



HAWAII COORDINATING GROUP ON ALIEN PEST SPECIES (CGAPS)
VESSEL INCIDENTAL DISCHARGE ACT LEGAL ANALYSIS
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INTRODUCTION

The introduction of aquatic invasive species (AIS) associated with global shipping has been identified as a significant threat to ocean and coastal ecosystems. There are two main vectors for AIS introduction: ballast water and vessel biofouling. Vessel biofouling is broadly defined as the attachment of organisms to the submerged portions of ships, boats, and other mobile maritime structures. While both the United States Coast Guard (USCG) and United States Environmental Protection Agency (EPA) currently regulate ballast water, the control of AIS via vessel biofouling remains largely voluntary. Biofouling of vessels – including large commercial ships and smaller recreational craft – is as important as ballast water in its contribution to marine introductions globally (Hewitt & Campbell, 2010) and is the most important vector in Hawaii’s marine invasion history (Eldredge & Carlton, 2002). Up to 78% of the introduced and cryptogenic marine species in the state have been brought to the island by, or in conjunction with, vessel biofouling (Davidson & Ruiz, 2014). It is the dominant vector for the introduction of non-native species into Hawaii’s marine ecosystems, some of which can cause major ecological and economic damage. Therefore, critical attention to the biofouling vector is warranted and must be addressed in any effective biosecurity system.

Several agencies work together to manage and enforce ballast rules and are working towards creating rules to reduce the risk of introduction via biofouling. The Hawaii Department of Health (HDOH), through Section 401 Water Quality Certification (WQC) under the Clean Water Act (CWA), the EPA’s Vessel General Permits (VGP), and state law, oversees twenty-seven vessel discharges that affect state water quality standards, especially at harbors and ports. Only one of these effluents is ballast water, though the others are pollutants that additionally impact Hawaii’s water quality standards. The Coast Guard and the Hawaii Department of Natural Resources, Division of Aquatic Resources (DAR) operate and enforce ballast water rules and management programs. DAR has been working for four years conducting risk assessment and risk mitigation studies to create a biofouling standard and draft regulations, all of which should be completed by the end of 2016.

Issues

The proposed Vessel Incidental Discharge Act (S. 373 as introduced on 2/4/15 and as amended into S. 2829 and H.R. 4909; and the nearly identical H.R. 980; herein collectively referred to as S. 373) seeks to establish uniform national standards for the regulation of ballast water discharges. Creating national ballast water standards draws criticism from established state

ballast water programs for preempting currently existing state standards. More problematic, however, is the inclusion of other “non-ballast water” discharges within the Act’s scope. Even though S. 373 predominantly seeks to address the perceived shortcomings of a multi-tiered ballast water regulatory framework, the bill as drafted occupies the entire field of “discharges incidental to the normal operation of a vessel,” including antifouling biocides and in-water cleaning effluent, thus preempting Hawaii and other states from managing their harbor and coastal waters as potential biofouling pathways.

In addition, S. 373 places both ballast and non-ballast discharge under the authority of the Coast Guard. Doing so effectively eliminates state water quality monitoring and enforcement authority under the EPA’s VGP at harbors and ports. It has long been established under the CWA that the federal act puts forth a baseline standard. From there, States have the right to establish laws and rules that offer more stringent and more specific protection of its local waters. S. 373’s preemption of state and local law, and implied repeal of EPA’s authority to issue the VGP, not only infringes on States’ rights to protect their own waters, but also conflicts with the CWA.

BIOFOULING REGULATORY FRAMEWORK

The International Maritime Organization (IMO) issued guidelines in July 2011 for the control and management of biofouling to minimize the transfer of AIS. The guidelines, while voluntary in nature, provide a framework for ship owners to address the threat of AIS introduction as a result of biofouling. The guidelines recommend that ship owners develop a biofouling management plan for each vessel that takes account of vessel type, size, hull configuration and pattern of activity, and tracks biofouling in a record book. In its guidelines, the IMO expresses concern about the potential release of biocides and aquatic invasive species into the environment due to in-water cleaning of anti-fouling coatings (AFCs). To combat this issue, the IMO guidelines suggest that biofouling material and other contaminants must be captured for safe disposal during the in-water hull husbandry process.

At the federal level, EPA recognizes that methods and technologies to manage vessel biofouling are in the early stages of development, and so relies largely on the 2011 IMO guidelines for vessel biofouling management. These management practices include minimizing hull fouling on long-distance voyages; selecting and maintaining an appropriate antifouling management system; performing in-water inspection; cleaning and maintenance of hulls; thorough cleaning of hull and other niche areas when a vessel is in drydock; and other specified management measures consistent with IMO guidelines. EPA 2011 Underwater Ship Husbandry Discharges, EPA 800-R-11-004. The 2013 VGP also requires inspection of hard-to-reach areas of vessels during drydock. In addition to EPA’s management guidelines, USCG requires rinsing of anchors and anchor chains, and removal of fouling from the hull, piping and tanks on a regular basis. 33 C.F.R. §§ 151.2050(e),(f). While both the Coast Guard and EPA require vessel owners to minimize the transport of AIS, neither mandates AFCs nor provides guidance on which AFCs are the best available technology for each vessel type.

Currently, California is leading the way for biofouling regulations at the state level. On May 1, 2015, the California State Lands Commission issued a notice of proposed rulemaking for amendments to Article 4.8, which would set in place a biofouling management plan to minimize

the transfer of nonindigenous species from vessels operating in California waters with a second round of public comment to begin in May 2016. The draft biofouling regulations are the product of several years of negotiations and input from the shipping industry and California's Marine Invasive Species Program, and largely represent the ideal model for state biofouling regulations. Moreover, the draft regulations maintain consistency with and largely incorporate the IMO 2011 biofouling guidelines.

The California biofouling regulatory framework consists primarily of four components: (1) a biofouling management plan, (2) a biofouling record book, (3) hull husbandry reporting forms, and (4) biofouling management for wetted surfaces. Of the four components, biofouling management for wetted surfaces is the action most vulnerable to preemption by S. 373. For example, Section 2298.6(c) of the draft biofouling regulations deals with vessels exhibiting excessive biofouling upon arrival to a port. This section dictates that vessels found to exhibit obviously excessive biofouling and which remain in the same California port for more than 21 days are subject to mandatory treatment of the vessel to remove or inactivate macrofouling using available in-water cleaning and treatment technologies or out-of-water maintenance. While in-water cleaning techniques often result in the discharge of pollutants into State waters, S. 373 preempts individual states from adopting or enforcing any statute or regulation with respect to this type of vessel discharge.

This type of regulatory mandate highlights the modern awareness that responsible hull husbandry practices are an important component of a broader approach to biofouling management. While antifouling and foul-release coatings are the primary method for reducing biofouling on vessels, there is also a need to manage and remove vessel biofouling that accumulates over time. In-water cleaning is one solution to this problem, but it is carried out in a variety of ways and it carries some biosecurity risk, which must be managed.

VESSEL INCIDENTAL DISCHARGE ACT (S. 373)

S. 373's stated purpose is to "provide for the establishment of nationally uniform and environmentally sound standards governing discharges incidental to the normal operation of a vessel." The primary purpose of the bill is to: (1) establish and implement enforceable, uniform, national standards and requirements for the regulation of ballast water discharge; and (2) permanently exempt commercial vessels less than 79 feet in length, fishing vessels, and recreational vessels from any regulation or standards for incidental discharge. Despite the heralding of this bill as merely establishing uniform ballast water regulations, S.373 broadly sweeps in the entire field of "discharges incidental to the normal operation of a vessel" by including ballast and non-ballast water alike within that definition.

For example, the term "incidental discharge" under S. 373 includes, other than ballast water, twenty-eight specific forms of effluent and six general pollutants associated with various shipboard functions. Specifically, any other pollutant associated with the operation of "a marine propulsion system, shipboard maneuvering system, habitability system, or installed major equipment, or from a protective, preservative, or absorptive application to the hull of a vessel" or "any effluent from a properly functioning marine engine." S. 373 §§ 3(7)(a)(i)(I-III). In Hawaii, EPA's VGP regulates the discharge of twenty-seven categories of effluent, including:

- (1) Deck Washdown and Runoff and Above Water Line Hull Cleaning
- (2) Bilgewater/Oily Water and Separator Effluent
- (3) *Ballast Water*
- (4) Anti-fouling Hull Coatings/Hull Coating Leachate
- (5) Aqueous Film Forming Foam
- (6) Boiler/Economizer Blowdown
- (7) Cathodic Protection
- (8) Chain Locker Effluent
- (9) Controllable Pitch Propeller and Thruster Hydraulic Fluid and other Oil Sea Interfaces including Lubrication Discharges from Paddle Wheel Propulsion, Stern, Tubes, Thruster Bearings, Stabilizers, Rudder Bearings, Azimuth Thrusters, and Propulsion Pod Lubrication, and Wire Rope and Mechanical Equipment Subject to Immersion
- (10) Distillation and Reverse Osmosis Brine
- (11) Elevator Pit Effluent
- (12) Firemain Systems
- (13) Freshwater Layup
- (14) Gas Turbine Wash Water
- (15) Graywater
- (16) Motor Gasoline and Compensating Discharge
- (17) Non-Oily Machinery Wastewater
- (18) Refrigeration and Air Condensate Discharge
- (19) Seawater Cooling Overboard Discharge
- (20) Seawater Piping Biofouling Prevention
- (21) Boat Engine Wet Exhaust
- (22) Sonar Dome Discharge
- (23) Underwater Ship Husbandry
- (24) Weldeck Discharges
- (25) Graywater Mixed with Sewage from Vessels
- (26) Exhaust Gas Scrubber Washwater Discharge
- (27) Fish Hold Effluent

Final 2013 VGP § 6.7.1(a). Of the twenty-seven categories of effluents listed, only one is ballast water. There are still twenty-six other pollutants that affect Hawaii’s water quality standards, all of which would fall under the Act’s definition of “discharges incidental to the normal operation of a vessel.” This sweeping definition is problematic because S. 373 preempts both state and EPA regulatory authority of these pollutants without providing adequate guidance for future regulatory authority.

Preemption of Existing Regulatory Authority

Under the Supremacy Clause of the U.S. Constitution, any state law that conflicts with a federal law is preempted. Express preemption occurs when a federal statute explicitly confirms Congress’ intention to preempt state law. In this case, S. 373’s language clearly preempts any state effort to develop ballast water or non-ballast water management policies. Section 10(a) of S. 373 reads, “[n]o 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.” Accordingly, S. 373 would

fundamentally preempt all state and local laws relating to incidental discharges from vessels by establishing a national uniform standard and set of best management practices.

Likewise, S. 373 supersedes “any permitting requirement or prohibition on discharges incidental to the normal operation of a vessel under any other provisions of the law.” S. 373 § 4(a)(2). Under the Act, EPA would no longer issue discharge permits to vessels and S. 373 would become the exclusive statutory authority for regulation by the Federal Government of incidental vessel discharges. *See* S. Rep. No. 113-304, at 7-8 (2014). As a result, the Act entirely usurps existing State and Federal authority under the National Invasive Species Act (NISA) and CWA to enact both ballast and non-ballast water policies.

S. 373’s sole guidance on how the myriad of non-ballast water pollutants will be regulated is by deferral to the Coast Guard to eventually make that determination. As instructed, the Coast Guard “[n]ot later than 2 years after the date of enactment of this Act, the Secretary, in consultation with the Administrator, shall issue a final rule establishing best management practices for discharges incidental to the normal operation of a vessel other than ballast water.” S. 373 § 5(a)(2). Other than this provision, the regulatory authority for non-ballast water discharge is noticeably absent. Claudia Copeland noted in her testimony to the Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard on February 4, 2015, “[c]entralizing ballast water management with the Coast Guard might reduce confusion about ballast water, but questions would still remain. One question concerns, how would the more than two dozen non-ballast water waste streams that also are included in EPA’s permit be regulated?”

Options could include regulation at the state-level, centralizing authority with the Coast Guard, or having EPA continue to regulate non-ballast water discharges. If EPA were to continue regulating other discharges such as graywater, antifouling hull coating leachate, underwater ship husbandry effluent, or any other non-ballast water discharges, vessels would still be subject to those portions of the VGP. Thus, vessel owners and operators would still be dealing with multiple agencies. On the other hand, centralizing both ballast water and non-ballast water discharges with the Coast Guard raises issues regarding the Coast Guard’s ability to adequately address non-ballast water pollutants, specifically the growing concern of biofouling and in-water cleaning.

In a report by the Committee on Commerce, Science, and Transportation on S. 2094 (the 2014 iteration of S. 373), the estimated costs for implementing the legislation is \$5 million over the 2015-2019 period. S. Rep. No. 113-304, at 7-8 (2014). The projected amount would be used to hire additional staff to conduct enforcement actions and review any proposals from states for more stringent water discharge standards. What this projected cost largely ignores is the amount necessary to establish best management practices for the additional non-ballast water discharges within a two-year period, as mandated by S. 373. Absent the necessary resources allocated to promulgate best management practices for non-ballast water discharges, the Coast Guard’s ability to produce sufficient policy within two years remains in question.

Regulatory Authority for Non-Ballast Water Under S. 373

In December 2013, a report by the California State Lands Commission to the California State Legislature outlined the key problems with both Federal (*i.e.* - EPA and USCG) and California biofouling programs. Three gaps, in particular, illustrate the key discrepancies between EPA and the Coast Guard's biofouling policy and state-level management of biofouling.

First, neither of the federal programs has announced plans to develop preventative and comprehensive biofouling management regulations. Instead, the USCG has encouraged the voluntary implementation of the IMO biofouling guidelines. These are voluntary measures, however, and levels of voluntary implementation are currently unknown. Though plans and priorities may have shifted with the emergence of S. 373, EPA and USCG are still behind Hawaii and California in hull husbandry reporting requirements and biofouling research. Both states have been collecting data to inform the development of biofouling management policies for several years and plan to implement comprehensive regulations during the year 2016.

Second, the Coast Guard does require vessel owners and operators to remove fouling organisms from the vessel's hull, piping, and tanks on a regular basis, but the term "regular basis" is not defined. 33 C.F.R. 151.2050(f). This ambiguous regulatory language leads to an unenforceable requirement that unfortunately functions more as guidance rather than mandatory management. Absent clear statutory language defining the term "regular basis" to remove the ambiguity of the Coast Guard's requirements, the mandate is simply unenforceable.

Finally, neither EPA nor USCG collect data frequently enough to properly assess the biofouling-mediated risk of species introduction or to properly develop management requirements to reduce that risk. Specifically, the Coast Guard does not require vessel-specific information on biofouling management or hull husbandry practices to be submitted in order to inform future policy decisions. The EPA collects minimal data once every five years as part of their VGP renewal. 2013 Final VGP, Appendix E. The Coast Guard and EPA have been primarily focused on the collection of data related to ballast water management rather than biofouling management. Hawaii, on the other hand, has been collecting information on the biofouling management and hull husbandry practices of the vessels operating in the State on a regular basis since 2013. This data allows the Hawaii program to better understand the biofouling-related practices of the vessels operating in the state in order to develop more well-informed and science-based policies to reduce the likelihood of AIS introductions.

Although biofouling progresses in a predictable manner, it is not a uniform process and therefore should not be subject to uniform standards. Certain movement patterns and environmental factors have been observed to affect the diversity and the quantity of biofouling observed on commercial vessels. The factors likely to affect the rate of biofouling include: the amount of time a vessel spends in port; vessel speed; voyage duration; voyage movement patterns; and environmental factors, including salinity, temperature, and nutrients. EPA 2011 Underwater Ship Husbandry Discharges. These factors influence the ability of free swimming or floating organisms to attach to a vessel and remain affixed or affect the ability of the organism to survive voyages. To properly address biofouling, each of these factors would need to be taken into account in order to create a risk-assessment to determine when in-water cleaning would be appropriate or necessary.

The risk of AIS introduction to Hawaii is influenced by Hawaii's specific vessel traffic patterns and biofouling management practices. Effective policies to reduce the risk of species introductions to Hawaii must take these AIS risk factors into consideration. These factors are likely to differ from state to state and coast to coast. The type of individualized risk-assessment that must take place before in-water cleaning may occur distinguishes biofouling management from ballast water management. As a result, federal policies that intend to reduce the threat of AIS introduction broadly across all ports in the United States may not be the most protective or appropriate policies for Hawaii. While centralizing regulatory authority with a federal entity might be desirable, there are key areas where state biofouling programs are better equipped to fill critical management gaps present at the federal level.

S. 373'S EFFECT ON BIOFOULING, ANTIFOULING COATINGS, & UNDERWATER HULL HUSBANDRY

Of particular interest to Hawaii is the effect S. 373 would have on the State's ability to maintain clean water standards and regulate in-water cleaning as part of a comprehensive biofouling management policy. The concern is that the Act's sweeping definition would prohibit the regulation of underwater ship husbandry at locations like harbors and ports, which are particularly high-risk areas for the deposit of biocides and spread of AIS.

Underwater ship husbandry is the maintenance of the underwater portions of a vessel, usually initiated in response to marine biofouling of the underwater hull and hull appendages of boats and ships. Unfortunately, hull husbandry practices can have environmental consequences. Two important issues for aquatic ecosystem health that are directly related to hull husbandry include: (1) the discharge of toxic chemicals used as biocides in antifouling coatings (AFCs), and (2) biofouling as a vector for AIS.

In-Water Cleaning, Biocides, & AIS

Virtually all vessels that are permanently kept in saltwater use AFCs, and the majority of AFCs presently in use contain biocidal chemicals to inhibit the colonization of the vessel's hull (Minchin et al., 2003). These chemicals, which are toxic to fouling organisms, are slowly released from the coated surface into the surrounding waters. The primary constituent used in most biocidal AFCs is copper. Copper-based coatings have the potential to cause severe environmental harm by threatening sediment quality and adversely impacting benthic life. California has recognized this growing problem and in areas like the Unified Port of San Diego, efforts have been made to reduce copper levels through in-water hull cleaning regulations. The policy requires the use of Best Management Practices for any business doing in-water hull cleaning on recreational or commercial boats and requires permits for all hull-cleaning businesses.

At international, national, and state levels, ballast water management has been the major marine biosecurity policy initiative over the last two decades. Biofouling of vessels, however, has received growing attention and is now recognized as one of the most important pathways of AIS translocation (Carlton & Eldredge, 2009). For example, there are now 417 new marine and estuarine species in Hawaii (Carlton & Eldredge, 2009), which is an average of nearly 2 new

species per year since Western contact. Vessel biofouling is responsible for up to 78% of those introductions (Davidson & Ruiz, 2014).

Routine in-water hull cleaning between dry docks could significantly reduce AIS problems. However, many currently available in-water cleaning methods neither contain the organisms that are removed from surfaces nor treat them before they are released into coastal water. As a result, current cleaning methods likely contribute to – rather than reduce – AIS problems. Developing in-water cleaning regulations and establishing a framework to assess when the risks of cleaning are acceptable is necessary to carry out an effective biofouling policy.

As currently written, S. 373 preempts state and local law by prohibiting the adoption or enforcement of any statute or regulation with respect to incidental discharges. S. 373 § 10(a). An incidental discharge includes the following key pollutants: “anti-fouling hull coating leachate;” “any other pollutant . . . from a protective, preservative, or absorptive application to the hull of a vessel;” “underwater ship husbandry effluent;” and “a discharge of a pollutant into navigable waters in connection with the testing, maintenance, or repair of a system, equipment, or engine . . . whenever the vessel is waterborne.” S. 373 § 3(7). The term “anti-fouling hull coating leachate” includes the biocidal copper and antifouling paint plumes that are released into surrounding harbor waters as a result of in-water cleaning activities. Additionally, the term “underwater ship husbandry effluent” includes the discharge of fouling organisms and potential AIS dislodged as a result of the same cleaning process. As a result, any state or local regulations pertaining to these types of discharges are strictly prohibited under S. 373, including any in-water cleaning permitting system.

In addition to biofouling pollutants, vessel graywater is a non-ballast water discharge preempted by S. 373. S. 373 § 3(7)(A)(i)(I)(AA). Graywater is a major source of water quality degradation throughout the United States, containing high levels of pathogens, nutrients, detergents, and organics. Final 2013 VGP Fact Sheet at 19. According to the VGP Fact Sheet, nutrients including nitrogen, phosphorous, and numerous micro-nutrients are associated with a variety of negative environmental impacts; most notably eutrophication, which can have significant adverse impacts on both aquatic life and human health. Pathogens are another important constituent of graywater discharges that present a similar threat. EPA’s study of graywater discharges from cruise ships found that levels of pathogen indicator bacteria exceeded enterococci standards for marine water bathing and fecal coliform standards for harvesting shellfish the majority of the time. Final 2013 VGP Fact Sheet at 20. Graywater discharge may be a significant source of excessive nutrients and pathogenic microorganisms within some regulated waters, and reducing graywater discharges may provide significant human health benefits if sufficiently regulated.

Under the current regulatory framework, underwater ship husbandry, hull fouling discharges, and vessel graywater are federally regulated through the VGP and subject to individual permit conditions at the state level. Under Section 401 of the Clean Water Act, States have to certify that federally issued permits are protective of water quality in order for the permit to be issued in state’s waters. Some states have additional requirements applicable to underwater ship husbandry and hull fouling within their state waters. These states include California, which requires vessel discharges to comply with California State Lands Commission requirements for

hull fouling to control and prevent the introduction of nonindigenous species; Washington, which does not allow in-water cleaning of boat hulls painted with soft, toxic paint; Maine, which prohibits underwater cleaning except as part of emergency repairs, and Massachusetts, which allows hull husbandry discharges only three or miles offshore. Final 2013 VGP.

Hawaii is now four years into developing a biofouling standard, with draft regulations planned for 2016. In the meantime, however, there is a risk that in-water cleaning requests in Hawaii will increase in the near future because of biofouling policy developments in California and other west coast states. To move forward with centralizing biofouling management with the federal government at this early stage would be premature without adequately addressing: (1) how management plans function at the state-level, and (2) which federal program is most capable of establishing and enforcing a national biofouling policy.

S. 373'S EFFECT ON STATE WATER QUALITY STANDARDS

Hawaii state water quality standards, especially at ports and harbors, are primarily regulated in two ways: (1) under the Clean Water Act Section 401 Water Quality Certification (WQC) of VGPs; and (2) under the State of Hawaii's Water Pollution Control prohibition in the Hawaii Revised Statutes (HRS), Chapter 342D-50, and its long standing Water Quality Standards adopted in the Hawaii Administrative Rules, Chapter 11-54. In this case, both mechanisms are either superseded or preempted by S. 373.

Under CWA Section 401, an applicant for a federal license or permit to conduct any activity that may result in a discharge to waters of the United States must provide the federal agency with a certification that the discharge will comply with applicable provisions of the federal law, including state-established water quality standards. Section 401 gives states two distinct powers: first, the power to deny federal permits or licenses by withholding certification; and second, the power to impose conditions on federal permits. When states impose conditions on a federal permit, such as the VGP, the permittee must meet additional state limitations as conditions of the federal permit. In 2008, in Lake Carriers' Association v. EPA, a federal court affirmed that EPA does not have the power to amend or reject state certifications of VGPs under Section 401, which must be attached to and become conditions of the federal permit. 652 F.3d 1, 10 (D.C. Cir. 2011).

Hawaii's conditional Section 401 WQC covers the discharge of 27 categories of effluent from applicable vessels. The EPA primarily enforces these conditions, though the Hawaii Department of Health (HDOH) reserves the right to take appropriate enforcement action as authorized by state law. Discharges authorized under the VGP shall not violate the applicable specific water quality criteria established in HAR, § 11-54. In addition, permittees must report all non-compliance of state water quality standards to HDOH and, in turn, HDOH may conduct routine inspection of vessels covered under the conditional Section 401 WQC. In this way, the VGP operates in close conjunction with HDOH and applicable State law.

Under Section 4, Subsection (a)(2), of S. 373, the Act's uniform national standards and requirements for the regulation of discharges shall "supersede any permitting requirement or prohibition on discharges incidental to the normal operation of a vessel under any other provision

of the law.” The concern is that as a result of this section, EPA would no longer retain authority to issue VGPs to vessels because S. 373 would supersede Section 401 certification of VGPs.

When two federal statutes appear to conflict, the courts generally engage in what is called an “implied repeal” analysis. In making such a determination, the courts look to the later statute and its legislative history to see if there is evidence as to whether Congress intended to leave the prior statute in place or whether it intended the later statute to supersede the prior statute, to the extent of the conflict between the two. The question here is whether Congress intends to repeal Section 401 certification under the CWA as applicable to VGPs. S. 2094’s Committee Report seems to indicate that this is the case. *See* S. Rep. No. 113-304, at 7-8 (2014). If so, States will lose their authority to impose conditions on federal permits of, at a minimum, twenty-six non-ballast water discharges occurring in state waters. Doing so infringes on the State of Hawaii’s ability to enforce state water quality standards anywhere vessel discharges may occur and directly contradicts Congress’ intention that discharges from vessels be regulated under the Clean Water Act. *See Northwest Environmental Advocates v. EPA*, 537 F. 3d 1006 (9th Cir. 2008).

Even more problematic is Section 10, Subsection (a), which states “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.” This section effectively preempts the State from managing its harbor waters by prohibiting the establishment of laws and rules pertaining to any vessel discharges. For example, the State could regulate water quality standards for someone who dumps their aquarium into Honolulu Harbor, but not for copper leachate or the release of undesirable aquatic life as a result of underwater hull husbandry, the difference being the point of origin of the discharge. Moreover, Section 10, Subsection (a) infringes directly on the State’s ability to monitor and enforce state water quality standards established in HRS § 342-D and HAR § 11-54 by exempting the entire field of incidental vessel discharges from any state laws or regulations, thereby disabling the State’s capacity to protect its own waters.

Along the same lines, Section 10, Subsection (b) effectively declares that the only recourse a state has if it desires to have more stringent ballast water standards is to petition the Secretary to adopt a more stringent national uniform standard. This could obviously lead to disagreements among the states about the appropriate national standard, rendering an accepted petition for increased standards highly unlikely. There are also concerns with the Coast Guard’s willingness and ability to enforce more stringent performance standards with the expediency required to protect the public and the environment.

As a result of the broad preemption of state and local law, as well as the implied repeal of EPA’s authority to issue VGPs, states will lose all authority to manage and protect their own waters where vessel discharges occur. In Hawaii, especially, the detrimental effects of such legislation on biofouling and state water quality standards have the potential to be devastating without the proper regulatory oversight.

S. 373’S EXCLUSIONS AND THEIR EFFECT ON PROTECTED WATERS

Section 7 of VIDA lists a series of exclusions for both ballast water discharge and non-ballast water discharge. Of particular concern is the effect that Section 7(d)(B) will have on ballast water discharge in Marine National Monuments and National Marine Sanctuaries (protected waters). This section states that “[n]o permit shall be required or prohibition enforced under any other provision of law for, nor shall any ballast water discharge standard under this title apply” to the uptake and discharge of ballast water within one Captain of the Port Zone (COPT) as identified by the USCG. Hawaii’s COPT includes “the State of Hawaii including all the islands and atolls of the Hawaiian chain and the adjacent waters of the exclusive economic zone (EEZ); and the following islands and their adjacent waters of the EEZ: American Samoa, Johnston Atoll, Palmyra Atoll, Kingman Reef, Wake Island, Jarvis Island, Howland and Baker Islands, and Midway Island.” 33 CFR §3.70–10. Thus, any ballast water taken up in the main Hawaiian islands or American Samoa can be released without regulation or standards in either Papahānaumokuākea Marine National Monument or the Pacific Remote Islands Marine National Monument.

The current USCG ballast water regulations employ the same COPT exemption; however, the current multi-tiered ballast water regulatory authority means that managers of protected waters are free to promulgate ballast water regulations or prohibitions to protect these pristine and fragile environments. Under the extreme preemption found in VIDA, and especially Exclusion 7(d)(B), all Marine National Monument regulation of ballast water taken up and discharged within the COPT is null and void. Unspoiled coral reef ecosystems, such as are found in the waters of Palmyra Atoll, would no longer be protected from discharges of ballast water taken up in places such as Pearl Harbor or Honolulu Harbor.

A fundamental flaw in the language of VIDA leads to the development of this gaping hole in the regulations. Paragraph 3 of Section 4, titled “Rule of Construction”, specifically states that the vessel discharge standards established by the Secretary in Paragraph 1 of Section 4 do not supersede any regulations in marine national monuments or national marine sanctuaries. This Rule of Construction, unfortunately, does not state that the all-encompassing exclusion from regulation found in Section 7(d)(B) does not apply to protected waters. In effect, the Rule of Construction allows managers of protected waters to regulate or prohibit the discharge of ballast water taken up outside of its COPT, but any ballast water taken up within the COPT may be discharged completely free from any prohibition, permitting, regulation, or standards. This fundamental flaw recklessly leaves the U.S.’s marine monuments and sanctuaries vulnerable to AIS and unacceptably undermines the purpose of these protected waters.

SUGGESTED ACTIONS

CGAPS supports S. 371, which would make the VGP exemption for fishing and small vessels permanent. S. 371 provides necessary relief for small/fishing vessels that were inadvertently caught in a legal battle regarding ballast water and the spread of aquatic invasive species. The small vessels subject to the proposed permanent exemption pose a minimal risk to the movement of invasive species as compared to larger vessels and are more suitably controlled through best management practices. In contrast, S. 373 would exempt ballast water and all other discharges incidental to the normal operation of vessels from requirements under the CWA. If adopted, S.

373 would eliminate the long-standing ability of States to protect our waters from shipping-mediated pollution, the introduction of non-native species, and their associated deleterious economic, human health, and ecological impacts.

If the bill progresses, however, we ask for your help in making changes and clarifications that achieve the intent of establishing uniform national ballast water standards under USCG while ensuring all other incidental discharges can be meaningfully addressed and State water quality standards may be enforced locally. If S. 373 is to include non-ballast water discharges, please provide additional guidance clarifying how these discharges will be regulated and establish a better mechanism for state input and collaboration in developing management policies.

In order to achieve S. 373's clear purpose of establishing environmentally sound standards and requirements for the management of incidental vessel discharges, we recommend that Sec. 5(a)(2) be amended to either designate EPA as the agency charged with establishing a final rule for non-ballast water discharges or expand sole rulemaking authority from the Coast Guard to include the EPA, and to mandate consultation with state agencies in promulgation of a final rule establishing best management practices (BMPs) for incidental vessel discharges other than ballast water. Centralizing federal regulatory authority over non-ballast water discharge is not an ideal solution; however, if done so, it needs to provide for a clear delegation of authority to a federal program capable of sufficiently managing and enforcing biofouling policies and allow for substantial state participation in the process.

Our concern is that in the future USCG will issue a biofouling standard without adequate state consultation. Hawaii is now four years into developing a biofouling standard and California plans to commence a second public comment period for its biofouling regulations in May 2016. Though a two-year deadline for establishing non-ballast water BMPs is appreciated for expediency reasons, it might also result in a hastily prepared management plan that does not allow for sufficient state/EPA coordination.

On the other hand, EPA is better prepared to issue a comprehensive final rule establishing BMPs within a two-year period. EPA already manages non-ballast water discharges through its VGP, which mandates implementation of state certification conditions and establishes effluent limitations to control a variety of vessel discharges. Thus, EPA would simply continue to manage non-ballast water discharges, as authorized under the CWA, while establishing future biofouling policies in coordination with individual states. EPA's sole mission is protecting public health and the environment, while for the Coast Guard, regulating pollutant discharges is one of several existing missions and responsibilities. For these reasons, EPA is the appropriate federal agency to establish environmentally sound standards for non-ballast water discharges.

In addition, we suggest that the petition process for more stringent standards occur on a state-by-state basis, as was in earlier renditions of this bill, rather than the petition process as currently proposed that only allows states to petition for a more stringent national standard. Further, we suggest that the petition process be revised to allow state petitions to be submitted on an ongoing basis or within one year of the date of enactment and every ten years thereafter.

Finally, if S. 373 is allowed to move forward, we suggest that the paragraph 3 of section 4 “Rule of Construction” be amended to state that nothing in the entire VIDA bill supersedes or has any effect on the Secretary of the Interior or other managing authorities’ jurisdiction to regulate, permit, or prohibit any discharge incidental to the normal operation of a vessel, including ballast water, within marine national monuments or national marine sanctuaries.

From a biosecurity standpoint, uniform national ballast water standards are less than ideal for controlling the spread of AIS. However, if Congress finds it necessary to move forward with the legislation, we ask that all non-ballast water discharges remain under EPA’s authority to ensure that S. 373’s fundamental purpose of establishing “nationally uniform and *environmentally* sound standards governing discharges incidental to the normal operation of a vessel” is fulfilled.

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Note: This analysis is provided for information purposes only; it has not been reviewed by the Attorney General and thus is not the formal opinion of the State of Hawaii. Questions or comments may be directed to CGAPS.