STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

State of Minnesota ex rel., Minnesota Center for Environmental Advocacy,

Plaintiff,

vs.

Minnesota Pollution Control Agency,

Defendants.

SUMMONS

Court File No.

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon Kevin Reuther, Plaintiff's attorney, whose address is 26 E. Exchange Street, Suite 206, St. Paul, MN 55101, an Answer to the Complaint, which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: 8/27/07

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

State of Minnesota ex rel., Minnesota Center for Environmental Advocacy,

Plaintiff,

vs.

the Minnesota Pollution Control Agency,

Defendants.

COMPLAINT

Court File No.

INTRODUCTION

1. Plaintiff Minnesota Center for Environmental Advocacy ("MCEA") brings this action against defendant Minnesota Pollution Control Agency ("PCA") because the PCA's failure to act to prevent the spread of the Viral Hemorrhagic Septicemia ("VHS") fish virus to Minnesota's lakes violates Minnesota's environmental laws and is likely to cause pollution, impairment or destruction of Minnesota's environment. MCEA, on behalf of itself and its members, seeks declaratory and injunctive relief, costs and attorneys fees, and an order compelling the PCA to take such immediate action as will prevent the introduction of VHS into Lake Superior and other Minnesota waters.

PARTIES

2. Plaintiff MCEA is a Minnesota-based non-profit environmental organization whose mission is to use law, science, and research to preserve and protect Minnesota's wildlife, natural resources, and the health of its people. MCEA works in

five program areas, one of which is water quality. MCEA is located at 26 E. Exchange Street, Suite 206, St. Paul, Minnesota 55101. MCEA brings this action on behalf of itself and its members.

3. MCEA members live and recreate throughout the state. Many MCEA members live and recreate on the shores of Lake Superior and other waterbodies that will be adversely affected if the VHS virus reaches Minnesota. The recreational, aesthetic, economic and/or environmental interests of MCEA and its members are threatened by PCA's failure to execute its duty to prevent the spread of the VHS virus. PCA's failure to execute its duties has caused MCEA to direct its limited resources to forcing the agency to act and resulted in injury to MCEA, its members, and its mission.

4. Defendant PCA is charged with protecting Minnesota's waters from pollution. The PCA consists of the Commissioner, Brad Moore, and eight citizen Board members. Minn. Stat. § 116.02, subd. 1. Since June of 1974 the PCA has been delegated the authority to administer the National Pollutant Discharge Elimination System ("NPDES") permit program by the federal Environmental Protection Agency ("EPA") pursuant to 40 C.F.R. § 122.28. The PCA is located at 520 Lafayette Road North, St. Paul, Minnesota 55155.

FACTS

5. Viral Hemorrhagic Septicemia, VHS, has been called the "ebola of fish viruses." It causes severe hemorrhaging, resulting in organ failure and eventually death to the fish it infects. The U.S. Department of Agriculture ("USDA") describes VHS as "an extremely serious pathogen of fresh and saltwater fish" and states in a 2006 alert that the virus is "causing an emerging disease in the Great Lakes region of the United States

and Canada." Further, USDA notes that "[d]ue to its high mortality and severe economic consequences, VHS is classified as a reportable disease by the World Organization for Animal Health."

6. The strain of VHS infesting the Great Lakes affects a large number of fish species, including species previously not known to be susceptible to VHS. The virus has been responsible for die-offs in the Great Lakes and connected waters of muskellunge, smallmouth bass, northern pike, freshwater drum, gizzard shad, yellow perch, black crappie, bluegill, rock bass, white bass, redhorse sucker, bluntnose sucker, round goby, and walleye. The number of different species that are known to be susceptible to the Great Lakes strain of VHS is increasing. According to USDA, the species currently known to be affected make up 36% of all species caught in the lower Great Lakes in 1999. Many of these species are also present in Minnesota's other waters including the Mississippi River basin.

7. VHS will cause severe and irreparable environmental damage to Minnesota's waters if it arrives in the state.

8. As of the date of filing this Complaint, VHS had been detected in all of the Great Lakes except for Lake Superior. No other Minnesota waters are known to be yet infested with the virus. Mortality is highest at low water temperatures, and therefore, if VHS reaches Lake Superior, the consequences are expected to be dire.

9. The VHS virus is carried among fish through urine and reproductive materials. Fish that survive infection can become life-long carriers of the virus.

10. As with other invasive species, VHS is spread through the discharge of vessels' untreated ballast water containing infected fish, fish urine, and fish sex products.

11. Vessels traveling in, through, and among the Great Lakes routinely discharge ballast water into Lake Superior. Some of the vessels are ocean-going ships ("salties"), but the majority are ships that travel between the fresh water Great Lakes ("lakers"). Both salties and lakers are vectors of the VHS virus and other invasive species because they take on ballast water in areas of known and potential infestation, transport it, and discharge it in different waters without first treating the discharge.

12. No regulation is currently in place that protects Minnesota waters, including Lake Superior, from the discharge of ballast water that is infested with VHS or that carries fish infected with VHS. PCA does not currently require any permits or inspections of either salties or lakers for or related to the discharge of ballast water.

13. Because the PCA has failed to require the treatment of ballast water and has failed to otherwise exercised its authority to prevent pollution from reaching Minnesota's waters, the fish of Lake Superior and the inland waters of Minnesota are in immediate jeopardy from VHS. As with other aquatic invasive species brought to Lake Superior by ballast water from both the lakers and salties, VHS will likely spread to the rivers, lakes, and streams of Minnesota once VHS arrives in Lake Superior.

14. Lake Superior and other water bodies that will likely be infested with VHS are important natural resources of the state, as are the fish that the virus will kill or harm and other species that will be indirectly affected, for example, through disruption of the food chain and/or balance of species.

STATUTORY AND REGULATORY BACKGROUND

15. The Federal Water Pollution Control Act, or Clean Water Act ("CWA"), prohibits the "discharge of any pollutant" unless the discharge is authorized by law. 33 U.S.C. 1311(a). A discharge of any pollutant means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft." 33 U.S.C. § 1362(14).

16. Pollution discharges are primarily regulated through the NPDES permit program. 33 U.S.C. § 1342. Prior to discharging a pollutant, the discharger is required to obtain an NPDES permit which places conditions on the discharge, including limits on the discharge that are "necessary to meet water quality standards." 33 U.S.C. 1311(b)(1)(C). Water quality standards are established by the states and must be approved by the EPA to ensure consistency with the purposes of the CWA. 33 U.S.C. 1313.

17. The Clean Water Act allows the EPA to delegate to the states the authority to administer and enforce the NPDES permitting requirements of the Act. 33 U.S.C. § 1342(b). Minnesota sought and received authority from EPA to administer and enforce NPDES permits in Minnesota in 1974. PCA is the agency charged with this duty. Minn. Stat. 115.03, subd. 5; 40 C.F.R. 122.28.

18. The CWA requires that states set water quality standards and administer the NPDES permitting program to meet minimum federal requirements. However, the CWA does not preempt state authority to regulate water pollution or preclude a state from

having broader or more stringent regulations than required by federal law. 33 U.S.C. § 1370.

19. States are required, as part of their water quality standards, to develop an "anti-degradation" policy and implementation plan. 40 C.F.R. § 131.6. The policy must, at a minimum, be consistent with the federal requirements, including a mandate that the water quality of outstanding National resource waters be "maintained and protected." 40 C.F.R. § 131.12.

20. Minnesota has adopted an anti-degradation rule for outstanding National resource waters. The rule prohibits any discharge of any pollutant into such an outstanding water. Lake Superior is an outstanding National resource water, referred to in the Minnesota rule as an Outstanding Resource Value Water. Minn. R. 7050.0180, subps. 2,3.

21. In addition to its authority and duty to administer the NPDES permitting program and its anti-degradation rules, the Legislature has provided PCA with the authority and obligation to prevent water pollution: "The agency is . . . charged with the following powers and duties: . . . to issue . . . [and] enforce reasonable orders . . . in order to prevent, control or abate water pollution . . ." Minn. Stat. § 115.03, subd. 1

PCA'S CONDUCT AND FAILURE TO ACT

22. The PCA has been aware of the grave threat VHS virus poses to Minnesota's water resources for many months. The threat has been widely reported in the press. On April 2, 2007, plaintiff MCEA sent a letter to PCA Commissioner Moore providing background on VHS, the threat it poses to Minnesota's waters, and the agency's authority and obligation to prevent the virus from reaching Lake Superior by

prohibiting the unregulated discharge of ballast water from salties and lakers in Minnesota's harbors.

23. The PCA is further aware that ballast water discharges, if permitted to continue without regulation, will lead to the spread of VHS and other invasive species to Minnesota's waters. The State of Minnesota has taken an official position in litigation in the Ninth Circuit U.S. Court of Appeals in support of requiring ballast water discharges to be subject to NPDES permitting. Yet, in the face of an immediate threat to Minnesota's waters, the PCA has not imposed any permit requirements on ballast dischargers in Lake Superior.

24. PCA has failed to use its authority or execute its duty to protect Lake Superior and Minnesota's other waters from introduction of the VHS virus. This failure to act poses a direct threat to Minnesota's important natural resources and is in violation of the Minnesota Environmental Rights Act, the Minnesota Administrative Procedures Act, and the federal Clean Water Act.

COUNT 1
Violation of an environmental quality standard (Clean Water Act)
MERA, Minn. Stat. § 116B.03

25. The Clean Water Act prohibits the discharge of any pollutant absent a permit or exemption. 33 U.S.C. § 1311(a). PCA is charged with enforcing the Clean Water Act, including issuing permits under the Clean Water Act for the discharge of pollutants. Minn. Stat. §115.03, subd. 5.

26. Vessels discharging ballast water taken on in other waterbodies containing waste, including potentially the VHS virus and fish infected with the VHS virus, are discharging pollutants. Minn. Stat. § 115.01, subd. 9.

27. PCA's decision to allow vessels to discharge ballast water containing pollutants, including VHS virus, into Lake Superior violates the environmental quality standard, limitation, or rule expressed in the Clean Water Act's prohibition on pollutant discharges absent a permit.

28. PCA's failure to require NPDES permits for the discharge of ballast water to Minnesota's waters constitutes pollution, impairment or destruction of the environment in violation of the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03. MCEA is entitled to declaratory and equitable relief as requested below. Minn. Stat. § 116B.07.

COUNT 2
Violation of an environmental quality standard (Minnesota nondegradation rule)
MERA, Minn. Stat. § 116B.03

29. PCA's nondegradation rule prohibits the discharge of pollutants to Lake Superior. Minn. R. 7050.0180, subp. 3. PCA is charged with enforcing its rules. Minn. Stat. § 115.03.

30. Vessels discharging ballast water taken on in other waterbodies containing waste, including potentially the VHS virus and fish infected with the VHS virus, are discharging pollutants. Minn. Stat. § 115.01, subd. 9.

31. PCA's decision to allow vessels to discharge ballast water containing pollutants, including VHS virus, into Lake Superior violates the environmental quality standard, limitation, or rule expressed in Minnesota's Nondegradation Rule prohibiting discharges to certain Outstanding Resource Value Waters.

32. PCA's conduct and failure to act constitute pollution, impairment or destruction of the environment in violation of the Minnesota Environmental Rights Act,

Minn. Stat. § 116B.03. MCEA is entitled to declaratory and equitable relief as requested below. Minn. Stat. § 116B.07.

COUNT 3
Adversely affecting the environment (failure to require NPDES permit)
MERA, Minn. Stat. § 116B.03

33. Defendant PCA is authorized and has the duty to administer the NPDES permitting program. PCA must use its authority over the NPDES permitting program to ensure that Minnesota's water quality standards are maintained and to prevent pollution of Minnesota's waters.

34. PCA has failed to require that those seeking to discharge polluted ballast water, including ballast water potentially containing VHS-infected fish and/or the VHS virus, in Minnesota's waters first obtain an NPDES permit.

35. PCA's ongoing failure to regulate ballast water discharges through the NPDES program is likely to materially adversely affect the environment by allowing for the introduction of VHS virus to Lake Superior, a significant state natural resource.

36. PCA's conduct and failure to act constitute pollution, impairment or destruction of the environment in violation of the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03. MCEA is entitled to declaratory and equitable relief as requested below. Minn. Stat. § 116B.07.

COUNT 4
Adversely affecting the environment (failure to issue order or rule)
MERA, Minn. Stat. § 116B.03

37. The Minnesota Legislature has directed, and provided the authority to PCA, to issue and enforce all reasonable orders or rules to "prevent, control or abate water pollution." Minn. Stat. § 115.03, subd. 1(e).

38. The Minnesota Legislature further prohibited actions or permits that are "likely to cause pollution, impairment, or destruction" of the state's resources where alternatives exist. Minn. Stat. § 116D.04, subd. 6.

39. The state is faced with an impending water pollution crisis from the introduction of VHS virus resulting from the unregulated discharge of ballast water. Despite acknowledging the gravity of this threat, PCA has continued to allow the discharge of untreated ballast water pollution and has failed to adopt or issue any enforceable order or rule directed at mitigating or preventing the threat.

40. PCA's failure to assume its authority and act on its obligations to prevent the introduction of VHS to Lake Superior is likely to materially adversely affect the environment, specifically Lake Superior, a significant state natural resource.

41. PCA's conduct and failure to act constitute pollution, impairment or destruction of the environment in violation of the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03. MCEA is entitled to declaratory and equitable relief as requested below. Minn. Stat. § 116B.07.

COUNT 5
Agency action arbitrary and capricious
MAPA, Minn. Stat. § 14

42. With regard to the impending infestation of Minnesota's waters with the devastating VHS virus, PCA has made the following decisions and/or taken the following actions:

a. PCA has continued to allow unregulated discharges of ballast water into Lake Superior in direct violation of its anti-degradation rule;

b. PCA has failed to use its authority to require that ballast water discharges be subject to the NPDES permit program

c. PCA has failed to exercise its authority to issue any enforceable order or rule aimed at preventing or controlling the introduction of VHS; and

d. PCA has allowed untreated discharges of ballast water into Lake Superior when it is clear that such permissive action is not adequate to protect the State's natural resources from pollution, impairment or destruction.

43. The VHS virus poses an imminent threat to Minnesota's environment. MCEA, its members, and its mission have been, are, and will be injured by PCA's failure to act in preventing VHS from spreading to Lake Superior and Minnesota's other waters, and, as a result, are entitled to the relief requested below. Minn. Stat. § 14.63; *In re Sandy Pappas Senate Committee*, 488 N.W.2d 795 (Minn. 1992)

COUNT 6
Mandamus, Minn. Stat. § 586.01

44. The PCA is statutorily charged with the following duties:

a. Administering the NPDES program to prevent the discharge of pollutants absent a permit. 33 U.S.C. § 1311(a); Minn. Stat. §115.03, subd. 5.

b. Administering the NPDES program and other water pollution control measures to protect Minnesota's Outstanding Resource Value Waters, including Lake Superior, from any degradation of water quality. 40 C.F.R. 131.12(a)(3); Minn. R. 7050.0180, subp. 3.

c. Issuing and enforcing orders to prevent, control and abate water pollution, which includes the introduction of foreign pathogenic organisms such as VHS virus. Minn. Stat. § 115.03, subd. 1.

45. PCA's duties are clear, mandatory and ministerial in nature.

46. Because the PCA has failed to execute its mandatory duties in administering water pollution control programs to prevent introduction of the VHS virus from Minnesota's waters, MCEA is entitled to a writ of mandamus to the PCA directing actions consistent with the relief requested below. Minn. Stat. § 586.01.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

a. Declare that the actions and inactions of the PCA complained of herein constitute pollution, impairment and destruction and are a violation of the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03;

b. Declare that PCA has failed to execute its duty to prevent pollution of the State's waters from ballast water discharges containing the VHS virus and that its actions and inactions are arbitrary and capricious in violation of the Minnesota Administrative Procedures Act;

c. Compel the PCA to take immediate action to enforce its anti-degradation rule prohibiting the discharge of pollutants into Lake Superior;

d. Compel the PCA immediately to exercise its authority under the NPDES permitting program to regulate discharges of ballast water in Lake Superior;

e. Enjoin the PCA from failing to take other immediate, effective, and meaningful action to prevent the infestation of Lake Superior and Minnesota's other waters with VHS virus;

f. Award plaintiff its costs, expenses, expert witness fees, and reasonable attorneys fees under Minn. Stat. § 15.472; and

g. Grant plaintiff such other and further relief as this Court deems just and equitable.

Dated: 8/27/07

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ACKNOWLEDGEMENT

Plaintiff, by its attorney, Kevin Reuther, acknowledges that sanctions may be awarded under MINN. STAT. § 549.211 to the opposing party if the party or its attorney acts in bad faith, asserts a frivolous claim, asserts an unfounded position to delay or harass, or commits a fraud upon the Court.

Kevin Reuther