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August 1, 2007

The Honorable Daniel Inouye, Chairman
Committee on Commerce, Science,
and Transportation
United States Senate
Washington, DC 20510

The Honorable Ted Stevens, Ranking Member
Committee on Commerce, Science,
and Transportation
United States Senate
Washington, DC 20510

RE: Please Remove Clean Water Act Exemption and State Preemption
From S. 1578, the Ballast Water Management Act of 2007

Dear Chairman Inouye and Ranking Member Stevens:

Our organizations and the millions of Americans we represent wish to convey to you our strong opposition to the troubling Clean Water Act exemption and state preemption provisions of the Ballast Water Management Act of 2007, S. 1578. While we support the overall goal of the bill – to create more federal tools for limiting the spread of aquatic invasive species through ballast water discharges – we are concerned that several provisions of the bill would thwart that goal by overriding federal and State tools already in place that are being used now or could be used soon to help address invasive species pollution of our nation’s lakes, rivers, and coastal waters. We urge that these provisions be removed from the bill.

In particular, we are concerned because the current version of S. 1578 – scheduled for markup tomorrow by the full Committee on Commerce, Science, and Transportation – would exempt the discharge of ballast water from the Clean Water Act and preempt numerous State programs aimed at preventing the spread of harmful species. These provisions of the bill are unwarranted, contrary to current law, and will hamper efforts to reduce this destructive type of water pollution.

Congressional action to override the Clean Water Act and preempt States’ rights will only serve the shipping industry’s interest in further delaying effective regulation under existing authorities. This will impede efforts to solve problems associated with invasive species and other pollution from ballast water discharges.

The Clean Water Act Exemption Should Be Deleted From S. 1578

The current version of S. 1578 would exempt the discharge of ballast water from the Clean Water Act, including discharges of invasive species, by declaring the Ballast Water Management Act “the sole Federal authority for preventing the introduction of species through the control and management of vessel ballast water or sediment or other vessel-related vectors.” See S. 1578 § 3(u)(3) (amending § 1001 of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990). In addition, S. 1578 does not preserve but replaces – and effectively repeals – long-

standing provisions of law adopted by previous Congresses that expressly preserved Clean Water Act jurisdiction over these discharges. See 16 U.S.C. § 4711(b)(2)(c) (“[t]he regulations issued under this subsection shall ... not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act”); see also 16 U.S.C. § 4711(c)(2)(J) (“voluntary guidelines issued under this subsection shall...not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act”).

We strongly oppose Clean Water Act exemptions for any pollutants, including invasive aquatic organisms, or special interest exemptions for any sources of water pollution. Not only does exempting the discharges from one industry set a dangerous precedent – encouraging other industries to petition Congress for their own special loopholes in the law – but the exemption for ballast water discharges in S. 1578 will likely increase water pollution levels from this source.

The Clean Water Act exemption in the bill is clearly meant to undercut a 2005 U.S. District Court ruling requiring EPA to move forward in regulating ballast discharges under the Clean Water Act. See *Northwest Environmental Advocates et. al. vs. U.S. EPA*, No. C. 03-05760 SI (March 30, 2005). In its opinion, the Court emphasized that Congress expressly reserved Clean Water Act authority when enacting the National Invasive Species Act in 1996 and its predecessor law, the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. With the Court’s order giving EPA two years to act, exempting these discharges from the Clean Water Act now would be detrimental to the interests of the public and all States, including the Great Lakes States that intervened in the case in favor of the Clean Water Act authority. Doing so would also be harmful to our nation’s ecosystems and waterways as a whole.

Ballast water contains a wide variety of pollutants, ranging from invasive species like the zebra mussel and viruses, to toxins such as polychlorinated biphenyls (PCBs) and waste oil. By superseding the Clean Water Act and promulgating new standards for invasive species and sediment, the legislation would create a new dual system of regulating the discharge of all pollutants other than nuisance species and sediment under the Clean Water Act’s permit program while eliminating the use of Clean Water Act tools for reducing the spread of invasive species and discharge of sediment. It is difficult to understand how this could be a more efficient, effective, or less costly approach than an approach that coordinates Clean Water Act programs with other existing and new federal programs aimed at reducing or eliminating these discharges.

Exemption of any pollutants or any sources of water pollution from the Clean Water Act is a direct assault on the Act itself, is counterproductive, and must be stricken from the bill.

State Efforts Should Not Be Preempted

We strongly oppose the preemption of State efforts to protect waters and ecosystems from the devastation wrought in their waters by invasive species. In the absence of effective federal action, many States have required or are starting to require ships to manage their ballast for invasive species. S. 1578 would undercut these efforts by preempting the ability of States to take action and further delay treatment requirements until S. 1578 standards are implemented. The State preemption provisions, largely written in the guise of a saving clause that only ‘saves’ for the states a modicum of their current legal authorities to protect their waters from invasive species, must also be stricken from the legislation.

In conclusion, S.1578, in its current form, would set back federal and State efforts to address invasive species, not move them forward. We urge you to strip from the bill the sections that would create new loopholes in the Clean Water Act and preempt State laws and other authorities, and instead address the harmful effects wrought by invasive species in our nation's waters by passing proactive and effective legislation.

Thank you for your consideration of our views.

Sincerely,

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CC: Members, U.S. Senate Committee on Commerce, Science, and Transportation