

UNITED STATES DISTRICT COURT  
FOURTH DISTRICT OF MINNESOTA  
FIFTH DIVISION

---

Save Lake Superior Association,  
the Izaak Walton League, Duluth  
Minnesota Chapter, the Minnesota  
Council of Trout Unlimited, and  
Wisconsin Trout Unlimited, Inc.

Plaintiffs,

v.

**COMPLAINT**

Michael Chertoff, Secretary of the  
U.S. Department of Homeland  
Security and the U.S. Department of  
Homeland Security; Admiral Thad  
W. Allen, Commandant of the United  
States Coast Guard and the U.S. Coast  
Guard; Ed Schafer, Secretary  
of the U.S. Department of Agriculture; and  
the U.S. Department of Agriculture; Cindy  
Smith, Administrator of the Animal and  
Plant Health Inspection Service; and the  
Animal and Plant Health Inspection Service,

Defendants.

---

Plaintiffs by their attorneys, and for their Complaint herein, state and allege as follows:

**I. INTRODUCTION**

1. This is an action for declaratory judgment, injunctive relief, and a writ of mandamus challenging the United States Coast Guard's ("Coast Guard") failure to implement and enforce the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996, 16 U.S.C § 4701 et seq.
2. This is an action for declaratory judgment, injunctive relief, and a writ of mandamus challenging the United States Department of Agriculture's Animal and Plant Health Inspection Service division ("APHIS") failure to enforce its viral hemorrhagic septicemia

virus (“VHSV”) Order issued pursuant to its authority under the Animal Health Protection Act (“AHPA”), 7 U.S.C. § 8301 et seq.

3. This is an action for declaratory judgment, injunctive relief, and writ of mandamus to enforce the existing federal laws, regulations and orders regarding aquatic invasive species which, if enforced, would protect the natural resources of the state of Minnesota from pollution, impairment or destruction.

4. This is an action for declaratory and permanent equitable relief under the Minnesota Environmental Rights Act to protect Lake Superior and environs from destruction as a result of the imminent threats posed by the VHSV, as well as other aquatic nuisance species.

5. This action arises under and alleges violations of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706. In particular, plaintiffs contend that the failure of the Coast Guard and APHIS to enforce existing laws and regulations is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under 5 U.S.C. § 706(2)(A).

#### **JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2202 (injunctive relief), 1361 (mandamus) as well as 5 U.S.C. § 706 (APA). There is a present and actual controversy between the parties and plaintiffs have challenged a final agency action pursuant to 5 U.S.C. §551(13). The final agency action of the Department of Homeland Security being the failure of the Coast Guard to enforce the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the

National Invasive Species Act of 1996, 16 U.S.C § 4701 et seq. and its regulations issued pursuant thereto.

7. The final agency action of the United States Department of Agriculture being the failure of APHIS to enforce the Animal Health Protection Act ("AHPA"), 7 U.S.C. § 8301 et. seq. and its regulations issued pursuant thereto.

8. Venue is properly vested in this court pursuant to 28 U.S.C §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief).

9. Venue is properly vested in this court pursuant to 28 U.S.C. § 1391(e) as plaintiffs reside in Minnesota and Wisconsin. Defendants maintain offices in Washington, D.C.

### **PARTIES**

10. Plaintiff Izaak Walton League ("IWL") is a national non-profit conservation organization with an interest in protecting Minnesota's natural resources including the natural ecosystem of Lake Superior. IWL is headquartered in Washington, D.C. and maintains the Duluth, Minnesota Chapter. IWL has over 32,000 members. Of those, 92 reside in Duluth, Minnesota and comprise the Duluth Chapter. IWL's mission is to conserve, maintain, protect and restore soil, forest, water and the natural resources.

11. Plaintiff Save Lake Superior Association ("SLSA") is a regional non-profit environmental organization established in 1969 and incorporated under the laws of Minnesota. SLSA's principal place of business is in Two Harbors, Minnesota. SLSA's mission is to prevent further degradation of Lake Superior and to promote its rehabilitation.

12. Plaintiff Minnesota Council of Trout Unlimited ("MNTU") is the Minnesota subsidiary of Trout Unlimited, Inc., a Michigan non-profit corporation. Plaintiff Wisconsin Trout Unlimited, Inc. ("WTU") is a Wisconsin nonprofit nonstock corporation and a subsidiary of

Trout Unlimited, Inc., a Michigan non-profit corporation. The mission of Trout Unlimited, Inc. is to conserve, protect and restore North America's coldwater fisheries and their watersheds. Trout Unlimited, Inc. is headquartered in Arlington, Virginia and has over 150,000 members nationwide. Approximately 3,000 of those members reside in Minnesota and comprise the Minnesota Council. Approximately 4,500 of those members reside in Wisconsin and comprise the Wisconsin Council. The members of MNTU and WTU have an interest in protecting Minnesota's and Wisconsin's natural resources including the coldwater fisheries and ecosystem of Lake Superior. Many MNTU and WTU members regularly fish Lake Superior and its tributary streams and rivers and are concerned with keeping these waters free of aquatic invasive species, including VHSV.

13. Plaintiffs and their members regularly use and enjoy the fish, wildlife, water, and other natural resources of the waters of the United States, including but not limited to the Lake Superior basin area, for a variety of recreational, aesthetic, educational, and scientific purposes, including, but not limited to, boating, fishing, swimming, wildlife observation, interpretative field trips, photography, nature study, and aesthetic appreciation. Plaintiffs and their members intend to continue to do all of the foregoing on an ongoing basis in the future and thereby do and will continue to derive recreational, aesthetic, scientific, educational, conservational, and economic benefits from the natural resources of these aquatic ecosystems.

14. Defendant Coast Guard, as a division of the United States Department of Homeland Security, is the federal agency with primary responsibility for implementing the National Invasive Species Act of 1996.

15. Defendant APHIS, as a division of the United States Department of Agriculture, is the federal agency with primary responsibility for implementing the Animal Health Protection Act.

## **BACKGROUND**

### **National Invasive Species Act of 1996**

16. The National Invasive Species Act of 1996 mandates the Secretary of the Department of Homeland Security to issue regulations to prevent the introduction and spread of aquatic nuisance species into the Great Lakes through the ballast water of vessels. 16 U.S.C. § 4711(b).

17. The term “aquatic nuisance species” means “a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural or recreational activities dependent on such waters.” 16 U.S.C. § 4702(a)(1).

18. The term “ballast water” means “any water and associated sediments used to manipulate the trim and stability of a vessel.” 16 U.S.C. § 4702(a)(3).

19. The term “Great Lakes” means “Lake Ontario, Lake Erie, Lake Huron (including Lake St. Clair), Lake Michigan, Lake Superior, and the connecting channels (Saint Mary's River, Saint Clair River, Detroit River, Niagara River, and Saint Lawrence River to the Canadian Border), and includes all other bodies of water within the drainage basin of such lakes and connecting channels.” 16 U.S.C. § 4702(a)(7).

Discharges from Vessels

20. Vessels and other floating craft (hereinafter “vessels”) routinely discharge effluent into navigable waters of the United States. Such vessel discharges include, among other things, ballast water, bilge water, cooling water, deck runoff, gray water, and oil or oily water. These discharges may, and often do, contain aquatic plants and animals including small fish. In addition, these items are also likely to be present: non-native species, pathogens such as bacteria and viruses, suspended solids, ammonia, detergent, solvents, organic matter, hydrocarbons, heavy metals, hazardous chemicals, paint chips, and contaminated sediment.

21. For example, cargo and other commercial vessels always discharge water from their ballast tanks into navigable waters of the United States whenever they take on cargo and/or fuel. Such ballast water discharges typically contain a variety of biological materials, including plants, animals, viruses, and bacteria. These biologic materials often include live, non-native, nuisance, exotic, or invasive species.

22. Invasive species can cause extensive ecological and economic damage to aquatic ecosystems. Recent studies suggest that invasive species cost the United States more than \$5 billion per year. Furthermore, the environmental damage attributable to invasive species in the Lake Superior basin alone includes reduction or local extinction of native species, disruption of the aquatic food chain, and additional ecosystem alterations that extend to bird and wildlife populations.

23. The viral hemorrhagic septicemia virus (“VHSV”), a highly contagious pathogen of fresh and saltwater fish, is causing an emerging disease in the Great Lakes region. VHSV, which has been called the “Ebola of fish,” causes severe hemorrhaging in fish resulting in

death from organ failure. It has caused a significant number of large-scale fish kills in the lower Great Lakes, including several in Lakes Erie, Ontario, Huron and Lake St. Clair in 2005-06.

24. VHSV causes high mortality in fish and can have severe economic consequences. Because of the severe consequences, both to the fish and the local economies relying on the fishing industry, VHSV is classified as a reportable disease by the World Organization for Animal Health.

25. The number of wild fish species found to be susceptible to VHSV is growing, with at least forty different species (both freshwater and marine) testing positive for the virus.

26. VHSV has been found in fish of many different species in Lakes Ontario, Erie and Lake St. Clair and most recently in a brown trout which washed up on the shore of Lake Michigan. It has also recently been found in Lake Winnebago, Little Lake Butte des Morts and the Fox River of Wisconsin.

27. The movement of VHSV in the Great Lakes water system is to a preponderant degree of scientific certainty caused by two vectors of delivery; the first vector is the practice of Great Lakes freighters ("lakers") and foreign ships ("salties") adjusting their trim and balance by taking on VHSV infected organisms in ballast water, and later dumping those infected waters when taking on cargo. This ballast water is pumped in from docking locations in VHSV infected water sites and then discharged at remote sites and destination ports which are not yet infected. The second vector is sport fishing and commercial fishing activities involving movement and relocation of infected bait fish, either live or frozen.

28. The fish resources and commerce of Lake Superior, the inland waters of Minnesota, as well as the entire Great Lakes fresh water system in other states and the provinces of Canada are in immediate jeopardy from the VHSV. Also in immediate jeopardy from the VHSV are all the fresh water systems of the United States which are trafficked by ballast transfers from salties and local equivalents of lakers. Such fresh water systems include but are not limited to the Mississippi River and the Chesapeake Bay. As with other aquatic invasive species that have been brought to Lake Superior by ballast water from both lakers and salties, the VHSV already has migrated, see paragraph 26 above, or will likely migrate to the rivers, lakes and streams of Minnesota, Wisconsin and Michigan as well as Ontario once the virus arrives in Lake Superior.

29. Defendant Coast Guard's failure to properly regulate ballast water uptakes from and discharges into the waters of the United States, including but not limited to the Lake Superior basin, pursuant to the National Invasive Species Act of 1996, has harmed and continues to harm plaintiffs and their members' recreational, aesthetic, scientific, educational, conservational and economic interests in the natural resources of these waters.

## **COUNT I**

### **Minnesota Environmental Rights Act ("MERA")**

30. Plaintiffs re-allege the facts and allegations contained in paragraphs 1 through 29 of the Complaint. Unless action is taken very soon VHSV and other aquatic invasive species will be brought into the waters of Lake Superior via the ballast water of lakers and salties. Just as in the lower Great Lakes and inland waters, the virus will attack a wide spectrum of

fish which are natural resources of Minnesota within the purview of the Minnesota Environmental Rights Act ("MERA") Minn. Stat. §116B.02.

31. The Coast Guard and APHIS have failed to enforce their regulations and orders which would avoid the discharge of ballast water taken from areas known to have infestations or populations of harmful organisms and pathogens, including VHSV and VHSV-infected fish. Their conduct and ongoing failure to act renders likely the arrival of VHSV in the Minnesota waters of Lake Superior from ballast water carried by lakers and salties. Their conduct and failure to act constitute pollution, impairment or destruction of the natural resources of Minnesota in violation of the Minnesota Environmental Rights Act, Minn. Stat. § 116.01 et. seq.

32. As a result, plaintiffs are entitled to the declaratory and equitable relief requested below.

## **COUNT II**

### **UNITED STATES COAST GUARD**

#### **Violation of Federal Administrative Procedure Act**

33. Plaintiffs re-allege the facts and allegations contained in paragraphs 1 through 32 of the Complaint. Plaintiffs have made numerous attempts without success to obtain enforcement by the Coast Guard of its regulation Title 33--Navigation and Navigable Waters, Part 151, Subpart D Ballast Water Management for Control of Nonindigenous Species in Waters of the United States. 33 C.F.R. 151 2035 (a) provides that "...all vessels equipped with ballast water tanks that operate in the waters of the United States must:

- (1) "Avoid the discharge or uptake of ballast water in areas within or that may directly affect marine sanctuaries....

- (2) "Minimize or avoid uptake of ballast water in the following areas and situations:
  - (i) Areas known to have infestations or populations of harmful organisms and pathogens...."

34. Plaintiffs have attempted to obtain enforcement by the Coast Guard against vessels plying the Great Lakes by seeking two remedies:

- 1) prevent vessels from taking on ballast water in areas that are, or may be, infested with VHSV; and
- 2) require chemical or physical disinfection and sterilization of all vessels transporting water and biota, including all commercial and recreational vessels traveling through VHSV infested waters, before entering into Lake Superior at the Sault St. Marie Locks.

35. Although plaintiffs have sought these remedies for over a year, the Coast Guard has failed to implement them or to enforce its regulations against any vessel. As a result, defendant Coast Guard has violated the Administrative Procedure Act, 5 U.S.C. § 706 (2) (A) by abusing its discretion and engaging in arbitrary and capricious actions.

### **COUNT III**

#### **ANIMAL AND PLANT HEALTH INSPECTION SERVICE**

##### **Violation of Federal Administrative Procedure Act**

36. Plaintiffs re-allege the facts and allegations contained in paragraphs 1 through 35 of the Complaint.

37. Plaintiffs have expended a great deal of energy and effort to convince the U.S. Department of Agriculture, APHIS to stop the spread of the VHSV to Lake Superior. Despite plaintiffs' numerous requests by correspondence, electronic mails and telephone

calls, APHIS has not enforced its order that prohibits lakers and salties from taking on and moving live fish from waters of the Great Lakes that are infested with VHSV. As a result, defendant APHIS has violated the Administrative Procedure Act, 5 U.S.C. § 706 (2) (A) by abusing its discretion and engaging in arbitrary and capricious actions.

### **RELIEF REQUESTED**

Unless the Court takes action in the form of a declaratory judgment, permanent injunction and/or writ of mandamus, plaintiffs and the general public will suffer substantial and irreparable injury.

**WHEREFORE**, plaintiffs pray that the Court enter its order and judgment as follows:

1. That this Court, pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, enter a declaratory judgment that the failure of the defendants to enforce their regulations is arbitrary and capricious and therefore unlawful.

2. That this Court finds that the conduct of defendants violates the Minnesota Environmental Rights Act and that said violation must cease within 60 days of this Court Order.

3. That this Court issue a permanent injunction mandating that within 60 days defendant Coast Guard enforce its orders preventing lakers and salties from taking on and moving ballast water from waters of the Great Lakes that are infested or populated with the dangerous VHSV or other aquatic nuisance species.

4. That this Court issue a mandatory injunction requiring defendant APHIS to enforce within 60 days its prohibition against the transportation of live fish in ballast water anywhere in the Great Lakes.

5. That this Court issue a mandatory injunction requiring the defendants to monitor for compliance at sites of uptake and discharge of water for ballast.

6. Further, that this Court adjudge and declare that the failure of defendant Coast Guard to enforce 33 C.F.R. 151.2035 is arbitrary, capricious, an abuse of discretion and contrary to law.

7. That this Court issue a permanent injunction mandating that within 60 days defendant Coast Guard begin enforcing 33 C.F.R. 151.2035 and otherwise comply with the National Invasive Species Act of 1996 to prevent the spread of aquatic nuisance species throughout the Great Lakes.

8. That in accordance with the Federal Equal Access to Justice Act, 28 U.S.C.A. § 2412, this Court awards plaintiffs their costs and reasonable attorneys fees incurred in connection with the institution and prosecution of this action.

9. That this Court grant such other and further relief as may be appropriate.

---

Grant J. Merritt, Esq. (Minn. # 7214x)  
Kalina, Wills, Gisvold & Clark, P.L.L.P.  
6160 Summit Drive, #560  
Minneapolis, MN 55430  
(763) 259-3459; Fax (763) 503-7070  
merritt@kwgc-law.com

---

Julie Root, Esq. (Minn. # 0386461)  
1370 Carling Drive #303  
St. Paul, MN 55108  
(651) 343-5605  
Julie\_Root@yahoo.com

---

Fintan Dooley, Esq. (Wisc. # 1057322)  
(ND # 03270)  
P.O. Box 250559  
53221 N 91st St. #3  
Milwaukee, WI 53225  
(414) 438-1689; Fax (414) 438-1689  
findooley@wi.rr.com

Attorneys for Plaintiffs

Dated April 29, 2008