

**State of Illinois
State of Michigan
State of Minnesota
State of New York
State of Wisconsin
Commonwealth of Pennsylvania**

September 24, 2007

The Honorable Daniel Inouye
Chairman
Committee on Commerce, Science
and Transportation
United States Senate
Washington, DC 20510

The Honorable Ted Stevens
Ranking Member
Committee on Commerce, Science
and Transportation
United States Senate
Washington, DC 20510

Dear Chairman Inouye and Ranking Member Stevens:

We, the responsible legal officers for six Great Lakes States, write to express our strong opposition to three aspects of the proposed Ballast Water Management Act of 2007, S 1578. We understand that this bill, which was originally scheduled for markup on August 3, 2007, may be considered by the Committee later this month.

The Great Lakes States continue to suffer grave economic and ecological harm from the introduction of aquatic invasive species (AIS) pollutants to our waters. It is beyond dispute that ballast water discharges from oceangoing vessels are the primary pathway through which AIS continue to enter our nation's waters.

While S 1578, as most recently drafted by committee staff, would establish new, measurable standards for ballast water discharges and ultimately require treatment of ballast waters before discharge, it suffers from three critical flaws. The bill would unacceptably:

- exempt discharges of pollutants in ballast water from regulation under the Clean Water Act;
- preempt states' ability to enforce their own laws that protect against these harmful pollutants; and
- allow unwarranted delays in the actual enforcement of the new discharge standards proposed in the bill.

Accordingly, we urge you to consider amendments to S 1578 to address these issues.

Unacceptable Clean Water Act Exemption

The Clean Water Act (CWA) provides for superior controls over vessel discharges of pollutants, including AIS in ballast water. Ships' ballast water discharges that include pollutants are subject to CWA regulation by the U.S. Environmental Protection Agency (EPA). *See Northwest Environmental Advocates, et al v U.S. EPA*, 2005 WL 756614 (ND Cal, March 30, 2005) (NWEA). We intervened in the above case to force EPA to fulfill that obligation and utilize the time-tested regulatory and enforcement tools available under that statute. Although EPA is pursuing an appeal from the U.S. District Court's remedy order entered last year, EPA has since issued its Notice of Intent to develop regulations to control harmful vessel discharges of AIS. 72 Fed Reg 34241, June 21, 2007.

To date, Congress has ensured that any other programs to address AIS are not a substitute for EPA enforcement of the CWA. The Non-indigenous Aquatic Nuisance Prevention and Control Act (NANPCA), 16 USC § 4701, as reauthorized and amended by the National Invasive Species Act of 1996 (NISA), establishes a program to develop regulatory requirements for ballast water to control invasive species, directed by the Coast Guard, but expressly preserves application of the full scope of the CWA. "The regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act." 16 USC § 4711(b)(2)(c). Similarly, "[t]he voluntary guidelines issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act." 16 USC § 4711(c)(2)(J).

As drafted, S 1578 would expressly provide that it is the "sole federal authority for preventing the introduction of species through the control and management of vessel ballast water or sediment or other vessel-related vectors." This effectively exempts vessel ballast water discharges of AIS from EPA regulation under the CWA. Elimination of EPA's role in controlling pollutant-containing vessel discharges into our nation's waters would fragment the anti-pollution enforcement authority that Congress has vested in EPA, the agency with the duty, authority, and expertise to regulate pollutants in a comprehensive and integrated manner, including in a manner to exempt de minimis discharges. As currently provided for under NISA and the CWA, the Coast Guard can and should play a role in controlling these pollutant-containing discharges from vessels. However, the Coast Guard alone lacks the expertise, mandate, and resources to regulate ballast water discharges in the manner that EPA can under the CWA.

Most importantly, because much of the implementation of CWA programs is delegated to states, exemption of vessel-discharged AIS from the CWA constitutes removal of a significant state regulatory tool to control these harmful pollutants. For this reason, we are as opposed to losing our rightful responsibilities to implement the CWA as we are opposed to a direct preemption of state laws, as discussed below, that we consider essential to protecting our waters and ecosystems from environmental harm.

Finally, the bill sets the dangerous precedent of exempting a particular industry's harmful pollutant discharges from coverage under the CWA. As the Supreme Court has noted, the CWA is "comprehensive" in its coverage of pollutant discharges, *City of Milwaukee v Illinois*, 451 US 304 (1981), and it is this comprehensive coverage that underlies its effectiveness.

Carving out an entire category of point source pollutant discharges from CWA controls is inconsistent with evenhanded, environmentally protective public policy.

Unacceptable Preemption of Traditional State Legal Authority

The bill also seeks to preempt any more protective state or local regulation of AIS-containing ballast water discharges, contrary to the bedrock principle of environmental law that states may set standards that are more protective of the environmental health and safety of their citizens than those set by the federal government. This provision is even more troubling in the absence of effective federal regulation. The states must retain the authority to protect their sovereign, regulatory, and proprietary interest in their waters. Moreover, the proposal's preemptive effect would prohibit states and localities from enforcing existing standards or adopting planned standards that have been necessitated by the continuing introduction of AIS into state waters.

In addition, we urge you to resist proposals that may give the appearance of preserving state authority under the CWA and state laws but which, in reality, will leave us at the mercy of inadequate federal programs. For example, we understand that other legislative proposals have been described as being "silent" on the matter of the CWA by virtue of not including an explicit CWA savings clause. We want to be very clear that Congressional action to remove the existing CWA savings clause (referenced above) from current statutes without a commensurate replacement is, in fact, not silence. Instead, removal of the existing CWA savings clause constitutes an attempt to undercut our law enforcement efforts in federal court to preserve and ensure CWA authority over pollutant-containing vessel ballast water discharges. We are firmly committed to use of the CWA's time-tested National Pollutant Discharge Elimination System (NPDES) permitting program to control these harmful discharges. To date, states have borne the brunt of invasive species spread by the discharge of ballast water; we strenuously oppose any efforts to preclude our ability to obtain the most timely and protective controls on this pollution source.

Unwarranted Delays in Enforcement of Treatment Requirements

The establishment of federal performance standards for ballast water treatment in S 1578 is an important, albeit long-overdue, development. Unfortunately, the practical benefits of these requirements are undercut by provisions that would leave the door open to unwarranted delays in their enforcement. To begin with, the prescribed treatment standards would not be implemented for several years, i.e., until 2012. Moreover, the Coast Guard would be authorized to further delay implementation based upon a "feasibility review" regarding the "availability" and "cost-effectiveness" of treatment technology. Congress should not invite additional years of

bureaucratic delay, particularly when there has already been extensive testing and development of ballast water treatment methods and given the enormous environmental and economic costs imposed by the continuing introduction of AIS through ballast water discharges.

We respectfully urge you to promptly advance legislation that will build upon rather than discard EPA's existing authority under the CWA to regulate pollution discharges from vessels, preserve the authority of states to protect their waters from the scourge of further AIS introduction, and ensure that ballast water discharges from oceangoing vessels are effectively treated as soon as possible.

Thank you for considering our views on this proposed legislation.

Sincerely,



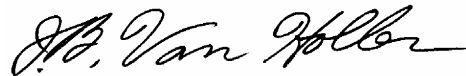
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