

TO THE DEPARTMENT OF NATURAL RESOURCES

Application of the U.S. Environmental )  
Protection Agency for a Clean Water Act )  
Water Quality Certification for Issuance of a )  
NPDES Vessel General Permit for )  
Regulating Discharges Incidental to the )  
Normal Operation of a Vessel. )  
\_\_\_\_\_ )

*Request for Contested Case Hearing*

The undersigned petitioners, the National Wildlife Federation and the Wisconsin Wildlife Federation, hereby request a contested case hearing under Wis. Stat. § 227.42 and Wis. Admin. Code § NR 299.05.

1. The agency action which is the basis for this request is the decision of the Department of Natural Resources (“DNR”) under § 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341, and ch. NR 299, Wis. Admin. Code, to conditionally grant certification to discharges incidental to the normal operation of commercial vessels and large recreational vessels greater than or equal to seventy-nine feet in length (“vessels”), proposed to be authorized by the U.S. Environmental Protection Agency (“EPA”) under a draft National Pollutant Discharge Elimination System Vessel General Permit (“VGP”), 73 Fed. Reg. 34296 (Jun. 17, 2008).

2. The DNR’s certification violates 33 U.S.C. § 1341 and Wis. Admin. Code Ch. NR 299 for the following reasons:

- a. Contrary to 33 U.S.C. § 1341(a)(1), the certification fails to certify that the discharges proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, will comply with the standards enumerated in Wis. Admin. Code § NR 299.04.
- b. Contrary to Wis. Admin. Code § NR 299.05(3)(d)(1), the certification fails to include a statement that there is a reasonable assurance the discharges proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, will be conducted in a manner which will comply with the standards enumerated in Wis. Admin. Code § NR 299.04.
- c. The discharges proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, violate 33 U.S.C. § 1341(a) and (d), the standards under Wis. Admin. Code § NR 299.04(1)(b), and the public interest for the following reasons:

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- i. The discharges proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, will not comply with the standards enumerated in Wis. Admin. Code § NR 299.04.
- ii. The certification fails to set forth effluent limitations or other limitations necessary to assure or reasonably assure that vessels which apply for coverage under the VGP will comply with the water quality standards adopted under Wis. Stat. § 281.15 and 33 U.S.C. § 1313 (“WQS”), including, but not limited to, Wis. Admin. Code NR § 102.01 (establishing designated uses); Wis. Admin. Code NR § 102.10 (establishing that outstanding resource waters may not be lowered in quality); Wis. Admin. Code NR § 102.11 (establishing that exceptional resource waters may not be lowered in quality, except as provided in NR 207); and Wisc. Admin. Code NR §103.03(1) (establishing wetland water quality standards).
  - 1) Aquatic species not indigenous to Wisconsin discharged in vessel ballast water have severely impaired WQS by preventing the attainment of designated uses and violating the antidegradation policy.
  - 2) The VGP’s technology-based effluent limitations—ballast water exchange and saltwater flushing—have been ineffective, and will not be effective, in preventing further discharges of non-indigenous aquatic species in vessel ballast water.
  - 3) Implementing the VGP’s technology-based effluent limitations will or may result in the discharge of non-indigenous species which will cause, have the reasonable potential to cause, or contribute to the non-attainment of WQS—specifically, designated uses and the antidegradation policy.
  - 4) The VGP’s water quality-based effluent limitation—stating that vessel ballast water discharges must be controlled to meet WQS—provides no assurance or reasonable assurance that vessel ballast water discharges will, in fact, comply with WQS—specifically, designated uses and the antidegradation policy.
  - 5) Conditions 5(a)-(c) of the certification require vessel ballast water discharges to achieve certain biological treatment performance standards. No adequate basis exists to establish that achievement of those performance standards will reduce the risk of the introduction or establishment of non-indigenous aquatic species to a level that will assure or reasonably assure that vessels discharging ballast water will comply with WQS—specifically, designated uses and the antidegradation policy.

- iii. The certification fails to set forth monitoring requirements necessary to assure or reasonably assure that vessels which apply for coverage under the VGP will comply with WQS.

3. The petitioners' interests are adversely affected by the DNR's determination to conditionally grant certification because the substantial interests of their members are injured or threatened with injury as follows:

- a. National Wildlife Federation ("NWF"), 213 West Liberty Street, Suite 200, Ann Arbor, Michigan, 48104-1398, is a national, non-profit organization with approximately one million members nationwide and approximately 33,000 members in Wisconsin. 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 Wisconsin waters and the Great Lakes for recreational uses and aesthetic enjoyment, including, but not limited to, fishing, boating, and swimming. These members include the following:
  - i. Charles Matyska. Mr. Matyska lives at Route 1, 5055 Co. Hwy. V, Cecil, Wisconsin. Mr. Matyska is also a member of the Wisconsin Wildlife Federation. He is an avid angler and fishes in many inland lakes and streams and in the Great Lakes, including in Wisconsin's Green Bay. Waters that he fishes in have been infested by aquatic invasive species, including, but not limited to, aquatic invasive species that were introduced into the Great Lakes Basin through the discharge of ballast waters from oceangoing vessels. These species include the zebra mussel and viral hemorrhagic septicemia ("VHS"). He has experienced adverse impacts as a result of aquatic invasive species.
  - ii. George Meyer. Mr. Meyer lives at 201 Randolph Drive, Madison, Wisconsin. Mr. Meyer is also a member of the Wisconsin Wildlife Federation. He is an avid angler and fishes in many inland lakes and streams and in the Great Lakes, including in Wisconsin's Lake Winnebago and its drainage and Lake Michigan. Waters that he fishes in have been infested by aquatic invasive species, including, but not limited to, aquatic invasive species that were introduced into the Great Lakes Basin through the discharge of ballast waters from oceangoing vessels. These species include the zebra mussel, quagga mussel, round goby, and VHS. He has experienced adverse impacts as a result of aquatic invasive species.
  - iii. Lillian Pipping. Ms. Pipping lives at 562A Crestwood Drive, Elkhart Lake, Wisconsin. Ms. Pipping is also a member of the Wisconsin Wildlife Federation. She is an avid angler and fishes in many inland lakes and streams and in the Great Lakes, including in Wisconsin's Lake Winnebago, Big Elkhart Lake, and Lake Michigan. Waters that she fishes in have been infested by aquatic invasive species, including, but not limited to, aquatic invasive species that were introduced into the Great Lakes Basin through the discharge

of ballast waters from oceangoing vessels. These species include the zebra mussel. She has experienced adverse impacts as a result of aquatic invasive species.

Therefore, members of NWF have a substantial interest in maintaining and protecting the quality of Wisconsin's waters. Members of NWF are concerned that the certification will result in the invasion of aquatic non-indigenous species, which will interfere with or eliminate their use and enjoyment of Wisconsin waters. NWF's Regional Executive Director for the Great Lakes Region is Andy Buchsbaum.

- b. Wisconsin Wildlife Federation ("WWF"), W7303 County Highway CS, Poynette, Wisconsin, is a Wisconsin non-profit organization comprised of 161 hunting, fishing, trapping, and forestry-related organizations in Wisconsin, with a combined membership exceeding 100,000 individuals. WWF is dedicated to conservation education and the advancement of sound conservation policies on a state and national level. WWF has strongly advocated for effective measures to prevent the introduction and establishment of aquatic non-indigenous species in the Great Lakes. Members of WWF use Wisconsin waters for recreational uses and aesthetic enjoyment, including, but not limited to, fishing, boating, and swimming. These members include the following:
  - i. Charles Matyska. See above. Mr. Matyska is the Second Vice-President of WWF.
  - ii. George Meyer. See above. Mr. Meyer is the Executive Director of WWF.
  - iii. Lawrence Freitag. Mr. Freitag lives at 1610 South 11th Street, Sheboygan, Wisconsin. Mr. Freitag is a member of the Board of Directors of WWF, the Chair of the WWF Great Lakes Committee, a member of the Board of Directors of the Wisconsin Federation of Great Lakes Sports Fishing Clubs, and a member of the Sheboygan Outboard Club. He is an avid angler and fishes in many inland lakes and streams and in the Great Lakes, including Lake Michigan. Waters that he fishes in have been infested by aquatic invasive species, including, but not limited to, aquatic invasive species that were introduced into the Great Lakes Basin through the discharge of ballast waters from oceangoing vessels. These species include the zebra mussel, quagga mussel, round goby, spiny water flea, and VHS. He has experienced adverse impacts as a result of aquatic invasive species.
  - iv. Lillian Pipping. See above. Ms. Pipping is the President of WWF.

Therefore members of WWF have a substantial interest in maintaining and protecting the quality of Wisconsin's waters. Members of WWF are concerned that the certification will result in the invasion of aquatic non-indigenous species, which will interfere with or eliminate their use and enjoyment of Wisconsin waters. WWF's Executive Director is George Meyer.

4. The basis for a finding that there is no evidence of legislative intent that the interest is not to be protected is found, *inter alia*, in 33 U.S.C. § 1251 *et seq.*, Wis. Stats. §§ 1.11 and 281.15, and Wis. Admin. Code Chs. NR 1, 102, 103, and 299. Further, Wis. Admin. Code § 299.05, expressly contemplates that persons and entities in the position of the petitioners have a right to a contested case hearing to challenge the DNR's certification.

5. The injury or threatened injury to the members of the petitioners caused by the certification is different in kind or degree from injury to the general public because, unlike the general public, members of the petitioners all personally use and enjoy Wisconsin waters that would be adversely affected by the issuance of the certification, as described in section 3.a.-b.

6. There is a dispute of material fact, and the disputed facts are summarized as follows:

- a. The petitioners dispute that discharges proposed to be authorized under the VGP, whether or not subject to the conditions imposed by the certification, will comply with WQS.
- b. The petitioners dispute that the certification sets forth effluent limitations, other limitations, or monitoring requirements necessary to assure or reasonably assure that vessels which apply for coverage under the VGP will comply with WQS. As drafted, the certification will allow vessels to discharge non-indigenous species to Wisconsin waters without an adequate basis for concluding that the discharges will comply with WQS.
- c. The petitioners reserve the right to specify other disputed facts as they are discovered during the course of this proceeding.

7. The statute or administrative rules that accord a right to hearing are Wis. Stat. § 227.42 and Wis. Admin. Code § NR 299.05(5).

8. Petitioners will appear and present information supporting their objections in a contested case hearing.

WHEREFORE, petitioners request that the DNR grant their request for a contested case hearing under Wis. Stat. § 227.42 and Wis. Admin. Code § NR 299.05.

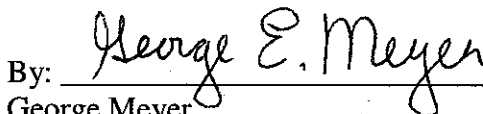
Dated this 20<sup>th</sup> day of November, 2008.

NATIONAL WILDLIFE FEDERATION



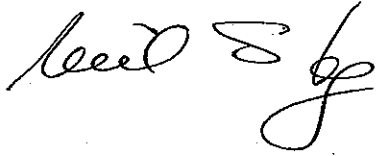
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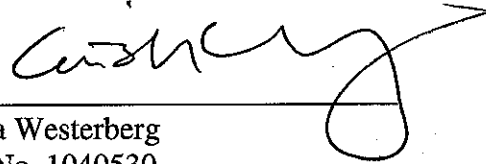
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