



NEW YORK'S BALLAST WATER REGULATIONS ISSUE UPDATE & BACKGROUNDER

September 2011

ISSUE SUMMARY

Despite the fact that the bi-national Great Lakes/St. Lawrence Seaway has the most stringent regulatory regime in the world to control the transfer of invasive species via ship's ballast water, the State of New York seeks to impose ballast water treatment regulations that not only greatly exceed global standards set by the International Maritime Organization, they are impossible to comply with. The proposed regulations would take effect as soon as January 1, 2013.

Alongside industry and other government jurisdictions, the scientific community has also determined that cost-effective technology does not yet exist to meet New York's proposed ballast water standards.

New York's regulations would not only apply to vessels intending to discharge ballast water in New York waters, but more universally to any and all ships seeking innocent passage through New York waters. As all ships seeking transit into and out of the Great Lakes must travel through New York waters, the State of New York's ballast water regulations could effectively stop all inter-provincial, inter-state, and international traffic through the St. Lawrence Seaway into the Great Lakes. In addition, New York's rules would also affect all cargo moving in and out of the Port of New York and New Jersey (NYNJ), because vessels calling at New Jersey terminals must pass through New York waters on their way to and from open sea.

The impact of disrupting waterborne commerce dependent on transiting New York waters would be economically disastrous as hundreds of businesses and millions of consumers reliant on ships to transport goods and material to and from both the Port of NYNJ and through to the St. Lawrence Seaway to the heartland of North America would be unable to transit past New York waters. Such a situation would also lead to severe environmental impacts as much of the cargo normally carried by ships would be shifted to North America's already over-burdened highways and hauled with thousands of additional heavy truck movements.

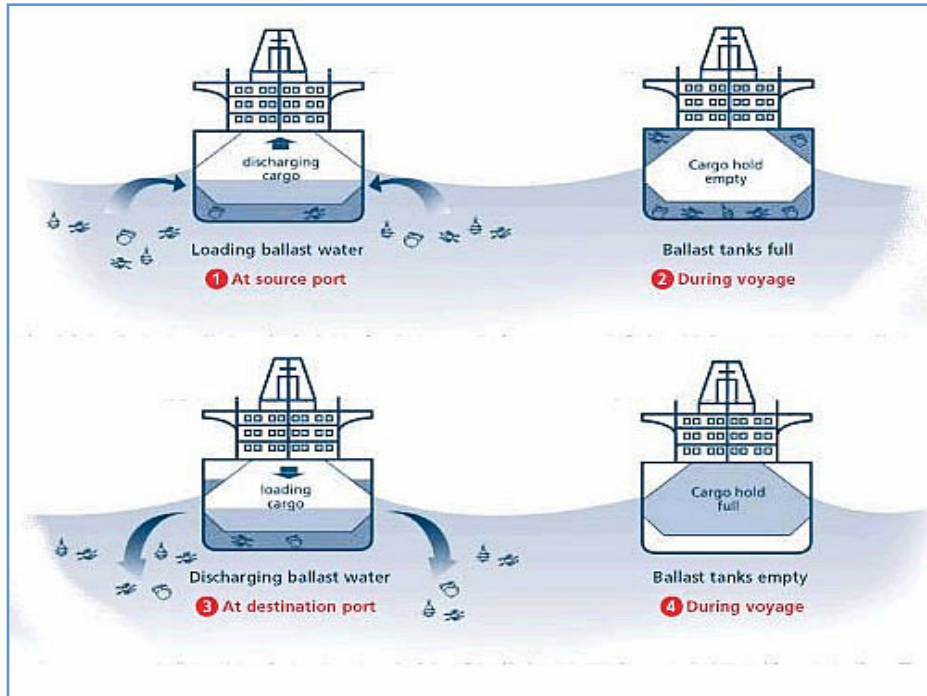
SOLUTIONS: WHAT SHOULD NEW YORK DO ?

- Grant shipping companies extensions to the current August 1, 2013 effective date to the end of the current VGP (December 2013). This will allow the State of New York to work with other stakeholders – most notably the USEPA and U.S. Coast Guard – towards a consistent, harmonized science-based standard for the next five-year VGP.
- Remove the transit provision: vessels that do not intend to discharge ballast water in New York waters must be free to transit through New York waters to other destinations.
- Work with industry and other governments and agencies (ie. U.S. Coast Guard, Transport Canada, USEPA, International Maritime Organization) towards achievable, harmonized, scientifically sound standards for the long-term sustainability of our waters and the economic prosperity of its citizens.

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BACKGROUND

When not fully loaded, cargo ships must take on water (ballast) to maintain stability. Once pumped onboard, ballast water is stored in narrow cavities (ballast tanks) built into the hull of a ship. Ballast water pumped onboard in one port may inadvertently contain aquatic organisms and they could be released if the ballast is discharged in another port while the ship takes on cargo and releases ballast.



In 2004, the International Maritime Organization (IMO), the maritime arm of the United Nations that coordinates international shipping policy, crafted a treaty calling for ballast treatment technology on all vessels throughout the world. The world's shipping industry and most governments (including the Government of Canada) support these requirements.

Ships entering the Great Lakes from overseas already comply with the most aggressive ballast water management requirements in the world. Under federal law, every ocean-going vessel must exchange its ballast water while at sea before entering the St. Lawrence Seaway and the Great Lakes. This practice physically flushes organisms from the ships' ballast tanks, and the salinity of ocean water kills many organisms.

A recent Canadian government-funded study¹ indicates that these two practices of ballast water exchange and flushing are 99.993% effective at removing or exterminating freshwater zooplankton that could possibly invade the ecosystem of the Great Lakes.

Furthermore, the U.S. and Canadian governments currently inspect and test every international ship entering the St. Lawrence Seaway, the gateway to the Great Lakes. These protections were put in place in 2006, and since then, no new aquatic nuisance species have been discovered in the Great Lakes.

¹ *Evaluating Efficacy of an Environmental Policy to Prevent Biological Invasions* (February 2011) Link to report: <http://pubs.acs.org/doi/abs/10.1021/es102655j>

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U.S. EPA VESSEL GENERAL PERMIT

On February 6, 2009, the U.S. Environmental Protection Agency's (EPA) Vessel General Permit (VGP) to control incidental discharges from ships came into effect. The VGP is enacted under the U.S. federal Clean Water Act (CWA), but unfortunately does not put in place a ballast water regulatory standard common to all States, nor standardized with other jurisdictions (like Canada).

On the contrary, the CWA provides for individual States to unilaterally apply more stringent conditions for waters under their jurisdiction. Predictably, since the VGP came into effect, a number of U.S. States have availed themselves of the jurisdictional opportunity to regulate ballast water in their own waters.

NEW YORK STATE REGULATIONS

The Department of Environmental Conservation (DEC) for the State of New York put in place a VGP for ballast water requiring that by August 1, 2013 (originally January 1, 2012, see "Extensions Requests", below), all vessels operating in New York waters must treat ballast water to a standard 100 times greater than those established by the IMO. The regulations would also require that any new ships built after January 1, 2013, must be equipped to clean or treat ballast water to a level that is 1,000 times more stringent than IMO standards.

This means discharged ballast water would be effectively sterile. Such water would be cleaner than the tap water in the average North American home.

Furthermore, New York's interpretation of their certification under the VGP is that the regulations not only apply to vessels intending to discharge ballast water in New York waters, but more universally to any and all ships seeking simple transit through New York waters.

LEGAL ACTIONS

Great Lakes maritime industry stakeholders (Chamber of Marine Commerce, Association of Great Lakes Ports Association, Canadian Shipowners Association, Fednav Limited, Polsteam Inc., Canfornav Limited, Port of Oswego, Port of Albany) have repeatedly challenged New York's regulations in court.

On May 29, 2009, the Albany County Supreme Court dismissed industry's petition against New York State's 401 Certificate. The Court never addressed the transiting issue. Rather, the court's decision appeared to be confined to the question of whether New York had the jurisdictional authority to regulate ballast water.

Notice of Appeal was filed in the Appellate Division of state Court on June 18. The Seafarers International Union and the World Shipping Council supported the industry brief.

The Appellate Division of the New York Supreme Court dismissed the appeal on February 4, 2010 granting deference to New York DEC. A subsequent motion to seek leave to appeal this decision to the New York State Court of Appeals was denied on June 15, 2010.

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EXTENSION REQUESTS

In June 2010, marine carriers operating through New York waters submitted an extension request to the New York DEC asking New York to grant an extension of the implementation date of the ballast water equipment requirements through the expiration of the current VGP (December 19, 2013) under the rationale that no ballast water treatment technology exists that would enable compliance with the DEC requirements.

New York DEC responded on February 7, 2011 with an extension until August 1, 2013.

However, if the extension had been granted to December 2013, then the overall level of uncertainty caused by New York's regulations would be greatly reduced because, unlike with the first VGP, the EPA has pledged to ensure a comprehensive consultation process with extensive scientific input before finalizing the second VGP, which will commence in December 2013.

Regarding new vessels built after January 1, 2013, they will be required to meet New York's 1,000 times IMO standard by January 2013, seven months BEFORE the 100 times IMO standard is scheduled to come into force. This too is clearly impossible and threatens to exclude new, highly-efficient and environmentally friendly vessels from entering Great Lake's service in 2013.

SCIENCE COMMUNITY CONFIRMS TECHNOLOGY NOT AVAILABLE

The State of Wisconsin, which previously required a ballast water treatment standard of 100 times IMO (similar to New York), engaged the Ballast Water Collaborative, a group of experts from academia, government, the shipping industry, testing facilities, treatment vendors and nonprofit organizations in an unprecedented in-depth review of ballast water treatment technologies and the science available to measure their effectiveness.

The Collaborative concurred with the latest science and technology reports that treatment systems have not been approved to the level that Wisconsin's standard had required. The group concluded that technology does not exist to verify whether a treatment system can effectively meet Wisconsin's standard ². Wisconsin has since revised its discharge standard to the IMO standard for implementation in 2014.

On July 12, 2011, the Science Advisory Board of the U.S. Environmental Protection Agency released a report ³ on the technological availability of ballast water technology. The Board found that any ballast water management standard that is more stringent than the one being imposed by the International Maritime Organization (IMO) is not currently achievable.

“Although current test methods and detection limits preclude a complete statistical assessment of whether a ballast water

² **Wisconsin Ballast Water Treatment Feasibility Determination** (December 2010) Link to report: <http://dnr.wi.gov/org/water/wm/ww/gpindex/BallastWaterFeasibilityReport.pdf>

³ **Efficacy of Ballast Water Treatment Systems: a Report by the EPA Science Advisory Board** (July 12, 2011) Link to report: [http://yosemite.epa.gov/sab/sabproduct.nsf/6FFF1BFB6F4E09FD852578CB006E0149/\\$File/EPA-SAB-11-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/6FFF1BFB6F4E09FD852578CB006E0149/$File/EPA-SAB-11-009-unsigned.pdf)

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management system (BWMS) meets any standard more stringent than Phase 1 (IMO ballast water standard), the Panel concluded that none of the assessed BWMS can meet a standard that is 100 or 1000 times more stringent.”

“Reasonable changes in existing BWMS are likely to result in incremental improvements, but are not likely to lead to 100 or 1000 times further reductions in organism concentrations.”

THE LATOURETTE AMENDMENT

On July 12, 2011, the Appropriations Committee of the U.S. House of Representatives approved an amendment introduced by Rep. Steve LaTourette (R-OH) to the Interior and Environment Appropriations bill which is designed to bring unified standards to the issue of ballast water regulation in the Great Lakes region.

LaTourette's amendment bars any state adjacent to one or more of the Great Lakes from receiving federal funds from the U.S. Environmental Protection Agency (EPA) if that state puts into effect a ballast water regulation that is more stringent than U.S. Coast Guard or International Maritime Organization standards.

The amendment was approved by committee and is now (August/2011) in the House spending bill that funds the EPA and Great Lakes programs. The full U.S. House of Representatives has not yet voted on this bill.

COAST GUARD AND MARITIME TRANSPORTATION SUBCOMMITTEE HEARINGS

On July 13, 2011, the U.S. Coast Guard and Maritime Transportation Subcommittee, chaired by U.S. Rep. Frank LoBiondo (R-NJ), and the Water Resources and Environment Subcommittee, chaired by U.S. Rep. Bob Gibbs (R-OH), held a joint hearing to explore current ballast water and incidental discharge management regulations as well as potential ways to implement cost effective and common sense approaches to future regulations.

Citing the EPA Science Advisory Board report, Gibbs, LoBiondo and a host of experts testified that regulations such as those proposed by the New York Department of Environmental Conservation don't reflect the realities of the business of protecting the environment from the threat posed by aquatic invasive species.

Subcommittee Chairman Lobiondo said, “We have to overcome this mindset that mandating a dozen different, unachievable standards, each more stringent than the next, somehow protects our environment. It does not. The time has finally come to enact a clear, effective, and uniform national standard that utilizes available and cost effective technology to reduce the risk of future aquatic invasions. We cannot afford to delay any longer as ballast water continues to threaten our environment and our economy.”

Chairman Gibbs echoed LoBiondo's call for improvement to the current system: “As we consider ballast water standards, we should not burden our shippers with unobtainable, unrealistic, expensive regulations that have not demonstrated a significant environmental benefit. Instead we need a common sense approach that can be enacted quickly, protects the environment, reduces red tape, grows maritime jobs and opens the flow of maritime commerce.”

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GOVERNMENT OF CANADA ACTION

In July, 2010, the Chamber of Marine Commerce coordinated the formation of an industry-government working group consisting of representatives from five government departments (Transport, Environment, Foreign Affairs, International Trade, and Industry) and a number of industry representatives. This group meets periodically in order to advance collaborative efforts on addressing this issue.

The Government of Canada has also engaged in extensive diplomatic efforts to address the New York regulation, including representations from the Minister of Transport in the form of direct letters to NY Governor Cuomo and the U.S. State Department, as well as diplomatic intervention from Canada's Ambassador in Washington and the Canadian Consulates in New York.

In January, 2011, The Chamber of Marine Commerce accompanied St. Catharines, Ontario Member of Parliament, Rick Dykstra to Albany, New York to meet and brief New York State legislators on this issue. Mr. Dykstra and Burlington MP, Mike Wallace, have both been very active in working towards a solution to this issue.

Provincial government officials in Ontario and Quebec have also been active in taking up this issue with their State counterparts.

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