

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Minnesota Conservation Federation,
Minnesota Center for Environmental
Advocacy,
National Wildlife Federation,
Natural Resources Defense Council,

Petitioners,

vs.

Minnesota Pollution Control Agency,

Respondent.

**STATEMENT OF THE CASE OF
PETITIONERS**

Court of Appeals Number: _____

Minnesota Pollution Control Agency

Petitioners Minnesota Conservation Federation, Minnesota Center for Environmental Advocacy, National Wildlife Federation, and Natural Resources Defense Council (collectively “Petitioners”) state as follows:

1. Agency of Case Origination

This case originated in the Minnesota Pollution Control Agency (“MPCA”). On August 29, 2012, MPCA Commissioner John Linc Stine signed an order approving MPCA’s § 401 Water Quality Certification of the U.S. Environmental Protection Agency’s (“EPA’s”) draft 2013 National Pollutant Discharge Elimination System Vessel General Permit (“VGP”), 76 Fed. Reg. 76,716 (Dec. 8, 2011).

2. Jurisdictional Statement

This certiorari appeal is authorized by Minn. Stat. § 480A.06, Subd. 3, Minn. Stat. § 606.06, and *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). The authority fixing the time limit for obtaining certiorari review is Minn. Stat. § 14.63, which requires

a petition for a writ of certiorari for judicial review to be filed with the Court of Appeals not more than thirty days after the party receives the final decision of the agency. MPCA Commissioner John Linc Stine mailed a letter dated August 29, 2012, to Petitioners notifying them of MPCA's final decision.

3. Type of Litigation and Statutes at Issue

The type of litigation involves administrative and environmental law. The statutes at issue are (a) the federal Clean Water Act ("CWA"), 33 U.S.C. § 1341 ("CWA § 401"), which authorizes a state to certify whether an applicant for a federal permit to conduct an activity which may result in any discharge into navigable waters will comply with the applicable provisions of Sections 1311, 1312, 1313, 1316, and 1317 of Title 33, United States Code; and (b) Minn. Stat. Ch. 115 (Water Pollution Control).

Minnesota Rules at issue are (a) Part 7001.1400-7001.1470 (governing certifications pursuant to CWA § 401); (b) Part 7050 (Waters of the State); and (c) Part 7053 (State Waters Discharge Restrictions).

4. Description of the Case

On December 8, 2011, EPA proposed to issue the VGP. 76 Fed. Reg. 76,716 (Dec. 8, 2011). Pursuant to CWA § 401, EPA was required to give Minnesota an opportunity to certify whether the VGP will comply with Minnesota water quality standards before the permit can become operative for discharges to Minnesota waters. Accordingly, on December 8, 2011, EPA sent a letter to MPCA requesting that the agency certify the VGP.

On May 4, 2012, MPCA gave public notice of a draft certification, which proposed to add conditions to the VGP. On May 26, 2012, Petitioners submitted comments to MPCA on the draft certification. Petitioners noted that the discharge of ballast water by vessels has led to the introduction, establishment, and spread of many aquatic species not indigenous to Minnesota waters. These aquatic invasive species have severely impaired the use and value of Minnesota waters for the propagation of fish and wildlife, recreation, aesthetic enjoyment, navigation, and the supply of water to the public, agriculture, and industry.

Petitioners commented that the draft certification would harm Minnesota waters because the VGP would not prevent new aquatic invasive species introduced and spread as a result of ballast water discharges, even with the conditions MPCA proposed to impose as part of its certification. Petitioners asked MPCA to revise the draft certification in several ways to assure compliance with the uses of Minnesota waters. In support of their comments, Petitioners submitted extensive evidence to MPCA and the MPCA Citizens' Board. MPCA responded to Petitioners' comments in a summary fashion.

On August 29, 2012, following a vote by the MPCA Citizens' Board to approve MPCA's draft certification of the VGP, Commissioner John Linc Stine signed an order approving the certification.

5. Issues Proposed to be Raised on Appeal

MPCA's decision was affected by the following errors of law:

(a) MPCA certified the VGP based upon a determination that the certification conditions provide “reasonable assurance” that ballast water discharges will comply with Minnesota water quality standards, instead of upon a determination that the certification conditions “assure” such compliance, as required by CWA § 401;

(b) MPCA included only technology-based effluent limitations in the certification instead of effluent limitations as stringent as needed to attain and maintain Minnesota water quality standards, contrary to CWA § 401 and Minnesota Rules; and

(c) MPCA failed to include in the certification certain monitoring requirements, contrary to CWA § 401 and Minnesota rules;

MPCA’s decision was arbitrary or capricious for the following reasons:

(a) The technology-based effluent limitations, monitoring requirements, and other conditions MPCA included in the certification are insufficient to assure or even reasonably assure compliance with Minnesota water quality standards;

(b) MPCA offered an explanation for the certification that runs counter to the evidence.

(c) MPCA failed to articulate a rational connection between the facts found and the certification.

(d) MPCA relied on factors not intended by Congress.

Petitioners reserve the right to raise additional issues after MPCA produces the record, exhibits, and proceedings below.

6. Related Appeals

Petitioners are unaware of any related appeals.

7. Contents of the Record

So far as Petitioners know, the following documents constitute the record: the VGP; the technical fact sheet for the VGP; other materials contained in EPA's docket for the VGP that MPCA considered; comments on MPCA's draft certification, including the comments, supporting exhibits, affidavits, and other materials submitted to and accepted by MPCA and the MPCA Citizens' Board; MPCA's certification of the VGP and responses to written comments on the draft certification. No transcript is available and no statement of proceedings is necessary because no hearing or trial occurred.

8. Argument

Oral argument is requested in St. Paul.

9. Briefs

Formal briefs are necessary.

10. Parties' Attorneys

The attorneys for the parties are as follows:

Attorneys for Petitioners:

Neil S. Kagan (Pro Hac Vice Pending)
National Wildlife Federation
Great Lakes Regional Center
213 West Liberty Street, Suite 200
Ann Arbor, MI 48104-1398
734-887-7106

Kathryn M. Hoffman (#0386759)
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, Minnesota 55101
651-287-4863

Attorney for Respondent Minnesota Pollution Control Agency:

Ann E. Cohen
Office of Minnesota Attorney General Lori Swanson
900 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101
651-296-3353

Dated: September 14, 2012

/s/Neil S. Kagan
Neil S. Kagan (pro hac vice pending)
National Wildlife Federation
Great Lakes Regional Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104-1398
Phone: (734) 887-7106
Fax: (734) 887-7199

and


Kathryn M. Hoffman (#0386759)
Minnesota Center for Environmental
Advocacy
26 East Exchange Street, Suite 206
St. Paul, Minnesota 55101
Phone: (651) 287-4863
Fax: (651) 223-5967

Attorneys for Petitioners