STATE OF MINNESOTA, ex rel.
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY,
Plaintiffs

v.

MINNESOTA POLLUTION CONTROL AGENCY,
Defendant

Minnesota District Court, Second Judicial District, Ramsey County
File No. 62-CV-07-2224
Dated: April 22, 2008

[380:5] Regulation of ballast water discharges.

Minnesota's rule under the National Pollutant Discharge Elimination System (NPDES) permitting program is invalid as to ballast water discharges by commercial vessels into Lake Superior and is vacated effective October 1, 2008. The Minnesota Pollution Control Agency is ordered to begin regulating ballast water discharges from ships as "water pollution" by that date. As of that date, all ships with ballast water entering Minnesota waters must have an NPDES permit issued by the MPCA. **State of Minnesota ex rel. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 31 SRR 256 [Mn Dist Ct, 2008].**

ORDER

Kathleen Gearin, District Court Judge.

The above-entitled matter came on for hearing before the Honorable Kathleen Gearin, Judge of the District Court, on February 28th, 2008, pursuant to motions for summary judgment filed on behalf of the Plaintiff and the Defendant.

Kevin S. Reuther and Janette Brimmer appeared representing the Plaintiffs. Robert Roche, Assistant Attorney General for the State of Minnesota, appeared representing the Defendant. Shawn B. Reed appeared representing the Seaway Port Authority Duluth.

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

1. Minnesota Center for Environmental Advocacy (MCEA) is a Minnesota-based, nonprofit environmental organization. Its mission is to use law, science, and research to preserve and protect Minnesota's wildlife, natural resources, and the health of its people. One of its areas of concern is Minnesota's water quality.

2. Minnesota Pollution Control Agency (MPCA) is charged with protecting, among other things, Minnesota's waters from pollution. Since June of 1974 the MPCA 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 CFR Section 122.28.

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

4. The Great Lakes, other than Lake Superior, have been infested with a strain of VHS which affects a large number of fish species. This virus has been responsible for die-offs in the Great Lakes in connected waters of muskellunge, smallmouth bass, northern pike, freshwater drum, gizzard shad, yellow perch, black crappie, bluegill, rock bass, white bass, redhorse sucker, blunt nose sucker, round goby, and walleye. Many of these species are present in Lake Superior. They are also present in Minnesota's other waters including the Mississippi River Basin.

5. VHS has already been detected in all of the Great Lakes except for Lake Superior. No Minnesota waters are known to be yet infested with the virus. If VHS reaches Lake Superior the consequences to fish life will be severe not only to Lake Superior, but also, to Minnesota's inland lakes and waterways.

6. The VHS virus is carried through the urine and reproductive materials of fish. Even if an individual fish survives a VHS infection, it can become a lifelong carrier of the virus to other fish. VHS is spread through the discharge of untreated ballast water from vessels. Vessels in the Great Lakes that come into Lake Superior from other Great Lakes or the St. Lawrence Seaway routinely discharge ballast water into the lake. Some of these vessels are ocean-going ships (salties). The majority of the ships that come into Lake Superior are from other freshwater Great Lakes. They are called lakers.

7. There is no regulation 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. The MPCA does not currently require any permits or inspections of either salties or lakers for or related to the discharge of ballast water.

8. The discharge of ballast waters is an issue that is currently being litigated in the federal courts. Even if Minnesota were to strictly regulate the discharge of ballast water in Minnesota ports and waters that would not guarantee that Lake Superior would be protected. Besides Minnesota, Michigan, Wisconsin, and Canada have land on Lake Superior and regularly receive ships that discharge ballast water. The port of Superior in Wisconsin is so close to the port of Duluth that unregulated discharges there would endanger Minnesota's waters.

9. The fact that regulation of discharges in Minnesota would not eliminate the risk does not excuse the PCA from following the environmental laws of this state.

10. Only the State of Michigan presently has any regulations regarding the discharge of ballast water. Michigan only regulates discharge from salties. As of January 31, 2008, Michigan has had no ballast water discharged into Superior under these regulations.

11. 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 USC 1311(a). A discharge of any pollutant means "any addition of any pollutant to navigable waters from any point source." 33 USC Section 1362(12). A point source is a "discernable, confined, and discreet conveyance" and includes a "vessel or other floating craft." 33 USC Section 1362(14).

12. Polluted discharges are regulated through the NPDES permit program 33 USC Section 1342. Before 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 USC 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 USC 1313. The Clean Water Act allows the EPA to delegate to the states the authority to administer and enforce the permitting requirements of the act. Minnesota sought and received authority from EPA to administer and enforce NPDES permits in Minnesota in 1974. The MPCA is the agency charged with this duty. Minn. Stat. 115.03, subd. 5; 40 CFR 122.28.

13. 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 being subject to NPDES permitting. Minnesota joined with New York, Michigan, Wisconsin, Illinois, and Pennsylvania in supporting a summary judgment motion made by numerous environmental organizations in a case against the United States Environmental Protection Agency. (Exhibit 17 of Kevin Reuther affidavit filed January 30, 2008.) In that brief, the states argued that EPA's failure to regulate ballast water discharges threatens increased invasive species damage under the current ineffective regulatory regime and is illegal under the federal Clean Act.

14. In the amicus brief Minnesota also argued that the Clean Water Act requires regulation of vessels' ballast water discharge and claimed that EPA's basis for maintaining an exemption for ballast water was erroneous.

15. The purpose of this lawsuit was to have the federal judge declare the United States Environmental Protection Agency's regulation 40 CFR Section 122.3(a), that categorically exempts from control vessels' ballast water discharges invalid. The motion for summary judgment of the Plaintiffs was successful and the federal judge declared the regulation exempting ballast water discharges in the Great Lakes from regulation invalid.

16. In the amicus curiae brief the states asserted that they can take some measures to control aquatic nuisance species (ANS) such as VHS introduced by ballast water. They argued, however, that the EPA has far broader and more effective authority to prevent such discharges. They expressed fear that unless there was federal action, the states will continue to be harmed by ANS invasions.

17. The federal court decision ruling that the exemption to the Clean Water Act that has been offered the shipping industry for decades is invalid and that the Environmental Protection Agency must begin regulating discharges from ships as water pollution starting September 30, 2008 was issued in 2005. *Northwest Environmental Advocates, et al., Plaintiffs, the States of New York, Illinois, Michigan, Minnesota, Wisconsin, and the Commonwealth of Pennsylvania, Plaintiff-Intervenors v. United States Environmental Protection Agency, Defendant, Shipping Industry Ballast Water Coalition, Defendant-Intervenor.* No. C03-05760SI. (2006 WL 2669042 (ND Cal) This Court adopts the reasoning of the federal court judge expressed on Pages 9 thru 12 of her decision. She did not grant immediate injunctive relief for a number of reasons. These reasons apply to Minnesota today.

18. The instant court is influenced by the fact that the regulation at issue has stood for more than 30 years and by the fact that the effects of an immediate injunction prohibiting the discharge of unregulated ballast water would be as the Federal judge stated "...so dramatic as to make such an option a practical impossibility".

19. It is necessary to balance the practical implications involved in regulating discharge of ballast waters with the increasingly serious threat of harm that these polluted waters represent to Minnesota's Great Lake, inland lakes, and rivers. The State of Minnesota acknowledged the urgency of having the EPA promulgate new regulations in its amicus brief in the federal case. MPCA has known of this danger for years.

20. The Court is aware that Minnesota Pollution Control Agency has known about the September 30th, 2008 deadline given to the EPA by the federal court for years.

21. There is no dispute between the parties in this case that invasive species have been, and continue to be, introduced into the Great Lakes of this country through ballast water discharges. There is also no dispute that the consequences that the invasive species have are irreparable as once introduced they can spread rapidly, threaten native species with extinction, and become almost impossible to eradicate.

22. Both the Minnesota Pollution Control Agency and the shipping industry have known for years that ballast water discharge was a serious problem. They have known for more than two years of the September 30th deadline this year. In the federal court case both the Plaintiffs and Plaintiff-Intervenors requested that the trial court make October 1st, 2007 the deadline.

23. The Seaway Port Authority of Duluth application for intervention is appropriate and they should be allowed to participate in any further proceedings. The Court has reviewed all of their submissions and does not believe that there is any need for further submissions before issuing its rulings in the Plaintiffs' summary judgment motions.

24. The Lake Carriers Association and Canadian Ship Owners Association's motion for leave to appear as amicus curiae is appropriate. They should be allowed to participate in any further proceedings. The Court has reviewed all of their submissions and does not believe that there is nay need for further submissions before issuing its rulings on the Plaintiffs' summary judgment.

25. As stated above, the state of Michigan is the only state to put into place a permitting scheme regarding ballast water up to date. Michigan's ballast water permitting scheme requires only ocean-going ships (salties) that operate in Michigan ports to either declare that they will not discharge ballast water in Michigan's waters, or to agree to treat their ballast water. The permitting scheme contains four specific technologies identified by the Michigan Department of Environmental Quality as acceptable methods of treating ballast water. At present, there is very little "real world" information regarding the effectiveness of those four technologies. The MPCA legitimately believes that more time is needed to study these technologies. This is especially true since MPCA expresses a desire to develop a permitting scheme that would apply to both salties and lakers.

26. The plaintiff has argued that the method used at Isle Royal National Park involving chlorinating the ballast water in its vessel could be used effectively by Minnesota as part of a permitting scheme. This assumption is not supported by sufficient information and it would be unwise for the MPCA to adopt chlorination as part of their permitting scheme without further research.

27. This Court, like the Federal Court, is wary of imposing a deadline that is too ambitious for the Minnesota Pollution Control Agency to meet. The Court is also aware that the MPCA has made numerous public statements to the effect that they believe they can have some type of regulating procedure in place by October 1, 2008. The Court does not believe that the MPCA has handled the Minnesota ballast water issues with the urgency that the danger of VHS demands. The Minnesota agency correctly asserts that even if Minnesota regulates ballast water appropriately, that doesn't remove the danger to Lake Superior. The fact that this issue demands national and international action does not excuse Minnesota from doing what it can to follow the requirement of this state's environmental laws.

28. Both sides have acknowledged that there's an immediate threat of irreparable injury because of the continuing discharge of ballast water into Lake Superior from both salties and lakers. Regulation of ballast water discharge is the only adequate way to address this injury. Money damages are not realistic.

29. The Court is aware that any regulation of ballast water discharges will have an effect upon the Great Lakes shipping industry. It is also aware of the importance of that industry to the city of Duluth, the iron ore industry and the entire economic health of the state. Some of the written materials and public statements from representatives of that industry seem to imply that any action by State or Federal environmental protection agencies would require that all shipping stop in the Great Lakes. That implication is not helpful to the necessary discussion that needs to take place between the industry and the agencies entrusted with protecting the waters of this country.

Based upon the above Findings of Fact, the Court makes the following Order:

1. Minnesota's rule under the NPDES permitting program, Minn. R. 7001.1030 is invalid as to ballast water discharges by commercial vessels into Lake Superior. It is vacated effective October 1, 2008.

2. Minnesota Pollution Control Agency is ordered to take action to enforce its antidegradation 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.

3. The Minnesota Pollution Control Agency is ordered to begin regulating ballast water discharges from ships as water pollution starting on or before October 1st, 2008. As of October 1st, 2008 all ships with ballast water entering Minnesota waters must have an NPDES permit issued by the state before any discharge.

4. The Seaway Port Authority of Duluth motion to intervene is granted as to any future proceedings.

5. The Lake Carriers Association and Canadian Ship Owners Association motion for leave to appear as amicus curiae is granted as to any further proceedings.

6. The Plaintiff's motion to strike the motion to intervene by the Seaway Port Authority of Duluth is denied.

7. Plaintiff's motions to strike Lake Carriers Association and Canadian Ship Owners Association leave to appear amicus curiae as untimely are denied.

8. Defendant MPCA's motion for summary judgment is denied.

© 2008, Institute of Management and Administration, Inc. - Published by Pike & Fischer