

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

July 20, 2005

The Honorable Ted Stevens
Chair, Senate Commerce Committee
522 Hart Senate Office Building
Washington, D.C. 20510

RE: Opposition to S.363, the "Ballast Water Management Act of 2005"

Dear Senator Stevens:

We, the Attorneys General of six Great Lake states, write to express our strong opposition to S.363, the "Ballast Water Management Act of 2005." We understand that this bill is proposed for markup tomorrow. The Great Lakes states are experiencing continued and unabated introductions of aquatic invasive species ("AIS" or "exotic" or "alien" species) to our waters, causing extraordinary economic, social and ecological havoc. The proposal contained in the bill represents a huge step backwards in the effort to control ballast water discharges of AIS to our nation's waters. The bill unacceptably:

- removes EPA's regulatory authority under the Clean Water Act to control pollutant discharges in ballast water;
- preempts states' ability to enforce laws that protect against these harmful pollutants; and
- perpetuates an ineffective regulatory effort and fails to replace it with timely, sound environmental standards.

Accordingly, we urge you to not permit this bill to advance.

Because AIS multiply in the absence of natural predators, there is virtually no way to eradicate them once introduced. There is ample evidence that the ballast water of ships coming in from foreign ports is the primary way in which alien species are introduced. Thus addressing ballast water discharges effectively must be the top priority. Unfortunately, this proposal hurts, rather than helps, that regulatory effort.

Removal of EPA Clean Water Act Authority

The Clean Water Act (“CWA”) provides for superior controls of ballast water discharges of pollutants, including AIS. 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. E.P.A., 2005 WL 756614 (N.D.Cal. March 30, 2005) (“NWEA”). We recently 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. Besides setting the dangerous precedent of fragmenting comprehensive and integrated water pollution control among federal agencies, S.363 discounts the need for applying EPA’s expertise to a complicated problem and for integrating controls of ballast water for invasive species with controls of other pollutants in ballast water.

Congress has ensured that any other programs to address AIS are not a substitute for EPA enforcement. The Non-indigenous Aquatic Nuisance Prevention and Control Act (“NANPCA”), 16 U.S.C. § 4701, as re-authorized 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 Clean Water Act. “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 U.S.C. §4711(b)(2)(c). Similarly, “The 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 U.S.C. §4711(c)(2)(J). See also NWEA (“Additionally, NISA only addresses aquatic nuisance species from ballast water. It does not address the many other types of pollutants found in ballast water, such as sediment, debris, rust, and interior coatings that have flaked off the inside walls of ballast tanks.”).

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. 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. This is evidenced by the ongoing Coast Guard practice of exempting 90% of ocean vessels entering the Great Lakes from any ballast water management requirements. S. 363 will perpetuate this unacceptable and ineffective enforcement practice.

In addition, while the proposal purports to set forth specific standards for ballast water discharges containing AIS, the proposed implementation of these standards provides for continued delay. What is needed is immediate promulgation of environmentally protective

standards for ballast water and the immediate application of best performing ship-board ballast water treatment and hull management methods for ocean-going vessels (with a set approval period) with continued upward ratcheting of the treatment floor to achieve the standard as treatment performance improves.

Finally, S. 363 sets a dangerous precedent of carving out a particular point source discharge from the coverage of the CWA. As the Supreme Court has noted, the CWA is “comprehensive” in its coverage of pollutant discharges, City of Milwaukee v. Illinois, 451 U.S. 304 (1981), and it is this comprehensive coverage that underlies its effectiveness. A balkanized approach to water pollution control would undermine a statutory scheme that has proven extraordinarily effective for more than 30 years.

Preemption of State Authority to Set Standards

S. 363 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 interests 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 over a decade of federal agency inaction.

Freezing of Existing Great Lakes Regulations

Finally, S. 363 seeks to lock in place an existing Coast Guard regulatory regime that has proven woefully inadequate in protecting the Great Lakes ecosystem from the devastating effects of AIS introductions from ballast water discharges. A recent report issued jointly in April 2005 by the U.S. National Oceanic and Atmospheric Administration and the University of Michigan under the sponsorship of EPA, the Coast Guard, and others confirms that over 90% of ocean vessels entering the Great Lakes are not required by the Coast Guard to conduct any ballast water management because these ships claim to have no ballast on board (NOBOB). Yet the report demonstrates that these vessels in reality carry tons of AIS-containing residual ballast water and sediment in their ballast tanks. These unregulated vessels represent the greatest threat of continuing AIS introductions to the Great Lakes. See Johengen, Reid, et al., “Assessment of Transoceanic NOBOB Vessels and Low-Salinity Ballast Water as Vector for Non-Indigenous Species Introductions to the Great Lakes.” The proposed perpetuation of this disastrous regulatory loophole to some unspecified future date is unacceptable.

Conclusion

We urge you to put a hold on this ill-advised proposal and instead work with our affected

states on ways to carry out Congress's mandate to effectively control aquatic invasive species and other pollutants in ballast water discharges. Thank you for considering our views on this important legislation.

Sincerely,



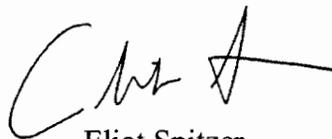
Lisa Madigan
Illinois Attorney General



Mike Cox
Michigan Attorney General



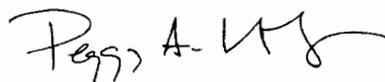
Mike Hatch
Attorney General of Minnesota



Eliot Spitzer
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Susan Shinkman
Chief Counsel
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Peg Lautenschlager
Attorney General of Wisconsin

cc: Members of the Senate Commerce Committee
Members of the Senate Environment and Public Works Committee
Co-Sponsors of S. 363