River once ran only in the Great Lakes Basin, emptying into Lake Michigan. But because it carried waste and sewage into the lake (the source of the city's drinking water) in 1900 the city dug the Chicago Sanitary and Ship Canal between the Chicago River and the Des Plaines River to the West, which meets the Kankakee River to form the Illinois River, eventually emptying into the Mississippi. This engineering feat reversed the flow of the Chicago River,⁶ but more significantly, it created a permanent water link between the basins. The CAW enables shipping between the Mississippi and the Great Lakes, with an economic impact for Chicago of at least \$1.3 billion per year.⁷ But it also provides a route for species to move between the two watersheds. The Army Corps of Engineers, which manages the CAW, has installed electrical barriers to block the carp but their effectiveness remains questionable as Asian carp DNA was found beyond the barriers in Lake Michigan, although no actual carp were found.⁸

The threat has alarmed residents of the Great Lakes region, and is particularly threatening to the commercial and sport fishing industries, whose value is estimated at \$7 billion per year.⁹ Opposition to the carp is centered

in Michigan, the only state that lies entirely within the Great Lakes watershed. In 2009 doubts about the effectiveness of the electric barriers led the state of Michigan to sue the state of Illinois in the U.S. Supreme Court, seeking closure of the CAW.¹⁰ The value of the CAW to Illinois' economy creates a strong incentive for the state to resist closure, which would block shipping between the Mississippi and Great Lakes basins. And because most of Illinois' waters are in the Mississippi basin, already invaded by Asian carp, closing the waterway would provide them with almost no benefit. The Supreme Court rejected the lawsuit, and the following year Michigan, joined by Wisconsin, Ohio, Minnesota and Pennsylvania, sued the Army Corps Engineers, seeking "emergency action to block Asian carp from entering Lake Michigan."^{11,12} This lawsuit was also unsuccessful.¹³

The "Stop Asian Carp Act": Poor Prospects for Legislative Success

In March of 2011, following the failure of these lawsuits, Michigan's Democratic Senator Debbie Stabenow and Republican Congressman Dave Camp submitted identical bills in the U.S. Senate and House of Representatives. Titled the "Stop Asian Carp Act," the bills would require the Army Corps of Engineers to permanently close the water link between the Mississippi and the Great Lakes. But like most bills that are submitted in Congress, Stabenow and Camp proposals had almost no chance of being enacted into law. The issue lack broad-based support as reflected by its co-sponsors, supporters were poorly positioned to pursue it while the opposition was well-positioned to stop it, the House was dominated by environmentally un-friendly Republicans, and the President could not be expected to provide support.

Lack of Broad-based Support

Congressmembers can attach their names to bills as cosponsors and consideration of who the cosponsors are reveals important information about a bill's prospects for passage. At the time of this writing the House bill had 26 cosponsors, but 14 of those were from Michigan. Every member of the Michigan delegation was a cosponsor, regardless of party, demonstrating the seriousness of the issue in the state. But there were only 12 other cosponsors, all of them from Great Lakes states and all but one a Democrat in the Republican-majority House. Importantly, no member of the Illinois delegation chose to cosponsor the bill. In the Democratic-majority Senate the bill had only 7 cosponsors, again all from Great Lakes states and all Democrats. Only one of Illinois' senators, Dick Durbin, joined the bill.

With every cosponsor representing a Great Lakes state the issue clearly has little, if any, national political salience. This does not mean that no one from outside those states would vote in favor of it but it shows that out-of-region congressmembers don't perceive any electoral benefits by publicly demonstrating support for the issue. This suggests that the supporters of the Bill cannot expect much voluntary support from them but would need to engage in a substantial amount of bargaining and vote-trading.

But noticeably, not even all Great Lakes states are represented in the sponsorship: No Wisconsin, Indiana, or Pennsylvania Congressmembers joined the bill. The lack of sponsorship from the Indiana and Pennsylvania delegations may be easily explainable. Both states have minimal Great Lakes shoreline, and the region of

Indiana that borders Lake Michigan is tightly integrated into the Chicago region economic structure. In other words, each state has comparatively little to gain from keeping Asian carp out of the Great Lakes, and Indiana likely has much to gain from keeping the shipping channels open. The absence of sponsorship from Wisconsin is more puzzling. Wisconsin has more Great Lakes shoreline than any state but Michigan; four of their ten Congressmembers are Democrats, who in general are more supportive of environmental regulation than are Republicans; Wisconsin was one of the states that joined Michigan's lawsuit against the EPA; and Wisconsin's Secretary of the state Department of Natural Resources testified in favor of closing the waterways before the House Transportation and Infrastructure Subcommittee on Water Resources and the Environment.¹⁴ So despite the current lack of cosponsors from Wisconsin we can expect that there would be some support from the Wisconsin delegation if the bill comes to the floor of either chamber for a vote. But whether the Representatives from Illinois and Pennsylvania would support the bill is dubious.

While other environmentally oriented legislators would almost certainly vote in favor, the bill does not naturally have a broad-based constituency cutting across multiple regions or across party lines. Support for it will have to be built in a piecemeal fashion by engaging in vote-trading or adding in specific elements to benefit likely supporters. An issue like this, where a small group is very passionate and a larger group is only mildly concerned or even indifferent, is tailor-made for allowing non-passionate legislators to extract payments for their support. For example, to try to placate opposing Illinois legislators, the bill includes a clause allowing the Army Corps of Engineers to include in its study issues of flooding, waste and stormwater infrastructure in Chicago, and ways to either replace barge traffic through alternative transportation modes or develop means of moving shipping through the waterway without aiding the movement of invasive species. The question is whether supporters of the bill have the capacity to provide the necessary benefits to gain those votes.

Lack of Sponsors on Relevant Committees

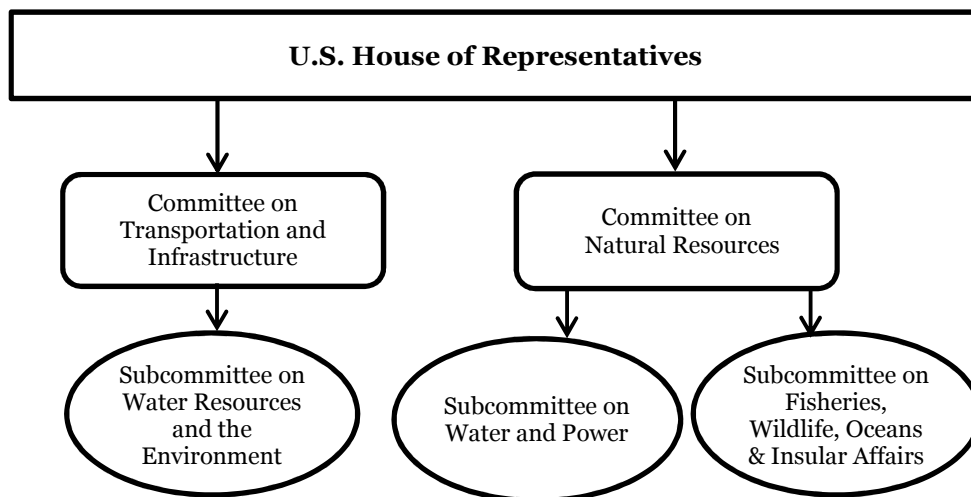
In the Senate the bill was assigned to the Committee on Environment and Public Works. But while this is the appropriate committee for such a bill, only one cosponsoring senator sits on that committee, New York's Kirsten Gillibrand, who as one of the Senate's most junior members was not yet very influential. Nor was she a subcommittee chair, with the potential to at least guide it through that level.

The Senate bill did have two potential advantages. First, the Senate had a Democratic majority, so if the bill did manage to make it through committee it would presumably have a chance of passing the full Senate. Second, cosponsor Dick Durbin was the Majority Whip, the second highest ranking Democrat in the Senate, and from that leadership position he could be influential in shepherding the bill to passage if it made it out of committee. But there are many Democratic-sponsored bills that will never see passage even in the Democratic-controlled Senate, and many of those also have Democratic leaders as at least nominal cosponsors.

If prospects in the Senate seemed marginal, they were nearly non-existent in the House, where the Democrats were in the minority (and where the majority is much more dominant than in the Senate). The House bill had a multiple referral, being sent to both the House Committee on Transportation and Infrastructure (whose jurisdiction includes navigation and ports as well as marine environmental protection) and to the Committee on

Natural Resources (which has jurisdiction over fisheries and wildlife). In each House Committee the bill has been further assigned to subcommittees. In the Transportation and Infrastructure Committee it was assigned to the Subcommittee on Water Resources and the Environment, and in the Natural Resources Committee, the bill had a further multiple referral to two subcommittees, the Subcommittee on Water and Power and the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs.¹⁵ At the time this case study was written no further action had been scheduled.

The only cosponsor of the bill in the Transportation and Infrastructure Committee was Michigan's Candice Miller, who also sat on the Water Resources subcommittee. As a Republican she was in the majority so she was positioned to have some influence on moving the bill forward. However because she was the only cosponsor in the parent committee, she was necessarily the only one on the subcommittee as well. On the other side of the issue, the Transportation and Infrastructure Committee had three Illinois members, including Democratic Representative Dan Lipinski, whose district straddles the Chicago Sanitary and Ship Canal, an important link in the Chicago Area Waterway. Lipinski did support creation of the electric barrier in the waterway,¹⁶ but the canal's economic importance to his district was substantial, and he could be expected to fight closure of it vigorously. Indeed his support for the electric barrier may have been a preemptive move designed to forestall demands for complete closure. The two Illinois Republican members of the Committee were Republicans from outside the CAW region, but as Republicans and representatives from Illinois they would most likely put economic and state interests above environmental and out-of-state interests.



Prospects were slightly better in the Natural Resources Committee, where three cosponsors were members: Republicans Dan Benishek of Michigan and Bill Johnson from Ohio, and Michigan Democrat Dale Kildee. Potentially they could form a strong across-the-aisle team that will give the bill a non-partisan quality that could aid passage. However none of them sat on either of the subcommittees to which the bill was been assigned—the Subcommittee on Water and Power and the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs. Ultimately, no cosponsor in the House was in a position to help shepherd the bill through its subcommittee assignment.

Lack of Presidential Support

Few things help a bill become a law like strong presidential support, but for several reasons the Stop Asian Carp Act received little support from President Obama. First, he was a former Senator from Illinois, and prior to that represented Chicago in the Illinois Senate. Although there is no direct evidence, it is possible that even as president he identified more closely with the concerns of the Chicago area than with the broader Great Lakes Region. Anti-carp activists were very dissatisfied with the President's response to the issue. Although he did appoint an "Asian carp Czar" and allocated \$78.5 million for a carp management plan he resisted permanent closure of the waterway and had former Solicitor General Elena Kagan file a brief in support of Illinois opposing the Michigan lawsuit.¹⁷

Beyond regional interests, in the larger scope of presidential politics, the president had more pressing concerns. Stuck with an economy that was still struggling as he began re-election bid, on-going wars in Afghanistan and Iraq along with recently begun military involvement in Libya, and a high-stakes battle over default on the national debt, it would have been a strategic error for the President to devote substantial attention to the Asian carp issue even if he did support closure of the waterways.

Summary and Conclusion

Although invasive Asian carp pose a serious threat to the environment of the Great Lakes and to the sport fishing and recreational boating industries of the region, concern about the issue is limited to the Great Lakes states, and particularly to the state of Michigan. Sponsors of the legislation are poorly positioned to support it, while at least one Illinois Representative whose district spans the waterway is reasonably well-positioned to fight it, and the House of Representatives is under control of the Republican Party, which is historically more sympathetic to business than environmental issues. The legislation appears to have little, if any, hope of passage in this session of Congress, and unless the Democrats can regain control of the House in the 2012 elections, a difficult challenge, it probably has little hope in the next session of Congress as well. By then it may well be too late—Asian carp may breach the electric barrier and successfully invade the Great Lakes, where eradication will be much more difficult and expensive than would be the preventative act of closing the connecting waterway.

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