
# Regulating Ballast Water Discharges: Legislative Issues in the 110th Congress

**Claudia Copeland**
Specialist in Resources and Environmental Policy

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# Summary

Today there is wide agreement on the need for stronger measures to control ballast water discharges from vessels which are a major pathway for introduction of invasive species into U.S. waters, but there are differing views on how best to do that. Current federal authority to manage ballast water, in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended (NANPCA), has been criticized as inadequate. Several states (notably Michigan, California, Minnesota, Oregon, and Washington) have passed or are considering their own ballast water laws, creating concern that separate state programs could create a patchwork of inconsistent regulatory requirements.

This concern was part of the rationale for Title V of H.R. 2830, the Coast Guard Reauthorization Act of 2007, passed by the U.S. House of Representatives on April 24, 2008. It would have established a strengthened national ballast water management program administered by the Coast Guard. This legislative approach was supported by many in the maritime industry and by a number of environmental advocacy groups, such as the National Wildlife Foundation. They argued, in essence, that a nationally uniform program providing certainty to the regulated community, requiring standards more stringent than existing Coast Guard or international rules, and specifying compliance deadlines is the best legislative approach.

However, H.R. 2830 was opposed by other advocacy groups, such as the Natural Resources Defense Council (NRDC), and several of the states that have moved forward with their own ballast water programs. They contended that the legislation would largely have preempted state efforts and provide a slower and less effective approach to controlling ballast water discharges than that of the Clean Water Act.

Evaluating these differing views was complicated by an Environmental Protection Agency (EPA) proposal to control ballast water and other discharges incidental to the normal operation of vessels through the mechanism of a Clean Water Act permit. EPA finalized this permit in December 2008.

At issue was whether the standard-setting, permit, and enforcement authorities of the Clean Water Act (CWA) are better tools for managing ballast water discharges than the approach that was proposed in H.R. 2830. That legislation contained statutory performance standards to be implemented by the Coast Guard which would preempt state regulatory programs that are inconsistent or in conflict with federal law. These issues and the views of proponents and opponents, which could again receive attention in the 111th Congress, are reviewed in this report.

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# Introduction

Invasive species entering U.S. waters (aquatic nuisance species, or ANS) exact tremendous economic losses, social, recreational, and ecological disturbances and costs. National attention was drawn to the invasive species problem with the arrival of zebra mussels in the Great Lakes in the late 1980s. Since then, virtually all coastal and Great Lakes states have experienced ecological change and loss from zebra mussels and other aquatic nuisance species.[1]

Ballast water has been identified as a major pathway for introduction of ANS. Ships use large amounts of ballast water to stabilize the vessel during transport. Ballast water is often taken on in the coastal waters in one region after ships discharge wastewater or unload cargo, and then discharged at the next port of call, wherever more cargo is loaded, which reduces the need for compensating ballast. Thus, the practice of taking on and discharging ballast water is essential to the proper functioning of ships, because the water that is taken in or discharged compensates for changes in the ship's weight as cargo is loaded or unloaded, and as fuel and supplies are consumed. However, ballast water discharge typically contains a variety of biological materials, including non-native, nuisance, exotic species that can alter aquatic ecosystems.

Federal authority to address ballast water concerns in the United States is contained in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA), as amended by the National Invasive Species Act of 1996 (NISA), and is administered by the U.S. Coast Guard. Together these laws initially required a program to prevent the introduction and spread of ANS into the Great Lakes by managing vessel ballast water discharges and subsequently extended the Great Lakes program to all U.S. ports and waters. The current national ballast management program pursuant to these laws directs all ships that have operated outside the U.S. Exclusive Economic Zone to undertake high seas (i.e., mid-ocean) ballast exchange before entering U.S. waters. However, ballast water exchange is believed to be only partially effective and is often not carried out due to safety considerations. The current federal program has been criticized as inadequate, including criticism of the Coast Guard for delays in implementing necessary rules.[2]

Today there is wide agreement on the need for stronger measures to control ballast water discharges, but there are differing views on how best to do that. Several states (notably Michigan, California, Minnesota, Oregon, and Washington) have passed or are considering their own ballast water laws, raising concern that separate state programs could create a patchwork of inconsistent regulatory requirements. This concern was part of the rationale for Title V of H.R. 2830, the Coast Guard Reauthorization Act of 2007, passed by the House on April 24, 2008.[3] It would have amended NANPCA to establish a strengthened national ballast water management program administered by the Coast Guard. This legislative approach was supported by many in the maritime industry and by a number of environmental advocacy groups, such as the National

[1] For more information, see CRS Report RL32344, *Ballast Water Management to Combat Invasive Species*, by (name r edacted).

[2] Ibid.

[3] Ballast water management also was the subject of S. 1578, reported by the Senate Commerce, Science, and Transportation Committee in March 2008 (S.Rept. 110-269). The provisions of that legislation were similar but not identical to Title V of H.R. 2830. They are not discussed in this report, because discussion among interested parties during the 110th Congress primarily focused on H.R. 2830.

Wildlife Federation.[4] However, it was opposed by other advocacy groups, such as the Natural Resources Defense Council (NRDC),[5] and several of the states that have moved forward with their own ballast water programs. Evaluating these differing views is complicated by an Environmental Protection Agency (EPA) proposal to control ballast water and other discharges incidental to the normal operation of vessels through the mechanism of a Clean Water Act (CWA) permit. EPA finalized this permit in December 2008.

At issue was whether the standard-setting, permit, and enforcement authorities of the CWA are better tools for managing ballast water discharges than the approach in H.R. 2830. That legislation contained statutory performance standards that were to be implemented by the Coast Guard which would preempt state regulatory programs that are inconsistent or in conflict with the federal law. These issues and the EPA permit issued in December are discussed in the remainder of this report. It is unknown for now if these issues will again receive attention in the 111th Congress and, if so, whether the positions of stakeholder groups will differ from their earlier views.

# Description of Title V of H.R. 2830

Title V of H.R. 2830, as passed, mandated ballast water management requirements for U.S. and foreign vessels that carry ballast water and use ports or places in waters subject to U.S. jurisdiction. It would have strengthened the existing provisions of law by amending NANPCA Section 1101 to require that such vessels have a ballast water management plan, maintain record books, comply with ballast water exchange requirements, and comply with ballast water treatment requirements; the last of these is the central feature of the legislative proposal.

Under the legislation as passed by the House, vessels that enter drydock[6] between January 1, 2009, and December 31, 2011, would have to meet ballast water treatment standards for living organisms specified in the International Maritime Organization's (IMO's) 2004 *International Convention for the Control and Management of Ships' Ballast Water and Sediment* (see column 2 of **Table 1**). Further, all vessels subject to the legislation would have to meet specific performance standards contained in the legislation during the first drydocking after December 31, 2011, but no later than December 31, 2013. After that date, these statutory standards (see column 3 of **Table 1**) would apply to all ships subject to the law, whether or not they have drydocked for needed repairs or construction by then. The statutory standards were modeled after but are 100 times more stringent than the IMO standards.

[4] A large number of national and regional environmental groups supported H.R. 2830, including the Union of Concerned Scientists, Great Lakes United, National Audubon Society, Defenders of Wildlife, Natural Areas Association, Healing Our Waters-Great Lakes Coalition, and The Nature Conservancy.

[5] A similarly large number of national and regional environmental groups opposed H.R. 2830, including Clean Water Action, Earthjustice, Friends of the Earth, Sierra Club, Northwest Environmental Advocates, the Environmental Law and Policy Center, Friends of Detroit River, San Diego Coastkeeper, and Washington Invasive Species Coalition.

[6] A drydock is a dock that can be drained of water and that is used in the repair and construction of ships.

**Table 1. Ballast Water Treatment Performance Standards**

| Organism Size Class | IMO Regulation[a] | H.R. 2830 Proposed Standards | Existing California Standards |
|---|---|---|---|
| Organisms greater than 50 micrometers in minimum dimension | < 10 viable organisms per cubic meter | < 0.1 living organisms per cubic meter | No detectable living organisms |
| Organisms 10 - 50 micrometers in minimum dimension | < 10 viable organisms per milliliter (ml) | < 0.1 living organisms per ml | < 0.01 living organisms per ml |
| Organisms less than 10 micrometers in minimum dimension | No provision | No provision | < $10^3$ bacteria/100 ml<br>< $10^4$ viruses/100 ml |
| *Escherichia coli* | < 250 colony-forming-units (cfu)/100 ml | < 126 cfu/100 ml | < 126 cfu/100 ml |
| Intestinal enterococci | < 100 cfu/100 ml | < 33 cfu/100 ml | < 33 cfu/100 ml |
| Toxicogenic *Vibrio cholerae* (serotypes 01 & 0139) | < 1 cfu/100 ml or < 1 cfu/gram of wet weight zooplankton samples | <1 cfu/100 ml or <1 cfu/gram of wet weight zoological samples | < 1 cfu/100 ml or < 1 cfu/gram of wet weight zoological samples |

**Source:** Compiled by CRS.

a. Standards in the IMO ballast water convention will enter into force 12 months after ratification by 30 nations, representing 35% of the world merchant shipping tonnage. As of June 30, 2008, this convention had been ratified by 14 nations, representing 3.55% of the world merchant shipping tonnage. The United States has not ratified the convention.

However, vessels would not be required to install any treatment technology until the Coast Guard approves and certifies it, even technology to meet the IMO's minimal standards. By January 1, 2010, the Coast Guard and EPA would be required to complete a feasibility review of the statutory standards to determine whether appropriate technologies are available for compliance. One or more 24-month delays may be granted, if technology is not available. At the same time, the Coast Guard and EPA are required to revise the statutory standards sooner to be more stringent, if technology is available.

Under H.R. 2830, as passed by the House, vessels would have been allowed to continue using technologies that comply with whichever of these standards applies to them for 10 years. Thus, if a vessel begins using systems to meet the less stringent IMO standards by December 31, 2011, it could use that technology for 10 years and not be required to meet alternative, more stringent statutory standards before December 31, 2021. Similarly, a vessel using innovative ballast water treatment technology approved by the Coast Guard would have a 10-year grace period allowing use of that technology in lieu of meeting the statutory standards.

Existing ballast water requirements that apply to vessels operating solely in Great Lakes waters (called "lakers") call for mid-ocean exchange of ballast before ships first enter the lakes. The statutory standards in H.R. 2830 would not have applied to vessels operating exclusively there, unless the Coast Guard and EPA were to so require, because it is assumed that "lakers" do not transport invasive species. However, critics pointed out that "lakers" can spread invasive species among the Great Lakes through contaminated ballast water that is taken on in the lakes and transported between Great Lakes ports.

Under H.R. 2830, the Coast Guard and EPA would have been directed to review the statutory standards every three years, beginning in December 2012, and revise them as necessary. Title V

also contained administrative provisions and enforcement provisions authorizing civil and criminal judicial penalties and administrative actions for violations of NANPCA Section 1101 and regulations issued pursuant to it.

## State Role and Federal Preemption

Preemption of state regulatory programs was one of the key issues in dispute between supporters and critics of H.R. 2830. Under current law, within the framework of the ballast water management program now implemented by the Coast Guard, state and local programs to control ANS are permitted.[7] This general non-preemption has allowed states like Michigan, California, and others to develop ballast water management programs with performance standards or technology requirements that are more comprehensive than the Coast Guard's rules require.

H.R. 2830, as passed by the House, envisioned a program that would be implemented by federal agencies (principally the Coast Guard and EPA). The intention was to establish nationally uniform requirements that would protect all U.S. waters from ballast water discharges of ANS, replacing the minimal Coast Guard rules and handful of state laws that are more protective of those states' waters, but not all waters. Under H.R. 2830, states could apply to the Coast Guard for approval to administer their own inspection and enforcement authority for ballast water discharges, to determine vessel compliance with the federal law's requirements. Otherwise, the role of states under the legislation's ballast water treatment provisions was limited.[8]

H.R. 2830 would not have altered the general non-preemption provision described above that was enacted in 1990, but it would have added new language specifically preempting states or localities from adopting alternative or more stringent treatment requirements or ballast water exchange requirements that are inconsistent with or that conflict with the requirements in the legislation concerning ballast water exchange and performance standards (new NANPCA Section 1101(q), titled "Preemption"). However, states could impose greater fines or penalties for violations of the federal law and could adopt alternative incentive programs to encourage rapid adoption of ballast water treatment technology. Also, any more stringent standard under federal, state, or local law concerning land- or water-based facilities to receive ballast water would not have been preempted.

The key element of the preemption provision in H.R. 2830, as passed by the House, stated that, as of January 1, 2012, the legislation's requirements concerning ballast water exchange and standards would supersede any provision of state or local law that is inconsistent with or conflicts with NANPCA, as amended, or regulations. Specifically, state rules requiring ballast water treatment that were in effect on January 1, 2007 (such as Michigan's) could continue until January 1, 2012. But after that date, the preemption in H.R. 2830 presumably would take effect, barring the state's program if it is inconsistent with or in conflict with the statute. Questions of inconsistency could be germane to the regulatory approach in Michigan's program, enacted in 2005 state legislation, because it differs from that in H.R. 2830. The Michigan program requires vessels to use one of four specified types of ballast treatment technology (rather than numeric

[7] 16 U.S.C. § 4725.

[8] Under the legislation, states could identify a list of vessels that pose a relatively high risk of introducing ANS in their waters, and they could consult with the Coast Guard about exempting certain vessels from performance standards if the risk of introducing ANS is considered insignificant.

performance standards) and requires vessels to obtain a state-issued permit in order to discharge into state waters.

## California's Regulatory Program

California has a regulatory program, pursuant to legislation enacted in 2006, that requires ships entering California ports to treat ballast water to meet specific performance standards beginning January 1, 2009. The performance standards adopted by the California State Lands Commission in response to this law also are modeled after, but are more stringent than, the IMO ballast water convention standards. They are shown in column 4 of **Table 1**. The California standards are 1,000 times more stringent than the IMO standards that would initially have applied under H.R. 2830, as passed, and they also are more stringent than the statutory numeric standards in the bill in certain respects (i.e., California prohibits discharge of detectable living organisms greater than 50 micrometers in size). Because California's standards were not in effect on January 1, 2007, enactment of H.R. 2830, as passed by the House, apparently would have preempted them even in the interim before January 1, 2012.

H.R. 2830, as passed by the House, was supported by the maritime industry and a number of environmental advocacy groups (such as the National Wildlife Federation, see footnote 4) who argued, in essence, that a nationally uniform program providing certainty to the regulated community, requiring standards more stringent than existing Coast Guard or international rules, and specifying compliance deadlines is the best approach.

During House consideration of H.R. 2830, California state officials proposed that the bill be amended to change the January 1, 2007 grandfathering date to January 1, 2009, and to allow the Coast Guard to delay the January 1, 2012 date. They also proposed that the numeric standards in the legislation be made consistent with and as stringent as California's regulatory standards (see column 4 of **Table 1**). Thus, California's existing standards could remain in effect until January 1, 2012, and then would apply nationally after that date. California officials also proposed that the bill be amended to allow states to impose fees on vessels in order to implement state ballast water management programs. None of these proposals was adopted, but there reportedly was subsequent discussion among legislators about these and other issues in order to overcome opposition to the bill. However, environmental groups that opposed House-passed H.R. 2830 contended that the proposed changes were relatively minor and did not overcome serious deficiencies in the bill, namely that the legislation largely would preempt state efforts, could override CWA authorities, and would have provided a slower and less effective approach to controlling ballast water discharges than that of the CWA.[9]

# The Clean Water Act's Regulatory Approach Was Preferred by Some

States often want to have the flexibility to require standards more stringent than federal, and thus it was not surprising that Michigan and California opposed H.R. 2830, as passed, because of its

[9] Henry Henderson, program director, Natural Resources Defense Council, Midwest Office, et al., letter to Honorable Richard Durbin, July 25, 2008.

preemption provision. Also opposing federal preemption were NRDC and some other environmental advocacy groups (see footnote 5). Preemption of state programs was one of the reasons why critics of H.R. 2830 would have preferred addressing ballast water treatment through an alternative approach, specifically the Clean Water Act. As discussed below, EPA has authority under the CWA to address ballast water discharges, but it had declined to do so.

The CWA is administered by EPA, not the Coast Guard, and it has aspects that differ from H.R. 2830. First, CWA Section 510 allows states to adopt standards more stringent than federal rules, which H.R. 2830 likely would have prohibited.[10] The language in CWA Section 510 provides that states may adopt discharge, effluent limitation, or other requirements so long as they are not less stringent than a federal requirement under the CWA. This provision is arguably more generous than H.R. 2830, which would have allowed a state or local law that is not inconsistent with or does not conflict with the federal law. Under the CWA, federal requirements are the floor, while under H.R. 2830, federal requirements arguably would be the ceiling for a state law.

Second, under CWA Section 505, a wide range of entities may bring "citizen suits" in federal court against the Administrator of EPA for failure to carry out a nondiscretionary duty under the act. They also may bring a citizen suit in U.S. district court against persons who violate a prescribed effluent standard or limitation. By comparison, H.R. 2830, as passed, would have provided that citizens may petition the Coast Guard to take an enforcement action and, if the Coast Guard fails to do so, can sue in federal court to require the Coast Guard to take the actions required under the law. Critics of the legislation argued that this was a more restrictive and cumbersome enforcement approach than the citizen suit provision of the CWA.

Third, the critics of H.R. 2830 argued it would be preferable that EPA have responsibility for dealing with vessel discharge issues, including ballast water management, because EPA's primary mission is to protect public health and welfare. According to this view, the Coast Guard, which has multiple missions, has shown insufficient interest in pollution control generally, and ballast water management specifically. Under the CWA, EPA could, for example, issue scientifically based national performance standards (called effluent limitation guidelines) requiring a minimum level of treatment or pollution control to assure protection of public health and the environment.

CWA performance standards are implemented through discharge permits which are issued by EPA or an authorized state for five-year terms and must be renewed thereafter. Permit issuance requires opportunities for public participation. Opponents of H.R. 2830 noted that EPA could use the CWA authority to promulgate stringent ballast water management standards with uniform minimum treatment standards based on technology. On the other hand, the legislation's supporters contended that while the CWA's permit-based approach works well for industrial plants and other fixed, stationary dischargers, it would not work well for mobile sources, such as vessels, particularly if state-issued permits were to call for requirements that could vary from one location to another.

The federal courts have held that EPA already could have promulgated effluent limitation guidelines for ballast water and other vessel discharges. The Clean Water Act prohibits the discharge of pollutants from a point source into the navigable waters of the United States without

[10] H.R. 2830 did not prohibit more stringent state standards in so many words. Rather, it would have prohibited a state or local law that is "inconsistent with" or "conflicts with" the federal law. It is not a foregone legal conclusion that a state standard more stringent than its federal counterpart is "inconsistent with" or "conflicts with" the federal law.

a permit. Vessels are defined in the law as point sources. In 1973, EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels (including ballast water, but not including sewage vessel discharges, which are regulated under CWA Section 312) from CWA permitting requirements. This long-standing regulation was challenged in federal district court by environmental advocacy groups who wanted EPA to address ballast water as a source of ANS. In 2005 the court found that Congress had directly expressed its intention that discharges from vessels be regulated under the CWA, and that the regulation at issue contradicted that intention. In September 2006 the court issued a final order vacating (revoking) the regulatory exclusion as of September 30, 2008. The Ninth Circuit U.S. Court of Appeals upheld the district court's ruling on July 23, 2008.[11] On June 17, while waiting for the court of appeals or Congress to provide relief from the district court's order, EPA proposed two CWA general permits in order to respond to the court, one applicable to commercial vessels and one applicable to small recreational vessels.[12]

A general permit covers multiple facilities within a specific category for a specific period of time (not to exceed five years), after which it expires. Categories covered by general permits have common elements, such as similar types of operations that discharge the same types of wastes. Because of the large number of potential sources of vessels, EPA believed that it made administrative sense to use general permits, rather than individual permits. On August 31, the federal district court agreed to EPA's request to delay vacatur of the regulatory exemption until December 19, 2008, to ensure that permits could be issued before the exemption is eliminated. EPA finalized a Vessel General Permit for vessels subject to a permit requirement on December 18. The permit became effective on December 19, 2008. However, on the same day, the federal district court granted an EPA motion to delay vacatur of the existing exclusion in 40 CFR § 122.3(a) until February 6, 2009. Thus, the effective date remains December 19, but regulated sources need not comply with terms of the permit until February 6, 2009.

# Requirements of EPA's Vessel General Permit

In July 2008, Congress enacted legislation (P.L. 110-299) that provides a two-year moratorium on CWA permitting for discharges from commercial fishing vessels and non-recreational vessels less than 79 feet in length. During the moratorium, EPA is to study the discharges from these vessels and submit a report to Congress. However, this legislative action did not exempt or provide a permitting moratorium for all discharges from all types of vessels. The Vessel General Permit (VGP) finalized by EPA in December gives permit coverage to an estimated 69,000 commercial vessels and large recreational vessels that were not affected by P.L. 110-299, including tankers, freighters, barges, and cruise ships, many of which do use ballast water in their normal operations.[13] It applies to pollutant discharges incidental to the normal operation from non-

[11] Northwest Environmental Advocates v. U.S. Environmental Protection Agency, No. 03-74795, 2008 WL 2813103 (9th Cir. July 23, 2008).

[12] U.S. Environmental Protection Agency, "Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of Vessels," 73 *Federal Register* 34296-34304, June 17, 2008. Small recreational vessels generally do not utilize ballast water. Thus, this group of vessels is not of interest in connection with ballast water management policy. However, in July, Congress passed S. 2766, a bill which exempts small recreational vessels and commercial fishing vessels less than 79 feet in length from new CWA permitting requirements, which eliminated the need for EPA to issue this permit. President Bush signed the bill on July 29 (P.L. 110-288).

[13] U.S. Environmental Protection Agency, "Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel," 73 *Federal Register* 79473-79481, December (continued...)

recreational vessels that are 79 feet or more in length, and to ballast water discharges from commercial vessels of less than 79 feet and commercial fishing vessels of any length. The VGP prescribes technology-based effluent limits for 26 effluent streams or discharge types, including ballast water discharges.

The only available evidence of how EPA would approach ballast water management, under its CWA authority, is reflected in this permit. Its ballast water requirements are minimal, largely requiring what current Coast Guard rules require.[14] Like H.R. 2830, the VGP mandates mid-ocean ballast water exchange for ships traveling outside the 200-nautical-mile exclusive economic zone (EEZ) of the United States. This requirement already applies under the Coast Guard's 2004 mandatory ballast water management rule (codified at 33 CFR Part 151). EPA's VGP also requires ballast water exchanges at least 50 nautical miles from shore for vessels engaged in Pacific nearshore voyages, which are not covered by the Coast Guard's mandatory exchange procedures. Further, like H.R. 2830, the VGP requires vessels that declare they have "no ballast on board" either to seal the ballast tanks to prevent any discharge or to carry out saltwater flushing.

Like H.R. 2830, the VGP includes requirements that vessels maintain a log book and records of ballast water management and submit reports of noncompliance to EPA annually (H.R. 2830 would have required that reports be submitted monthly to the Coast Guard). Vessels would be required to comply with these requirements upon the effective date of the permit. As noted above, the effective date of the permit was December 18, but on that date, the district court agreed to EPA's request to delay the vacatur of the existing regulatory exclusion until February 6, 2009.

Significantly, unlike H.R. 2830, the VGP does not include numeric limits on living organisms or pathogenic discharges. Some environmental groups have advocated that EPA issue such standards. EPA explained this position in a fact sheet accompanying the VGP.[15]

> EPA is not requiring any numeric treatment standards for the discharge of living organisms as part of this permit issuance and is instead requiring management practices (e.g. ballast water exchange) that decrease the risk of ANS introduction. EPA is proposing this approach because treatment technologies that effectively reduce viable living organisms in a manner that is safe, reliable, and demonstrated to work onboard vessels are not yet commercially available ... [R]equiring a numeric effluent limit for the discharge of living organisms is not practicable, achievable, or available at this time.... EPA will consider establishing treatment requirements in the next generation of permits [i.e., no sooner than 2013] that will provide for compliance with treatment standards that will be expressed as units of living or viable organisms per unit of volume in ballast water discharge.

(...continued)

29, 2008.

[14] Separately, under CWA Section 312(n), EPA and the Navy are developing national performance standards (Uniform National Discharge Standards, or UNDS) for discharges incidental to the normal operation of Armed Forces vessels. Ballast water releases from Armed Forces vessels have been identified for inclusion in UNDS requirements, and in 2004, EPA and the Navy began collecting data and performing necessary technical analyses. No information is available on when these rules will be proposed, or details of what they might require.

[15] U.S. Environmental Protection Agency, *2008 Final Issuance of National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP) for Discharges Incidental to the Normal Operation of Vessels Fact Sheet*, December 2008, pp. 62-63.

There is no way of knowing today what kind of treatment requirements EPA might adopt at a later date, how they would compare with the standards in H.R. 2830, with the IMO ballast water convention standards which are unlikely to come into force for some time, or even with California's more stringent standards.

The VGP includes no special enforcement provisions, but would use existing provisions of the CWA. That act authorizes administrative (civil) and judicial (civil and criminal) enforcement of the law, including permit violations. In addition, as noted above, persons may bring a citizen suit in U.S. district court against persons who violate a prescribed effluent standard or limitation. Proponents of H.R. 2830 pointed out that CWA citizen suits would be limited to demonstrating noncompliance with the minimal provisions of the VGP.

Some of the groups that were critical of H.R. 2830 took the position that the VGP is a good first step toward regulating ballast water discharges through the CWA, but in comments submitted to EPA, they recommended improvements in a number of areas.[16]

As previously described, CWA Section 505 allows individuals to bring CWA citizen suits against the Administrator of EPA for failure to carry out a nondiscretionary duty under the act. Following issuance of the VGP in December, 2008, some of the same environmental advocacy groups that originally challenged EPA for not addressing ballast water as a source of ANS brought suit in federal court, asserting that the ballast water provisions of the permit fail to meet federal requirements because it allows ships to discharge untreated ballast water containing invasive species.[17]

# Concluding Thoughts

Two existing provisions of NANPCA expressly state that regulations governing ballast water discharges in the Great Lakes and voluntary national guidelines issued pursuant to current law 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 [CWA]."[18] H.R. 2830 would have deleted those two provisions. There was no similar language in H.R. 2830; the bill was facially silent regarding the CWA.[19] As discussed previously, until it issued the VGP, in response to the federal court's order, EPA had not used the CWA or any other statutory authority to address ballast water.

CWA Section 303 is a central part of the statute. It authorizes states to adopt water quality standards that include criteria which are necessary to protect the use or uses of particular waterbodies. These standards are the basis for establishing water quality-based treatment controls and for determining specific limits in CWA discharge permits. Although few have apparently

[16] Northwest Environmental Advocates, et al., Comments on Docket ID No. EPA-HQ-OW-2008-0055 (VGP), July 31, 2008.

[17] Stanford Environmental Law Center, "Environmental Organizations Sue Agency over Ship Discharges and Invasive Species," press release, January 12, 2009, http://www.law.stanford.edu/news/pdf/EPA_Permit_Challenge_Press.pdf.

[18] 16 U.S.C. § 4711(b)(2)(C) and (c)(2)(J).

[19] Critics of H.R. 2830 said that the bill was not really silent with respect to the CWA, because it would have replaced an affirmative statement in federal law that preserves the CWA with legislation that gives no congressional directive about whether the CWA would continue to apply.

done so, states arguably could use this authority to adopt water quality standards to protect waters from aquatic invasive species. It is arguable that the preemption language in H.R. 2830—for "any provision of state or local law this is inconsistent with" or "conflicts with" the legislation's requirements concerning ballast exchange and treatment standards—would also have preempted inconsistent or conflicting state water quality standards.

Some who favored H.R. 2830, as passed by the House, contended that if the legislation were enacted, arguably it would not bar EPA from using CWA authority to address ballast water discharges—at least in a way not inconsistent with NANPCA, as it would be amended by H.R. 2830. The specific preemption language in the bill, described above, addressed state or local laws that are inconsistent with H.R. 2830. It did not address potentially separate federal requirements under other authority which could raise a different question of reconciling overlapping federal statutes. First, H.R. 2830 did not explicitly prohibit EPA from finalizing the draft VGP for vessels that do not benefit from the two-year moratorium in P.L. 110-299. Second, H.R. 2830 did not explicitly prohibit EPA from including ballast water requirements for the exempted vessels (e.g., commercial fishing vessels) in the VGP after the two-year moratorium expires. As noted, the ballast water requirements in the VGP are minimal, but H.R. 2830 did not expressly prohibit EPA from re-issuing the VGP later with more stringent requirements, or from taking other actions that EPA determines are appropriate. And third, H.R. 2830—which focused on harmful living microorganisms and sediment in ballast water—did not explicitly prohibit EPA from addressing other contaminants that could be present in the discharge (e.g., toxic chemicals, oil, or particulates that were found in the waters where the ballast was brought on board).

However, uncertainty about these points was central to the debate about the legislation. Critics of H.R. 2830 asserted that, by superseding NANPCA's existing savings clause, the legislation *could* be read as limiting the application of the CWA to invasive species in ballast water discharge. If it were read in that manner, they contended, it would backtrack from longstanding provisions of law previously adopted by Congress in NANPCA and NISA, thus weakening existing law. From their perspective, the result could exclude states and the public from participating in most regulatory decisions, place environmental decisions in the hands of the Coast Guard rather than EPA, preclude EPA and citizen enforcement actions under the CWA, and freeze development of improved technology-based treatment standards.[20]

Finally, it should be noted that the federal court's order that EPA must regulate "discharges incidental to the normal operation of vessels" (discussed previously) continues to apply, even if H.R. 2830 or other similar ballast water legislation had been enacted.[21] Thus, except for categories of vessels exempted or covered by a temporary delay pursuant to congressional action (e.g., P.L. 110-288 and P.L. 110-299), even if similar legislation were to be enacted in the future, EPA still is required to regulate vessel discharges such as deck runoff, oily bilge water releases, and graywater (laundry and sink wastewater) discharges.

[20] Henry Henderson, program director, Natural Resources Defense Council, Midwest Office, et al., letter to Honorable Richard Durbin, July 25, 2008.

[21] If H.R. 2830 or other legislation were enacted, presumably EPA could petition the federal court to rescind its order, in light of congressional action.

## Author Contact Information

(name redacted)
Specialist in Resources and Environmental Policy
[redacted]@crs.loc.gov, 7-....