

December 4, 2007

The Maritime Industry Supports A National Ballast Water Program and S. 1578, the Ballast Water Management Act of 2007

Dear Member of Congress:

As ships load and unload their various cargoes at ports, they need to also take on and discharge ballast water to ensure vessel stability, trim and safety. The water pumped onboard to become ballast, however, may contain various aquatic species from that harbor. Many of these are unlikely to survive the voyage or survive in a new environment; however, when that ballast water is discharged at a subsequent port, there is a known risk that they might establish a reproductive population in the new environment. As a result of this risk, the unintentional transportation of marine species in ballast water is an environmental issue requiring attention.

The maritime industry has worked closely with the government to take interim steps to address this issue. International shipping vessels now engage in what is called “mid-ocean ballast water exchange”, where they discharge their ballast water taken on in port environments and replace it with mid-ocean water that poses a very low environmental risk. This process is roughly 95% effective at flushing out coastal ballast water from a ship’s tanks.

To make further progress on this complicated challenge will require the installation of technology on vessels to treat ballast water, without making the treated water harmful to the ship or to the environment when discharged.

The Ballast Water Management Act of 2007 (S. 1578) establishes a comprehensive and effective approach to the issue of addressing the risk of ballast water discharges, including a process to establish an effective national treatment technology standard. It is a good bill for the environment.

Congress should pass S. 1578 and establish a clear standard for what would be expected of vessels calling in U.S. ports.

The Problem:

NPDES Permits Are Not an Effective Mechanism for Regulating Ballast Water

An objection has been raised to S. 1578 on the ground that the National Pollutant Discharge Elimination System (NPDES) permitting mechanism under the Clean Water Act (CWA) is a more appropriate system for regulating ballast water than the ballast-water-specific system to be created under S. 1578. Unfortunately, this is not true, and should not be a reason to block passage of the Inouye bill.

Because of the structure of the CWA and the NPDES permitting program, vessels visiting ports in more than one state (which is very common in most sectors of the maritime industry) could be subjected to different permit requirements in each state that they visit. To the extent that different states impose different discharge standards and/or require different treatment technologies to be employed, vessels will be unable to comply with these multiple standards.

The United States needs a single standard for vessels to meet so that they can install the necessary treatment technology and know that it will be acceptable in whatever U.S. port they call. Many vessels have no idea which U.S. port they will be calling when they are built.

The CWA provides predictable standards for facilities that operate in one state's jurisdiction. The structure of the CWA and the NPDES permitting system, however, virtually guarantees that a vessel making port calls in multiple states will be called upon to meet different and conflicting standards in each of those states. Under section 402(b) of the CWA (33 U.S.C. § 1342(b)), the EPA Administrator must delegate NPDES program authority to a requesting state unless the Administrator finds that one of the statutory disqualifying conditions exists. Once program authority is delegated, the Administrator loses authority to issue permits within the scope of the state's delegated program. There is no requirement that state programs be consistent with one another. Once a state program has met the minimum standards set by the EPA, the state is free to add additional, more stringent requirements to the permits that it issues.

The Clean Water Act's NPDES system works well for stationary sources, because the state in which the facility and the regulated discharge occur does not change. It has never been applied to normal ship operations. With vessels, the point source (i.e., the ship) literally is a moving target. Most vessels serving America's foreign commerce spend most of their time outside the U.S., and when they do arrive, a single voyage may result in port calls in two, three, and sometimes four different states within a matter of weeks or even days. Vessels operating in domestic service also travel to and through the waters of multiple states. The vessel and its equipment -- especially its ballast water treatment equipment -- cannot change between ports. The vessel is capable of doing only what the vessel is designed and built (or retrofitted) to do. There simply is no mechanism by which differing state requirements can all be met by a single vessel.

Attempting to apply the NPDES permitting system to vessels will weaken, not strengthen, the Clean Water Act and the NPDES system. A Clean Water Act regime would create a system that requires vessels either to violate a state's laws or cease making port calls in states with requirements that are inconsistent with the ballast water technology that the vessel has installed in response to an earlier-enacted regulation from another state.

An insistence on regulating ballast water under the NPDES program will have a substantial negative impact on international trade. It could cause ports to be dropped from vessel schedules. It would create confusion regarding what technology is required

to serve U.S. commerce. It will create confusion and disincentives for those companies trying to develop ballast water treatment technologies – companies that need to have an assurance of what treatment standard their product needs to meet.

And, the CWA approach is incompatible with the emerging international legal regime regulating ballast water. In contrast, S. 1578 is consistent in approach with the “International Convention for the Control and Management of Ships' Ballast Water and Sediments”, and it can serve as the United States’ implementation of that treaty (the convention allows the U.S. to establish a higher national treatment standard, which S.1578 does). The Clean Water Act’s NPDES system would not be compatible with implementation of this treaty.

The Solution:
The Ballast Water Management Act of 2007 (S. 1578)

Anticipating and addressing these practical and political issues now is what S. 1578 does. It will provide the most efficient and prompt route to meaningful ballast water control measures.

The issue of having multiple state standards applicable to point sources in the context of the Clean Water Act is not a new one. Addressing the question of whether a state affected by a discharge in another state could maintain a common law nuisance claim under the affected state’s law against a NPDES-permitted discharge in the source state, the Supreme Court held that applying multiple standards to a single discharge would be unworkable and would undermine the Clean Water Act:

“After examining the Clean Water Act as a whole, its purposes and its history, we are convinced that if affected states were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the “full purposes and objectives of Congress.”

International Paper Co. v. Oullette, 479 U.S. 481, 478 (1987). The particular legal issue in *Oullette* was different, but the practical problem faced there was precisely the same as here: it is not workable in practice to submit a single point source to multiple permitting requirements. That is even more certainly true when that source is by necessity a mobile vessel engaged in interstate or foreign commerce. The practical differences between stationary sources and mobile ship sources require that the two situations be treated differently.

To recognize that fact is not “a direct attack on the [Clean Water] Act itself” as some have alleged. It is instead recognition that there will be no national or international progress on this important environmental issue until the federal government is able to put an effective regulatory system in place.

S. 1578 is a good bill for the environment. We urge the relevant Senate committees to come to agreement and pass the Inouye bill now.

Sincerely,

American Waterways Operators
Chamber of Shipping of America
Cruise Line Industry Association
INTERTANKO
Lake Carriers' Association
World Shipping Council