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An international coalition to protect and restore the Great Lakes and St. Lawrence River

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Understanding the moving administrative, legislative, and litigation pieces of ballast water regulations

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Legislative History (pre-2008)

In response to the zebra mussel invasion, Congress passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, which included voluntary measures to protect the Great Lakes from invaders in ballast water. When this law was reauthorized in 1996, some incremental improvements were made, such as requiring ballast tank flushing, and it was renamed the National Invasive Species Act (NISA). Both bills relied on the Coast Guard as the lead federal agency. There are a number of significant gaps in NISA: ballast water exchange is the main prevention tool, lakers are exempted from regulation and and hitchhikers on hulls are not addressed.

NISA came up for reauthorization in 2002. In both the House and Senate, bills (the National Aquatic Invasive Species Act - NAISA) were introduced to address aquatic invasive species in a comprehensive manner. This included addressing issues such as screening, rapid response, research, education, state management plans, and ballast water management. For two years subcommittees held hearings, staff briefings were hosted, and NGOs worked on raising awareness of the need to stop aquatic invasive species. Passage of NAISA was also a key recommendation in the Great Lakes Regional Collaboration. Comprehensive aquatic invasive species legislation ultimately was overshadowed as other bills took precedence during the remainder of 2005-06. NGO's won significant victories in Congress in 2005-06 by blocking a weak ballast-only bill in the Commerce Committee that was championed by the shipping industry (the Ballast Water Management Act - BWMA). The BWMA threatened the movement of NAISA and would have set a dangerous precedent by superseding the Clean Water Act (CWA) and preempting states rights. Despite the bill's fatal flaws, it did contain a few provisions that were improvements over NAISA's ballast water program; namely, it set a rigorous ballast water discharge

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standard in legislation, as opposed to relying on the Coast Guard to define a standard.

In 2007, key Congressional champions expressed concerns regarding the difficulty of moving a comprehensive bill through the committees of multiple jurisdictions in both the Senate and the House. Senators Levin and Voinovich wrote a letter to the Commerce Committee requesting that Commerce address specific flaws with the BWMA and move the bill through committee. Discussions with staff in the Senate Environment and Public Works Committee (EPW) revealed that moving NAISA ranked low on the list of priorities of incoming Chairwoman Boxer. Also that year, Representative Oberstar, chairman of the House Transportation and Infrastructure Committee, introduced and quickly moved to the House floor the Coast Guard Authorization Act, which included a full ballast-water program.

Litigation History Under the Clean Water Act (pre-2008)

At the same time that legislation was moving slowly, parallel action was being pursued. In 1999, fourteen NGOs petitioned the EPA to reverse 28 years of failure to comply with the Clean Water Act and to develop regulations for ships' ballast discharges in order to reduce the amount of species invasions. The opportunity to use the CWA to develop specific water quality standards for waterbodies across the U.S. through the development of a TMDL (total maximum daily limit) for biological pollutants is a powerful mechanism to advance the strongest national legislative or EPA solution that would protect all waterbodies.

After no response, in 2001, the coalition demanded that EPA respond or legal action would be initiated. In 2002, after an unsatisfactory response, legal action was filed by a group of Westcoast NGOs.

In 2005, a Federal court in California ruled that the EPA failed to regulate pollution in ballast tanks under the Clean Water Act. In 2006 the court directed the EPA to regulate ballast water discharges by September 30, 2008. The EPA appealed, but also began to develop a general permit for commercial and recreational vessels in case the appeal was not decided before September 30, 2008. Had the appeal not been resolved in time, any ship discharging ballast water would have been violating the CWA and subject to enforcement lawsuits. The general permit for commercial vessels largely relied on the existing Coast Guard's mandatory ballast water management and exchange standards, as well as the NOBOB flushing requirements mandatory in the Great Lakes, for vessels that carry ballast water.

Both the legislative approach and legal approach dovetailed in 2008.

Legislation Developments in 2008

In April 2008 the U.S. House of Representatives passed the Coast Guard Authorization Act

(H.R. 2830), which contained the Ballast Water Management Act (Title V). The bill passed by a vote of 395 to 7. Due to well coordinated efforts of the NGO community, Title V embodied most of the best provisions from the previous five years of legislative efforts including a federal discharge standard 100 times more stringent than international standards and an aggressive deadline for implementation of cleaning technology, beginning in 2009. The bill was silent on the Clean Water Act and state authority.

The Senate had already passed its version of the Coast Guard authorization bill out of committee, and unlike the House bill, the Senate bill did not contain a ballast title. With successful Clean Water Act lawsuit developments emerging, Senator Barbara Boxer from California placed a hold on the bill, due to her concern that silence implied the federal authority of the Clean Water Act would be undermined and state's rights would be preempted. This issue created a tense negotiation between the EPW and Commerce committees with neither committee willing to offer compromise. The inability of the committees to compromise precipitated debate throughout the environmental NGO community over whether immediately securing a strong national ballast water standard and timeline for implementation under a Coast Guard-led program was better than pursuing improvements to the EPA program, which was much weaker but ensured strong legal enforcement under the Clean Water Act in the long run, or whether "silence" on the Clean Water Act actually implied such a trade off. The concerns in the Senate were not resolved in time for the Coast Guard Authorization Act or a stand alone ballast bill to pass before the November 2008 elections, and the bills died.

Litigation Developments Under the Clean Water Act in 2008

In July, 2008 the US Court of Appeals in California upheld the original Federal district court decision and the EPA was on course to put in place a permit for commercial vessels by September 2008. The national permit was weak, essentially rubberstamping the existing Coast Guard ballast water exchange requirements and St. Lawrence Seaway's NOBOB flushing requirement. After multiple court permitted extensions, the final permit was issued on February 6, 2009.

Under the Clean Water Act, states have the authority to go beyond the minimum Federal standards and require greater protections for their waters. Across the Great Lakes, states took that authority and certified 401 permits that exceeded the national EPA requirements. Seven Great Lakes states require, at a minimum, compliance with the International Maritime Organization's ballast water discharge standard by 2016 for ocean-vessels docking at state ports (Michigan is notably absent from this list, having set specific treatment requirements much earlier, but retains the ability to require IMO compliance). In a bold move, New York and Wisconsin have put in place standards at least 100 times more stringent than IMO by 2012; Pennsylvania adopted the 100 x IMO standard for new builds. Also, Minnesota, Illinois and Pennsylvania require lakers to comply with the IMO standard by 2016. New York requires lakers to meet the 100 x IMO standards by 2012.

Given the irregularity of regulations across the Great Lakes region and nation, lawsuits quickly emerged. The shipping industry has filed suit against New York for putting in place requirements that cannot be met; NGO's have sued Minnesota for not putting in place strong enough regulations, and NGOs have sued the EPA for putting in place a weak and illegal permit.

What Does 2009 Hold?

All the developments over the past 10 years have resulted in a dramatically different regulatory landscape in 2009. Previously, only the Coast Guard (and St. Lawrence Seaway) had clear regulatory authority over ballast, and the NGOs approach and access to gaining improved protections was limited. Now, with the EPA and the states having authority to regulate ballast water, administrative action on the part of multiple federal agencies is a viable approach to achieving strong ballast water discharge standards, as is a legislative approach. In fact, an administrative approach may be a much more viable option given that no change in political positioning between key Senate committees. Also encouraging is that the new EPA Administrator, Lisa Jackson, stated in February 2009 at Great Lakes Day that the agency is reconsidering the general permit. Ongoing verbal notifications from Coast Guard personnel are that a national ballast water standard rulemaking is imminent. Further, if Federal action (administrative or legislative) fails, strong state action can continue to lead protections here in the Great Lakes region.

It should be noted that after decades of avoiding the problem, engagement in this issue is at an all time high. Congressional leaders, multiple federal agencies, eight Great Lakes states and the NGO community are engaged in finding the path to a strong national standard. All our work over the years has also informed us exactly where the political roadblocks are: preempting state and Clean Water Act authority will stop negotiations dead in its tracks. At this time it is important to reiterate the goal of efforts to regulate ballast: Prevent the introduction, and control the spread, of aquatic invasive species hitchhiking in, or on, vessels operating in waters of the U.S. including the Great Lakes-St. Lawrence River. This means addressing ballast, hulls, anchors and sea chests for both ocean-going, coastal, and lake vessels.

Here are the opportunities this year:

Administrative:

- Strengthen the national EPA vessel general permit for commercial vessels to require a strong national ballast water discharge standard, such as that adopted by the states of New York and California, and ensures that lakers and coastal vessels do not spread invasive species.
- Set a strong national ballast water discharge standard through rulemaking, under current Coast Guard authority in NISA. As NISA currently contains a savings clause for

federal and state authorities, setting a standard through this vehicle may be an option to make significant progress.

Legislative:

- Support passage of new ballast-water legislation this Congress that sets a strong national ballast water discharge standard, such as that adopted by New York and California for all ocean vessels coming to the U.S., and ensures that lakers and coastal vessels do not spread invasive species. Given the new authorities that emerged in 2008, a legislative approach could place the EPA, the Coast Guard, or some combination of both, in charge of different aspects of the program. Clean Water Act authority, citizen suits, and state authority must be preserved.

Regional approach (State/International needs):

- Support state efforts to harmonize state regulations across the Great Lakes region, coordinating to the highest state standard, such as that adopted by the states of New York.
- Coordinate Federal, or state, efforts with ballast water regulations in Canada. Currently the Canada Shipping Act sets the IMO standard as the national standard, but does not articulate an implementation schedule.

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