

Calendar No. 171

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-96

VESSEL INCIDENTAL DISCHARGE ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 373



JULY 29, 2015.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 373]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 373) to provide for the establishment of nationally uniform and environmentally sound standards governing discharges incidental to the normal operation of a vessel, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 373, the Vessel Incidental Discharge Act, as amended, is to provide for the establishment of nationally uniform and environmentally sound standards for the regulation of ballast water discharges and other discharges that are incidental to the normal operation of vessels.

BACKGROUND AND NEEDS

Ballast water discharged from vessels has been, and continues to be, of serious concern as one of several vectors for the introduction into ecosystems of aquatic invasive species. One of the best known examples of introduction of an aquatic invasive species via ballast water is that of the zebra mussel (*Dreissena polymorpha*). The zebra mussel is indigenous to freshwater lakes and rivers in Eastern Europe and Western Asia, but was discovered in North America in Lake St. Clair, which connects Lake Huron and Lake Erie, in 1988. It is generally accepted by the scientific community that the species arrived there in ballast water discharged by vessels coming from European ports. Since arriving in North America, the

zebra mussel has spread throughout and beyond the Great Lakes. The introduction of this nonindigenous filter-feeder has drastically altered ecosystems in the Great Lakes and elsewhere.

Although the problem of, and potential solution to, introduction of invasive species through ballast water are clear, the laws and regulations that govern ballast water management and the management of other discharges incidental to the normal operation of vessels could hardly be more confusing. Currently these incidental discharges are regulated by a patchwork of Federal and State laws and regulations. In 1973, when the Environmental Protection Agency (EPA) first implemented the National Pollutant Discharge Elimination System (NPDES) pursuant to section 402 of the Clean Water Act, it excluded discharges incidental to the normal operation of a vessel from the permitting requirement for the discharge of pollutants by point sources under NPDES.¹ At the time, the EPA reasoned that the exclusion was warranted because “this type of discharge generally causes little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically.”² This exemption remained in place until 2005, when the 9th Circuit Court of Appeals upheld a Federal district court ruling that the EPA’s 32-year-old regulatory exclusion of vessel discharges from NPDES was *ultra vires* to the Clean Water Act.³

Separately, during the three decades in which the NPDES vessel exclusion was in place, Congress responded to growing concerns about zebra mussels and other aquatic invasive species in the United States by enacting the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990⁴ (NANPCA), and amendments thereto by the National Invasive Species Act⁵ (NISA) in 1996. NANPCA/NISA requires the Coast Guard, in coordination with the EPA and other relevant Federal agencies, to establish and administer a ballast water management program to prevent introduction and dispersal of nonindigenous species into the waters of the United States.

Also prior to the overturn of the EPA’s regulatory exclusion of vessels from NPDES, the Coast Guard in 2004, with the State Department, led the U.S. Delegation to the International Maritime Organization (IMO) Diplomatic Conference on Ballast Water Management for Ships, at which the International Convention for the Control and Management of Ships’ Ballast Water and Sediments⁶ (Convention) was adopted. The Convention includes provisions for the experimental testing of prototype ballast water treatment systems on operating vessels that is largely based on the Coast Guard’s own Shipboard Technology Evaluation Program, implemented in January 2004.⁷ It also contains a provision advanced by the U.S. Delegation for the sampling of ballast water discharged by ships as a port state control activity, in order to help port states

¹ National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528 (May 22, 1973) (to be codified at 40 C.F.R. pt. 125).

² *Ibid.*

³ Northwest Env’tl. Advocates et al. v. U.S. Env’tl. Prot. Agency, 537 F.3d 1006 (9th Cir. 2008).

⁴ Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, Pub. L. No. 101-646, 104 Stat. 4761 (1990).

⁵ National Invasive Species Act, Pub. L. No. 104-332, 110 Stat. 4073 (1996).

⁶ International Convention for the Control and Management of Ships’ Ballast Water and Sediments, 2004, available at <http://www.uscg.mil/hq/cg5/cg522/cg5224/docs/BWM-Treaty.pdf>.

⁷ *Ibid.*, Section D, Regulation D-4.

ensure foreign-flagged vessels' compliance with the Convention's treatment and other management requirements.⁸

Most importantly, the 2004 Convention includes a ballast water treatment standard based on the number of living organisms contained in discharged ballast water that is the most stringent standard scientifically proven to be achievable and detectable today. Specifically, Regulation D-2 requires that ballast water discharge contain: (1) less than 10 viable organisms per cubic meter of ballast water that are greater than or equal to 50 micrometers in minimum dimension; and (2) less than 10 viable organisms per milliliter of ballast water that are less than 50 micrometers in minimum dimension and greater than or equal to 10 micrometers in minimum dimension.⁹ Regulation D-2 further requires that ballast water discharge contain only minimal concentrations of certain human health indicator microbes, as follows: (1) less than 1 colony-forming unit (CFU) of toxicogenic *Vibrio cholerae* (serotypes O1 and O139) per 100 milliliters of ballast water, or less than 1 CFU per 1 gram (wet weight) of zooplankton samples; (2) less than 250 CFUs of *Escherichia coli* per 100 milliliters of ballast water; and (3) less than 100 CFUs of intestinal Enterococci per 100 milliliters of ballast water.¹⁰

Today, as a result of these independent developments, both the Coast Guard and EPA are regulating ballast water under separate, inconsistent, and sometimes directly conflicting sets of requirements; the Coast Guard under NANPCA/NISA and the EPA under the Clean Water Act and NPDES. While both the Coast Guard and the EPA have adopted the Regulation D-2 standard as their treatment standard for ballast water, there is considerable confusion between Federal regulators and among vessel owner/operators over how to administer, and properly comply with, the Coast Guard and EPA's separate requirements.

As an example, both the Coast Guard and EPA require a ballast water management system (BWMS) aboard a vessel covered by their regulations. On the one hand, the Coast Guard's regulations generally require that a BWMS be type-approved by the Coast Guard.¹¹ In the case of a manufacturer whose BWMS has been approved by a foreign regulatory authority pursuant to Convention standards, that manufacturer may request a Coast Guard determination that its BWMS qualifies as an Alternate Management System (AMS). On the other hand, the EPA's Vessel General Permit (VGP) requires only that a BWMS "has been shown to be effective by testing conducted by an independent third party laboratory, test facility or test organization." Although a BWMS approved by the Coast Guard is deemed by the VGP to comply with its effectiveness requirement, a BWMS may also be tested and found effective under the VGP by another "laboratory, test facility, or test organization,"¹² even though it has not been approved by the Coast Guard. Thus a BWMS could end up being installed on a vessel in

⁸ Ibid, Article 9.

⁹ Ibid, Section D, Regulation D-2.

¹⁰ Ibid.

¹¹ 33 C.F.R. 151.2025(a)(1) (2013).

¹² Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (December 19, 2013) (VGP), Section 2.2.3.5.1.1, available at http://www.epa.gov/npdes/pubs/vgp_permit2013.pdf.

compliance with the VGP, even though it does not (and may never) comply with Coast Guard regulations.

Furthermore, as of March 2015, no BWMS has yet received type-approval from the Coast Guard because the type-approval process has taken longer than expected. Coast Guard regulations allow for the extension of compliance deadlines to accommodate delays in type-approval, but the EPA's VGP is vague as to how it will or will not apply when Coast Guard has granted a compliance date extension.¹³ The VGP took effect for most commercial vessels on December 19, 2013, while the first BWMS is not expected to be type-approved by the Coast Guard until sometime toward the end of 2015 at the earliest. Other questions exist about crewing, such as, are vessel owner/operators expected to install VGP-compliant BWMS that may or may not later be approved by the Coast Guard? The EPA's only guidance in this regard is that, in cases where the vessel has received a compliance date extension from the Coast Guard, the vessel is not in compliance with the ballast water numeric discharge limit under the VGP, and the vessel is otherwise in compliance with the VGP, the EPA will, subject to additional case-by-case considerations, "consider such violations of the VGP ballast water numeric discharge limit a low enforcement priority."¹⁴

Another example of the conflict and confusion between the two regimes is the EPA's VGP requirement of ballast water exchange combined with the use of a BWMS for certain vessels that enter the Great Lakes after operating outside the U.S. Exclusive Economic Zone.¹⁵ This requirement stands in contrast to Coast Guard and IMO regulations, which do not require this combination of management methods. These inconsistent requirements are certain to cause confusion among vessel owner/operators, and particularly among owner/operators of foreign-flagged vessels. Some foreign vessel owner/operators have even suggested that this and other Clean Water Act requirements seem, to the extent they are inconsistent with IMO requirements, like thinly veiled non-tariff barriers to trade.

Challenges abound not only with respect to proper compliance with, but also proper enforcement of, these conflicting requirements. Most notable among them is the fact that the Coast Guard is both required to enforce its own ballast water management and other vessel operational requirements and the EPA's conflicting vessel operational requirements under the VGP.¹⁶

On top of this duplicative, inconsistent, and confusing Federal regime, subjecting vessels to NPDES also has opened the door for States to establish their own varying standards and requirements for vessel incidental discharges. The States of California, Michigan, Minnesota, Ohio, Oregon, and Washington are among those that al-

¹³ See *id.* Section 1.9.1 (stating only that "Regarding implementation dates of the limits found in Part 2.2.3.5 of the VGP, EPA advises that where the U.S. Coast Guard has granted or denied an extension request pursuant to 33 CFR 151.2036, that information will be considered by EPA, but is not binding on EPA.").

¹⁴ Memorandum from Cynthia Giles, EPA Assistant Administrator, to Regional Vessel General Permit Enforcement and Program Directors (Dec. 27, 2013), available at <http://www2.epa.gov/sites/production/files/2013-12/documents/vesselgeneralpermit-erp.pdf>. VGP section 2.2.3.7.

¹⁵ VGP section 2.2.3.7.

¹⁶ Memorandum of Understanding between the U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, and the U.S. Coast Guard, Office of Marine Safety, Security and Stewardship, for Collaboration on Compliance Assistance, Compliance Monitoring, and Enforcement of Vessel General Permit Requirements on Vessels (Feb. 11, 2011), http://www.uscg.mil/hq/cgcv/cvc1/general/vgp/CG_EPA_MOU.pdf.

ready have promulgated their own ballast water management requirements that also apply to commercial vessels navigating in State waters.

In 2006, the State of California enacted a ballast water treatment standard at the recommendation of the California State Lands Commission (CSLC) that requires less than 0.01 living organisms measuring between 10 and 50 micrometers per milliliter of ballast water discharged (1000 times the IMO D-2 standard) and requires zero detectable living organisms greater than 50 micrometers per milliliter of ballast water discharged.¹⁷ However, the State has continued to delay implementation of its requirement that vessel owner/operators install BWMS that meet these standards because no BWMS are available that meet California's treatment standards. In the CSLC staff's words:

More specifically, shipboard ballast water treatment systems cannot be considered available to meet the California performance standards because: 1) no ballast water treatment system has demonstrated efficacy for all of the California performance standards based on the best available data; 2) there are no suitable methods/technology to analyze ballast water samples to determine treatment system efficacy for some of the California performance standards; and 3) a lack of sampling/compliance protocols precludes the ability of the Commission to make a conclusive determination about the availability of shipboard ballast water treatment systems to meet the California performance standards.¹⁸

The States of Oregon and Washington, meanwhile, have adopted a number of reporting, recordkeeping, and inspection requirements, as well as certain ballast water open sea exchange measures, but neither State has yet imposed a treatment standard under State law, as California has done. The State of Washington's Ballast Water Management statute requires that the Washington Department of Fish and Wildlife:

shall adopt by rule standards for the discharge of ballast water into the waters of the state and their implementation timelines. The standards are intended to ensure that the discharge of ballast water poses minimal risk of introducing nonindigenous species. In developing these standards, the department shall consider the extent to which the requirement is technologically and practically feasible. Where practical and appropriate, the standards must be compatible with standards set by the United States Coast Guard, the Federal Clean Water Act, or the International Maritime Organization.¹⁹

¹⁷ Cal. Pub. Res. Code 71205.3 (West 2014).

¹⁸ California State Lands Commission, 2014 Assessment of the Efficacy, Availability, and Environmental Impacts of Ballast Water Treatment Technologies for Use in California Waters (Aug. 2014), available at http://www.slc.ca.gov/spec_pub/mfd/ballast_water/Documents/Reports/2014CSLC_BWTEchReport_Final-2.pdf.

¹⁹ Wash. Rev. Code Ann. 77.120.030 (West 2014).

The State of Oregon's ballast water management statute contains similar language regarding technological and practical feasibility.²⁰ Oregon's statute also includes a requirement that its ballast water standards and procedures be, "To the extent practicable . . . consistent with relevant rules adopted by the States of California and Washington,"²¹ but it is unclear how Oregon, or Washington for that matter, can reconcile its practicability-based approach to ballast water treatment with that of California, which has taken a very different approach.

In all, 25 States have certified the VGP subject to additional, individual State requirements. The potential compliance challenges posed by this situation are staggering. As an example, a commercial vessel owner/operator transiting the full length of the Mississippi River is required to comply not only with applicable Coast Guard requirements under NANPCA/NISA and the EPA's VGP requirements, but also with varying additional VGP permit requirements imposed by the States of Minnesota, Wisconsin, Iowa, Illinois, Missouri, and Arkansas.

This complicated, inefficient, and confusing patchwork of Federal and State requirements will only continue to grow, confusing vessel owner/operators seeking in good faith to comply, confounding law enforcement authorities, unnecessarily impeding maritime commerce, and, most importantly, diminishing the overall effectiveness of U.S. efforts to prevent the introduction of aquatic invasive species. Strong, uniform national standards are necessary to effectively defend against invasive species brought to the United States in ballast water.

The Vessel Incidental Discharge Act would require the Secretary of the department in which the Coast Guard is operating (Secretary), in consultation with the Administrator of the EPA (Administrator), to establish and implement enforceable, uniform, national standards and requirements for the regulation of ballast water discharges and other discharges incidental to the normal operation of vessels. The new standards and requirements would be required to be based upon the best available technology economically achievable, and would generally supersede the current jumble of Federal and State incidental discharge requirements. Enforcement responsibilities with respect to these uniform standards and requirements would be vested in the Secretary and the States.

SUMMARY OF PROVISIONS

S. 373 would require the Secretary, in consultation with the Administrator, to establish and implement uniform national standards for the regulation of ballast water discharges and other discharges incidental to the normal operation of vessels. The new standards would be based upon the best available technology eco-

²⁰ See Or. Rev. Stat. Ann. 783.635 (West 2014) (providing, in part, that "[t]he Environmental Quality Commission may adopt by rule standards and procedures that the commission considers necessary to carry out the provisions of ORS 783.625 to 783.640. The standards and procedures must minimize the risk of introducing aquatic invasive species into the waters of this state and must be based on the availability of treatment technology. Rules adopted under this subsection include, but are not limited to: Standards for the discharge of ballast water into the waters of this state and appropriate timelines for the implementation of the standards. In adopting the standards, the commission shall consider the extent to which treatment technology is feasible, practicable and commercially available, or expected to be available, by the proposed implementation timelines." (emphasis added)).

²¹ *Ibid.*

nomically achievable, and would generally supersede the current jumble of Federal and State incidental discharge requirements. The initial ballast water treatment standard under S. 373 would be the IMO D-2 Standard, the most stringent treatment standard scientifically proven to be achievable and detectable today. In 2022, a revised standard would take effect that is 100 times more stringent than the initial standard, unless the Secretary and Administrator determine the revised standard is not yet feasible, in which case the most stringent standard that is feasible would be adopted. If a standard more stringent than 100 times the initial standard is determined to be feasible, that standard would become the revised standard. Thereafter, decennial feasibility reviews would be required to determine whether further revisions of the ballast water standard would result in a scientifically demonstrable and substantial reduction in the risk of the introduction of aquatic nuisance species. These decennial reviews could also look at other vessel discharges for which standards are established under the Act, to determine if revising those standards would substantially reduce their impacts on navigable waters. Enforcement responsibilities would be vested in the Secretary. States also would be authorized to enforce the standards and requirements established under the Act.

LEGISLATIVE HISTORY

On February 4, 2015, the Oceans, Atmosphere, Fisheries, and Coast Guard Subcommittee of the Committee on Commerce, Science, and Transportation of the Senate held a hearing on the impacts of vessel discharge regulations on the shipping and fishing industries. Three representatives from the shipping and charter boat industries, as well as a Congressional Research Service specialist in resources and environmental policy, appeared before the subcommittee.

S. 373, the Vessel Incidental Discharge Act, was introduced by Senator Rubio on February 4, 2015, with Senator Thune and Senator Nelson as original cosponsors, and referred to the Committee on Commerce, Science, and Transportation. The bill is also cosponsored by Senators Vitter, Ayotte, Boozman, Capito, Blunt, Manchin, Isakson, Cochran, Shelby, Coons, Cassidy, Wicker, McCaskill, Shaheen, Schatz, Sullivan, Casey, Collins, Cornyn, and Inhofe.

On February 26, 2015, the Committee met in open Executive Session and, by a voice vote, ordered S. 373 reported with an amendment in the nature of a substitute. Changes in the substitute included 2 modified ballast water performance standards that will be issued in a final rule; an increase in the amount of time afforded manufacturers from 60 days to 1 year to meet new testing protocols and earn certification of ballast water treatment technology; a refinement to what constitutes a vessel of the armed services; and a clarification in the definition of the term “geographically limited area.” The Committee also approved two amendments offered by Senator Peters. The first would codify an EPA VGP requirement that vessels entering the Great Lakes through the St. Lawrence River, after operating outside of the U.S. Exclusive Economic Zone, conduct saltwater flushing of all ballast water tanks onboard prior to entry. Senator Peters’ second amend-

ment modified the process by which a State can petition for more stringent ballast water standards.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 373—Vessel Incidental Discharge Act

S. 373 would amend the environmental standards for water that is discharged from ships and permanently exempt certain smaller vessels from those standards. Under current law, the United States Coast Guard (USCG) and the Environmental Protection Agency (EPA) set and enforce those standards.

S. 373 also would change the procedures for how the United States regulates water discharged from certain vessels. The legislation would increase the administrative responsibilities of the USCG to implement some of the laws that govern water discharged from ships and require that the USCG carry out those responsibilities in consultation with EPA. Under current law, most of those responsibilities are carried out by EPA under the Clean Water Act.

Under the bill, EPA would no longer issue water discharge permits to vessels. However, based on information from EPA, CBO estimates that any cost savings to the agency would be negligible because those activities constitute only a minor share of EPA's responsibilities under the Clean Water Act. Based on information from the USCG, CBO estimates that the Coast Guard would gradually add 15 staff members over the next two years, resulting in a cost of \$5 million over the 2016–2020 period, assuming appropriation of the necessary amounts. Those additional staff members would conduct enforcement actions and review any proposals from states for more stringent water discharge standards.

Enacting S. 373 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 373 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill would preempt state and local laws relating to discharges from vessels by establishing a national uniform standard and a set of best management practices, but CBO estimates that the preemption would not impose costs on state and local governments. Although it would limit the applications of state and local regulations, the bill would impose no duty on state or local governments that would result in additional spending or a loss of revenues.

S. 373 also would impose a private-sector mandate, as defined in UMRA, on manufacturers and importers of certain water treatment technology. Those entities would be prohibited from selling such technology unless it has been certified by the USCG or by a foreign entity and deemed to meet equivalent levels of performance and safety. The cost of the mandate would be the cost of obtaining certification and any net loss of income from forgone sales.

Under current law, manufacturers of water treatment technology already need to obtain USCG certification because owners of vessels that use such technology are required to install USCG-certified technology by a certain date. If the certification process under the

bill was similar to the certification process conducted under current law, the incremental cost of complying with the mandate would be small. Although the incremental cost of such compliance could be greater than that under current law, on balance, CBO expects the cost of the private-sector mandate would probably fall below the annual threshold established in UMRA (\$154 million in 2015, adjusted annually for inflation).

The CBO staff contacts for this estimate are Martin von Gnechten (for federal costs), Jon Sperl (for intergovernmental mandates), and Amy Petz (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 373 as reported does not create any new programs or impose any new regulatory requirements, and therefore will not subject any individuals or businesses to new regulations. It would streamline regulatory compliance for the owners and operators of approximately 70,000 vessels with respect to ballast discharge. It would also permanently exempt approximately 120,000 vessels from incidental vessel discharge rules and thus reduce the regulatory burden on the owners and operators of those vessels.

ECONOMIC IMPACT

Enactment of this legislation is not expected to have any significant adverse impacts on the Nation's economy.

PRIVACY

The bill will not impact the personal privacy of individuals.

PAPERWORK

By replacing myriad Federal and State vessel incidental discharge requirements with a single set of national requirements, S. 373 will likely reduce paperwork requirements for individuals and businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents.

This section would provide that this Act may be cited as the "Vessel Incidental Discharge Act".

Section 2. Findings; purpose.

This section would set forth findings of Congress and state that the purpose of this Act is to provide for the establishment of nationally uniform and environmentally sound standards for discharges incidental to the normal operation of a vessel in the navigable waters of the United States.

Section 3. Definitions.

This section would define the terms “Administrator,” “aquatic nuisance species,” “ballast water,” “ballast water performance standard,” “ballast water treatment technology” or “treatment technology,” “biocide,” “discharge incidental to the normal operation of a vessel,” “geographically limited area,” “manufacturer,” “Secretary,” and “vessel.”

Section 4. Regulation and enforcement.

This section would require the Secretary, in consultation with the Administrator, to establish and implement enforceable uniform national standards for the regulation of discharges incidental to the normal operation of a vessel. These standards would be required to be based upon the best available technology economically achievable, and generally would supersede any other permitting requirement or prohibition on discharges incidental to the normal operation of a vessel to which the Act would apply, under any other provision of law. The Secretary would be required to enforce the standards and requirements under the Act, and each State would be authorized to enforce the standards and requirements under the Act.

Section 5. Uniform national standards and requirements for the regulation of discharges incidental to the normal operation of a vessel.

The existing congressional waiver for such discharges is slated to expire on December 18, 2017.

This section would provide for the establishment and future review and revision of rules regulating discharges incidental to the normal operation of a vessel.

Subsection (a) would provide that the requirements set forth in the final rule, Standards for Living Organisms in Ship’s Ballast Water in U.S. Waters (77 Fed. Reg. 17254 (March 23, 2012), as corrected at 77 Fed. Reg. 33969 (June 8, 2012)), shall be the management requirements for a ballast water discharge incidental to the normal operation of a vessel until the Secretary revises the ballast water performance standard under subsection (b) or adopts a more stringent State standard. It would require the Secretary to adopt a more stringent State ballast water performance standard if the Secretary makes a determination in favor of a State petition under section 10 of the Act. It also would require the Secretary, in consultation with the Administrator, to issue a final rule governing discharges incidental to the normal operation of a vessel other than ballast water not later than two years after the date of enactment of this Act.

Subsection (b)(1) would require the Secretary, in consultation with the Administrator, to issue a final rule not later than January 1, 2022, revising the ballast water performance standard under

subsection (a) so that a ballast water discharge incidental to the normal operation of a vessel will contain: less than 1 organism that is living or has not been rendered harmless per 10 cubic meters that is 50 or more micrometers in minimum dimension; less than 1 organism that is living or has not been rendered harmless per 10 milliliters that is less than 50 micrometers in minimum dimension and more than 10 micrometers in minimum dimension; concentrations of indicator microbes that are less than 1 colony-forming unit of toxicogenic *Vibrio cholera* (serotypes O1 and O139) per 100 milliliters or less than 1 colony-forming unit of that microbe per gram of wet weight of zoological samples, less than 126 colony forming units of *Escherichia coli* per 100 milliliters, and less than 33 colony-forming units of intestinal Enterococci per 100 milliliters; and concentrations of such additional indicator microbes and of viruses as may be specified in regulations issued by the Secretary, in consultation with the Administrator and such other Federal agencies as the Secretary and the Administrator deem appropriate.

Under subsection (b)(2), issuance of a final rule under subsection (b)(1) would be subject to a feasibility review. This review would be required to be completed by the Secretary, in consultation with the Administrator, not less than two years before January 1, 2022, for the purpose of determining the feasibility of achieving the required, revised ballast water performance standard under this subsection. In conducting the feasibility review, the Secretary would be required to consider whether revising the ballast water performance standard will result in a scientifically demonstrable and substantial reduction in the risk of introduction or establishment of aquatic nuisance species, taking into account the following criteria:

- improvements in the scientific understanding of biological and ecological processes that lead to the introduction or establishment of aquatic nuisance species;
- improvements in ballast water treatment technology, including: the capability of such treatment technology to achieve a revised ballast water performance standard; the effectiveness and reliability of such treatment technology in the shipboard environment; the compatibility of such treatment technology with the design and operation of a vessel by class, type, and size; the commercial availability of such treatment technology; and the safety of such treatment technology;
- improvements in the capabilities to detect, quantify, and assess the viability of aquatic nuisance species at the concentrations under consideration;
 - the impact of ballast water treatment technology on water quality; and
 - the costs, cost-effectiveness, and impacts of: a revised ballast water performance standard on shipping, trade, and other uses of the aquatic environment; and of maintaining the existing ballast water performance standard, including the potential impacts on water-related infrastructure, recreation, propagation of native fish, shellfish, and wildlife, and other uses of navigable waters.

If the Secretary, in consultation with the Administrator, determined on the basis of the feasibility review and after an opportunity for a public hearing that no ballast water treatment tech-

nology can be certified under section 6 to comply with the revised ballast water performance standard under section 5(b)(1), then the Secretary would be directed to require the use of the treatment technology that achieves the performance levels of the best performing treatment technology available. If the Secretary, in consultation with the Administrator, determined that requirements for the best performing treatment technology available under section 5(b)(2)(c)(i) cannot be implemented before the implementation deadline provided in subsection (b)(3) of that section with respect to a class of vessels, then the Secretary would be required to extend the implementation deadline for that class of vessels for not more than 36 months. If an implementation deadline were extended, the Secretary would be required to recommend action to ensure compliance with the extended implementation deadline under subsection (b)(2)(c)(ii).

If the Secretary, in consultation with the Administrator, determined that ballast water treatment technology existed that exceeded the revised ballast water performance standard prescribed in subsection (b)(1) with respect to a class of vessels, then the Secretary would be required to revise the ballast water performance standard for that class of vessels to incorporate that higher performance standard. If the Secretary, in consultation with the Administrator, determined that ballast water treatment technology could be implemented before the implementation deadline under subsection (b)(3) with respect to a class of vessels, then the Secretary would be required to accelerate the implementation deadline for that class of vessels. If an implementation deadline were accelerated, the Secretary would be required to provide not less than 24 months' notice before the deadline took effect.

Under subsection (b)(3), the revised ballast water performance standard required by subsection (b)(1) would apply to a vessel beginning on the date of the first dry docking of the vessel on or after January 1, 2022, but not later than December 31, 2024.

Subsection (b)(4) allows for the Secretary to establish a compliance deadline for compliance by a vessel (or a class, type, or size of vessel) with a revised ballast water performance standard under subsection (b)(1). In issuing regulations under subsection (b), the Secretary would be required to establish a process for an owner or operator to submit a petition to the Secretary for an extension of a compliance deadline with respect to the vessel of the owner or operator. An extension may be applied for a period not to exceed 18 months from the date of the applicable deadline and would be renewable for an additional period not to exceed 18 months. In issuing a compliance deadline or reviewing a petition for extension of a deadline the Secretary would be required to consider, with respect to the ability of the owner or operator to meet a compliance deadline, the following factors:

- whether the treatment technology to be installed is available in sufficient quantities to meet the deadline;
- whether there is sufficient shipyard or other installation facility capacity;
- whether there is sufficient availability of engineering and design resources;

- vessel characteristics, such as engine room size, layout, or a lack of installed piping;
- electric power generating capacity aboard the vessel; and
- safety of the vessel and crew.

The Secretary would be required to approve or deny a petition for an extension of a compliance deadline submitted by an owner or operator. If the Secretary did not approve or deny a petition referred to in subsection (b)(4)(E)(i) on or before the last day of the 90-day period beginning on the date of the petition, the petition would be deemed approved.

Subsection (c) of this section would require the Secretary, in consultation with the Administrator, to complete a review 10 years after the issuance of a revised final rule under subsection (b) and every 10 years thereafter to determine whether further revision of the ballast water performance standard would result in a scientifically demonstrable and substantial reduction in the risk of the introduction or establishment of aquatic nuisance species.

Subsection (c) also would permit the Secretary, in consultation with the Administrator, to include in these decennial reviews best management practices for discharges other than ballast water which are covered by this section. The Secretary would be required to initiate a rulemaking to revise one or more best management practices for such discharges after a decennial review if the Secretary, in consultation with the Administrator, determined that revising one or more of such practices would substantially reduce the impacts on navigable waters of discharges incidental to the normal operation of a vessel other than ballast water. In reviewing a ballast water performance standard under this subsection, the Secretary, the Administrator, and the heads of other appropriate Federal agencies as determined by the Secretary, would be required to consider the same review criteria required in the feasibility review under subsection (b)(2).

The Secretary would be required to initiate a rulemaking to revise the ballast water performance standard after a decennial review if the Secretary, in consultation with the Administrator, determined that revising the performance standard would result in a scientifically demonstrable and substantial reduction in the risk of the introduction or establishment of aquatic nuisance species.

In developing revised standards under subsections (b) and (c), it is anticipated that the Secretary will also review whether any exception described under section 7(b) need to be included, removed or updated.

Subsection (d) of this section would require the Secretary, in consultation with the Administrator, to establish a requirement that vessels entering the Great Lakes through the St. Lawrence River, after operating outside the U.S. Exclusive Economic Zone, to conduct saltwater flushing of all ballast water tanks onboard prior to entry.

Section 6. Treatment technology certification.

This section would establish the requirements and process for the certification of ballast water treatment technology.

Subsection (a) would provide that, beginning one year after the date that the requirements for testing protocols are issued under

subsection (i) of this section, no manufacturer of a ballast water treatment technology shall sell, offer for sale, or introduce or deliver for introduction into interstate commerce, or import into the United States for sale or resale, a ballast water treatment technology for a vessel unless the treatment technology has been certified under this section.

Subsection (b) would provide that, upon application of a manufacturer, the Secretary shall evaluate a ballast water treatment technology with respect to its effectiveness in achieving the current ballast water performance standard when installed on a vessel (or a class, type, or size of vessel); its compatibility with vessel design and operations; its effect on vessel safety; its impact on the environment; its cost-effectiveness; and any other criteria the Secretary considers appropriate. If, after such evaluation, the Secretary determined that the treatment technology meets the criteria, then the Secretary would be authorized to certify the treatment technology for use on a vessel (or a class, type, or size of vessel). This subsection would also require the Secretary to establish, by regulation, a process to suspend or revoke a certification that has been issued.

Subsection (c) would provide that, in certifying a ballast water treatment technology under this section, the Secretary, in consultation with the Administrator, would be authorized to impose any condition on the subsequent installation, use, or maintenance of the technology onboard a vessel as is necessary for: the safety of the vessel, the crew of the vessel, and any passengers aboard the vessel; the protection of the environment; or the effective operation of the technology. Failure of a vessel owner or operator to comply with such a condition would be considered a violation of this section.

Subsection (d) would require the Secretary to allow a vessel on which a system is installed and operated to meet a ballast water performance standard under this Act to continue to use that system, notwithstanding any revision of a ballast water performance standard occurring after the system is installed, until the expiration of the service life of the system as determined by the Secretary, so long as the system is maintained in proper working condition and maintained and used in accordance with the manufacturer's specifications and any treatment technology certification conditions imposed by the Secretary under this section.

Subsection (e) would require that, if the Secretary approves a ballast water treatment technology for certification under subsection (b), the Secretary shall issue a certificate of type-approval for the treatment technology to the manufacturer in such form and manner as the Secretary determines appropriate. A certificate of type-approval would be required to specify each condition imposed by the Secretary under subsection (c). A manufacturer that received a certificate of type-approval for the treatment technology would be required to provide a copy of the certificate to each owner and operator of a vessel on which the technology is installed.

Subsection (f) would require that an owner or operator who receives a copy of a certificate of type-approval retain a copy of the certificate onboard the vessel and make it available for inspection at all times while the owner or operator is utilizing the treatment technology.

Subsection (g) would bar the Secretary from approving a ballast water treatment technology if the technology: (1) uses a biocide or generates a biocide that is a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, unless the biocide is registered under that Act or the Secretary, in consultation with Administrator, has approved the use of the biocide in such treatment technology; or (2) uses or generates a biocide, the discharge of which causes or contributes to a violation of a water quality standard under section 303 of the Federal Water Pollution Control Act.

Subsection (h) would provide generally that the use of a ballast water treatment technology by an owner or operator of a vessel shall not satisfy the requirements of this Act unless it has been approved by the Secretary under subsection (b). An owner or operator would, however, be permitted to use a ballast water treatment technology that has not been certified to comply with the requirements of this section if the technology is being evaluated under the Coast Guard Shipboard Technology Evaluation Program, or the technology has been certified by a foreign entity and the certification demonstrates performance and safety of the treatment technology equivalent to the requirements of this section, as determined by the Secretary.

Subsection (i) would require the Administrator, in consultation with the Secretary, to issue requirements not later than 180 days after the date of enactment of this Act for land-based and shipboard testing protocols or criteria for certifying the performance of each ballast water treatment technology under this section and certifying laboratories to evaluate such treatment technologies.

Section 7. Exemptions.

Subsection (a) would provide that no permit shall be required or prohibition enforced under any other provision of law for, nor shall any standards under this Act apply to: (1) a discharge incidental to the normal operation of a vessel if the vessel is less than 79 feet in length and engaged in commercial service (as defined in section 2101(5) of title 46, United States Code); (2) a discharge incidental to the normal operation of a vessel if the vessel is a fishing vessel, including a fish processing vessel and fish tender vessel (as defined in section 2101 of title 46, United States Code); (3) a discharge incidental to the normal operation of a vessel if the vessel is a recreational vessel (as defined in section 2101(25) of title 46, United States Code); (4) the placement, release, or discharge of equipment, devices, or other material from a vessel for the sole purpose of conducting research on the aquatic environment or its natural resources in accordance with generally recognized scientific methods, principles, or techniques; (5) any discharge into navigable waters from a vessel authorized by an on-scene coordinator in accordance with part 300 of title 40, Code of Federal Regulations, or part 153 of title 33, Code of Federal Regulations; (6) any discharge into navigable waters from a vessel that is necessary to secure the safety of the vessel or human life, or to suppress a fire onboard the vessel or at a shoreside facility; or (7) a vessel of the armed forces of a foreign nation when engaged in noncommercial service.

Subsection (b) would provide that no permit shall be required or prohibition enforced under any other provision of law for, nor shall any ballast water performance standards under this Act apply to:

(1) a ballast water discharge incidental to the normal operation of a vessel determined by the Secretary to:

- operate exclusively within a geographically limited area, unless the Secretary determines that such discharge poses a substantial risk of introduction or establishment of an aquatic nuisance species;
- operate exclusively within one Captain of the Port Zone established by the Coast Guard unless the Secretary determines such discharge poses a substantial risk of introduction or establishment of an aquatic nuisance species;
- operate pursuant to a geographic restriction issued as a condition under section 3309 of title 46, United States Code (or an equivalent restriction issued by the country of registration of the vessel); or
- continuously take on and discharge ballast water in a flow-through system that does not introduce aquatic nuisance species into navigable waters;

(2) a ballast water discharge incidental to the normal operation of a vessel consisting entirely of water suitable for human consumption; or

(3) a ballast water discharge incidental to the normal operation of a vessel in an alternative compliance program established pursuant to section 8.

The Committee received testimony from the Lake Carriers' Association expressing concern with the direction of the Canadian government's development of ballast water regulations, especially regarding vessels that operate in the Great Lakes and St. Lawrence River. The Committee encourages the Coast Guard to monitor Transport Canada's development of ballast water regulations for vessels operating in Canadian waters and ports on the Great Lakes and St. Lawrence River for consistency with this Act and Coast Guard regulations. The Committee also encourages the Coast Guard to address the concerns of operators of Canadian laker vessels operating in United States waters and ports with regard to Coast Guard implementation of this Act. In defining a "geographically limited area" the Coast Guard should take into consideration the bi-national nature of the Great Lakes and St. Lawrence Seaway and the traditional trade patterns of U.S. and Canadian vessels.

Subsection (c) would provide that no permit shall be required or prohibition enforced under any other provision of law for, nor shall any ballast water performance standard apply to, a vessel that carries all of its permanent ballast water in sealed tanks that are not subject to discharge.

Subsection (d) would provide that nothing in this Act shall be interpreted to apply to a vessel owned or operated by the Department of Defense (other than a time-chartered or voyage-chartered vessel), or a vessel of the Coast Guard, as designated by the Secretary of the department in which the Coast Guard is operating.

Section 8. Alternative compliance program.

This section would authorize the Secretary, in consultation with the Administrator, to promulgate regulations establishing one or

more alternative compliance programs for a vessel having a maximum ballast water capacity of less than eight cubic meters and for a vessel that is not less than three years from the end of its useful life, as determined by the Secretary. Vessels that discharge ballast water into a facility for the reception of ballast water that meets standards promulgated by the Administrator, in consultation with the Secretary, may have an alternate compliance program. Within one year after the date of enactment of this Act, the Administrator, in consultation with the Secretary, would be required to promulgate standards for the reception of ballast water from a vessel into a reception facility and the disposal or treatment of the ballast water.

Section 9. Judicial review.

This section would allow an interested person to file a petition for review of a final regulation promulgated under this Act in the United States Court of Appeals for the District of Columbia Circuit. Such a petition would be required to be filed not later than 120 days after the date that notice of the promulgation appears in the Federal Register. In the case of a petition that is based solely on grounds that arise after the filing deadline has passed, the petitioner would be permitted to file not later than 120 days after the date on which the grounds for the petition first arose.

Section 10. Effect on State authority.

Subsection (a) of this section would provide generally that no State or political subdivision thereof may adopt or enforce any statute or regulation of the State or political subdivision with respect to a discharge incidental to the normal operation of a vessel after the date of enactment of this Act.

Notwithstanding the general prohibition of subsection (a), under subsection (b) a State or political subdivision thereof would be permitted to adopt or enforce a statute or regulation of the State or political subdivision with respect to ballast water discharges incidental to the normal operation of a vessel that specifies a ballast water performance standard that is more stringent than the ballast water performance standard under section 5(a)(1)(A) if the Secretary, after consultation with the Administrator and any other Federal department or agency the Secretary considers appropriate, makes a determination that: compliance with any performance standard specified in the statute or regulation can in fact be achieved and detected; the technology and systems necessary to comply with the statute or regulation are commercially available; and the statute or regulation is consistent with obligations under relevant international treaties or agreements to which the United States is a party.

Under subsection (c), the Governor of a State seeking to adopt or enforce a statute or regulation under subsection (b) would be required to submit a petition to the Secretary requesting a review of the statute or regulation. This petition would be required to be accompanied by the scientific and technical information on which it is based, and be submitted to the Secretary not later than 1 year after the date of enactment of this Act, and every 10 years thereafter. The Secretary would be required to make a determination on

any such petition not later than 90 days after the date on which the petition is received.

Section 11. Application with other statutes.

This section would provide that, notwithstanding any other provision of law, this Act shall be the exclusive statutory authority for regulation by the Federal Government of discharges incidental to the normal operation of a vessel to which this Act applies.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

