

**Citizens for Clean Columbia ♦ Columbia Riverkeeper ♦ Conservation Northwest ♦  
Environment Washington ♦ Northwest Environmental Advocates ♦ Northwest  
Environmental Defense Center ♦ Pacific Marine Conservation Council ♦ People for  
Puget Sound ♦ Rivervision ♦ Rosemere Neighborhood Association ♦ Skippers for Clean  
Oregon & Washington Waters ♦ Wahkiakum Friends of the River ♦  
Washington Toxics Coalition ♦ Waste Action Project ♦ Wild Fish Conservancy**

May 20, 2008

The Honorable Maria Cantwell  
U.S. Senate  
Washington, D.C. 20510

Re: **H.R. 2830 Title V – Undermines EPA and State Authority to Regulate  
Invasive Species and Chemicals in Ballast Water**

Dear Senator Cantwell:

We write knowing you share our concerns about the serious threat invasive species pose to Washington's and the nation's waters. The recent passage of the Coast Guard Authorization Act of 2008, H.R. 2830, which includes Title V, the Ballast Water Treatment Act of 2008, raises serious issues regarding the nation's ability to control invasive species including current and future efforts by the State of Washington. As passed, H.R. 2830 is unacceptable because, while largely preempting State efforts and Clean Water Act authorities, it provides a slower and less effective approach in their place. As our Senator and the Chair of the Commerce Committee's Oceans, Atmosphere, Fisheries, and Coast Guard Subcommittee, we urge you to address these problems in any conference with the House by making significant changes to Title V to address these concerns including strengthening and preserving State authority, insuring adequate standards for treatment technology, and a range of other protections that are provided by the Clean Water Act. If this is not possible, then Title V should be removed from the bill.

Washington has been a leader in the effort to reduce and eventually eliminate the spread of harmful invasive species having first passed laws requiring ballast water treatment in 2000. During the 2006 state legislative session, the Washington Legislature passed a new bill with an effective date of July 22, 2007, resulting in the Washington Department of Fish and Wildlife's adopting new emergency rules on August 14, 2007. Most recently, after discussions with the shipping industry, Washington is planning to adopt the equivalent of the stringent California treatment standards this summer. It would be very bad public policy for the State of Washington and the health of its waters for Congress to pass federal legislation that may allow effective treatment standards to be postponed until 2021 for many if not most ships and would preclude Washington's planned adoption of more stringent standards. Moreover, it is imperative that the state be permitted to supplement Coast Guard implementation of ballast water laws, by conducting inspections and operating compliance programs. H.R. 2830 does not allow for full state implementation of the program.

### **H.R. 2830 Preempts All Future and Most Existing State Treatment Programs.**

Washington's efforts and its plans are now in peril of being overturned by the provisions of H.R. 2830, which would preempt both Washington's statutes and its regulations because the bill only allows state treatment programs to remain in place if they were effective on January 1, 2007. The bill could also preempt the efforts already made by California. Only Michigan's existing program clearly would be left standing<sup>1</sup> and only until 2012 when all State programs would be preempted. All future actions by States, including near term actions planned by Washington and Minnesota, are clearly precluded.

### **H.R. 2830 Unacceptably Postpones Treatment Standards.**

As currently drafted, the bill would preempt faster State treatment time lines. On its face, the bill appears to require its federal treatment standards to be installed between 2012 and 2015. However, the bill also includes two provisions that work together to significantly postpone that time frame. First, the bill requires ships to install lower (IMO) level treatment equipment in 2009-2011. Then, the bill allows ships to use treatment equipment installed during this period to continue to be used for ten years. The result is an extension of the treatment time lines to 2019-2021. In contrast, California's treatment standards apply to new ships in 2009-2012 and existing ships by 2014-2016.

### **Use of the IMO Treatment Standard Under the Bill is Unacceptable.**

The equipment provision that would allow installation of IMO-level treatment equipment, and then "grandfather" that equipment, is itself cause for great concern. These international standards have been the subject of recent discussions within the Washington Ballast Water Task Force. In this context, environmental organizations and shippers concluded that the IMO standards are not better and possibly worse than ballast water exchange. The Washington Department of Fish and Wildlife has concluded that IMO treatment standards are generally less effective than open water exchange.<sup>2</sup> Moreover, the IMO standard is dramatically less protective than the proposed treatment standard in H.R. 2830, which itself is far less protective than the treatment standard adopted by California and proposed for adoption in Washington State (*see* Comparison of Ballast Water Treatment Standards, attached). Requiring ships to install substandard treatment equipment only to have to retrofit it later is bad policy.

### **H.R. 2830 Preempts More Stringent State Standards.**

In preempting most State treatment requirements, H.R. 2830 would preclude the application of treatment requirements that are more stringent than those contained in the bill. California's treatment standards – which are mirrored by Washington's proposed rule – are more strict on controls for larger and mid-sized living organisms than the federal standards in the bill. In addition, California has treatment limits for the smallest living organisms – bacteria and viruses – in contrast to H.R. 2830 which has limited standards for bacteria and no standard for viruses. Finally, the bill appears to deregulate the chemicals and oil contained in ballast water discharges

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<sup>1</sup> *See Fednav, Ltd. v. Chester*, 505 F.Supp 2d 381 (E.D. Mich., 2007), *appeal pending*, No. 07-2083 (6th Cir.) (rejecting shipping industry challenges to Michigan's ballast water law).

<sup>2</sup> Pleus, Washington Department of Fish and Wildlife, Comparison of Ballast Water Treatment Standards: Number of Introduced Organisms, May 6, 2008.

because it could be read to preclude the Clean Water Act yet it puts nothing in place to regulate these other constituents in ballast water. As a result of the State preemption language in H.R. 2830, Washington and possibly California would lose the most stringent ballast water treatment requirements in the nation. Oregon would be precluded from following its neighbors (thereby creating a “West Coast ballast treatment standard”) despite statements by agency staff that Oregon would likely follow Washington’s lead.

**Implementation is Key, Yet H.R. 2830 Will Not Improve Implementation and Will Likely Hamper It.**

Currently, States such as California, Washington, and Michigan have vessel inspection programs which allow them to verify compliance and monitor the effectiveness of exchange and treatment systems. California has, for example, a very large staff which tracks ballast water management, compliance, and enforcement of more than 750 vessel arrivals every month, funded by vessel fees which generate over three million dollars annually. Washington currently has two inspectors, although if the State were to use NPDES permits, fees would automatically go into effect, allowing the State to significantly expand its inspection and enforcement program.

The importance of having State inspection programs cannot be overestimated. While the federal Coast Guard does have inspection programs, the multi-mission nature of the agency has compromised its effectiveness. The Coast Guard must evaluate compliance with a wide range of laws applying to vessels – everything from homeland security and navigational safety to oil spill prevention. Given this, the Coast Guard is challenged to prioritize inspections of vessels which are at high risk of improperly discharging ballast water. In addition, the nature of Coast Guard inspections tends to be less thorough than a comparable State inspection given the broad spectrum of programs the service administers. Finally, Coast Guard compliance policies often vary dramatically from those of State natural resource agencies. For all these reasons it is essential that States be equal players with the federal government.

While H.R. 2830 does allow a State to petition the Coast Guard to conduct inspections and compliance programs, the Coast Guard has a history of objecting to such State programs, leaving real questions as to whether the service would approve these requests or what constraints might be placed on approved State programs. The Coast Guard joined with shippers, for example, to strip Washington’s authority to conduct oil spill prevention programs under the landmark *Intertanko v. Locke*<sup>3</sup> case.

**Ballast Water Should be Regulated by the EPA, not the Multi-Mission Coast Guard.**

As you know, the Coast Guard is responsible for national security, maritime safety, facilitating commerce, and oil spills. The service is already suffering from insufficient resources and too diverse a mission which is hampering its ability to carry out its existing mandates. Its priorities with regard to ships – whether manifested in which ships it chooses to board, the time allocated to various inspections, the qualifications of its inspectors – are based on the Coast Guard’s primary missions, not environmental protection. The service’s loss of effectiveness in its key mission of marine safety was demonstrated yet again in its highly flawed casualty inspections following the collision of the COSCO BUSAN with the San Francisco-Oakland Bay Bridge on

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<sup>3</sup> *United States (Intertanko) v. Locke*, 529 U.S. 89, 00 C.D.O.S. 1763 (2000).

November 7, 2007. Asking the Coast Guard to take on a significant additional role when it cannot effectively carry out its key missions is wrong. The appropriate federal agency to address issues of water quality impacts and treatment of polluted water is the U.S. Environmental Protection Agency. For example, in Section 1101(f)(4), the bill gives the Coast Guard authority to approve treatment technology. This authority should be vested with the EPA, an agency with several decades of experience approving treatment technologies.

**If H.R. 2830 is Read to Override Clean Water Act Provisions, Many Gaps Are Left.**

By superseding the existing invasive species law's "savings" clause, the H.R. 2830 could be read as limiting the application of the federal Clean Water Act (CWA) to ballast water discharges. That would be a very damaging outcome that Congress must ensure does not result from any federal legislation in this area. There is little in H.R. 2830 that adds environmental protection that the Clean Water Act does not already provide – and will provide much more quickly.<sup>4</sup> The CWA already requires EPA, the nation's preeminent water quality authority, to develop and regularly revise uniform minimum treatment standards based on technology; assures protection of public health and the environment by requiring discharge permits to meet State water quality standards; requires discharge permits be renewed every five years, at which time States, EPA, and the public can re-evaluate treatment levels, monitoring results, and compliance; and has an enforcement scheme that allows States, EPA, and citizens to bring actions against sources discharging without a permit or in violation of permit conditions.

In contrast, H.R. 2830 damages the existing federal scheme by likely deregulating chemical and oil discharges from ballast tanks; excluding States and the public from participating in most regulatory decisions; placing environmental decisions into the hands of already-overburdened Coast Guard; precluding EPA and citizen enforcement actions; and replacing routinely filed discharge monitoring reports that are now readily available to the public with making reports available, if at all, through the heavily backlogged Freedom of Information Act.

We understand that the shipping industry's greatest concern regarding the CWA is the possibility ships will be subject to different treatment requirements. Yet States very much want consistent treatment standards as well and most States have inadequate resources with which to develop them. If EPA were to issue sufficiently stringent and near-term treatment standards, pursuant to its existing CWA authorities, States would readily adopt them into permits, resulting in a consistent standard. Even without EPA's involvement, the States on the West Coast are doing just that. With Washington poised to adopt California's standards this summer, there are strong assurances that Oregon would not be long behind, resulting in the three States having adopted a

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<sup>4</sup> See *Northwest Environmental Advocates v. U.S. EPA*, No. 03-05760 (N.D. Cal., Sept. 18, 2006) (ordering that EPA's regulatory exclusion from Clean Water Act permitting for "discharge incidental to the normal operation of a vessel" will be vacated on September 30, 2008), *appeal pending*, Nos. 03-74795, 06-17187, 06-17188 (9 Cir.); *State of Minnesota ex rel., Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, File No. 62-CV-07-2224 (Ramsey Co. Dis. Ct., State of Minnesota, April 21, 2008) (court ordered Minnesota Pollution Control Agency to begin issuing Clean Water Act discharge permits to ships by October 1, 2008 to stop or mitigate the spread of Viral Hemorrhagic Septicemia).

consistent treatment standard.

At the same time, the CWA allows States to adopt treatment levels that are consistent with their need to protect their waters from invasive species with their attendant environmental and economic impacts on industrial and drinking water intakes, threatened and endangered species, and the harvest of commercially-important fish and shellfish. Certainly States are well aware of the economic benefits of shipping to their State economies and can be trusted to weigh those considerations against the impacts of ships' pollution.

### **Conclusion**

In short, we fear Title V of H.R. 2830 will perpetuate the economic and environmental harm of invasive species for many years to come. State law and the Clean Water Act provide essential tools for controlling water-borne invasive species in the United States. We urge you not to adopt legislation in conference that could result in taking these tools away, leaving in place a weak federal program with inadequate provisions for oversight, enforcement, and implementation.

We look forward to providing you with a comprehensive list of the items in H.R. 2830 that we believe are particularly problematic from the standpoint of State preemption, limiting the effectiveness of federal ballast water treatment requirements, and the Clean Water Act. Again, if this bill goes to conference with the House, we urge you to use your influence on the Committee and as a leader on Oceans and clean water issues to address these problems by making significant changes to Title V. If these changes are not made, we urge you to vote for eliminating Title V altogether from any final Coast Guard authorization bill.

Thank you for considering our views on this important issue.

Sincerely,

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cc: Senator Patty Murray  
Representative Jay Inslee  
Representative Rick R. Larsen  
Representative Brian Baird  
Representative Norman D. Dicks  
Representative Jim McDermott  
Representative Dave Reichert  
Representative Adam Smith

Attachments: Pleus, Washington Department of Fish and Wildlife, Comparison of Ballast Water Treatment Standards: Number of Introduced Organisms, May 6, 2008.

Comparison of Ballast Water Treatment Standards, prepared by Jerry Joyce for the Washington Ballast Water Work Group and Seattle Audubon.