



## **NEMWI Note to the Coalitions**

### **Implications of the Vessel Incidental Discharge Act for the NEMW Region**

**May 13, 2016**

The Northeast-Midwest Institute (NEMWI), which has a long history with developing ballast water management policy and testing capacity for the NEMW region, evaluated the implications for the NEMW region of the inclusion of the Vessel Incidental Discharge Act (H.R. 980) as an amendment to the National Defense Authorization Act of 2016 (H.R. 4909). Specifically, NEMWI reviewed the ramifications on the region's capacity to protect and restore its Great Waters – which comprise a critical foundation for the NEMW economy – and concludes that VIDA would substantially reduce this capacity. Additionally, it is important that any legislation changing the Clean Water Act's authority over ballast water discharges be carefully vetted and approved by the Committees with the appropriate jurisdiction over this matter, in this case, the House Transportation and Infrastructure Committee.

#### **Background**

Vessel discharges of harmful aquatic organisms and pathogens in ballast water have caused hundreds of millions of dollars of damage to the NEMW region. Ballast discharge is regulated by the United States Coast Guard (USCG) under the National Invasive Species Act of 1996 [16 U.S.C. § 4701], and by the Environmental Protection Agency (EPA) under the CWA National Pollutant Discharge Elimination System (NPDES) [33 U.S. Code § 1342]. The Coast Guard issued its ballast water treatment regulations in 2012. The EPA published a Vessel General Permit relevant to ballast water discharges in 2013, after a lawsuit by environmental groups<sup>1</sup>. Additionally, in October of 2015 a federal appeals court ruled that the EPA must revisit its ballast water permitting rules after stating that the agency was wrong in deciding to follow an international standard for ballast water treatment and ignored the best available technology<sup>2</sup>. Like other NPDES authorities, the federal regulatory authority over discharges is shared with States. Thus, ballast water standards are now set and enforced by two federal statutes (NISA and the CWA), two lead agencies (USCG and EPA), and potentially each coastal state. During the USCG's protracted regulatory development process, restive states, many in the NEMW region, enacted their own standards. These standards at times conflicted with each other, were unenforceable, and/or created a complicated compliance web for ships plying interstate waters. However, federal regulations have now largely aligned, and the few coastal states with active ballast-related laws have conformed to federal processes, for practical purposes. This trend will likely continue.

#### **VIDA Goals**

VIDA's champions seek to achieve:

- One national set of standards regulating ballast water discharge;
- One oversight agency (USCG) regulating and enforcing ballast water discharge standards; and
- More limited scope of federal ballast requirements in terms of vessel size.

The bill would eliminate the CWA jurisdiction over organisms in ballast discharge, thereby eliminating the CWA delegation of authority to states to protect their waters, while also lifting requirements on small vessels.

#### **Better Ways to Improve**

Conflicting state ballast laws are currently not an acute problem, but with continued CWA jurisdiction over ballast discharges, the risk of conflict remains. However, NEMWI finds this potential for state action has had the positive effect of driving federal action, and industry cooperation with it, to avert state assumption of a regulatory role. A strong federal program, drawing on core competencies of EPA and the USCG, is a better solution to the problem than reduction of state/EPA authority. In particular, the EPA will have greater capacity to guide fulfillment of environmental protection goals than USCG. Rather than curtail CWA jurisdiction, Congress should direct the two agencies to increase consistency and complementarity of their complementary regulatory systems through:

- Streamlining regulatory processes and certification, enforcement and monitoring systems, especially within multijurisdictional aquatic systems like the Great Lakes;
- Aligning regulatory timelines and limits; and
- Cooperating in required evaluations of available technology and standard revision.

#### **Conclusion**

The NEMWI concludes that regulatory alignment and streamlining are critical for environmental and economic health of the NEMW region, but that both National Invasive Species Act and Clean Water Act jurisdiction over ballast discharge are essential to effective protection of the region's Great Waters.

---

<sup>1</sup> Northwest Environmental Advocates v. U.S. Environmental Protection Agency, 537 F.3d 1006 (9th Cir. 2008).

<sup>2</sup> Natural Resources Defense Council v. U.S. Environmental Protection Agency, No. 13-1745 (2d Cir. 2015).