



Preventing the Spread of Quagga and Zebra Mussels to the Columbia River Basin and Pacific Northwest via Interstate Boat Sales: Executive Summary

August 6, 2021

Context. At the request of Wisconsin Sea Grant, the National Sea Grant Law Center conducted research to inform discussions regarding interstate boat sales. Online boat sales are a potential pathway for the spread of aquatic invasive species. Of particular concern is the sale and transport of boats from the Upper Midwest and Lower Colorado River to the Pacific Northwest due to the presence of quagga and zebra mussels (QZM) in those regions. Because this memorandum was requested by Wisconsin Sea Grant, the analysis of state law focuses on the Upper Midwest route. While the details of state law will vary, the memorandum's overall discussion of the issue is equally applicable to the Lower Colorado River route.

Challenges. States with QZMs have less incentive to prioritize prevention efforts, especially if those efforts are perceived to solely benefit states without known QZM infestations. Additionally, states without QZM populations have no legal recourse to compel states with QZMs to implement containment programs.

State law. All states examined prohibit the possession, transportation, and introduction of QZMs. In addition, all states also require all water to be drained, and all plants and aquatic animals to be removed, upon a boat's removal from the water. Violations, however, are difficult to detect and mandatory inspection requirements vary.

Potential liability of buyers, sellers, and transporters. Online boat sales involve a buyer, seller, and sometimes a transporter. One or more of these parties can incur legal liability by "possessing" or "transporting" QZMs in violation of state law. In practice, this will be the party hauling a QZM-contaminated vessel, but the buyer or seller may also be liable depending on state laws and the legal relationship between the hauler and the buyer or seller.

Recommendations. Because state law already prohibits the possession and transport of QZMs, additional legislation is not necessarily required to address the pathway. There are various actions that can be taken to increase compliance with existing law, including (1) targeted outreach campaigns, (2) adoption of clauses in boat sales contracts and marina slip leases regarding legal responsibilities, or (3) coordination of multistate enforcement efforts. New legal requirements, however, may be desired to address discrete aspects of the pathway. For instance, a statute or regulation could be enacted that explicitly requires all boat sellers to disclose the presence of QZMs aboard watercraft during sales. Moreover, provisions can be added to existing commercial hauling and permit statutes, such as those concerning the transportation of oversize or overweight watercraft, to require that vessels be cleaned prior to transport. Finally, states can mandate use of a hotline for commercial boat haulers and other parties transporting watercraft to inform state authorities about the source, destination, and route of transported watercraft.



To: Tim Campbell, Aquatic Invasive Species Outreach Specialist, Wisconsin Sea Grant

From: Zachary Klein, Ocean and Coastal Law Fellow, National Sea Grant Law Center

Re: Preventing the Spread of Quagga and Zebra Mussels to the Columbia River Basin and Pacific Northwest via Interstate Boat Sales (NSGLC-21-04-04)

Date: August 6, 2021

Hi Tim,

In August 2020, you contacted the National Sea Grant Law Center (NSGLC) about assisting the efforts being undertaken by Wisconsin Sea Grant, the Montana Department of Fish, Wildlife, and Parks, and other partners to prevent quagga and zebra mussels spreading to the Columbia River Basin and the Pacific Northwest from the Great Lakes states. More specifically, you indicated that Wisconsin Sea Grant and its partners are concerned about the introduction of mussels as a result of boat sales that are being facilitated by online platforms, such as Craigslist. The NSGLC was asked to identify the legal framework that applies to these transactions and the interstate transportation of quagga and zebra mussels in Wisconsin, Montana, and the two states between them: Minnesota and North Dakota. Additionally, you requested that the NSGLC identify possible implementation strategies for Wisconsin Sea Grant and its partners to consider to combat the spread of quagga and zebra mussels from this pathway under the current legal framework.

I. Introduction

Quagga and zebra mussels (QZMs) (*Dreissenid* ssp.) are aquatic invasive species (AIS) that are native to eastern Europe. Both mussel species are small—typically growing no larger than the size of a fingernail—and are prolific breeders that can attach to both hard and soft surfaces in fresh water. Dreissenids can survive for 3-5 days out of water, thus boats that are not properly cleaned and dried can transport invasive mussels from waterbodies.¹

¹ Mark S. Hoddle, *Quagga & Zebra Mussels*, CTR. FOR INVASIVE SPECIES RESEARCH AT UNIV. OF CALIFORNIA, RIVERSIDE (last visited Apr. 5, 2021). Available at <https://cistr.ucr.edu/invasive-species/quagga-zebra-mussels>.



Although QZMs have established populations in California, Nevada, Arizona, Utah, the Great Lakes states, and even North Dakota,² there are no known populations in any waters in states in the Columbia River Basin or the Pacific Northwest.³ Consequently, states in these regions are concerned about the spread of QZMs to their waters, especially due to the movement of contaminated boats arriving from states with infested waters. Oftentimes, such movement is the result of online transactions, such as those facilitated by Craigslist and Facebook Marketplace. Montana alone intercepted 34 QZM-infested vessels at inspection stations in 2020—doubling the previous record set in 2017. Many of these watercraft were purchased through Craigslist or a boat broker.⁴

Regions of the country with established populations of dreissenids, such as the Great Lakes states, have less incentive to dedicate resources to combating the export of these AIS to other regions. Agencies, budgets, and personnel are stretched thin, and although states in the Columbia River Basin or Pacific Northwest may have *hundreds* of accessible lakes, some of the Great Lakes states have *thousands* of accessible lakes. Also, Great Lakes states may have greater priorities that impact waters in their respective jurisdictions. Invasive carp, for example, are increasingly attracting attention in the Great Lakes states and Upper Mississippi River watersheds, where they have the potential to devastate local ecosystems and economies.⁵

Another impediment to preventing the spread of QZMs into the Columbia River Basin and Pacific Northwest is the existing legal framework. The realm of public international law recognizes the so-called “no-harm rule,” which prohibits transboundary environmental harm.⁶ Under this principle, countries may not conduct or permit activities within their jurisdiction without regard to other countries, or the protection of the global environment.⁷ Where this principle is recognized, it is understood as imposing substantive and procedural obligations on

² *Game and Fish confirms zebra mussels in Lake LaMoure in southeast North Dakota*, GRAND FORKS HERALD (July 8, 2020). Available at <https://www.grandforksherald.com/sports/outdoors/6566530-Game-and-Fish-confirms-zebra-mussels-in-Lake-LaMoure-in-southeast-North-Dakota>.

³ Although there was a QZM scare in Montana in 2016, the state was later declared QZM-free in 2019. Lauren Lundquist, *FWP: Montana still free of invasive mussels, but must remain vigilant*, MISSOULA CURRENT (Oct. 7, 2019). Available at <https://missoulacurrent.com/outdoors/2019/10/montana-invasive-mussels/>.

⁴ David Murray, *Record number of mussel infested boats intercepted across Montana in 2020*, GREAT FALLS TRIBUNE (Oct. 13, 2020).

⁵ Dave Golowenski, *Progress slowly being made to prevent Asian carp from entering Great Lakes*, COLUMBUS DISPATCH (Jan. 31, 2021). Note that the proper nomenclature for this species changed from “Asian carp” to “Invasive carp” in mid-2021. See John Flesher, *Worries over racism, waterways inspire push to rename Asian carp*, DETROIT FREE PRESS (July 15, 2021), <https://www.freep.com/story/news/local/michigan/2021/07/15/push-rename-asian-carp/7978341002/>.

⁶ See Marte Jervan, *The Prohibition of Transboundary Environmental Harm: An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, Research Paper No. 14-17, PLURICOURTS (Aug. 25, 2014), 1. Available at <https://ssrn.com/abstract=2486421>.

⁷ *Id.*



upstream countries toward their downstream counterparts.⁸ However, the U.S. legal system has largely rejected the no-harm principle outside of narrow application in common law nuisance.

With respect to common law nuisance, domestic courts generally recognize that private parties have an obligation to refrain from engaging in activity that is otherwise legal if that activity substantially impedes another party's use and enjoyment of their property.⁹ But with respect to the 50 U.S. states' obligations to each other, the United States Supreme Court has veered in a different direction. When several states filed suit in 1929 to stop the City of Chicago's diversion of water from Lake Michigan into the Mississippi River watershed because of the detrimental impact on states downriver, the Court determined that these states' complaints were not sufficient for the Court to enjoin Chicago's diversion.¹⁰ Later, the Court was asked in a 1992 case to determine whether Oklahoma, a downstream state, could require upstream Arkansas to reduce pollution into waterways to help Oklahoma meet its own water quality standards. The Court ultimately decided that Oklahoma could not.¹¹

The Court's decisions in these cases underscore the lack of judicial remedies available to states that are "downriver"—either literally or metaphorically—in their efforts to curb harmful activities in "upriver" states. Because litigation is unlikely to achieve their goals, downriver states must resort to solutions that either incorporate other legal tools to effect change, or to solutions that are not legal. With respect to the interstate transportation of QZMs, Montana is similar to the aforementioned downriver states in that it is at the receiving end of a harmful substance—QZMs—that are introduced "upriver." Because there is no domestic analog to the no-harm rule that meaningfully deters states from causing harm beyond their own borders, Montana has no legal mechanism to force states that are already infested to implement contaminant programs or police QZM-related offenses more stringently. As a result, Montana and other states that are concerned about the spread of QZMs to the Columbia River Basin and Pacific Northwest must carefully consider their approach to this increasingly urgent issue.

Wisconsin, North Dakota, Minnesota, and Montana collectively comprise a popular corridor for the interstate sale and movement of watercraft from the QZM-infested Great Lakes to the Columbia River Basin. This memorandum examines the legal frameworks that currently apply to the interstate transportation of potentially AIS-contaminated watercraft in these four states. After

⁸ Kerry Anne Brent, *The Certain Activities Case: What Implications for the No-Harm Rule?*, 20 ASIA PACIFIC J. OF ENVIRO. L. 28, 35-44 (2017). Available at https://www.elgaronline.com/view/journals/apjel/20-1/apjel.2017.01.02.xml#ref_bib-053.

⁹ See, e.g., *Boomer v. Atlantic Cement Co.*

¹⁰ *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

¹¹ *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).



identifying the applicable frameworks, the memorandum analyzes the practical challenges of enforcing these laws and goes on to propose measures that can be taken to overcome those challenges.

II. Applicable AIS Laws

There are provisions at both the state and federal level that prohibit—and, in some cases, criminalize—the possession and transportation of AIS, including QZMs. The Lacey Act is a federal statute that prohibits wildlife trafficking. The Lacey Act has two key provisions: Title 16 and Title 18. Title 16 prohibits wildlife trafficking and elevates the violation of state, tribal, or foreign wildlife laws to federal offenses. Title 18 prohibits the importation and interstate transportation of listed injurious species, including QZMs.

With respect to state frameworks, the exact configuration of state laws applicable to the possession and transportation of AIS-infested watercraft ultimately depends on a case-by-case assessment of the watercraft's state of origin, state of destination, and route between the two. For ease of analysis, the survey below focuses on the Upper Midwest route and the laws of Wisconsin, Minnesota, North Dakota, and Montana. While progressing through the analysis below, it's important to note that there are confirmed QZM populations in Wisconsin, Minnesota, and North Dakota, but none in Montana.

A. *Applicable State Law*

1. Wisconsin

Zebra mussels and quagga mussels are both identified as prohibited invasive species under Wisconsin law. [Wis. Admin. Code NR 40](#) makes it illegal for anyone to possess, transport, transfer, or introduce a prohibited invasive species in the state without a permit from the Department of Natural Resources (DNR). However, such activities might not be considered a violation if the DNR determines that the act was incidental or unknowing, and was not due to the person's failure to take reasonable precautions—including following the Best Management Practices (BMPs) for boat, gear, and equipment decontamination and disinfection that DNR has published on its [website](#).

Wis. Admin. Code NR 40 further requires that all attached plant and aquatic animals be removed upon the removal of a boat from the water and before leaving the parking area.¹² Wisconsin also requires that all water be drained from boats upon removal from the water. Moreover, no one

¹² Wis. Adm. Code § NR 40.07. Available at https://docs.legis.wisconsin.gov/code/admin_code/nr/001/40/07.



may transport a boat overland from another state for use on Wisconsin waters unless they have drained all water.¹³ Detecting and punishing noncompliance with these provisions often proves difficult, however. Wisconsin does have a voluntary inspection and boater education program, Clean Boats Clean Waters, but inspections are not mandatory and the state does not provide express authority for inspections stations.

In summary, Wisconsin prohibits the possession and transportation of QZMs without a permit from the DNR. The agency, however, will not prosecute the violation if it determines that the violation was accidental or unknowing and the individual in possession of the watercraft took reasonable precautions to decontaminate the vessel. All water needs to be drained, and all attached animals must be removed, upon removing a vessel from a body of water. But Wisconsin notably lacks mandatory inspection requirements, which can facilitate monitoring compliance and outreach efforts.

2. Minnesota

Zebra mussels and quagga mussels are on the list of prohibited invasive species in Minnesota.¹⁴ [Minnesota Statutes § 84D.05](#) prohibits the possession, importation, purchase, sale, propagation, transportation, or introduction of a prohibited invasive species in the state without a permit from Minnesota's Department of Natural Resources (MNDNR). The violation does not need to be knowing, and MNDNR does not publicly identify any mitigating circumstances that would lead to a violation not being prosecuted.

In addition, Minnesota law requires water recreationists to: clean watercraft of all aquatic plants and prohibited invasive species; drain all water by removing drain plugs, including during transport; properly dispose of unwanted bait; and dry docks, lifts, swim rafts and other equipment for at least 21 days before placing equipment into another water body.¹⁵

In contrast with its counterpart in Wisconsin, MNDNR is authorized to require inspections before a person places or removes water-related equipment into or out of a water body.¹⁶ However, there are not enough resources to place inspectors at every eligible water body in Minnesota, so inspectors are placed at various locations across the state based on risk.¹⁷

¹³ Id. at § 19.055. Available at https://docs.legis.wisconsin.gov/code/admin_code/nr/001/19/i/055/1.

¹⁴ Minn. Admin. Rules 6216.0250. Available at <https://www.revisor.mn.gov/rules/6216.0250/>.

¹⁵ Minn. Stat. § 84D.10.

¹⁶ Id. § 84D.105.

¹⁷ "Watercraft Inspection Program," MINN. DEP'T NAT. RES. (last visited July 28, 2021), https://www.dnr.state.mn.us/invasives/watercraft_inspect/index.html.



Additionally, inspections are not required for watercraft hauled on public roadways, or otherwise transported across the state border.

In summary, Minnesota takes a strict liability approach to its prohibition of the possession, importation, transportation, and introduction of QZMs without a MNDNR permit. It also has various requirements relating to the drainage and decontamination of watercraft, and this framework is enforced through inspections that occur anytime a watercraft is known to enter into or be removed from state waters. However, there are no inspections for watercraft that are merely hauled through Minnesota without launching in state waters.

3. North Dakota

It is unlawful to possess, import, transport, or introduce a Class I prohibited aquatic nuisance species in North Dakota, which include quagga and zebra mussels.¹⁸ Additionally, North Dakota law requires that all watercraft must be free of prohibited or regulated aquatic nuisance species upon leaving any water body, or while in transit. Separately, all water must be drained from boats and other watercraft before leaving a water body. During any out-of-water transport, all drain plugs that may hold back water must be removed and water draining devices must remain open.

Although North Dakota's regulations indicate that all watercraft are subject to inspection by law enforcement, the state does not have a mandatory inspection program—neither upon entering its jurisdiction, nor upon launching into or exiting state waters. North Dakota prohibits the possession, importation, transportation, and introduction of QZMs, and requires that drain plugs be removed from watercraft while out of water in order to prevent the spread of AIS in general. However, the state has no inspection requirements for transport of watercraft on public roadways into, or out of, North Dakota.

4. Montana

Under Montana law, no one may import, purchase, sell, barter, distribute, propagate, transport, introduce, or possess an invasive species without a permit.¹⁹ There is currently no official list of AIS for the state of Montana.²⁰ Instead, the species to which Montana's AIS legal requirements

¹⁸ N.D. Admin. Code 30-03-06. Available at <https://www.legis.nd.gov/information/acdata/pdf/30-03-06.pdf>; "North Dakota's Aquatic Nuisance Species - Species List," NORTH DAKOTA GAME AND FISH DEPT. (July 2015). Available at https://ec8c3022-1480-4580-96c0-98958d49781f.filesusr.com/ugd/0e48c2_4033ce23821e44fab28bbd782200ad40.pdf.

¹⁹ Mont. Code § 80-07-1012. Available at https://leg.mt.gov/bills/mca/title_0800/chapter_0070/part_0100/section_0120/0800-0070-0100-0120.html.

²⁰ MONTANA NATURAL HERITAGE PROGRAM, "Aquatic Invasive Species," *Montana Field Guide – Special Status Codes* (last visited Apr. 7, 2021). Available at <http://fieldguide.mt.gov/statusCodes.aspx#ais>.



apply are identified in an unofficial list compiled by agency representatives from the state's Departments of Agriculture; Transportation, Natural Resources and Conservation; and Fish, Wildlife & Parks. The species must also be recognized by the Montana Invasive Species Council (MISC). Quagga mussels and zebra mussels are both on the unofficial list of AIS and recognized as such by the MISC.²¹

Montana requires anyone who discovers the presence of an invasive species on their vessel or property, to notify the appropriate authorities.²² Under such circumstances, the owner of the vessel or property can avoid penalties for violating Montana's invasive species prohibition by complying with the state requirements for the treatment, control, and eradication of the invasive species—in the case of QZMs, decontamination. This exemption is not available, however, to anyone who purposely or knowingly attempts to introduce an invasive species to the state.²³

Furthermore, all watercraft entering Montana are required to be inspected, and anyone transporting watercraft in Montana must stop at all open watercraft inspection stations they encounter.²⁴ All vessels must also be either inspected or decontaminated before launching into Montana waters, with the specific requirement stemming from the type of vessel in question. Notably, Montana additionally requires all commercial boat haulers and anyone towing oversize boats to contact the Montana Department of Fish, Wildlife and Parks' Fisheries Office prior to entering the state.²⁵

In brief, Montana—like the other states mentioned above—totally prohibits the possession, transportation, and introduction of QZMs without a permit. However, Montana has the strictest legal framework of those covered by this memorandum. In addition to the requirement that it shares with Minnesota concerning the mandatory inspection of watercraft when entering or exiting state waters, Montana also has mandatory inspections for all watercraft entering into or traveling throughout the state. Montana's watercraft inspection stations are likely the first inspections that the hauler of a vessel will encounter when transporting that vessel from, for example, Wisconsin to Montana or even farther west. And the prior notification requirement for all commercial haulers and oversized boats is also the first requirement of its kind that someone towing a watercraft along the Great Lakes-Pacific Northwest corridor will encounter, representing an added layer of potential legal liability that boat owners and transporters must consider on this route.

²¹ MONTANA NATURAL HERITAGE PROGRAM, "Species," *Montana Field Guide – Special Status Codes* (last accessed Apr. 7, 2021). Available at <http://fieldguide.mt.gov/displaySpecies.aspx?inv=AIS>.

²² Mont. Code § 80-07-1012(2).

²³ *Id.*

²⁴ Admin. Rules of Mont. 12.5.706. Available at <http://www.mtrules.org/gateway/ruleno.asp?RN=12%2E5%2E706>.

²⁵ "Commercial Watercraft Haulers," *AIS Laws & Rules*, MONT. DEPT. OF FISH, WILDLIFE & PARKS (last visited Apr. 7, 2021). Available at <https://fwp.mt.gov/conservation/aquatic-invasive-species/rules>.



B. Applicable Federal Law - The Lacey Act

The Lacey Act (the Act) is one of the oldest wildlife protection statutes in the United States (U.S.). Originally enacted in 1900, the Act helps states protect their native wildlife by prohibiting the interstate transport of wildlife killed or taken in violation of state law. Congress amended the Lacey Act in 1981 and 2008 to broaden its definition of wildlife, extend protections to plants, and increase the penalties for violations. The U.S. Department of Agriculture originally administered the Lacey Act, but today that authority lies with the U.S. Fish and Wildlife Service (FWS) within the Department of the Interior.

1. Title 16 - Wildlife Trafficking

Title 16 makes it unlawful for any person “to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold” in violation of any federal, tribal, state, or foreign law. Title 16 trafficking violations require two steps, or layers. First, there must be an underlying or “predicate” violation of federal, tribal, state, or foreign wildlife-related law. If a predicate violation exists, the affected wildlife can be considered “tainted.” Second, a person must “import, export, transport, sell, receive, acquire, or purchase” the tainted wildlife or attempt to do one of those actions. As a result, Title 16 of the Lacey Act is only as strong as the underlying laws upon which the violation is based.

A single action cannot give rise to a Lacey Act violation. For example, the act of killing a game bird out of season cannot count as both “taking” the bird in violation of underlying law and also “acquiring” it in violation of the Lacey Act. The government must prove that two separate violations occurred. In other words, there must be an underlying violation followed by a separate, consummating act that happens at a different time. Additionally, the person who commits the second violation does not necessarily have to be the same person who committed the triggering violation, although it can be.

In the dreissenid context, a Lacey Act violation might arise as follows: a boater leaving a Wisconsin water body infested with quagga mussels fails to properly clean the boat and quagga mussels remain attached to the hull. In Wisconsin, as stated above, it is unlawful for a person to possess a quagga mussel. For purposes of aquatic invasive species, Wisconsin law defines “possess” as “to own, maintain control over, restrain, hold, grow, raise or keep.”²⁶ Because the boater has control over the boat, they arguably have control over anything attached to the boat. The owner, therefore, is in possession of quagga mussels in violation of Wisconsin law. This

²⁶ Wisc. Admin. Code NR 40.02. Available at https://docs.legis.wisconsin.gov/code/admin_code/nr/001/40.pdf.



violation of state law could serve as an underlying, or predicate, offense for a Lacey Act prosecution.

This violation of state law, however, is not enough to violate the Lacey Act. To violate the Lacey Act in the trailered boat context, someone (the boat owner or a commercial hauler) would have to transport, or attempt to transport, the quagga-infested watercraft in interstate commerce (i.e., across the state lines). When the underlying law is state law, the overlying offense (e.g., import, transport, sale, purchase) must occur in interstate commerce. The Lacey Act defines “transport” as “to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.” Commercial activity is not necessarily required for mussels to be transported in interstate commerce. Highways are considered “channels of commerce” and automobiles are “instrumentalities of commerce,” so trailering a boat across state lines would likely be considered interstate commerce. Driving a boat from one state to another on the same body of water, such as Lake Superior between Wisconsin and Minnesota, would also be interstate transport. This interstate transportation of the mussels is the second, or overlying, offense required for a Lacey Act violation.

2. Title 18 - Injurious Species Provision

Title 18 of the Lacey Act, which is often referred to as the “injurious species provision,” authorizes the Department of Interior, through the U.S. Fish and Wildlife Service (FWS), to prohibit the importation or transportation across state lines of species “deemed to be injurious or potentially injurious to the health and welfare of human beings, to the interest of forestry, agriculture, and horticulture, and to the welfare and survival of the wildlife or wildlife resources of the United States.” Congress may also designate species as injurious through legislation. Congress listed the zebra mussel in 1990 and quagga mussels in 2018.

Title 18 is violated whenever a listed injurious species is imported into the U.S.²⁷ Because its application is limited to species that are imported into the U.S., Title 18 is not relevant to the interstate transportation of AIS via contaminated watercraft unless the vessel in question potentially entered the United States from Canada while already contaminated with QZMs, which is possible in the context of online transactions in the Great Lakes and Columbia River Basin regions. When QZMs enter the United States under such circumstances, violations of Title 18 are strict liability offenses. Because zebra mussels and quagga mussels are both listed, their

²⁷ Although Title 18 was once believed to apply to the interstate transportation of listed species as well, the U.S. Circuit Court of Appeals for the District of Columbia rejected this interpretation of the Lacey Act in 2017. See *United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131 (D.C. Cir. 2017). As a result of this ruling, state governments and their subdivisions—such as state agencies or even municipalities—are the only entities who are legally able to deal with the issue of interstate QZM movement.



entry into the U.S. on an infested vessel from Canada is a violation of Title 18 of the Lacey Act if done without a FWS permit. Without this Canadian “hook,” however, Title 18 will not apply to the interstate transportation of QZMs in the context to which this memorandum is intended to apply.

Although Title 18 was once believed to apply to the interstate transportation of listed species as well, the U.S. Circuit Court of Appeals for the District of Columbia rejected this interpretation of the Lacey Act in 2017.²⁸ As a result of this ruling, state governments and their subdivisions—such as state agencies or even municipalities—are the only entities legally able to address the issue of interstate QZM movement.

III. Anatomy of a Boat Sale: Who is Legally Responsible?

There are two major practical impediments to enforcing AIS laws that are already in place. First, watercraft being transported interstate via highway are very rarely visibly covered in QZMs or otherwise contaminated in a manner that would be apparent to an untrained inspector. However, this does not mean that the watercraft is not contaminated; to the contrary, QZMs are commonly found in areas of a watercraft that are not visible from its exterior, e.g., the ballast tank. As a result, contaminated watercraft are unlikely to attract the attention of a law enforcement officer on the highway in states without mandatory inspection sites.

Second, even if a law enforcement officer were to accurately identify and intercept a QZM-contaminated watercraft that has entered his or her state through interstate commerce, the perpetrator is unlikely to be prosecuted by the U.S. Department of Justice (DOJ) for violating the Lacey Act. In light of its own priorities and budget constraints, the DOJ generally prosecutes violations of the Lacey Act only if they are egregious; a violation encompassing anything less than a commercial hauler or a repeat offender will likely not face federal charges. Although the severity of state-level charges that an offender might face are by no means trivial, the above-identified impediments to detection and prosecution of AIS violations by state officials suggests that there is a void of accountability or incentive for compliance. To identify potential opportunities to leverage compliance with existing law, this memorandum next considers the parties with whom legal responsibility lies when QZMs are transported across state lines.

A. Buyer

The degree of legal liability to which the buyer of potentially QZM-infested watercraft is exposed will ultimately depend on the *mens rea* requirement in each state. *Mens rea* refers to the

²⁸ See *United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131 (D.C. Cir. 2017).



state of mind—generally, the degree of intent to commit wrongdoing—statutorily required to convict a defendant of a crime.²⁹ Regardless of each state’s particular *mens rea* requirement for AIS-related offenses, however, a preliminary analysis suggests buyers of contaminated watercraft are unlikely to be responsible for complying with relevant state laws in the course of post-transaction interstate transportation unless the buyer is personally towing the vessel.

If the buyer is the party towing the vessel across state lines, then they are plainly liable for violating state laws prohibiting possession and transportation of AIS in the respective jurisdictions. If they are not, however, then they are likely not personally liable for violating the various state prohibitions on transporting QZMs without a permit issued by the appropriate state agency. This is because, even if they legally own a vessel after purchasing it, the buyer is not personally transporting the vessel—and, thus, any QZMs attached thereto—between the time of purchase and when the vessel is ultimately delivered into their actual possession.

But whether the buyer can be prosecuted for possessing an AIS without such a permit ultimately depends on whether the prohibitions on possession are limited to actual possession of the AIS or extend to constructive possession as well. Whereas actual possession refers to when an object is under someone’s direct physical control, constructive possession refers to when an object is considered to be legally possessed by someone even when it is not in their direct physical control. For example, someone with keys to a safe deposit box may have constructive possession to the contents of that box, even when they are not physically holding it at the bank.³⁰ Courts generally find constructive possession of an object requires an individual to have both knowledge of the object and the ability to control it.

More research would be needed to determine a buyer’s liability for possession and transportation of AIS under the respective interpretations of constructive possession by Wisconsin, Minnesota, North Dakota, and Montana. Depending on how a buyer arranges for the post-sale transport of the watercraft, some arguments could be crafted that the buyer of a QZM-contaminated vessel satisfies both of these criteria even if they do not transport the vessel across state lines themselves.

B. Sellers, Brokers, and Online Marketplaces

Much like the hypothetical buyer in the analysis above, the seller of a watercraft will likely escape legal liability unless the seller is also transporting the vessel. The seller would notably be in violation of any prohibition on possession of AIS in the state where the watercraft is located at

²⁹ “Mens Rea,” LEGAL INFORMATION INST. (last accessed Apr. 7, 2021). Available at https://www.law.cornell.edu/wex/mens_rea.

³⁰ “Constructive possession,” LEGAL INFORMATION INST. (last accessed Apr. 13, 2021). Available at https://www.law.cornell.edu/wex/ respondeat_superior.



the time of sale but a party who merely sells a QZM-contaminated vessel that later crosses state lines cannot be said to have possessed or transported the AIS at the time of the violation. Even in a state with a broad interpretation of constructive possession, it likely would not apply to the seller of QZM-infested watercraft once the seller has transferred actual possession to a commercial hauler, the buyer, or the buyer's agent.

Likewise, sites that provide forums for sales are not legally responsible for legal violations by the buyers and sellers. Internet forums, such as Craigslist, are immune from liability for legal infractions committed by their users related to transactions facilitated by such sites under Section 230 of the Communications Decency Act (CDA).³¹ However, these forums may take voluntary action—such as including warnings on commercial posts or even removing posts entirely—to combat illicit behavior, including AIS trafficking.

More research is needed to determine whether a seller may be liable for introducing quagga or zebra mussels to a state when that violation arises in an interstate context based on that state's *mens rea* requirements. For example, some jurisdictions' AIS laws explicitly make it illegal to not only knowingly sell, transport, distribute, and propagate AIS, but also to knowingly cause AIS to be sold, transported, distributed or propagated.³² Under such a framework, brokers or individuals selling their own used vessel can be held liable if they know a watercraft is intended for interstate commerce but fail to make a reasonable effort to decontaminate it before transferring possession to the buyer, buyer's agent, or commercial hauler. However, language to this effect is absent from the AIS statutes and regulations in Wisconsin, Minnesota, North Dakota, and Montana, and there does not appear to be case law in any of these states which addresses whether causing an AIS to be sold or transported across state lines is already prohibited by the current phrasing of the applicable legal provisions identified above.

Finally, there is the question of whether a broker or seller of an AIS-contaminated watercraft can be held liable for any consequent harm under a theory of failure to disclose. Under the theory of duty to disclose, the seller of an item can be held legally responsible for failing to disclose material information about that good to the buyer before the transaction is complete and the item changes possession. The theory typically arises in the sale of houses, as the seller is legally required to disclose any known defects—especially the presence of any lead-based paint in the dwelling—to potential buyers. This requirement applies regardless of whether the seller is a real estate agent or the current homeowner.

³¹ *Dart v. Craigslist*, 665 F. Supp. 2d 961 (N.D. Ill. Oct. 20, 2009).

³² *See, e.g.*, Suffolk County, NY Code § 446-11. Available at <https://ecode360.com/14945533>.



The sale of a QZM-contaminated vessel is analogous to the sale of a lead-tainted home in many respects, particularly given that the presence of AIS aboard the watercraft is a legal violation—and thus a material defect—of which every boat owner must be aware. But one key difference is that the duty to disclose the presence of lead in homes is actually a function of the federal Residential Lead-Based Paint Hazard Act (RLBPHA). The RLBPHA requires residential sellers and their realty agents to provide buyers with an information pamphlet about lead hazards, disclose any known lead hazards, provide an opportunity for the buyer to investigate within 10 days, and include a lead hazard warning statement in the sales contract.³³ But the RLBPHA applies only to lead in residential houses; the presence of AIS on watercraft is plainly beyond its purview. Instead, more research would be necessary to determine whether failure to disclose the presence of AIS aboard a vessel to a potential buyer runs afoul of implicated states' respective interpretations of the common law duty of disclosure. Additionally, states may want to consider enacting a statute or regulation that requires sellers to disclose the presence of QZMs (or AIS more generally) aboard watercraft during boat sales.

C. Transporters

As alluded to above in the analyses for buyers and sellers, legal liability will primarily fall on the party that is actually towing, hauling, or otherwise transporting the QZM-contaminated vessel across state lines. Such a party would plainly be in violation of the prohibitions of possession and transportation of AIS in all of the states in which they are physically located throughout the trip. The only factor that may complicate the transporter's liability is whether they had taken reasonable steps to decontaminate the vessel in question prior to entering into the state where the violation occurred. As noted in Section II above, there are some states—such as Montana—where taking those steps may be considered by prosecutors when deciding whether to file charges.

The other major consideration with respect to the transporter's liability is who qualifies as a transporter. At the most basic level, the term straightforwardly applies to the person driving the truck to which the boat is attached. But if that person is the employee of a commercial trucking company, that company may also end up being liable for the violation under the theories of *vicarious liability* and *respondeat superior*. Vicarious liability refers to an individual's liability for the actions of a third party, with *respondeat superior* referring specifically to when someone is held liable for the actions of their subordinate(s). Furthermore, these are both forms of *strict liability*, meaning that the vicariously liable (superior) party may be held responsible even in the absence of actual fault or intent to violate the law. As applied to the interstate movement of QZMs, this means that a commercial trucking company may be held legally responsible for

³³ 42 USC § 4851 *et seq.*



violations of state law and the Lacey Act if one of their drivers is intercepted hauling a QZM-infested vessel. Boat brokers may also be held liable under a similar theory for the interstate movement of QZMs under these circumstances, even if the broker is not also a commercial hauler. For instance, if the broker contracts with an independent contractor to haul a contaminated watercraft across state lines and the terms of that contract create a principal-agent relationship that qualifies for *respondeat superior* liability.³⁴

IV. Looking Ahead: Possible Solutions and Steps Forward

The fairly robust state legal framework that already exists for AIS, as well as the nature of the impediments to their enforcement at the current time, suggest that progress on this issue cannot be achieved by simply enacting more laws or providing for more law enforcement officers (such as field wardens). Instead, tackling the problem likely requires consideration of more innovative outreach strategies or incentives to increase compliance with existing laws. Some of these measures are already at the disposal of states concerned about QZMs. These measures generally emphasize promoting awareness of laws already in effect among the general public; improving compliance with those laws by means of existing channels; and increasing interstate coordination on QZM issues.

A. Promoting Awareness and Compliance Through Outreach and Contract Law

First, the appropriate state agencies and other interested stakeholders can work to promote awareness of and compliance with AIS laws that are already on the books in the Great Lakes, the Lower Colorado River, the Columbia River Basin, and beyond. This could be through any number of means, ranging from public service announcements on television or radio to more targeted outreach. For example, state agencies can pursue partnerships with marinas, boat dealers, and trade shows to increase awareness of AIS laws with boat buyers, marina users, and others interested in the industry. In a similar vein, these stakeholders can work with industry to incorporate interstate AIS laws into training for dealer's licenses and/or the relevant professional and ethical codes.

Another avenue that may yield fruitful results without the enactment of new laws is the field of contract law. More specifically, state agencies and other stakeholders can encourage the adoption of clearer clauses in boat sales contracts regarding the legal requirements related to AIS prevention—i.e., explicitly identifying which party is responsible for complying with all relevant laws in the course of interstate travel, as well as decontaminating the vessel in question if

³⁴ “Respondeat Superior,” LEGAL INFORMATION INST. (last accessed Apr. 13, 2021). Available at https://www.law.cornell.edu/wex/respondeat_superior.



necessary, in the course of transportation. Likewise, agencies and stakeholders can encourage the inclusion of clauses in marina slip leases that communicate watercraft may need to be decontaminated before moving across state lines, or clauses that even require marina owners to be notified in advance of departure so they can help arrange for inspection and decontamination if necessary. More widespread use of these clauses would not only create legally binding and enforceable obligations regarding decontamination and the interstate transportation of AIS that can supersede or fill in the gaps of applicable state laws, but also promote the awareness of the issue and legal frameworks among those reviewing such contracts.

Sea Grant programs across the country have already established working relationships with local marinas as a result of the Clean Marina Initiative. The Clean Marina Initiative is a voluntary, incentive-based program promoted by NOAA and others that encourages marina operators and recreational boaters to protect coastal water quality by engaging in environmentally sound operating and maintenance procedures.³⁵ Sea Grant affiliates in Wisconsin, Minnesota, and other implicated states with Sea Grant programs may want to consider incorporating AIS awareness and decontamination procedures into Clean Marina programs, as well as taking advantage of existing relationships with marinas to promote the adoption of decontamination-related clauses in marina slip leases.

B. Federal Assistance with Interstate Issue

Because this issue is interstate in nature, interested states may also look to the federal government for assistance with preventing the movement of contaminated watercraft into states without any confirmed QZM-infested waters. Luckily for these states, there is already a federal entity dedicated to AIS issues that may be able to provide assistance in tackling the spread of QZMs into the Pacific Northwest: the Aquatic Nuisance Species Task Force (ANSTF). The Task Force works in conjunction with Regional ANS Panels and issue-specific committees to coordinate efforts among federal and state agencies, as well as efforts of the private sector and other North American interests.³⁶

Following the detection of quagga mussels in Lake Mead National Recreation Area, Senator Dianne Feinstein requested that the ANSTF develop the Quagga Zebra Action Plan for Western Waters (QZAP). ANSTF agreed and delegated this task to the Western Regional Panel on Aquatic Nuisance Species (WRP), one of its regional advisory subcommittees, which includes representatives from nineteen western states, four Canadian provinces, federal agencies, tribes,

³⁵ "Clean Marina Program," MISS.-ALA. SEA GRANT CONSORTIUM (last visited Apr. 8, 2021). Available at <http://masgc.org/clean-marina-program>.

³⁶ "ANS Task Force," U.S. FISH & WILDLIFE SERV. (last visited Apr. 6, 2021). Available at <https://www.fws.gov/anstaskforce/default.php>.



private industries, and non-governmental organizations. The National Sea Grant Law Center has previously worked with the WRP to facilitate cooperation among states on AIS issues and watercraft decontamination in particular.

QZAP and its successor, QZAP 2.0, were reports that identified the western states' needs with respect to preventing the spread of AIS and the financial cost of implementing these needs.³⁷ Although non-binding and by no means a formal budget or grant request, QZAP and QZAP 2.0 conveniently identified priorities to which funds could be—and in many instances, would eventually be—allocated as resources were appropriated by Congress or otherwise became available to federal and state agencies.

Concerned states could refer the issues identified in this memorandum to the ANS Task Force. Either independent of or in addition to the work that the ANS Task Force ultimately engages as a result of that referral, these states could also prepare a QZAP-like document that identifies the issues and needs that they continue to encounter in this context and explains how much money would be required to address them.

The federal government could also address, at a national level, commercial boat hauler permits and oversize/overweight permits, mandating that boats be clean prior to transport and providing information to boat haulers via automated state permit systems that inform haulers of clean boat requirements, as well as mandatory notifications to destination states prior to departure from source locations. The Federal Highway Administration as well as state departments of transportation, departments of motor vehicles, and highway patrol could facilitate outreach to permit receivers through their application and automated processes.

C. Interstate Wildlife Violators Compact

Another potential model to which interested states might look is the Interstate Wildlife Violator Compact (IWVC). The IWVC was created to promote compliance with the laws, regulations, ordinances, resolutions and administrative rules that relate to the management of wildlife resources in the respective member states. The concept was first explored in the 1980s when law enforcement agencies were seeking a way to deal with individuals that violated wildlife and resource laws outside of their home state. The product of their deliberations—the IWVC—incorporates a process whereby wildlife law violations conducted by a non-resident

³⁷ WESTERN REGIONAL PANEL ON AQUATIC NUISANCE SPECIES, *Updated Recommendations for the Quagga and Zebra Mussel Action Plan for Western U.S. Waters (QZAP 2.0)* (Sept. 29, 2020). Available at <https://westernregionalpanel.org/wp-content/uploads/2020/12/QZAP-2.0-Final.pdf>.



while in a member state may be handled as if the person were a resident in the state where the violation took place.³⁸

The IWVC also includes a reciprocal recognition of license privilege suspension by member states, thus any person whose license privileges are suspended in a member state would also be suspended in all participating states, including that person's home state.³⁹ For example, if a Wisconsin resident has their hunting privileges suspended in Minnesota, their privileges may also be suspended in Wisconsin and in all other Compact states.

This approach has become quite popular across the country. After being officially formed by Colorado, Nevada and Oregon in 1989, the Compact has grown to forty-nine member states, and the lone holdout—Massachusetts—in the process of joining.⁴⁰ Despite nominally applying to all wildlife-related violations in member states, there is no evidence of QZM- or AIS-related offenses ever being prosecuted under the IWVC framework. More research is necessary to determine why the possession and transportation of QZMs and AIS more broadly—especially in an interstate context—do not qualify as a wildlife violation to which the IWVC would already apply. Although this uncertainty lingers, states concerned about the spread of QZMs to the Pacific Northwest may want to consider adopting a similar compact for violations of invasive species laws or expanding their IWVC legislation to explicitly account for such violations.

D. States Enact Legislation Mandating Boat Haulers Transport Clean Boats

Similar to the drain plug rule that has been enacted by many states during the past several years, states could add verbiage to existing commercial hauling and permit statutes that require any entity transporting watercraft, including watercraft requiring oversize and overweight permits, to ensure the vessel is clean prior to transport.

States could also mandate the use of a toll-free, 24-7 hour hotline for commercial boat haulers and those transporting oversize and overweight watercraft to provide information about the source, destination, and route of transported watercraft prior to transport. This notification

³⁸ "Interstate Wildlife Violator Compact," NATL. ASSN. OF CONSERVATION LAW ENFORCEMENT CHIEFS (last visited Apr. 6, 2021). Available at <https://www.naclec.org/wvc>.

³⁹ *Id.*

⁴⁰ "Interstate Wildlife Violator Compact Member States," OHIO DEPT. OF NATURAL RESOURCES (last visited June 18, 2021). Available at <https://ohiodnr.gov/static/documents/wildlife/laws-regs-licenses/iwvc%20map.pdf>; see Miguel Brown, *Hawaii Successfully Passed New Animal Protection Laws, Including Ban on Shark Killing*, NATURE WORLD NEWS (July 13, 2021), <https://www.natureworldnews.com/articles/46717/20210713/hawaii-animal-protection-laws-sharks-shark-killing.htm>.



system could connect with the existing notification application the western states use to communicate about boats intercepted at watercraft inspection and decontamination stations.

VI. Conclusion

The spread of QZMs to the Columbia River Basin and the Pacific Northwest is a serious threat that has the potential to wreak devastating ecological and economic damage in the region. This urgency has been amplified by repeated detection of QZM-contaminated watercraft at inspection stations in all Pacific Northwest states. The data confirms that many of these vessels are being transported from states with QZM-infested waters in the Great Lakes, Upper Midwest, and Lower Columbia River regions, and via online transactions. Watercraft transported from the Great Lakes and Upper Midwest have an identified travel corridor that consists of Wisconsin, Minnesota, North Dakota, and Montana. The Lower Colorado River corridor primarily consists of the states of Arizona, Utah, and California. This memorandum inventories the laws that apply to the possession and transportation of QZMs in four states along the above-identified Upper Midwest corridor. While the details of state law will vary, the general legal analysis and possible solutions are equally applicable to the Lower Colorado River routes. As detailed above, there are a variety of legal and non-legal avenues that states can pursue to curb the spread of QZMs in consideration of awareness and enforcement of existing applicable laws.