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Court Administrator

STATE OF MINNESOTA

OCT 24 2008

DISTRICT COURT

COUNTY OF RAMSEY

[Signature] Deputy

SECOND JUDICIAL DISTRICT

Court File No. 62-CV-07-2224
Gearin, K.

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

Plaintiffs,

vs.

ORDER

Minnesota Pollution Control Agency,

Defendant.

The above-entitled matter came on for hearing before the Honorable Kathleen Gearin pursuant to a request by the Defendant to reconsider the Court's April 21st, 2008 Order and a request by the Plaintiff for the Court to amend its April 21st, 2008 Order. The Court held a telephone conference regarding this matter on October 20th, 2008 at 3:00 p.m.

Kevin S. Reuther, Attorney for Defendant, represented the Plaintiffs during this telephone hearing. Robert B. Roche, Assistant Attorney General for the State of Minnesota, represented the Defendant. Shawn B. Reed participated in the conference call as attorney for the Seaway Port Authority of Duluth.

Based upon all of the records, files, and proceedings herein, the Court makes the following Order:

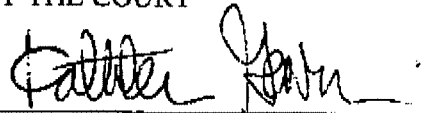
1. Plaintiffs' request that the Court amend its April 21st, 2008 Order is denied.
2. Defendant's motion for reconsideration of the Court's April 21st, 2008 Order is denied.

3. Given the actions of the United States Environmental Protection Agency in its April 30th, 2008 letter, the Court at this time enters judgment on this lawsuit in favor of the Plaintiffs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 10-24-08

BY THE COURT



Honorable Kathleen Gearin
District Court Chief Judge

MEMORANDUM

On April 21st, 2008, the Court ordered the Minnesota Pollution Control Agency to "... begin regulating ballast water discharges from ships as water pollution starting on or before October 1st, 2008." (Paragraph 3) In that same paragraph the Court ruled that on the same date "... all ships with ballast water enter Minnesota waters must have an NPDES permit issued by the state before any discharge." Paragraph 2 of the same document ordered the MPCA to "... enforce its anti-degradation rule prohibiting the discharge of pollutants into Lake Superior and to exercise its authority under the NPDES permitting program to regulate discharges of ballast water into Lake Superior." (Paragraph 2) At the time this Order was issued, all parties believed that the MPCA had authority to issue permits under the NPDES permitting program.

On April 30th the United States Environmental Protection Agency sent a letter to the MPCA notifying it that the EPA believes that the MPCA lacks authority to issue permits for discharges incidental to the normal operation of a vessel, which include

ballast water discharges. That letter is attached to this Order as Exhibit A. The action of the EPA does not affect the MPCA's duty to deal with ballast water discharge issues and to issue permits under state laws. None of the parties dispute the fact that Minnesota has setup a procedure to issue a State Disposal System permit under Minnesota state law for vessel discharges. The Plaintiff believes that the permitting implemented by the state on October 1st, 2008 is not sufficient to fulfill its duties to protect Minnesota waters under Minnesota Statutes. That matter is not appropriately before this Court.

KG



Exhibit (A)
 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 WASHINGTON, D.C. 20460

APR 30 2008

OFFICE OF
WATER

Mr. Paul Eger
 Assistant Commissioner
 Water Policy
 Minnesota Pollution Control Agency
 520 Lafayette Road North
 St. Paul, MN 55155-4194

Dear Mr. Eger:

I am writing in follow-up to staff level discussions regarding a general permit the Minnesota Pollution Control Agency (MPCA) is developing to address ballast water discharges from vessels operating in the Minnesota waters of Lake Superior. Pursuant to section 510 of the Clean Water Act (CWA), the states, including Minnesota, are free to issue state permits under state law. On Friday, April 11, 2008, a draft ballast water general permit labeled as a "National Pollutant Discharge Elimination System/State Disposal System" permit was posted on the MPCA website for public comment. Currently, the MPCA is not authorized to issue National Pollutant Discharge Elimination System (NPDES) permits for discharges incidental to the normal operation of a vessel, which include ballast water discharges.

As you know, the Environmental Protection Agency (EPA) is currently developing an NPDES permitting framework under the CWA for vessels. This action is in response to a U.S. District Court's vacatur of a 35 year old EPA regulation (40 C.F.R. 122.3(a)) that excludes certain discharges incidental to the normal operation of a vessel from NPDES permitting requirements. *Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI. The court's order in that case, which has national implications, will, unless reversed or modified on appeal to the 9th Circuit Court of Appeals, vacate the exclusion as of September 30, 2008. Upon such vacatur, vessels with discharges that had been excluded from the NPDES program by EPA's regulation would be required to be covered by an NPDES permit by that date or be in violation of the prohibition in CWA § 301 against discharges without a CWA permit. The goal of our NPDES permitting activity is to make environmentally sound NPDES permit coverage available nationwide upon the date of vacatur (should it become effective).

Staff from our offices have been discussing how the MPCA permitting effort relates to EPA's activity to develop an NPDES permitting framework for vessels. EPA is in the process of developing general permits intended to cover discharges incidental to the normal operation of a vessel in waters of the US in all states and territories, regardless of whether a state has otherwise been authorized to implement the NPDES program within its jurisdiction. While pursuant to

CWA section 402(c) EPA typically is required to suspend permit issuance in authorized states, EPA may issue NPDES permits in authorized states for discharges incidental to the normal operation of a vessel, because section 402(c)(1) of the Clean Water Act prohibits EPA from issuing permits in authorized states only for "those discharges subject to [the state's authorized] program." Discharges excluded under 40 CFR 122.3 are not "subject to" authorized state programs. The vessel discharges to be covered by EPA's general permits are discharges excluded from NPDES permitting programs under 40 CFR 122.3. Therefore, the discharges at issue are not considered a part of any currently authorized state NPDES program. See 40 CFR 123.1(i)(2) (where state programs have a greater scope of coverage than "required" under the federal program, that additional coverage is not part of the authorized program) and 40 CFR 123.1(g)(1) (authorized state programs are not required to prohibit point source discharges exempted under 40 C.F.R. 122.3).

Because the regulatory exclusion in 40 CFR 122.3(a) has been on the books for 35 years, no State, including Minnesota, has been authorized to issue NPDES permits for the vessel discharges subject to the 40 CFR 122.3(a) exclusion. As a result, until Minnesota (or any other state that would like to acquire permitting authority for such discharges) undertakes the necessary steps to obtain program approval for NPDES permitting of discharges incidental to the normal operation of vessels, the authority to issue NPDES permits for such discharges remains with EPA.¹

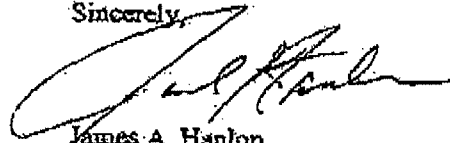
This exclusion only affects the State's ability to issue an NPDES permit for these discharges, and the State remains free to issue other permits under state laws preserved by CWA section 510. Accordingly, Minnesota may issue such state permits as it sees fit under state law. I also wish to emphasize that because NPDES permits for discharges incidental to the normal operation of vessels would be issued by EPA, they would be subject to certification by the State under CWA section 401 with respect to their compliance with State water quality standards and other more stringent requirements of State law.

NPDES states may regulate these discharges under their NPDES program through a revision to their NPDES program. The federal NPDES regulations at 40 C.F.R. 123.62 outline the process for revising a state's NPDES program, which includes the State's submission of a modified program description, Attorney General's statement, Memorandum of Agreement, and any other documents that EPA may need under the circumstances. If the revision is substantial, then public notice and an opportunity to comment are required. The program revision would become effective upon approval by EPA. It appears that MPCA is already taking steps that would contribute to any effort to revise its NPDES program, including a potential revision of the State's regulations to remove its current exclusion for vessel discharges. We would be pleased to work with MPCA on the development of any program revisions, and suggest that you contact Peter Swensen in EPA Region 5 at (312) 886-1236 for further discussion.

¹ During the course of drafting this letter notifying you of EPA's view that Minnesota will not be authorized to issue NPDES permits for the discharges at issue until MPCA obtains approval by EPA, EPA became aware of the order issued to MPCA by the Second Judicial District Court of the State of Minnesota (No. 02-CV-07-2224) requiring MPCA to issue NPDES permits. The order does not affect EPA's opinion put forth in this letter regarding the State's lack of authority to issue NPDES permits.

I hope that this letter clarifies the status of NPDES program requirements with respect to discharges incidental to the normal operation of a vessel. We look forward to working with you on these matters. Should you have any questions, please feel free to call me, or your staff may contact Deborah Nagle at (202) 564-1185.

Sincerely,



James A. Hanlon
Director
Office of Wastewater Management

cc: Jeff Stollenwerk
Peter Swanson