

State Ballast Water Management: Actions, Issues, and Potential Concerns



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Introduction

- Great Lakes states dealing with AIS introductions which are ecologically and economically harmful
- Ballast water has been a significant source of introductions into the state waters of the Great Lakes in the past
- In the absence of strong federal legislation, some of the Great Lakes states have begun considering state ballast water legislation

Michigan Public Act 33 of 2005

- Requires all vessels entering Michigan Ports to have a permit beginning January 1, 2007
- Permit certifies that the vessel will not discharge AIS by using state approved ballast treatment methods
- Established the Great Lakes Aquatic Nuisance Species Coalition to encourage consistency in ballast water legislation among the Great Lakes states
- Several other states (MN, NY, WI) have introduced legislation in response to the Michigan legislation

The States' Position on Ballast Water Management

- Representatives from Michigan, Minnesota, New York, and Wisconsin have indicated:
 - Aquatic invasive species are extremely costly, both ecologically and economically
 - Potential damage from further introductions justifies taking the initiative to pass legislation at the state level
 - Congressional action would be best
 - The Coalition will help develop a regional standard
 - Hopefully these actions will push Congress to enact ballast water standards that will protect the states

The States' Position on Ballast Water Management

- Representatives from Indiana, Illinois, and Ohio have voiced concern over:
 - The need for a regional approach led by the Federal government
 - A state led approach may prove to be piecemeal
 - Multiple permits and enforcement agencies
 - Keeping identical legislation identical into the future

The States' Position on Ballast Water Management

- A representative from Pennsylvania has indicated that:
 - Pennsylvania is not in a position at this time to think about whether or not it is interested in introducing ballast water legislation because the state's new Invasive Species Council is just beginning to determine how invasive species will be managed in the state.

Legal Issues: The Commerce Clause

- Section 8 of the United States Constitution contains the Commerce Clause:
 - “The Congress shall have power ... To regulate commerce with foreign nations, and among the several states, and with the Indian tribes...”
- Tenth Amendment
 - “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”
- Is navigation included in the Commerce Clause?
- Do the states have the right to regulate ballast water, and is federal regulation preemptive?

Legal Issues: The Commerce Clause

- Question: is navigation part of commerce?
 - Gibbons v. Ogden, 1824
 - Navigation is part of Commerce
 - This gives the federal government the right to regulate navigation under the Commerce Clause
 - Do the states have any rights to concurrent regulation?
 - Are overlapping state regulations preempted by the federal regulations?

Legal Issues: Commerce and Federal Preemption Cases

- Ray v. Atlantic Richfield Co. (1978) and U.S. v. Locke (2000)
 - The Supreme Court ruled that state regulations that covered areas already covered by Federal regulation are preempted
 - Need for uniformity in navigational requirements
 - State regulations that do not interfere with Federal standards of uniformity are allowed in highly sensitive areas
 - A court may use these cases as precedent to determine that state regulations are preempted due to the existence of federal ballast water standards
 - If the Great Lakes are determined a highly sensitive area meriting additional regulations, required modifications to vessels will still not be allowed

Legal Issues: Commerce and Federal Preemption Cases

- **Huron Portland Cement Co. v. City of Detroit, 1960**
 - Local regulation to protect the public interest is allowed even if it indirectly impacts commerce, unless explicitly preempted
 - This logic would allow the states or region to create stronger ballast water regulations to protect their environmental and economic interests

Legal Issues: Commerce and Federal Preemption Cases

- **Maine v. Taylor, 1986**
 - If a state law serves a legitimate local purpose it can impede commerce if no other viable alternatives exist
 - For ballast water in the Great Lakes basin no alternatives may be available than the laws some states have passed, proposed, or considered, and would therefore be allowed

Potential Outcomes and Viewpoint

- Outcome will depend on the views of the court
 - Does the court recognize state's rights or the authority of the Federal government more?
 - What does the court value more, unimpeded commerce or environmental protection?
 - Will the court review cases such as *Ray v. Atlantic Richfield Co.* and *U.S. v. Locke* or *Huron Portland Cement Co. v. City of Detroit* and *Maine v. Taylor* to determine precedent?
- States should have the right to protect their environmental and economic interests, but the easiest, most efficient, and best outcome would be Congress passing better ballast water legislation

Questions?



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