

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY**

**INTEROFFICE COMMUNICATION**

TO: Steven E. Chester, Director

FROM: William Creal and Barry Selden, Water Bureau

DATE: December 5, 2008

SUBJECT: U.S. 6<sup>th</sup> Circuit Court of Appeals Upholds Michigan's Ballast Water Permitting Law

The Water Bureau and Department of Attorney General successfully defended a lawsuit initiated by nine plaintiffs including: domestic and foreign shipping companies, domestic Great Lakes Port Authorities, and several trade associations who were seeking to invalidate Michigan's ballast water permitting law. Michigan was joined in this lawsuit by the Michigan United Conservation Club, the National Wildlife Federation, Alliance for the Great Lakes, and the Natural Resources Defense Council as intervenor-defendants.

Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, was amended on June 6, 2005, to establish permit requirements governing the discharge of ballast water from ships operating within Michigan's jurisdictional boundary waters of the Great Lakes. The amendments require shippers to obtain a permit and to utilize an effective treatment method to destroy potential aquatic nuisance species that may be transported in ballast water obtained in foreign ports and discharged into the Great Lakes. A separate type of permit is required for those shippers who do not discharge ballast water into the Great Lakes, but use Michigan ports.

The case was originally filed in the U.S. District Court in Detroit on March 15, 2007, (CN No. 07-11116). On August 15, 2007, District Judge John Feikens denied the plaintiff's motion for Summary Judgment and granted Defendant's Motion to Dismiss.

Subsequently, on November 21, 2008, the 6<sup>th</sup> Circuit Appeals Court in Cincinnati unanimously rejected the plaintiff's claims on appeal (COA No. 07-2083). In upholding the District Court ruling, the Circuit Court found that the State of Michigan had "undisputedly legitimate reasons" for enacting a state statute governing the discharge of ballast water into the Great Lakes waters under Michigan's jurisdiction. The court further stated that such a state law was expressly contemplated by Congress.

The Circuit Court quoted from the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. § 4701) (NANPCA) and concluded it is Congress' clear intent that the states should proactively pursue regulation of aquatic nuisance species in partnership with the federal government, including determining proper control and eradication measures. In fact, Congress declared under NANPCA that untreated ballast

water from ocean vessels results in the introduction of aquatic nuisance species; thereby, concluding that aquatic nuisance species are a real and present threat to the Great Lakes. Congress then reauthorized and amended the NANPCA by enacting the National Invasive Species Act of 1996 (NISA) declaring that preventative measures to control the introduction of aquatic nuisance species is necessary and that help from the states is paramount in controlling these organisms.

This Court examined the current U.S. Coast Guard regulations and found them lacking in establishing viable measures to prevent the introduction of aquatic nuisance species. The Circuit Court concluded that after nearly 15 years, the Coast Guard has failed to promulgate any meaningful regulations governing ballast water or preventing aquatic nuisance species introduction.

In analyzing each of the Plaintiff's claims, the Circuit Court found several of the Plaintiffs lacked constitutional standing, while the remaining Plaintiffs could not sustain their claims. These claims included: federal preemption, which the court found unpersuasive since Congress, through the NISA, expressly invites and authorizes state action.

The Circuit Court also rejected the Plaintiff's "dormant" Commerce Clause argument. This theory asserts that states may not enact statutes that may unduly interfere with Congress' exclusive authority to govern interstate and foreign commerce. Congress may, however, delegate certain types of regulatory authority related to commerce to the states through legislation. The Plaintiff's argument here also failed because the NISA expressly authorizes state action to control aquatic nuisance species—thus, Congress contemplated allowing broad state control in the ballast water arena.

Lastly, the Plaintiff's Substantive Due Process argument was flatly rejected. The Plaintiff's claim that requiring shippers to obtain permits, even if they do not discharge ballast water, is a property deprivation, and that was unpersuasive to the Court. Since Michigan has a legitimate interest in protecting its waters from further degradation due to aquatic nuisance species, such a statute passes the rational-review test.

*William A. ...*  
*B. O. ...*