

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

NATIONAL WILDLIFE FEDERATION, a District
of Columbia non-profit corporation.

Appellants.

Case No. 08- 1652 -AA

vs.

JAMES R. GIDDINGS

STEVEN E. CHESTER, Director of the
Michigan Department of Environmental
Quality and MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, a department in the
Executive Branch of the State of Michigan.

Hon. _____

Appellees.

Neil S. Kagan (P58948)
Attorney for National Wildlife Federation
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104-1398
(734) 887-7106

STATEMENT PURSUANT TO MCR 2.113(C)(2)(a): There is no
other pending or resolved civil action arising out of the transaction or
occurrence alleged in the Claim of Appeal.

**CLAIM OF APPEAL
FROM CERTIFICATION
OF VESSEL GENERAL PERMIT
OF U.S. ENVIRONMENTAL PROTECTION AGENCY**

1. Appellant National Wildlife Federation ("NWF") claims an appeal from the final decision (attached as Exhibit 1) entered on December 5, 2008, by Steven E. Chester, Director of the Michigan Department of Environmental Quality. In the decision, the Michigan Department of Environmental Quality certified that discharges from vessels covered by a National Pollutant Discharge Elimination System general permit the U.S. Environmental Protection Agency

proposed to issue will comply with Michigan water quality standards, provided conditions in the permit and the certification are met.

JURISDICTION AND VENUE

2. The Court has jurisdiction to grant the relief requested in this Claim of Appeal pursuant to one or more authorities, including but not limited to the Revised Judicature Act, Mich. Comp. Laws § 600.631, and Michigan Court Rule 7.104(A), because the certification was the final decision of an agency, and an appeal or other judicial review of the certification has not otherwise been provided for by law.

3. Venue is appropriate in this Court pursuant to Mich. Comp. Laws § 600.631. This provision provides for filing a claim of appeal from a final decision of an agency in the Circuit Court of Ingham County.

PARTIES

4. Appellant National Wildlife Federation ("NWF") is a non-profit corporation organized and existing under the laws of the District of Columbia. NWF is a national conservation advocacy and education organization with approximately one million members nationwide and approximately 39,000 members in Michigan. NWF's mission is to inspire Americans to protect wildlife for our children's future. NWF has strongly advocated for effective measures to prevent the introduction and establishment of aquatic non-indigenous species in the Great Lakes basin. Members of NWF use Michigan waters and the Great Lakes for aesthetic enjoyment and recreational uses, including, but not limited to, fishing, boating, and swimming. Among NWF's members are one or more individuals who recreate, reside, or own property next to, near, or downstream of Michigan waters.

5. One or more members of NWF have experienced adverse impacts to their aesthetic enjoyment or recreational use of Michigan waters as a result of one or more aquatic invasive species infesting those waters, including, but not limited to, aquatic invasive species that were spread to Michigan waters through the discharge of ballast water from vessels that operate exclusively within the Great Lakes. One or more members of NWF will or may experience adverse impacts to their aesthetic enjoyment or recreational use of Michigan waters as a result of the spread to those waters of one or more new aquatic invasive species through the discharge of ballast water from vessels that operate exclusively within the Great Lakes.

6. Appellee Steven E. Chester is the Director ("the Director") of the Michigan Department of Environmental Quality and its principal executive officer with his principal office in the City of Lansing, County of Ingham, and State of Michigan.

7. Appellee Michigan Department of Environmental Quality ("DEQ") is a department in the Executive Branch of the State of Michigan with primary responsibility for enforcement of Michigan's environmental laws and rules.

STATUTORY AND REGULATORY BACKGROUND

8. Congress enacted the Clean Water Act ("the Act") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water." 33 U.S.C. § 1251(a).

9. To achieve the Act's goal of eliminating the discharge of pollutants into navigable waters, each state must establish ambient water quality standards for intrastate waters at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of" the Act. 33 U.S.C. § 1313(c)(2)(A). "A water quality standard defines the water

quality goals for a water body . . . by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by protecting water quality through antidegradation provisions.” Office of Water, U.S. EPA, *Water Quality Standards Handbook* (2d ed.) 1-1 (1994); *see also PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. at 714; 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(e); 40 C.F.R. § 131.6.

10. Also to achieve the Act’s goal of eliminating the discharge of pollutants into navigable waters, Congress created the National Pollutant Discharge Elimination System (“NPDES”), prohibiting the discharge of any pollutant from a point source into navigable waters unless that point source receives a permit. 33 U.S.C. §§ 1311, 1342.

11. NPDES permits must contain technology-based effluent limitations (“TBELs”) and any more stringent limits, known as water quality-based effluent limitations (“WQBELs”), that are necessary to ensure that dischargers do not cause the quality of receiving waters to violate water quality standards. 33 U.S.C. §§ 1311, 1342. Specifically, WQBELs are necessary to control pollutants which the permitting agency “determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard.” 40 C.F.R. § 122.44(d)(1)(i).

12. DEQ is the Michigan department vested with the “statutory authority, powers, duties, functions and responsibilities” associated with water quality in Michigan. Mich. Comp. Laws § 324.3106.

FACTUAL BACKGROUND

13. EPA adopted a regulation that exempted discharges incidental to the normal operation of a vessel from the NPDES program. *See* 40 C.F.R. § 122.3(a).

14. EPA's exemption of discharges incidental to the normal operation of a vessel has allowed oceangoing vessels to discharge ballast water containing species not indigenous to the Great Lakes without effective controls to protect water quality. This has led to the establishment of many aquatic invasive species, which have severely impaired the use and value of Michigan's waters for the designated uses of public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.

15. Vessels that operate exclusively within the Great Lakes ("lakers") have played a significant role in spreading invasive species by taking up and discharging ballast water as they travel from port to port, including ports in Michigan waters.

16. In 2005, the United States District Court for the Northern District of California held that 40 C.F.R. § 122.3(a) was an invalid exercise "in excess of . . . [EPA's] statutory authority." *Nw. Envtl. Advocates v. U.S. EPA*, No. C 03-05760 SI, 2005 WL 756614 at *13 (N.D. Cal. Mar. 30, 2005). The United States Court of Appeals for the Ninth Circuit affirmed the district court. *Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006 (9th Cir. 2008).

17. Following the invalidation of the exemption, EPA proposed to issue a Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels ("VGP"). 73 Fed. Reg. 34,296 (Jun. 17, 2008). The VGP contains no TBELs applicable to discharges of ballast water by lakers.

18. Pursuant to § 401 of the federal Clean Water Act, each state must certify that discharges pursuant to the VGP will comply with applicable effluent limitations, water quality standards, and standards of performance before the permit can become operative. 33 U.S.C. § 1341(a)(1). A certification must include any effluent limitations, other limitations, and monitoring requirements necessary to assure such compliance. 33 U.S.C. § 1341(d).

19. On July 8, 2008, EPA sent a letter to DEQ requesting that it certify the VGP.

20. On August 4, 2008, DEQ solicited public comment on a draft certification.

21. DEQ received comments from NWF and others. Among other things, those comments noted that the absence of TBELs in the VGP applicable to lakers will or may result in the discharge of non-indigenous species which will cause, have the reasonable potential to cause, or contribute to non-attainment of Michigan water quality standards. Consequently, the comments noted, the VGP cannot assure compliance with those standards. The comments also noted that the VGP is not consistent with the antidegradation policy. Accordingly, NWF's comments urged DEQ to deny EPA's request for certification of the VGP.

22. On December 5, 2008, the Director made a final decision to issue a § 401 certification of the VGP, with conditions. The Director stated that the certification was "based on the information and materials included in Docket ID No. EPA-HQ-OW-2008-0055, available at <http://www.regulations.gov>."

23. In response to the comments it received regarding the VGP's TBELs, DEQ "agree[d that] ballast water discharges from 'Lakers' play a significant role in contributing to the spread of aquatic nuisance species that are already present in the Great Lakes." Nevertheless, DEQ "did not include a condition to require treatment of 'Laker' ballast water," because it did not have sufficient time to determine effective controls.

24. In response to the comments it received from NWF regarding the antidegradation policy, DEQ admitted it "has concerns similar to those expressed by the commenter." In fact, in its own comments to EPA regarding the VGP, the DEQ stated "we do not believe the justification regarding Antidegradation put forth by the USEPA is adequate." DEQ did not provide its own justification regarding antidegradation.

GROUND FOR RELIEF

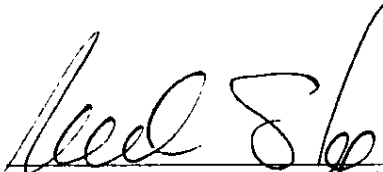
25. Appellants re-allege each and every allegation contained in the foregoing paragraphs.
26. The discharges by lakers proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, will or may not comply with Michigan water quality standards.
27. The certification fails to set forth effluent limitations, other limitations, or monitoring requirements necessary to assure or reasonably assure that lakers which apply for coverage under the VGP will comply with Michigan water quality standards.
28. For the reasons alleged in paragraphs 26 and 27, the Director's certification of the VGP, with conditions, was not authorized by law. In particular, the certification is in violation of a statute, made upon unlawful procedure resulting in a material prejudice to NWF, or arbitrary or capricious, or all three.

REQUEST FOR RELIEF

29. For the reasons stated above, NWF respectfully requests that the Court grant the following relief:
- a. reverse or vacate the Director's decision with respect to lakers, because it was not authorized by law in that the certification is in violation of a statute, made upon unlawful procedure resulting in a material prejudice to NWF, or arbitrary or capricious, or all three;
 - b. order the Director to modify and reissue the certification with conditions necessary to assure that lakers which apply for coverage under the VGP will comply with Michigan state water quality standards; and

- c. grant the Petitioners such other relief as may be required under the circumstances, including all other relief that is reasonable, equitable and just.

Respectfully submitted,



Neil S. Kagan (P58948)
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
(734) 769-3351

Attorney for National Wildlife Federation

Dated December 16, 2008



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING
EXHIBIT 1



STEVEN E. CHESTER
DIRECTOR

December 5, 2008

Ms. Lynn Buhl, Regional Administrator
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard (R-19J)
Chicago, Illinois 60604-3507

Dear Ms. Buhl:

The Michigan Department of Environmental Quality (MDEQ) certifies that discharges from vessels covered by the United States Environmental Protection Agency's (USEPA's) General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels and Large Recreational Vessels (VGP) will comply with the Michigan Water Quality Standards (MWQS), provided the conditions set forth in the VGP and this Certification are met. This Certification is issued under Section 401(a) of the federal Clean Water Act (CWA) in response to the July 8, 2008, letter from Ms. Tinka Hyde, Acting Director, Water Division, Region 5, USEPA, to Ms. Diana Klemans, Chief, Surface Water Assessment Section, Water Bureau, MDEQ, and is based on the information and materials included in Docket ID No. EPA-HQ-OW-2008-0055, available at <http://www.regulations.gov>.

Certification Conditions:

1. Discharges of blackwater and graywater from vessels covered by the USEPA's VGP are prohibited in Michigan waters. (Part 95, Watercraft Pollution Control, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, [NREPA])
2. Oceangoing vessels covered by the USEPA's VGP are prohibited from discharging ballast water in Michigan waters, unless the vessel has obtained a Certificate of Coverage under the Ballast Water Control General Permit (Permit No. MIG140000) or an Individual Permit from the MDEQ and is in full compliance with the discharge limitations, monitoring requirements, and other conditions set forth in that General Permit or Individual Permit. (Section 3112[6] of Part 31, Water Resources Protection, of the NREPA)
3. Non-oceangoing vessels covered by the USEPA's VGP that operate experimental ballast water treatment systems are prohibited from discharging ballast water in Michigan waters with total residual chlorine concentrations above 38 micrograms per liter (ug/l) when the ballast water discharge duration exceeds 160 minutes, or above 200 ug/l when the ballast water discharge duration is less than or equal to 160 minutes. Non-oceangoing vessels covered by the USEPA's VGP that operate experimental ballast water treatment systems are prohibited from discharging ballast water in Michigan waters with chlorite concentrations above 13 ug/l. (R 323.1057 of the MWQS)
4. Each vessel required to operate a ballast water treatment system pursuant to Condition No. 2 of this Certification shall allow the MDEQ reasonable entry onto the

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vessel for inspection, access to records, and collection of a ballast water discharge sample(s) for determining compliance with this Certification and applicable laws. In the event ballast water monitoring results indicate the discharge of aquatic nuisance species to Michigan waters is not being effectively prevented as determined by the MDEQ, the vessel operator shall cease any further discharges of ballast water until an aquatic nuisance species discharge prevention plan, submitted to, and approved by the MDEQ, is implemented. (R 323.2149 of the Part 21 rules, Wastewater Discharge Permits, promulgated under Part 31 of the NREPA)

5. All vessels covered by the USEPA's VGP are prohibited from lowering the water quality of Michigan's Outstanding State Resource Waters or their tributaries. The following water bodies in Michigan are designated as Outstanding State Resource Waters: (R 323.1098 of the MWQS)
 - The Carp River (Mackinac County) – the 7.5-mile segment from Michigan State Highway 123, T42N, R5W, Section 2, to one-quarter mile upstream from Forest Development Road 3119, T42N, R4W, Section 4.
 - The Carp River (Mackinac County) – the 4.9-mile segment from one-quarter mile downstream of Forest Development Road 3119, T42N, R4W, Section 3, to McDonald Rapids.
 - The east branch of the Ontonagon River (Houghton and Ontonagon Counties) – the 25.5-mile segment from the east branch of the Ontonagon River's confluence with an unnamed stream in T48N, R37W, Section 30, to the Ottawa National Forest boundary, T50W, R38W, Section 33.
 - The middle branch of the Ontonagon River (Ontonagon County) – the 17.4-mile segment from Trout Creek, T48N, R38W, Section 20, to the northern boundary of the Ottawa National Forest, T50N, R39W, Section 12.
 - The Sturgeon River (Baraga and Houghton Counties) – the 16.5-mile segment from the Sturgeon River's entry into the Ottawa National Forest, T48N, R35W, Section 12, to Prickett Lake.
 - The east branch of the Tahquamenon River (Chippewa County) – the 3.2-mile segment from the center of T46N, R6W, Section 20, to the boundary of the Hiawatha National Forest, T46N, R6W, Section 19.
 - The Yellow Dog River (Marquette County) – the 4-mile segment from the Yellow Dog River's origin at the outlet of Bulldog Lake Dam, T50N, R29W, Section 31, to the boundary of the Ottawa National Forest, T50N, R29W, Section 17.
 - The main, north, south, east, and west branches of the Two Hearted River and Dawson Creek from their headwaters to the mouth of the river at Lake Superior.
 - Water bodies within the designated boundaries of the following national parks or lakeshores: Sleeping Bear Dunes National Lakeshore, Pictured Rocks National Lakeshore, and Isle Royale National Park.

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6. All discharges in Michigan waters from vessels covered by the USEPA's VGP are prohibited from causing or contributing to exceedances of the MWQS. (Part 4 rules)
7. No condition in the USEPA's VGP may be made less restrictive because such action may violate the requirements of Michigan state law, including the MWQS.
8. Nothing in this Certification diminishes, negates, or precludes the state of Michigan from bringing civil and/or criminal actions for violations of state law and/or state issued permits. (Part 31 of the NREPA)
9. If the MDEQ determines that vessel discharges covered by this Certification can no longer comply with this Certification, the MDEQ may revoke or modify the Certification after appropriate public notice. (CWA, Section 401)
10. The MDEQ reserves the right to modify this Certification, after appropriate public notice, to require non-oceangoing vessels covered by the USEPA's VGP to install and operate ballast water treatment systems to prevent the discharge of aquatic nuisance species to Michigan waters, if a determination is made by the MDEQ's Director that such ballast water treatment systems are necessary, available, and cost effective.
11. All conditions of this Certification apply in all Michigan waters regardless of their distance from shore. (Part 4 rules)
12. The issuance of this Certification does not authorize violation of any federal, state, or local laws or regulations, nor does it obviate the necessity of obtaining such permits, including any other MDEQ permits, or approvals from other units of government as may be required by law. (Part 31 of the NREPA)
13. The contact point for consultation, submittals, and approvals as referred to in this Certification is:

MDEQ Chief, Surface Water Assessment Section
 P.O. Box 30273
 Lansing, Michigan 48909-7773
 Phone: 517-335-4121

This Certification shall expire on December 19, 2013.

The MDEQ reserves the right to challenge the USEPA's VGP.

Should you require further information regarding this Certification, please contact Ms. Diana Klemans, Chief, Surface Water Assessment Section, Water Bureau, at 517-335-4121, or you may contact me.

Sincerely,



Steven E. Chester
Director
517-373-7917

Ms. Lynn Buhl

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December 5, 2008

cc: Mr. Tim Henry, USEPA
Mr. Ken DeBeaussiaert, Director, Office of the Great Lakes
Mr. Jim Sygo, Deputy Director, MDEQ
Ms. JoAnn Merrick, Chief of Staff, MDEQ
Mr. Frank J. Ruswick, Jr., Senior Policy Advisor, MDEQ
Mr. William Creal, MDEQ
Mr. James K. Cleland, MDEQ
Ms. Diana Klemans, MDEQ
Mr. Gerald Saalfeld, MDEQ