

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER RESOURCES DIVISION

In the matter of:

ACO-000244
Date Entered: 3 Aug. 2015

United States Department of the Interior
Fish and Wildlife Service
5600 American Blvd, West, Suite 990
Bloomington, Minnesota 55437-1458
/

ADMINISTRATIVE CONSENT ORDER

This document results from allegations by the Michigan Department of Environmental Quality (DEQ), Water Resources Division (WRD). The DEQ alleges the United States Fish and Wildlife Service (USFWS) located at 3090 Wright Street, Marquette, Marquette County, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 *et seq.* The USFWS is a person, as defined by Part 3, Section 301 of the NREPA, (MCL 324.301). The USFWS and the DEQ agree to resolve the violations set forth herein through entry of this Administrative Consent Order (Consent Order).

I. STIPULATIONS

The USFWS and the DEQ stipulate as follows:

- 1.1 The NREPA MCL 324.101 *et seq.*, is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 *et seq.*, and the rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.
- 1.3 The DEQ is authorized by Section 3112(4) of Part 31 of the NREPA to enter orders requiring persons to abate pollution, and the director of the DEQ may delegate this authority to a designee under Section 301(b) Part 3 of the NREPA.

- 1.4 The USFWS consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DEQ and is enforceable as such under Section 3112(4) of Part 31. The USFWS agrees not to contest the issuance of this Consent Order and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable. It is also agreed that this Consent Order shall become effective on the date it is signed by the chief of the WRD, delegate of the director, pursuant to Section 301(b) of Part 3 of the NREPA.
- 1.5 The USFWS and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the USFWS that the law has been violated.
- 1.6 The Signatory to this Consent Order on behalf of the USFWS agrees and attests that he is fully authorized to assure that the USFWS will comply with all requirements under this Consent Order.
- 1.7 The USFWS shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section III, Compliance Program, of this Consent Order.

II. FINDINGS

- 2.1 The USFWS conducts applications of Bayluscide, a Lampricide, as part of an intensive effort to reduce local infestations of larval sea lamprey as part of the United States-Canada Great Lakes Sea Lamprey Control Program (SLCP). The Great Lakes SLCP is administered by the Great Lakes Fisheries Commission, a designated international organization created under the authority of the Convention on Great Lakes Fisheries. The USFWS is authorized to do so as an agent of the Great Lakes Fisheries Commission, according to the Convention on Great Lakes Fisheries entered between the United States and Canada.

- 2.2 On April 7, 2011, the DEQ issued to the USFWS a Certification of Approval for the application of Bayluscide in Michigan waters of the Great Lakes, under Rule 97 of the Part 4 rules, Water Quality Standards, under Part 31.
- 2.3 On August 4, 2011, the USFWS conducted an application of Bayluscide on Lake Superior's Huron Bay and the Silver River. The total area to which Bayluscide was applied was 46 acres.
- 2.4 On August 5, 2011, the USFWS notified the DEQ of non-target species mortality associated with the previous day's Bayluscide application, which included: 667 Brown Bullhead, 383 White Sucker, 48 Walleye, 47 Rock Bass, 22 Smallmouth Bass, 20 Logperch, 8 Black Bullhead, 4 Yellow Perch, 3 Spottail Shiner, 2 Lake Sturgeon, 1 Burbot, and 1 Common Carp. Non-target species mortalities were collected by USFWS field crews within the area of the Bayluscide operation and across a wide area of the bay, including waters as far as 4.5 miles away from the treated area. Due to the observed mortalities, the USFWS stopped applying Bayluscide after 46 acres had been treated, leaving an additional 32 acres within the planned treatment area untreated.
- 2.5 In total, 1,206 dead fish associated with the August 4, 2011, Bayluscide application were documented.
- 2.6 The USFWS filed an Adverse Effects forms to document the August 4, 2011, incident in accordance with Section 6(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).
- 2.7 The DEQ issued the USFWS a Violation Notice (VN No. VN-005158) on January 20, 2012. The letter stated that the USFWS was in violation of Part 31 of the NREPA and Rule 97 of Michigan's Water Quality Standards, and that the violations identified had ceased.

- 2.8 The USFWS responded to the VN No. VN-005158 by letter, which was received by the DEQ on February 21, 2012.

III. COMPLIANCE PROGRAM

IT IS THEREFORE AGREED AND ORDERED THAT the USFWS shall take the following actions to prevent further violations of Part 31:

- 3.1 As resolution to the natural resource damages incurred on August 4, 2011, the USFWS shall provide yearling brook trout to the Michigan Department of Natural Resources (DNR) in the following manner:
- a) Beginning in the spring of 2016, the USFWS shall provide 5,000 yearling brook trout per year for five years, and stock them at the Munising Bay City Dock, located at T46N, R19W, section 2.
 - b) USFWS staff shall load, transport, and stock the brook trout each year. USFWS staff shall communicate with the DNR, Fisheries Division, Lake Superior Basin Coordinator to determine when this task shall be completed.
 - c) Before the yearling brook trout are stocked each year, the USFWS shall mark the fish with coded wire tags with an adipose fin clip.
 - d) The brook trout shall be of the Tobin Harbor genetic strain.
- 3.2 The USFWS shall submit a yearly stocking report, no later than 30 days after stocking, to the DNR, Fisheries Division Chief, and to the DEQ, WRD, Enforcement Unit Chief, each office is located at Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909- 7773. The yearly stocking report shall include pertinent information related to the yearly stocking program which shall capture the following: number of fish stocked, the average size of the fish stocked, the date the stocking occurred, and detailed information pertaining to the coded wire tags.

3.3 During the application of Bayluscide 3.2% Granular Sea Lamprey Lampricide, the USFWS shall follow the procedures and protocols outlined in the TOP:017.3A (January 29, 2014), TOP:0.17.10 (March 1, 2015) and the following additional requirements specific to Michigan jurisdictional waters.

A) Potential Interference:

- 1) Aquatic vegetation is often present in desirable sea lamprey habitat; however, if vegetation is determined to be too dense, the treatment supervisor will defer treatment.

B) Pre-application safeguards:

- 1) Municipalities and agricultural irrigators in the vicinity of the application shall be notified of the application area and approximate time.
- 2) The treatment supervisor shall insure that the application vessel is operated safely at all times during application.
- 3) Granular Bayluscide or other granulated Lampricide shall not be applied if non-target organisms are seen congregated in the application area or if their movement from the area may be restricted and dispersal cannot be achieved. The term "congregated" means five or more fish observable within the immediate area (i.e., within a 10-foot sweeping radius of the applicator's vessel or from the stream bank).
- 4) If there exists reasonable uncertainty regarding condition number three, yet an alternate location is available for effective treatment application where non-target species are not congregated, then application may proceed in the alternate location. However, if no alternate location exists, then the application shall be postponed to avoid Lampricide exposure to non-target species.

C) Application Procedures:

- 1) Temperature and dissolved oxygen readings shall be conducted prior to starting the application process under all circumstances.

- 2) Application shall be performed beginning from the land side of the plot and progress away from the shore, unless conditions such as wind or obstruction within the plot require a different direction.

IV. DEQ OR DNR APPROVAL OF SUBMITTALS

- 4.1 For any work plan, proposal, or other document except the stocking report, excluding applications for permits or licenses, that are required by this Consent Order to be submitted to the DEQ by the USFWS, the following process and terms of approval shall apply.
- 4.2 The yearly stocking report shall be submitted to the DNR, Fisheries Division Chief and Lake Superior Basin Coordinator. Any other documents required to be submitted by this Consent Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.
- 4.3 In the event the DEQ or DNR disapproves the stocking report or other document, it will notify the USFWS, in writing, specifying the reasons for such disapproval. The USFWS shall submit, within 30 days of receipt of such disapproval, a revised stocking report or other document which adequately addresses the reasons for the DEQ's or DNR's disapproval. If the revised stocking report or other document is still not acceptable to the DEQ or DNR, the DEQ or DNR will notify the USFWS of this disapproval.
- 4.4 Failure by the USFWS to submit an approvable stocking report or other document, within the applicable time periods specified above, constitutes a violation of this Consent Order and shall subject the USFWS to the enforcement provisions of this Consent Order.

- 4.5 Any delays caused by the USFWS' failure to submit an approvable stocking report, or other document when due, shall in no way affect or alter the USFWS' responsibility to comply with any other deadline(s) specified in this Consent Order.
- 4.6 No informal advice, guidance, suggestions, or comments by the DEQ or DNR regarding stocking reports or any other writing submitted by the USFWS will be construed as relieving the USFWS of its obligation to obtain written approval, if and when required by this Consent Order.

V. EXTENSIONS

- 5.1 The USFWS and the DEQ agree that the DEQ or DNR may grant the USFWS a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension, except matters directly related to fish stocking, shall be preceded by a written request in duplicate to the DEQ, WRD, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773. For matters directly related to fish stocking, send a written request to: the DNR, Fisheries Division, Lake Superior Basin Coordinator, 484 Cherry Creek Road, Marquette, Michigan 49855. The written request must be submitted not later than ten business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Consent Order that will not be met.
 - b. A detailed description of the circumstances that will prevent the USFWS from meeting the deadline(s).
 - c. A description of the measures the USFWS has taken and/or intends to take to meet the required deadline.
 - d. The length of the extension requested and the specific date on which the obligation will be met.

The Enforcement Unit Chief or Lake Superior Basin Coordinator shall respond in writing

to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DEQ or DNR, and if applicable, signed by both parties.

VI. REPORTING

- 6.1 The USFWS shall verbally report any violation(s) of the terms and conditions of this Consent Order to the DEQ, Upper Peninsula District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The USFWS shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

VII. RETENTION OF RECORDS

- 7.1 Upon request by an authorized representative of the DEQ, the USFWS shall make available, consistent with Federal law, to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31 or its rules. All such documents shall be retained by the USFWS for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by Part 31 or its rules.

VIII. GENERAL PROVISIONS

- 8.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the USFWS to comply with the requirements of the NREPA and its rules.

- 8.2 The DEQ and the USFWS consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 *et seq.*; and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 *et seq.*, to the extent allowed under Federal law.
- 8.3 This Consent Order in no way affects the USFWS' responsibility to comply with any other applicable state, federal, or local laws or regulations.
- 8.4 The DEQ reserves its right to pursue appropriate action, including injunctive relief, to enforce the provisions of this Consent Order.
- 8.5 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 8.6 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same violations.

IX. TERMINATION

- 9.1 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, the USFWS shall submit a request consisting of a written certification that the USFWS has fully complied with the requirements of this Consent Order. Specifically, this certification shall include:
- a. The date of compliance with each provision of the compliance program in Section III.
 - b. A statement that all required information has been reported to the DEQ.

- c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained the USFWS.
- d. Lampricide application in the State of Michigan jurisdictional waters shall be implemented and will continue as specifically described in Section 3.3 of this Consent Order as the governing procedure, along with additional relevant parts of the TOPs identified in Section 3.3 of this Consent Order that are not inconsistent with subparagraphs (A) through (C), until the DEQ and the USFWS agree otherwise in writing.

The DEQ may also request additional relevant information. The DEQ shall not unreasonably withhold issuance of a TN.

Signatories

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

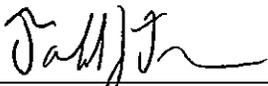
DEPARTMENT OF ENVIRONMENTAL QUALITY



By: William Creal, Chief
Water Resources Division

8/3/2015
Date

USFWS



By: Todd J. Turner

Title: Assistant Regional Director, Fisheries
Midwest Region

7/29/2015
Date

APPROVED AS TO FORM:



By: Neil D. Gordon, Assistant Attorney General
For: S. Peter Manning, Chief
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General

7/30/2015
Date