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ERRATA

JUNE 5, 2017.—Ordered to be printed

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

R E P O R T

[To accompany S. 1129]

CORRECTIONS

On page 20, regarding title VIII, after “(Senate Report 115-016).” insert “See appendix hereto for subsequent information regarding the Vessel Incidental Discharge Act.”

On page 128, after the Changes in Existing Law section, add the following:

APPENDIX—VESSEL INCIDENTAL DISCHARGE ACT

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 nuisance species. One of the best known examples of introduction of an aquatic nuisance 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. Other aquatic nuisance species have threatened the diversity and abundance of native species, threatened the ecological stability of our Nation's waters, and threatened the American people's commercial, agricultural, aquacultural, and recreational use of those waters.

Although the problems of, and potential solutions to, the introduction and spread of aquatic nuisance species through ballast water are clear, the laws, including 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 statutes 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, 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 In 1999, environmental groups petitioned EPA to repeal that regulation, noting that the introduction of non-indigenous species through ballast water was "significantly degrading aquatic resources through the United States," threatening both "aquatic ecosystems and the economic livelihood of many communities dependent on these aquatic resources."³ The petitioners contended that the exemption conflicted with the plain text of the Clean Water Act, and with judicial interpretations of that Act, and was thus unlawful.⁴ After EPA denied the petition, petitioners and a group of states sued EPA over the permitting exemption. A district court agreed with petitioners that EPA's then 32-year-old NPDES exclusion of vessel incidental discharges was *ultra vires*,⁵ and the U.S. Court of Appeals for the Ninth Circuit unanimously upheld that judgment.⁶

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 nuisance species in the United States by enacting the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990⁷ (NANPCA), and amendments thereto by the National Invasive Species Act⁸ (NISA) in 1996. NANPCA/NISA requires the Coast Guard, in coordination with EPA and other relevant Federal agencies, to establish and administer a ballast water management program to prevent introduction

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

²*Ibid.*

³Pac. Envtl. Advocacy Ctr. et al., "Petition for repeal of 40 C.F.R. §122.3(a)" (Jan. 13, 1999) at 1 (https://www.epa.gov/sites/production/files/2015-09/documents/2007_07_02_invasive_species_ball_water_pet-2.pdf).

⁴*Id.* at 2.

⁵*Nw. Envtl. Advocates, et al. v. U.S. Envtl. Prot. Agency (EPA)*, 2005 WL 756614 (N.D. Cal. Mar. 30, 2005) (granting summary judgment to petitioners); *Nw. Envtl. Advocates, et al. v. U.S. EPA*, 2006 WL 266 9042 (Sept. 18, 2006) (vacating the regulation).

⁶*Nw. Envtl. Advocates, et al. v. U.S. EPA*, 537 F.3d 1006 (9th Cir. 2008).

⁷Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, (P.L. 101-646, 104 Stat. 4761) (1990).

⁸National Invasive Species Act, P.L. 104-332, 110 Stat. 4073 (1996).

and dispersal of nonindigenous species into the waters of the United States.

In 2004, prior to the vacatur of EPA's regulatory exclusion of vessel incidental discharges from NPDES, the Coast Guard and 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 Sediments⁹ (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 2004.¹⁰ 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 ensure foreign-flagged vessels' compliance with the Convention's treatment and other management requirements.¹¹

Most importantly, the Convention includes a ballast water treatment standard based on the number of living organisms contained in discharged ballast water that was the most stringent standard scientifically proven to be achievable and detectable. 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.¹² 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.¹³ On September 8, 2017, the Convention came into effect, requiring ships in international trade to meet Regulation D-2.¹⁴

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

⁹International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

¹⁰Ibid, section D, Regulation D-4.

¹¹International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

¹²Ibid, section D, Regulation D-2.

¹³Ibid.

¹⁴MarEx, "Ballast Water Convention to Enter into Force in 2017," The Maritime Executive, September 8, 2016 (<http://www.maritime-executive.com/article/ballast-water-convention-to-enter-into-force-in-2017>).

properly comply with, the Coast Guard's 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.¹⁵ In the case of a manufacturer who's 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, 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,"¹⁶ even though it has not been approved by the Coast Guard. Thus, a BWMS could end up being installed on a vessel in compliance with the VGP, even though it does not (and may never) comply with Coast Guard regulations.

Though initially Coast Guard's type-approval took longer than expected, as of October 2018, the Coast Guard has approved 10 BWMS. Coast Guard regulations allow for the extension of compliance deadlines to accommodate delays in type-approval, but EPA's VGP is vague as to how it will or will not apply when Coast Guard has granted a compliance date extension.¹⁷ The VGP took effect for most commercial vessels on December 19, 2013, while the first BWMS was not type-approved by the Coast Guard until December 2016.¹⁸ Additional systems are likely to be approved shortly, but it will still be some time before there are suitable systems for all vessels. Other questions exist about crewing, such as whether vessel owner/operators are expected to install VGP-compliant BWMS that may or may not later be approved by the Coast Guard. 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, EPA will, subject to additional case-by-case considerations, "consider such violations of the VGP ballast water numeric discharge limit a low enforcement priority."¹⁹

Another example of the conflict and confusion between the two regimes is EPA's VGP requirement of ballast water exchange combined with the use of a BWMS for certain vessels that enter the

¹⁵ 33 CFR §151.2025(a)(1) (2013).

¹⁶ Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (VGP), December 19, 2013, section 2.2.3.5.1.1 (<https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0141-0949>).

¹⁷ 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.").

¹⁸ U.S. Coast Guard, "Ballast Water Management (BWM) Extension Program Update," Marine Safety Information Bulletin, December 2, 2016 (https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/MSIB/2016/014_16_12-2-2016.pdf).

¹⁹ Memorandum from Cynthia Giles, EPA Assistant Administrator, to Regional Vessel General Permit Enforcement and Program Directors, December 27, 2013 (<http://www2.epa.gov/sites/production/files/2013-12/documents/vesselgeneralpermit-erp.pdf>). VGP section 2.2.3.7.

Great Lakes after operating outside the U.S. Exclusive Economic Zone.²⁰ 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 with respect to effective compliance and enforcement of these sometimes 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, in addition to EPA's conflicting vessel operational requirements under the VGP.²¹

On top of this duplicative, inconsistent, and confusing Federal regime, subjecting vessels to NPDES also has opened the door for States to easily establish their own varying standards and requirements for vessel incidental discharges. Twenty-five States have used their certification authorities under section 401 of the Clean Water Act to impose additional, State-specific VGP requirements on vessels within their borders.²² Additionally, several States, such as California, Michigan, Minnesota, Ohio, Oregon, Washington, and Wisconsin, 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 Regulation D-2) and requires zero detectable living organisms greater than 50 micrometers per milliliter of ballast water discharged.²³ However, because no BWMS exists that can achieve these standards, the State has continually delayed implementation of requirements for vessel owner/operators to install such BWMS. 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 Cali-

²⁰VGP, section 2.2.3.7 (<https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0141-0949>).

²¹"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," February 11, 2011 (https://homeport.uscg.mil/Lists/Content/Attachments/883/signed%20CG%20EPA%20MOU%20dtd%2011feb11_2.pdf).

²²VGP, section 6 (imposing State-specific requirements for Alaska, Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Vermont, Washington, and Wisconsin).

²³Cal. Pub. Res. Code 71205.3 (West 2014).

ifornia 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 ship-board ballast water treatment systems to meet the California performance standards.²⁴

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. 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 non-indigenous 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.²⁵

Oregon's ballast water management statute contains similar language regarding technological and practical feasibility.²⁶ Oregon's statute also includes a requirement that its ballast water standards and procedures be, "[t]o the extent practicable . . . consistent with relevant rules adopted by the States of California and Washington."²⁷ 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 used their certification authority under section 401 of the Clean Water Act to condition the VGP, as it would apply in their waters, with 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 EPA's VGP requirements, but also with any additional VGP State-specific permit requirements. A total of 25 States have such VGP permit requirements.

²⁴ California State Lands Commission, 2014 Assessment of the Efficacy, Availability, and Environmental Impacts of Ballast Water Treatment Technologies for Use in California Waters, August 2014 (http://www.slc.ca.gov/About/Reports/MISP_TechRpts/2014.pdf).

²⁵ Wash. Rev. Code Ann. 77.120.030 (West 2014).

²⁶ 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)).

²⁷ Ibid.

Despite the wide latitude currently given to States to establish higher standards under the current regulatory regime, EPA has shown continued difficulty applying NPDES permitting requirements to mobile vessels. In October 2015, the U.S. Court of Appeals for the Second Circuit found that EPA acted arbitrarily and capriciously in issuing its 2013 VGP because, among other reasons, it had unlawfully failed (1) to consider the possibility of on-shore treatment facilities for ballast water; (2) to reasonably justify an exemption for Laker vessels from certain technology-based standards; and (3) to promulgate effluent limitations that, as required by section 402 of the Clean Water Act, would ensure compliance with local water-quality standards.²⁸ On October 10, 2018, EPA announced that despite the VGP's December 18, 2018, expiration date, the VGP would be "administratively continued . . . until a new permit is issued," with "a target timeframe of permit proposal in spring 2019."²⁹ EPA is expected to update the VGP to address the Second Circuit's holdings.

This complicated 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, impeding maritime commerce, and, most importantly, diminishing the overall effectiveness of domestic efforts to prevent the introduction of aquatic nuisance species. Strong, enforceable, uniform national standards are necessary to effectively defend against nuisance species brought to the United States in ballast water, and spread throughout our waters.

This Act requires the Administrator of EPA (Administrator), in concurrence with the Secretary of the department in which the Coast Guard is operating (Secretary), 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 are to be based on the best available technology economically achievable, and will provide greater consistency to the current patchwork of Federal and State incidental discharge requirements. This Act vests the Secretary with enforcement responsibilities with respect to these standards and requirements; States may also enforce in a manner consistent with the Secretary.

SUMMARY OF PROVISIONS

This Act requires the Administrator, in concurrence with the Secretary, to establish and implement uniform national standards for the regulation of discharges incidental to the normal operation of vessels, including ballast water. This Act draws on established regimes within the Clean Water Act for addressing discharges incidental to the normal operation of a vessel and utilizes well-understood Clean Water Act terminology to provide both industry and environmentalists regulatory certainty. This Act establishes best available technology economically achievable as the required basis and justification for most new standards, superseding the current patchwork of Federal and State incidental discharge requirements.

²⁸ *NRDC v. U.S. EPA*, 808 F.3d 556 (2d Cir. 2015).

²⁹ U.S. EPA, "Vessels-VGP National Pollutant Discharge Elimination System" (<https://www.epa.gov/npdes/vessels-vgp>) (last visited Nov. 13, 2018).

Five years after the initial promulgation of regulations, and every 5 years thereafter, the Administrator would conduct a review to determine whether it is possible to strengthen the standard. In the interim years, and in conjunction with a scheduled review, States will be allowed to petition for stricter incidental discharge standards. Under this Act, if the Administrator, in concurrence with the Secretary, determines those standards are feasible and protect the environment, they would become the new national standards. The Secretary and Administrator are empowered to enforce the standards and requirements established under this Act. States are also authorized to enforce in a manner consistent with the Federal standards and requirements established under this Act.

LEGISLATIVE HISTORY

During the 114th Congress, the Committee on Commerce, Science, and Transportation reported S. 373, the Vessel Incidental Discharge Act (VIDA). The Committee also included VIDA as part of S. 2829, the Maritime Administration Authorization and Enhancement Act for Fiscal Year 2017.

The House of Representatives passed a similar provision in H.R. 4909, the National Defense Authorization Act (NDAA) of 2017 (section 3604). Forty-one Senators signed a letter to the Armed Services chairmen and ranking members of both Houses, asking that the provision be included in the NDAA conference report. Ultimately, the provision was not included because it lacked a direct defense nexus.

On January 17, 2017, at the onset of the 115th Congress, Senator Wicker introduced legislation similar to S. 373, S. 168, the Commercial Vessel Incidental Discharge Act (CVIDA), which was referred to the Committee on Commerce, Science, and Transportation of the Senate. Senators Casey, Rubio, Nelson, and Thune are original cosponsors. There are 19 additional cosponsors. On January 24, 2017, the Committee met in open Executive Session and by voice vote ordered S. 168 to be reported favorably without amendment. The Committee worked with other Senate offices over the following year to amend the bill to create an acceptable bipartisan product. On April 18, 2018, the Committee incorporated a renamed CVIDA (hereafter VIDA) into the Coast Guard Authorization Act, S. 1129. The Coast Guard Authorization, including VIDA, was considered on the Senate floor as part of another measure, S. 140. The bill failed to achieve the necessary 60 votes to close debate because of concerns about the VIDA title. Thereafter, Commerce Committee staff agreed to work with staff from the Senate Committee on Environment and Public Works to further refine the language and address remaining concerns.

VIDA TITLE AS PASSED BY THE SENATE

The final VIDA language gives EPA the lead role in establishing standards for discharges incidental to the normal operation of a vessel, while the Coast Guard focuses on establishing technology and compliance requirements to achieve the EPA standards, and enforcing those EPA standards and other requirements.

This Act draws on established regimes under section 312 of the Clean Water Act to address discharges incidental to the normal op-

eration of a vessel, and utilizes well-understood Clean Water Act terminology to allow both industry and environmentalists regulatory certainty. It also keeps in place existing rules and State laws until the full suite of new requirements are final and enforceable for every vessel and discharge covered. This Act also provides certain accommodations for unique regional situations. For example, the Pacific Region ballast water exchanges would continue, and the Great Lakes could set their own basin-wide standards. These standards are driven by the Great Lakes Governors and take into account a multitude of interests. This Act allows for robust participation from States both for setting the nation-wide standards and enforcement, and it allows States to protect certain environmentally sensitive areas and drinking water through the establishment of no-discharge zones. It also establishes a Great Lakes Invasive Species Program at EPA.

This Act sets nationwide standards for incidental discharges. It ensures the safety of crews and vessels. It provides predictability to industry for standard setting and new investments in technologies. States have the authority to enforce the Federal requirements regarding incidental discharges, and States currently charging fees to vessel owners and operators for incidental discharge inspections are able to continue to do so. It also leaves in place the current regulatory regime until the new framework is final, effective, and enforceable. States also have the authority to require vessel operators to provide ballast water compliance information prior to arrival at a port. Finally, this Act creates a new grant program funded by ballast water penalties and appropriations that allow for further study of aquatic nuisance species.

SECTION-BY-SECTION ANALYSIS

TITLE IX—VESSEL INCIDENTAL DISCHARGE ACT

Section 901. Short title.

The section would include a short title, Vessel Incidental Discharge Act of 2018.

Section 902. Purposes; findings.

This section would establish purposes for this title, which include to establish uniform, environmentally sound standards and requirements for the management of discharges incidental to the normal operation of a vessel; to charge the Environmental Protection Agency (EPA) with establishing standards; to charge the Coast Guard with enforcing those standards and developing technology standards; and to preserve, in certain circumstances, the ability for States to set their own standards.

The section would preserve the historic roles of EPA and the Coast Guard and the regulatory and statutory history with respect to vessel discharges.

Section 903. Standards for discharges incidental to the normal operation of vessels.

This section would establish a new subsection (p) in section 312 of the Federal Water Pollution Control Act (known as the Clean Water Act).

Definitions

The new section 312(p)(1) would define the following terms: aquatic nuisance species; ballast water; ballast water discharge standard; ballast water exchange; ballast water management system; best available technology economically achievable; best conventional pollutant control technology; best management practice; best practicable control technology currently available; Captain of the Port Zone; Great Lakes Commission; Great Lakes System; internal waters; marine pollution control device; nonindigenous species; organism; Pacific Region; port or place of destination; render nonviable; saltwater flush; Secretary; Small Vessel General Permit; small vessel or fishing vessel; and Vessel General Permit.

Applicability

Section 312(p)(2) would establish the applicability for this section to be any discharge incidental to the normal operation of a vessel. It also would exclude certain vessels from this subsection, including vessels of the Armed Forces, recreational vessels, small vessels and commercial fishing vessels, and floating craft permanently moored to a pier. It additionally would exclude from 312(p) some discharges, including certain types of ballast water that do not present a risk for aquatic nuisance species, certain discharges that result from (or contain material resulting from) activity other than the normal operation of a vessel. Unless otherwise provided in 312(p), an incidental discharge excluded from regulation under 312(p) would remain subject to the pre-enactment status quo, which in most cases would be State law and NPDES permitting.

Continuation in Effect of Existing Requirements

The new section 312(p)(3) would continue in effect all requirements of the 2013 VGP,³⁰ and all regulations promulgated by the Secretary under NANPCA section 1101,³¹ until the Secretary has fully discharged his or her duty to develop all requirements under this section, and those requirements are final, effective, and enforceable with respect to every single individual type of discharge subject to 312(p). Only then would the legacy 2013 VGP and NANPCA section 1101 requirements cease to have effect.

Succinctly, no preemption or displacement of the 2013 VGP or NANPCA section 1101 rules would occur until every single type of incidental discharge that is subject to regulation under 312(p)(2), from every vessel releasing such discharge, is required to comply with Secretary-promulgated rules regarding implementation of the marine pollution control devices,³² rules regarding compliance assurance,³³ and published procedures for the enforcement of all

³⁰Every requirement of the 2013 VGP is continued in effect, including those parts such as 2.3 (“Additional Water Quality-Based Effluent Limits”) and 6 (“Specific Requirements for Individual States or Indian Country Lands”) that are not carried-over as statutory minima when the Administrator or Secretary develops standards and requirements under the new sections 312(p)(4) and 312(p)(5). The new section 312(p)(8)(A)(i) prohibits any person from violating these legacy VGP requirements during the transitional period.

³¹16 U.S.C. §4711. The new section 312(p)(3)(B) lists some, but not all, of the critical Secretary regulations promulgated pursuant to this section. All regulations promulgated pursuant to NANPCA section 1101 are continued in force and effect during the transitional period. As with the legacy VGP requirements, the new section 312(p)(8)(A)(ii) prohibits any person from violating these legacy NANPCA requirements during the transitional period.

³²Clean Water Act section 312(p)(5)(B).

³³Clean Water Act section 312(p)(5)(C).

312(p) standards and requirements by States.³⁴ If there is any discharge covered by section 312(p)(2) for which any Secretary-promulgated requirements are not yet final, effective, and enforceable against a vessel by relevant Federal and State agencies, then there would be no displacement of any legacy VGP or NANPCA section 1101 rule with respect to any discharge. This Act would use identical language with respect to the timing of State preemption so that the shift would occur simultaneously.³⁵

National Standard of Performance for Marine Pollution Control Devices and Water Quality Orders

Section 312(p)(4)(A) would require the Administrator, in concurrence with the Secretary, and in consultation with interested States, to promulgate Federal standards of performance for marine pollution control devices for incidental discharges within 2 years of enactment. The Secretary's failure to concur would not be a basis for the Administrator to fail to meet statutory deadlines or to comply with the substantive requirements applicable to developing the standards of performance. The Administrator also would be required to develop a consultation process with interested Governors, and to respond in writing to a Governor's concerns raised during that process. The Administrator would have an independent legal obligation to promulgate standards of performance for the applicable discharges, and on the applicable deadline, set forth in the new section 312(p)(4). Neither the Coast Guard concurrence process nor the Governor consultation process would provide a basis for the Administrator to miss the 2-year deadline established in section 312(p)(4)(A)(i).

Section 312(p)(4)(B)(i) would require the Administrator, for all pollutants, to set standards based on application of the best practicable control technology currently available. For conventional pollutants specifically, it further would require the use of the best conventional pollutant control technology. For toxic and nonconventional (including aquatic nuisance species) specifically, it would require the use of the best available technology economically achievable. The definitions of these technology-based standards in section 312(p)(1) intentionally cross-reference to other parts of the Clean Water Act to ensure that the Administrator makes identical considerations when setting the standards of performance under section 312(p) as the Administrator was previously required to do when setting technology-based effluent limits for permits under Clean Water Act section 402. As under section 402, these well-established technology-forcing regimes would promote stronger standards over time, and require the Administrator to consider the full range of technologies capable of limiting a particular discharge.³⁶

Section 312(p)(4)(B)(ii) would require the Administrator to require the use of best management practices if numeric standards of performance are infeasible or if best management practices are reasonably necessary to achieve the standard of performance or carry out the purpose and intent of the subsection. As with the technology standards themselves, this best management practice

³⁴ Clean Water Act section 312(p)(5)(A)(iii).

³⁵ See Clean Water Act section 312(p)(9)(A)(i).

³⁶ See, e.g., *NRDC v. EPA*, 808 F.3d 556 (2d. Cir. 2005); *NRDC v. EPA*, 822 F.2d 104, 124 (D.C. Cir. 1987).

language is modeled off a similar regulatory provision for NPDES permits to ensure that the Administrator applies the same relevant considerations under section 312(p).³⁷

Section 312(p)(4)(B)(iii) would establish the minimum requirements with respect to standards promulgated by the Secretary under this section to be no less protective than the specified portions of parts 2.1, 2.2, and 5 of the 2013 VGP and would allow the Administrator to distinguish among classes, types, and sizes of vessels. This would include the heightened technology-based requirements in the 2013 VGP applicable to waters protected for conservation purposes (those listed in Appendix G). This would mean that EPA's initial round of standards must be based on requirements at least as strong as those in relevant portions of the 2013 VGP, including the heightened requirements for Appendix G waters.

Section 312(p)(4)(C) would provide for subcategorization based on certain vessel characteristics, such as vessel size, allowing the Administrator to develop different standards for vessels that are not similarly situated with respect to those factors.³⁸

Section 312(p)(4)(D) would require the Administrator, in concurrence with the Secretary, to review, and update if necessary, the standards every 5 years. It also would provide a series of very limited circumstances, modeled off comparable anti-backsliding requirements in section 402(o), under which the Administrator may revise a standard of performance to be less stringent than an existing 312(p) requirement. The exceptions to this provision would provide the sole basis for the Administrator to weaken standards of performance compared to the legacy VGP requirements under section 312(p)(3) or to future standards of performance under section 312(p)(4); subcategorization is not itself a basis to weaken the requirements applicable to any vessel.

Section 312(p)(4)(E) also would allow the Administrator, in concurrence with the Secretary, to order the use of an emergency best management practice—including a prohibition of discharge—if the Administrator, in consultation with States, determines that such a practice is necessary to reduce the reasonably foreseeable risk of introduction of aquatic nuisance species, or will mitigate the adverse effects of a discharge that contributes to a violation of most water quality requirements established under section 303. State antidegradation policy requirements established pursuant to section 303, including water-quality requirements respecting Tier 3 waters, may present clear examples of water quality standards that do not directly concern aquatic nuisance species.

This Act has no impact on water-quality processes under section 303 of the Clean Water Act, including antidegradation policy requirements, and is silent with respect to State authority to establish the water quality-based requirements under section 303 that may form the basis for an emergency order.³⁹ Because States retain a primary role in developing water quality standards under section 303, when consulting with relevant States under this provision, the Administrator should give deference to a State's interpretation of its own standards.

³⁷ See 40 CFR §122.44(k)(3)–(4).

³⁸ Cf. *NRDC*, 808 F.3d. at 576–77.

³⁹ See 40 CFR §131.6.

As with the standards of performance under section 312(p)(4)(A), the Administrator would need not wait more than 60 days for the Secretary to concur with the use of an emergency best management practice. Nothing in this Act would prevent the Administrator from issuing the order sooner than 60 days if the Secretary concurs. The intent is that the Administrator will move expeditiously in emergency situations, or where best management practices can mitigate the adverse impacts of a discharge that contributes to violations of water quality requirements under section 303. This provision would set the maximum length of the order at 4 years but allow for 4-year extensions. The Administrator would have broad authority to order these emergency best management practices.

Implementation, Compliance, and Enforcement Requirements

Section 312(p)(5) would require the Secretary, within 2 years of the Administrator's establishment of standards, to promulgate standards with respect to ensuring, monitoring, and enforcing compliance of the standards established by the Administrator. It would require that standards be no less stringent with respect to ensuring, monitoring, and enforcing compliance than specified portions of parts 3, 4, and 5 of the 2013 VGP (including for protected waters under Appendix G) and the comparable, existing requirements promulgated under NANPCA. Such regulations shall include those governing the design, construction, testing, approval, installation, and use of marine pollution control devices as are necessary to ensure that vessels comply with the Administrator's standards of performance, and regulations to ensure inspection, monitoring, reporting, sampling, and record keeping. As for the Administrator's standards under section 312(p)(4), it also would provide a series of very limited circumstances under which the Secretary may revise an existing requirement to be less stringent. This section also would direct the Secretary to develop inspection, data management, and enforcement procedures for States.

Additional Provisions Regarding Ballast Water

Section 312(p)(6) would establish additional nationally applicable requirements with respect to discharges of ballast water that are subject to regulation under section 312(p).

Section 312(p)(6)(B) would require vessels with empty ballast tanks to conduct a ballast water exchange or saltwater flush on certain voyages, depending on whether the voyage originates within waters subject to United States or Canadian jurisdiction: (I) Voyages originating beyond the outside of the boundary of the United States and Canadian exclusive economic zones must conduct a flush or exchange at least 200 nautical miles from shore, while (II) voyages originating shoreward of the outer boundary of those zones must conduct a flush or exchange at least 50 nautical miles from shore. This section includes several exceptions to the flushing and exchange requirements, including for voyages originating within internal waters which would otherwise be subject to the 50-nautical mile requirement.

Section 312(p)(6)(C) would establish the period of use for ballast water management system equipment to generally be the design life of the equipment, provided that certain enumerated conditions are met.

Section 312(p)(6)(D) would require the Secretary, in coordination with the Administrator, to publish a draft policy letter describing type-approval testing methods and protocols, if any, for ballast water management systems that render organisms nonviable. Render nonviable is a defined term requiring the organism to be permanently incapable of reproduction following treatment by a ballast water management system. Some aquatic nuisance species, such as *Escherichia coli*, can repair damaged DNA. This definition would ensure that approved ballast water management systems do not merely temporarily render aquatic nuisance species incapable of reproduction. Section 312(p)(6)(E) would establish a task force.

Petitions by Governors for Review

Section 312(p)(7) would establish a process by which a Governor may petition the Administrator or Secretary for a higher discharge standard or requirement, or to petition the Administrator for an emergency order under section 312(p)(4)(E). Unlike typical rule-making petitions, the Administrator or Secretary would be required to act on a Governor's petition under 312(p) within 1 year or 180 days of its submission, depending on the type of petition. If the Secretary or Administrator grants the petition, the Secretary or Administrator shall conduct a rulemaking to revise that standard, or shall issue the order, in accordance with the process established by this section. If the Secretary or Administrator denies the petition, the Federal official must do so on the merits, with an explanation of the scientific, technical, or operational factors justifying that denial. Judicial review of a petition denial may be sought in any district court of competent jurisdiction.

Prohibition

Section 312(p)(8) would prohibit any person from violating a provision of the Vessel General Permit, while that requirement is still in effect; a regulation promulgated under section 1101 of the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, while those regulations are still in effect; or an applicable requirement or regulation under this section. This section also would make it unlawful for an owner or operator of a vessel to discharge any discharge incidental to the normal operation of the vessel in violation of the regulations promulgated under this section. It also would prohibit a vessel from operating if it is not equipped with a required marine pollution control device, unless the applicable discharge is avoided. This section also would establish as an affirmative defense that no person shall be found in violation if the discharge was required to ensure the safety of life at sea. This section would make each day of a continuing violation a separate offense and would allow the Secretary to hold a vessel in rem liable for a civil violation, and would allow the Secretary to revoke a vessel's clearance.

Effect on Other Laws

Section 312(p)(9)(A) would prohibit a State, political subdivision of a State, or interstate agency from adopting or enforcing any law, regulation, or other requirement with respect to any such discharge incidental to the normal operation of a vessel that is subject to regulation under this subsection only after every Secretary regulation

required by this section is final, effective, and enforceable. (This language is intended to ensure that the timing of preemption is concurrent with the timing of when all of the legacy VGP and NANPCA requirements cease to be in effect under section 312(p)(3).)

However, this section also would provide several exceptions to that preemption. First, clause (ii) would provide that preemption does not apply to State laws that are identical to a Federal 312(p) requirement, or that are a less-stringent subset, such that compliance with the State law would be achieved concurrently with Federal compliance. Second, clause (iii) would provide that States can directly enforce Federal requirements in accordance with subsection (k) and (p)(5)(iii). Third, clause (iv) would allow States that presently assesses a fee relating to the regulation of an incidental discharge to continue assessing such fees subject to individual and overall caps. Those caps may be adjusted to account for inflation. Fourth, clause (v) would allow Alaska to continue regulating certain graywater discharges from passenger vessels. Finally, clause (vi) would provide a savings clause making clear that Congress's intent with respect to preemption is limited to only those items expressly specified. No implied preemption of any State law, regulation, permit, or other requirement is intended to occur.⁴⁰

Section 312(p)(9)(B) would make clear that, unless expressly provided, nothing in section 312(p) affects the applicability to a vessel of any other provision of Federal law, including sections 311 and 312 of the Federal Water Pollution Control Act (Clean Water Act); the Act to Prevent Pollution from Ships; and title X of the Coast Guard Authorization Act of 2010.

Section 312(p)(9)(C) also would repeal the Small Vessel General Permit on the date of enactment and would prohibit the Administrator, or a State in the case of a permit program approved under section 402, from requiring, or in any way modifying, a permit under that section for (I) any discharge that is subject to regulation under this subsection; (II) any discharge incidental to the normal operation of a vessel from a small vessel or fishing vessel, regardless of whether that discharge is subject to regulation under this section (i.e., non-ballast water discharges from small vessels or fishing vessels, which remain subject to State law); or (III) certain low-concern ballast water discharges (which also remain subject to State law).

Section 312(p)(9)(D) would clarify that nothing in this section displaces any cause of action or law providing a remedy for civil relief or criminal penalty arising under State, Federal or maritime law, whether statutory or common.

Section 312(p)(9)(E) would maintain the authority of the Secretary of Commerce or the Secretary of the Interior to administer any land or waters under the administrative control of the Secretary of Commerce or the Secretary of the Interior, respectively.

⁴⁰For example, the implied preemption analysis courts have applied in other areas touching on maritime commerce, see, e.g., *United States v. Locke*, 529 U.S. 89 (2000), would not apply to a preemption case under section 312(p). Congress recognizes that States have traditionally had the "primary responsibilities and rights to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), and are not preempted by section 312(p) except as expressly provided.

Additional Regional Requirements

Section 312(p)(10)(A) would require ballast water exchange or saltwater flush requirements for vessels entering the St. Lawrence Seaway through the mouth of the St. Lawrence River. As with the empty ballast tank requirements of 312(p)(6)(B), this provision would establish different minimum distance requirements depending on whether an applicable voyage originates (I) beyond the outer boundaries of the United States and Canadian exclusive economic zones, or (II) shoreward of the outer boundary of those zones.

Section 312(p)(10)(B) would establish a process by which the Governors of the Great Lake States can propose an enhanced standard or requirement, and the Administrator and Coast Guard would be required to approve it absent a limited set of exigent circumstances. All eight Great Lakes Governors would be required to support a proposal that requests the Administrator and the Secretary impose additional equipment requirements on a vessel. To propose that the Administrator and the Secretary impose any other type of enhanced requirements within the Great Lakes, the support of only a simple majority of Great Lakes Governors (5) would be required. If a proposed enhanced requirement would completely prohibit any type of incidental discharge—whether in a single State, or across multiple States—such a requirement would only apply within the borders of States whose Governors support and joined in requesting that the Administrator and Secretary adopt it.⁴¹ For all other proposed enhanced requirements, the proposed requirements may apply across a portion or all the Great Lakes System. Finally, in all cases where Great Lakes Governors have proposed an enhanced requirement, the Administrator and Secretary may only reject the proposed requirement if it is less stringent than a comparable standard or requirement under this section, inconsistent with maritime safety, or inconsistent with applicable maritime and navigation laws and regulations.⁴² This section would authorize \$5,000,000 to the Great Lakes Commission to carry out this section.

Section 312(p)(10)(C) would require ballast water exchanges for certain Pacific Region voyages.

Section 312(p)(10)(D) would allow all States to establish no-discharge zones for one or more discharges incidental to the normal operation of a vessel if the Administrator, in concurrence with the Secretary, determines that there are adequate facilities reasonably available for the safe and sanitary removal and treatment of the discharge and that the discharge can be safely collected and stored. These requirements would work in tandem to ensure that the adequate facilities can be readily considered “reasonably available” if the discharge can reasonably be withheld until the vessel has exited the State’s requested no-discharge zone. It would require the Administrator to consider further factors in areas where cargo, pas-

⁴¹This section 312(p)(9)(B) process would provide an alternative pathway for Great Lakes Governors, working together, to establish no-discharge zones within their waters (or within the waters of a subset of endorsing Governors). Alternatively, a Great Lakes Governor (or any Governor) acting alone would be able to petition for the creation of a no-discharge zone pursuant to the requirements of 312(p)(9)(D).

⁴²*Cf. Natl. Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (upholding at Chevron step 2 that, where the Clean Water Act mandated that EPA “shall approve” a State permitting program if certain criteria are met, EPA’s discretion is limited to matters concerning only those criteria).

sengers, or fuel is loaded or unloaded if the no-discharge zone would apply to discharges of ballast water. The no-discharge zones established under this section would not apply to vessels under 79 feet, fishing vessels, and other vessels and discharges excluded from this section.

Section 312(p)(10)(E) would specify that where regional standards under paragraph (10) differ from the national requirements under paragraphs (4), (5), or (6), the more stringent or more environmentally protective standard controls.

Section 903(a)(2) of the bill would repeal, on the date of enactment, section 1101 of the Aquatic Nuisance Prevention and Control Act of 1990 and Public Law 110–299. It also would make conforming amendments.⁴³

Section 903(b) of the bill also would amend section 312 of the Federal Water Pollution Control Act to make conforming changes by adding the phrase “marine pollution devices” in relevant locations. It also would make other conforming changes. This section also would allow States to file a civil action in an appropriate Federal district court to enforce any violation of this section. It would give the Secretary the authority to carry out inspections of vessels at any time and detain a vessel that the Secretary has reasonable cause to believe is in violation of this section. It also would make conforming changes to sections 309, 505(f), 509(b) of the Federal Water Pollution Control Act. With the exception of denials of Governors’ petitions under the new section 312(p)(7)(C)(v), this section would limit the venue for a petition for review of a final agency action under section 312(p) to the United States Court of Appeals for the District of Columbia Circuit.

Section 903(d) of the bill would require a logbook notation for a failure to carry out ballast water management requirements.

Section 903(e) would list quagga mussels as injurious under the Lacey Act.

Section 903(f) of the bill would establish a Coastal Aquatic Invasive Species Mitigation Grant Program and Mitigation Fund to address aquatic nuisance species, including for permissible State ballast water inspection programs. Penalties assessed under this section would be authorized to be appropriated to this fund.

Section 903(g) of the bill would establish a Great Lakes and Lake Champlain Invasive Species Program at the Environmental Protection Agency.

Section 903(h) of the bill would provide further technical and conforming amendments.

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⁴³As discussed above, the relevant rules under NANPCA section 1101 would be continued in effect as provided by the new section 312(p)(3) of the Federal Water Pollution Control Act.