2016

Federal preemption on Michigan state's authority enacting law concerning ballast water discharge in the great lake

Mengxue Xie

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE UNITED STATES COAST GUARD

ISSUE: FEDERAL PREEMPTION ON MICHIGAN STATE'S AUTHORITY ENACTING LAW CONCERNING BALLAST WATER DISCHARGE IN THE GREAT LAKE

Prepared by Mengxue Xie

J.D. Candidate, May, 2017

Spring Semester, 2016

Contents

BIBLIOGRAPHY OF SOURCES 2

ACRONYMS 5

I. Introduction and Summary of Conclusion 6

A. Introduction 6

B. Summary of Conclusion 7

1. The Congress does not explicitly preempt state from regulating the ballast water. 7

2. The CWA and the NISA does not implicitly preempt state ballast water law. 7

3. Michigan state ballast water law does not in conflict with federal ballast water law 7

II. Factual Background: Ballast Water and the War Against Aquatic Invasive Species 8

A. Ballast Water and Aquatic Invasive Species. 8

B. Ballast Water Management 10

III. The Federal Regulation On Ballast Water 10

A. The National Invasive Species Act (NISA) and the Coast Guard 10

B. The Clean Water Act (CWA) and the US Environmental Protection Agency 12

IV. The State Regulation On Ballast Water ---Michigan as an example 13

V. Case Law Study On Federal And State Co-Jurisdiction on Regulating Ballast Water 15

A. The Federal Ballast Water Laws Do Not Explicitly Preempt State From Enacting Ballast Water Laws. 16

B. The State Ballast Water Law is not Subject to Field Preemption. 17

1. Federal Law Text and Interest Analysis 18

Whether or not the Congress intended to leave room to the states' authority depends on two considerations: a) the comprehensiveness of federal legislation in the field or b) the dominance of the federal interests. 18

2. Federal Interests. 21

C. The State Ballast Water Law Does Not has Actual Conflict With the Federal Ballast Water Law 23

VI. Conclusion. 25

BIBLIOGRAPHY OF SOURCES

Statutes and Rules

1. U.S. Const. art. I, § 6, cl. 2.
2. U.S. Const. art. I, § 8, cl. 3.
3. 33 C.F.R. § 151. 1510(a)(2006)
4. 16 U.S.C. § 4625
5. 16 U.S.C. §§ 4701-4751 (2000)
6. 46 U.S.C. §§ 2303(a)
7. 33 C.F.R. §§ 151.1500-2065 (2006)
8. 33 C.F.R. §§ 151. 1510(a)(2006)

Cases

9. *NRDV v. United States EPA* 804 F.3d 149 (2nd Cir. 2015)
10. *Fednav, Ltd. v. Chester* 547 F.3d 607 (6th Cir. 2008)
11. *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970)
12. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984)
13. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238 (1984)
14. *United States v. Locke*, 529 U.S. 89 (2000)
15. *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (N.D. Cal. March 30, 2005)
16. *Huron Portland Cement co. v. City of Detroit* 362 U.S. 440 (1960)
17. *Ray v. Atlantic Richfield*, 435 US 161 (1978)
18. *U.S. v. Mass*., 2006 U.S. Dist. LEXIS 50093 at 16

Law Reviews and Articles

19. Kyle H. Landis-Marinello, *NOTE: Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water*, 106 Mich. L. Rev. 135 (2007)

20. Stephanie Showalter, Terra Bowling, *Michigan's New Ballast Water Regime: Navigating the Treacherous Waters of States' Rights, Federal Preemption, and International Commerce* (2006)

21. Cory Hebert, *Article: Ballast Water Management: Federal, States, And International Regulations*, 37 S.U.L. Rev. 315

22. Julie A. Aquino, *Navigating in Uncertain Waters: 2006 Update on the Regulation of Ballast Water Discharge in the United States*, 1 Pitt. J. Envtl. Pub. Health L. 101 (2006)

23. Amy Browning, *The Current State of Ballast Water Regulations*, 2 Envt'l & Energy L. & Pol'y J. 327 (2008)

24. Loren Remsberg, *Too Many Cooks in the Galley: Overlapping Agency Jurisdiction of Ballast Water Regulation*, 76 Geo. Wash. L. Rev. 1412 (2008)

25. Samuel H. Wiest, *Comment: Protecting U.S. Waters from Nonindigenous Species Invasion: A Case for Federalism and Strong State Regulation* 18 Penn St. Envtl. L. Rev. 71 (2009)

26. *Ballast Water Management for Vessels Entering the Great Lakes*, 58 FR 18330 (1993)

27. Andrew N. Cohen Article: *The Regulation of Biological Pollution: Preventing Exotic Species Invasions From Ballast Water Discharged Into California Coastal Waters*, 30 Golden Gate U.L. Rev. 787 (2000)

28. Suzanne Bostrom, Chapter: *Halting The Hitchhikers: Challenges and Opportunities For Controlling Ballast Water Discharge and Aquatic Invasive Species*, 39 Envtl. L. 867 (2009)

29. Lisa A. Brautigam, *Article: Control of Aquatic nuisance Species introductions Via Ballast*

Water In the United States: Is the Exemption of Ballast Water Discharges From Clean Water Act Regulation A Valid Exercise of Authority By the Environmental Protection Agency? 6 ocean & Coastal L.J. 33

Miscellaneous

30. Environmental Protection Agency, 74 Fed. Reg. 7042 (Feb. 12, 2009) http://www.epa.gov/npdes/regulations/npdesvgp.pdf

31. Nat'l Invasive Species Council, Meeting the Invasive Species Challenge: National Invasive Species Management Plan 10 (2001) http://www.invasive speciesinfo.gov/docs/council/mpfinal.pdf

32. U.S. Coast Guard. Standards for living Organisms in Ship's Ballast Water Discharged in U.S. Waters; Final Rule. Federal Register, Vol. 77, No. 57. March 23, 2012. https://www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-6579.pdf

33. National Pollutant Discharge Elimination System https://www.epa.gov/npdes/npdes-frequent-questions#pane-1

ACRONYMS

AIS: Aquatic Invasive Species

CWA: Clean Water Act

EPA: Environmental Protection Agency

MDEQ: Michigan Department of Environmental Quality

NANPCA: Nonindigenous Aquatic Nuisance Species Control Act

NPDES: National Pollutant Elimination Discharge System

NPDES: National Pollutant Elimination Discharge System

NISA: National Invasive Species Act

PWSA: Ports and Waterways Safety Act of 1972

PTSA: Ports and Tankers Safety Act of 1978

VGP: Vessel General Permit

I. Introduction and Summary of Conclusion

A. Introduction[1]

In the case *NRDC v. United State EPA*, four environmental organizations challenged the Vessel General Permit ("VGP") that issued by the United States Environment Protection Agency ("EPA"), alleging that the ballast water discharge standard is not high enough to protect the water environment.[2] The court supported the petitions, and held that the EPA chose a standard without adequately explaining why higher standards could not be used. As a result, the court found that the EPA acted arbitrarily and capriciously in issuing parts of the 2013 VGP, and remand this matter to the EPA for further proceedings.[3]

On the other hand, due to the different interests between states and the federal government and the federal agency's slow reaction to the issue, some of the states have enacted more strict laws to limit the ballast water discharge. For instance: Michigan authority require all ships, including the ship that No Ballast Onboard to obtain the state general permit.[4] In contrast, the original Coast Guard program[5] does not require ships that claim No Ballast Onboard to comply with their ballast discharge programs. As a result,

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[*] This Notes mainly analyzes the conflicts between state's authority and the federal environmental regulations regarding ballast water discharge management.

[2] *NRDC v. United State EPA*, 804 F.3d, 149, 162 (2nd Cir. 2015)

[3] *Id*. at 155

[4] Stephanie Showalter, Terra Bowling, Michigan's New Ballast Water Regime: Navigating the Treacherous Waters of States' Rights, Federal Preemption, and International Commerce. October 2006.

[5] The "original" Coast Guard Rule refers to the rule issued in 2004. The newest rule went into effect in June 2012.

shipping companies challenged the states' regulation, alleging it violates the Constitutional Supremacy Clause.[6]

Part I of this memo explains the general scheme regarding the federal and states' authority on ballast water management. Part II consider whether or not the states' strict ballast water law violates the Supremacy Clause of the US Constitutional. Finally, this memo contents that the federal ballast water laws do not preempt the states' authority on ballast water management.

B. Summary of Conclusion

1. The Congress does not explicitly preempt state from regulating the ballast water.

Although the Clean Water Act ("CWA") as well as the National Invasive Species Act ("NISA") authorized the EPA and the Coast Guard to regulate ballast water, the Congress does not explicitly preempt state from regulating the ballast water.

2. The CWA and the NISA does not implicitly preempt state ballast water law.

The CWA and the NISA does not implicitly preempt state ballast water law because based on the text and the legislative history, in passing it the Congress did leave room for the states to enact its own home rule on the ballast water management issues. Moreover, there are no strong federal interests in the environmental problem that caused by the ballast water discharge. Rather, the state is in a better position than the Coast Guard and the EPA to protect the local environment.

3. Michigan state ballast water law does not in conflict with federal ballast water law

Generally, the Michigan state ballast water law does not in conflict with federal ballast water law as long as it is physically possible for a shipping company to satisfy both state law and

[6] See, Section V regarding the constitutionality of states' ballast water authority.

federal law. And when the state law and the federal law have the same goal: protecting environment, the state law would not frustrate the Congress's purpose by adding more strict requirement on the shipping companies.

II. Factual Background: Ballast Water and the War Against Aquatic Invasive Species

A. Ballast Water and Aquatic Invasive Species.

Ballast water is seawater that ships take on after unloading their cargo in order to adjust to changes in weight.[7] Every year, shipping vessels discharge billions of gallons of ballast water - the water stored in large tanks in the bottom of a cargo ship to keep the ship at the proper weight - into the waters of the United States.[8] Because cargo ships are designed to travel with heavy loads, these ships can only maintain their proper balance by taking in ballast water as they unload cargo.[9]

Upon arrival at a new port, the ship discharges its ballast water as it takes on the weight of cargo, releasing foreign water, and with it any organisms and eggs that may be in the ballast water, into the waters of that port.[10] Ballast water is the primary means of aquatic invasive species ("AIS") introduction and is a significant part of what is addressed by the statutory and regulatory regime.[11]

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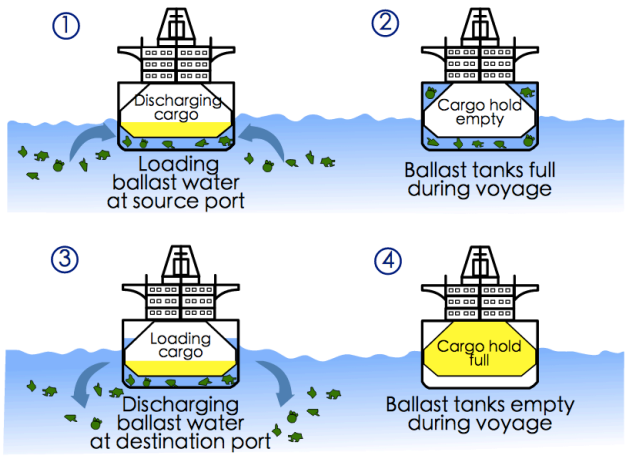
[7] Nw. Envtl. I, 2005 U.S. Dist. LEXIS 5373, at 4.

[8] Kyle H. Landis-Marinello, NOTE: Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water, 106 Mich. L. Riev. 135, 137

[9] James T. Carlton & Jonathan B. Geller, Ecological Roulette: The Global Transport of Nonindigenous Marine Organisms, 261 Science 78, 79 (1993).

[10] Protecting Our Great Lakes: Ballast Water and the Impact of Invasive Species: Hearing Before the Subcomm. on Regulatory Affairs, H. Comm. on Government Reform, 109th Cong. 26 (2005)

[11] Nat'l Invasive Species Council, Meeting the Invasive Species Challenge: National Invasive Species Management Plan 10 (2001), available at http://www.invasive speciesinfo.gov/docs/council/mpfinal.pdf



Generally speaking, the environmental impact of AIS is likely to be severe because they can harm native species by competing for common food sources, preying on native species, bringing in new diseases, and changing the genetic makeup of similar species.[12] Zebra mussels are a particularly destructive example. They were first introduced to Lake Erie in the 1980s by a freighter from Europe that discharged ballast water containing mussels.[13] These mussels have wreaked havoc in the Midwest and Northeast by blocking water intake and outtake at power plants and other industrial facilities, causing nearly $70 million in damage between 1989 and 1995.[14] Ultimately, AIS may be able to modify substantially the original ecosystem.[15] Government officials agree that invasive species cost the Great Lakes region alone as much as five billion dollars every year.[16]

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[12] The Growing Problem of Invasive Species: Joint Oversight Hearing Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans joint with the Subcomm. on National Parks, Recreation, and Public Lands, H. Comm. on Resources, 108th Cong. 5 (2003)

[13] Jum Robbins, "From that humble start, the invaders colonized the Great Lakes and spread across the country on towed boats", Western Showdown, N.Y. Times, Sept. 8, 2015, at D6.

[14] *Nw. Envtl, Advocates*, 537 F.3d at 1013.

[15] *Id.*

[16] Kyle H. Landis-Marinello, NOTE: Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water, 106 Mich. L. Rev. 135, 138

B. Ballast Water Management

Although there are many ways to prevent ballast water from polluting the water, the most widely used method of ballast water management is ballast water exchange.[17] Ballast water exchange means that a ship on its way to the next port release the lower salinity coastal water it brought aboard and replaces it with higher salinity open ocean water.

The treatment of ballast water is a second approach to ballast water exchange. It includes mechanical methods (filtration and separation), physical methods (sterilization and ultra violet light treatment), and chemical methods (biocide utilization).[18]

The EPA set two standards for the purpose of measuring the management of ballast water. One is Water Quality-Based Effluent Limits, where the purpose is to ensure that the discharges authorized by the permit do not violate water quality standards.[19] The other one is Technology-Based Effluent Limits, where it set effluent limitations on a point source based on how effectively technology can reduce the pollutant being discharged.[20]

III. The Federal Regulation On Ballast Water

A. The National Invasive Species Act (NISA) and the Coast Guard

According to 16 U.S.C. § 4701, Congress passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPC) to combat the problem of aquatic nuisance species ("ANS") in United States waters. NANPCA's purpose was "to prevent unintentional

[17] Julie A. Aquino, COMMENT: Navigating in Uncertain Waters: 2006 Update on the Regulation of Ballast Water Discharge in the United States. 1 Pitt. J. Envtl. Pub. Health L. 101,105

[18] *Id.* at 106.

[19] 33 U.S.C. §§ 1313, 1342(a)(2)

[20] NRDC v. United States EPA 804 F.3d 149, 155 (2nd Cir. 2015)

introduction and dispersal of nonindigenous species into waters of the United States through ballast water management and other requirements."[21]

Recognizing the inadequate protection that the NANPCA offers, on October 26, 1996, Congress reauthorized and amended NANPCA by enacting the National Invasive Species Act of 1996 ("NISA"). In this Act, the Congress found that "resolving the problems associated with aquatic nuisance species will require the participation and cooperation of the Federal Government and State Governments, and investment in the development of prevention technologies."[22]

The NANPCA and the NISA delegated the authority to the Coast Guard to establish voluntary ballast water management guidelines.[23] If these guidelines were insufficient to prevent the introduction of ANS, then the Coast Guard was authorized to make the guidelines mandatory.[24]

The Coast Guard guidelines was first issued in 2009, finalized in March 2012 and went into effect in June 2012.[25] The final rule requires all ocean-going vessels to reduce the risk of importing invasive species by practicing "ballast water exchange" while at sea, *i.e.,* flushing out ballast water and replacing it while in transit. Alternatively, the ships can also use an alternative

[21] 16 U.S.C. § 4701

[22] 16 U.S.C. § 4701(a)(15)

[23] 33 C.F.R. 151.1500 et seq. (2009)

[24] Amy Browning, RECENT DEVELOPMENT: THE CURRENT STATE OF BALLAST WATER REGULATIONS, 2 Envt'l & Energy L. & Pol'y J. 327 (2008)

[25] The Great Lakes Commission, Status of Ballast Water Discharge Regulations in the Great Lake Region, May, 23, 2013 The new rule is to be codified at 33 CFR Part 151 and 46 CFR Part 162.

environmentally sound method of ballast water management that has been approved by the Coast Guard.[26]

B. The Clean Water Act (CWA) and the US Environmental Protection Agency

The CWA is a federal statute that was enacted in 1977, Congress enacted the CWA with the intent to control and eliminate the pollution from the discharged water.[27] The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters".[28] The CWA prohibits the "discharge of any pollutant from a point source to the navigable waters of the United States, except as permitted by the CWA.[29] The discharge of polluted water from a vessel ballast tank is a point source discharge covered by the CWA.[30]

The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without a National Pollutant Discharge Elimination System ("NPDES").[31] The permit contains limits on what the ships can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health.[32] The Environment Protection Agency is delegated to administers the NPDES.[33]

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[26]http://www.shipmangoodwin.com/us-coast-guard-ballast-water-discharge-rule-establishes-new-requirements-and-enforcement-risks-for-ship-owners-and-operators More information, see U.S. Coast Guard. Standards for living Organisms in Ship's Ballast Water Discharged in U.S. Waters; Final Rule. Federal Register, Vol. 77, No. 57. March 23, 2012. https://www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-6579.pdf

[27] The CWA are codified at 40 C.F.R Subchapters D, N, and O (Parts 100-140, 401-471, and 501-503.

[28] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102, 124 S Ct. 1537, 158 L. Ed. 2d 264 (2004)

[29] 33 *U.*S.C. § § 1311 (a), 1362.

[30] *NRDC v. United States EPA*, 804 F.3d 149, 155 (2nd Cir. 2015)

[31] *N. Plains Res. Council v. Fid. Exploration & Dev. Co.,* 325 F.3d 1155, 1160 (9th Cir. 2003)

[32] https://www.epa.gov/npdes/npdes-frequent-questions#pane-1

[33] 33 U.S.C. § 1251(d)

The newest NPDES was issue by the EPA in 2013. However, in *NRDC v. United States EPA*, the permit was challenged by several environment protection groups for not strict enough to satisfy the environmental protection needs.[34] The court finally found that the EPA acted arbitrarily and capriciously in issuing parts of the 2013 VGP. Because it failed to explain why higher standard could not be used and failed to conduct an appropriate and factually-supported cost-benefits analysis.[35]

IV. The State Regulation On Ballast Water ---Michigan as an example

Although Congress has enacted laws concerning ballast water discharge and there are federal agencies that have authority over this issue, implementation of the federal action is, in general, slow and halting. Most often it advances only as the result of prodding from environmental activist groups or court orders.[36] On the other hand, states are in general more familiar with the complexities of their own waters and have a greater interest in ensuring their protection than the federal government has.[37] Therefore, some costal states have chosen to take actions.

The following coastal states have legislation that addresses ballast water issues[38]: California, Oregon, Washington, Maryland, Michigan, Illinois, Minnesota, and Alaska.[39]

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[34] *NRDC v. United States EPA*, 804 F.3d 149, 162 (2nd Cir. 2015)

[35] Id. at 162-172.

[36] Samuel H. Wiest, Comment: Protecting U.S. Waters From Nonindigenous Species Invasion: A Case for Federalism and Strong State Regulation. 18 Penn St. Envtl. L. Rev. 71, Fall, 2009.
See. e.g. *NRDC v. United States EPA*. This is a newly release case where an environmental group sued EPA for their too loose standard. And the court demanded the EPA to enact more strict rules on the ballast water management.

[37] Jason A. Boothe, COMMENT: Defending the Homeland: A Call to Action in the War Against Aquatic Invasive Species. 21 Tul. Envtl. L. J. 407, 420 (2008)

[38] State jurisdiction over the ballast water discharge issues only limits to three miles of the coast.

Since Michigan is an import state, most vessels come to Michigan ports loaded with cargo and empty ballast tanks and thus do not need to discharge ballast water upon arrival.[40] "Because it is a state that receives very little ballast water from ocean going vessels, it does not have much to lose economically by allowing oceangoing vessels to experiment with new ballast water treatment methods or having strict regulations.[41]

In June 2, 2005 Michigan Senate passed the Bill 332, which requires all ocean-going vessels engaging in port operations in Michigan after January 1, 2007 to obtain permits from the Michigan Department of Environmental Quality ("MDEQ"). The Permits will be issued in two situations: first, if the applicant can demonstrate that the vessel will not discharge any invasive species, or second, if the vessel's operator will use "environmentally sound technology and methods" approved by the MDEQ before discharging the water.[42] And the MDEQ identified four treatment methods to prevent the discharge of AIS: (1) hypochlorite; (2) chlorine dioxide; (3) ultraviolet (UV) light radiation; and (4) deoxygenation.

Therefore, asides from obtaining the general permit that issued by the EPA, all the oceangoing vessels that engage in Michigan port operations must also obtain the state permit. In 2012, MDEQ provided comments to general permit that issued by the EPA that the standard contains would "not provide an adequate degree of water quality protection for the Great Lakes and other waters of the United States" and suggesting a water-quality based effluent limit for

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[39] Amy Browning Recent Development: The Current State of Ballast Water Regulations, 2 Envt'l & Energy L. & Pol'y J. 327, 335 (2008)

[40] A. Ricciardi, Patterns of Invasion in the Laurentian Great Lakes in Relation to Changes in Vector Activity, 12 Diversity and Distributions 425 (2006).

[41] Samuel H. Wiest, Comment: Protecting U.S. Waters From Nonindigenous Species Invasion: A Case for Federalism and Strong State Regulation. 18 Penn St. Envtl. L. Rev. 71, Fall, 2009.

[42] Mich. Comp. Laws § 324.3112(6) (2009)

ballast water discharge at least two orders of magnitude more stringent than the standard that be included in the general permit.[43]

V. Case Law Study On Federal And State Co-Jurisdiction on Regulating Ballast Water

Potential legal issues exist because of the contrast between the strict state rule and the loose federal rule. For instance, the original Coast Guard guideline issued before 2012 does not require ships that claim No Ballast Onboard ("NOBOB") to comply with their ballast discharge programs. "NOBOBs are vessels which have discharged ballast water in order to carry cargo and, as a result, have only unpumpable residual water and sediment remaining in the tanks."[44] However, the Michigan state law requires all ocean-going vessels to obtain the state's general permit, because the residual water and sediment remaining may possibly bring in ANS when the ship wash their tank.

Because of the difference between the federal law and the state law, many shipping companies have sued the state regulation, claiming that it violates Constitutional clauses by undue burdening the shipping company.

By reviewing the relevant cases, this section will analyze to what extent the state could make its own rules on ballast water discharge issues, without violating Constitutional clauses. This memo will discuss only the most important and most debatable constitutional violation---- the Supremacy Clause.

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43 Status of Ballast Water Discharge Regulations in the Great Lakes Region, Great Lake Commission, May 23, 2013. See also, Michigan Department of Environmental Quality. February 21, 2012. Comments on USEPA's Draft Vessel General Permit and Draft Small Vessel General Permit. Docket I.D. Nos. EPA - HQ - OW - 2011 - 0141 and EPA - HQ - OW - 2011 - 0150.

44 Stephanie Showalter, Terra Bowling, Michigan's New Ballast Water Regime: Navigating the Treacherous Waters of States' Rights, Federal Preemption, and International Commerce. October 2006.

According to the U.S. Constitution, Article. IV cl.2, the federal law is the "supreme Law of the Land." Under Article V of the U.S. Constitution, the individual state also has authority to enact law. However, there are two general ways that a state permits' requirement can be preempted by federal law-- express or implied.

Express preemption occurs when Congress "explicitly state[s] that it intends a statute to have that effect."[45] Implied preemption comes in two forms: field and conflict preemption.[46] Field preemption occurs when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."[47] Field preemption also occurs when an "Act of Congress touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[48] And conflict preemption occurs when a provision of state law "actually conflicts with federal law."[49]

A. The Federal Ballast Water Laws Do Not Explicitly Preempt State From Enacting Ballast Water Laws.

Federal Law does not explicitly preempt state from enacting ballast water regulations. For federal law to explicitly preempts state's authority would mean it prevents states from enacting laws addressing the issues that Congress has decided to regulate exclusively at the federal level.[50]

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[45] *Jones v. Rath Packing Co*., 430 U.S. 519, 525, 97 S. Ct 1305, 51 L. Ed. 2d 604 (1977).

[46] *Fednav, Ltd v. Chester*, 547 F.3d 607,618 (6th Cir. 2008)

[47] *Ohio Mfrs. Assoc. v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986)

[48] *Ray v. Atlantic Richfield Co*., 435 U.S. 151,157, 98 S. Ct. 988, 5 L. Ed 2d 179 (1978)

[49] *City of Akron*, 801 F.2d at 828.

[50] Kyle H. Landis-Marinello, NOTE: Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water, 106 Mich. L. Riev. 135, 156

In fact, in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, the Congress explicitly recognized states' authority to regulate ballast water:

> "All actions taken by Federal agencies in implementing the provisions of section 4722 of this title shall be consistent with all applicable federal, state, and local environmental laws. Nothing in this chapter shall affect the authority of any State or political subdivision thereof to adopt or enforce control measures for aquatic nuisance species, or diminish or affect the jurisdiction of any State over species of fish and wildlife."[51]

If the Congress did not explicitly preempt states from regulating on the ballast water discharge issue, then we must consider "implied" preemption. Federal law will preempt the state home rule only if it has occupied the field in which the specific requirement in the state law, say, the permit requirement falls, or if the requirement actually conflicts with the federal law.

B. The State Ballast Water Law is not Subject to Field Preemption.

The federal law on ballast water discharge is not sufficiently comprehensive to make reasonable inferences that Congress left no room for the supplementary state regulation. First we must determine what is the relevant field that the Congress intended to regulate. Second, if both state legislation and Congress intend to regulate the field, based on the legislative intent, whether or not Congress left room for the state authority.

As stated in the Act, the purpose of the National Invasive Species Act of 1996's purpose is "to prevent unintentional introduction and dispersal of nonindigenous species into waters of the United States through ballast water management and other requirements."[52] Under the structure of the statute, one object is "to prevent" of aquatic nuisance species (“ANS”) introduction into the Great Lakes. However, the Michigan Ballast Water statute also seeks to prevent introduction

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[51] 16 U.S.C. § 4725
[52] 16 U.S.C. § 4701(b)(1)

of ANS into Michigan water.[53] Therefore, since state and federal legislation are both intended to regulate prevention of the ballast-water introduction of ANS, the issue is whether Congress intended to preempt the field of ANS prevention measures.[54]

1. Federal Law Text and Interest Analysis

Whether or not the Congress intended to leave room to the states' authority depends on two considerations: a) the comprehensiveness of federal legislation in the field or b) the dominance of the federal interests.[55]

a. National Invasive Species Act of 1996

Both NISA and CWA leave room for the state to regulate ballast water prevention. In *Fednav, Ltd. v. Chester*, the shipping companies sued Michigan state's official claiming that the additional requirement of obtaining a ballast water discharge permit under the Michigan state law placed an undue burden on the shipping companies, the state law violates the Constitutional Supremacy Clause and it should be preempted by NISA. The court in *Fednav* construed the Congressional intent in the NISA in this case. The court's decision noted that the U.S.C. § 4727(a)(2)(A) says that the "state aquatic nuisance species management plans" should "identify and describe state and local programs for environmentally sound prevention and control of the target aquatic nuisance species." Consequently, "[t]hat reference standing alone makes clear that Congress intended for the states' ANS prevention measures to continue after the enactment of

[53] Mich. Comp. Laws § 324.3112(6)

[54] *Fednav, Ltd. v. Chester*, 547 F.3d 607, 616 (6th Cir. 2008)

[55] *See supra.* notes 41, 42

NISA."[56] On this basis, the *Fednav* court found no filed preemption of state's law on ballast water discharge.

Additionally, the US Coast Guard, the federal entity authorized by NISA to enforce the federal law, also admitted that "the congressional mandate is clearly for a federal-state cooperative regime in combating the introduction of ANS into U.S. waters from ships' ballast tanks. This makes preemption unlikely."[57] Moreover, the US Coast Guard has also stated that "each state is authorized under NISA to develop their own regulations if they feel that federal regulations are not stringent enough."[58] Therefore, the court in *Fednav* held that the NISA's text thus reveals that Congress expressly contemplated ANS prevention measures conducted by the states. Therefore, the Federal law does not preempt the field of ANS prevention measures.

b. Clean Water Act

The CWA also does not preempt the state from managing ballast water. In the case *Chevron U.S.A., Inc v. Hammond*, an Alaska statute requires that absolutely no ballast water that has been held in oil cargo tanks may be discharged into the waters of the state. In contrast, the federal statute, Ports and Waterways Safety Act of 1972, as amended by the Ports and Tankers Safety Act of 1978 ("PWSA"/"PTSA") does not have such a strict requirement. As a result, the oil company filed suit against the state regulation for violating the federal statute and alleged that the state statute should be preempted by the federal law.[59]

[56] *Fednav, Ltd. v. Chester*, 547 F.3d 607, 619 (6th Cir. 2008)

[57] 69 Fed. Reg. 32864, 32868

[58] *Id.* at 32865

[59] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 485 No. 81-3700, LEXIS 25801

The issue in *Chevron* case is "whether Congress, when it passed the PWSA/PTSA, implicitly intended to occupy the field of regulating the discharge of pollutants from tankers within a state's territorial waters."[60] The court found the Congressional intent by analyzing the Congressional intent of the CWA. The court stated that the heart of federal marine environmental protection scheme is the CWA[61]， and the PWSA/PTSA is only a small part of the whole scheme. Therefore, the court should explain the statute in the light of the Congress's intent in the CWA. Under the NPDES permit system[62], "the states maintain primary responsibility for abating pollution in their jurisdictions; they have authority to establish and administer their own permit systems and to set standards stricter than the federal ones.[63] Accordingly, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[64] Therefore, the *Chervon* court concluded it is the Congress's intent that, within three miles off shore the protection of the marine environment should be a collaborative federal/state effort rather than an exclusively federal one."[65]

This court also gave an example where the Congress explicitly preempts the state from regulating the ballast water. The CWA applies only to the ocean within three miles of shore. Pollution beyond the three-mile limit is covered under another statute, where the text of the statute expressly preempts state regulation of such dumping while allowing state to propose

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[60] *Id.* at 487

[61] 33 U.S.C. §§ 1251-1376 (1976 & Supp.V. 1981)

[62] The detail of this system has explained in the Section III(B) of this Memo.

[63] 33 U.S.C §§ 1342(b), 1370.

[64] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 483 No. 81-3700, LEXIS 25801

[65] *Id.*

criteria to the EPA. "In the case of a Federal project, a state may not adopt or enforce a requirement that is more stringent than a requirement under this subchapter.[66]

Therefore, through analyzing the text and the whole scheme of the federal statute, it becomes clear that Congress does not implicitly intend to preempt states' authority on ballast water management.

2. Federal Interests.

Whether or not the Congress intends to preempt states from managing ballast water discharge also depends on whether the federal interest is dominating in this field. In other words, the subject matter of the federal laws is an important factor to decide Congressional intent. "[I]n making a preemption analysis, a court should examine those [federal interests] concerns emphasized by Congress in enacting the subject legislation."[67]

Both the court in *Chevron* case and the court in *Fednav* distinguish their facts from those of cases where the subject matter that the Congress intend to regulate about national interests.

In *Chevron*, the court distinguished *Ray v. Atlantic Richfield Company.* In *Ray*, the plaintiff challenged Washington's Tanker Law, which had been adopted to regulate the design, size, and movement of oil tankers in Puget Sound. The federal law in this case says that: "every coastwise seagoing steam vessel subject to the navigation laws of the United States, . . . not sailing under register, shall, when under way, . . . be under the control and direction of pilots licensed by the Coast Guard."[68] This statute also provides that "[n]o State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other

[66] 33 U.S.C. §§ 1402(b), 1416(d).

[67] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 485 No. 81-3700, LEXIS 25801

[68] 46 U.S.C. § 391a(2) (1970 ed., Supp. V)

license in addition to that issued by the United States."[69] Therefore, the court held that these two provisions read together give the federal government exclusive authority to regulate pilots on enrolled vessels and that they preclude a state from imposing its own pilotage requirements upon them.[70] As a result, the court found that the state law, which requires enrolled tankers to take on state-licensed pilots, was in conflict with federal law and was therefore invalid.

To distinguish *Chevron* at bar from *Ray*, the court stated that there are significant differences between the subject matter regulated in *Ray* and the subject matter in *Chevron*. In *Ray*, the subject matter is the ship designing, which the Congress [h]ad previously observed that ship design and construction standards are matters for national attention.[71] Whereas the subject matter in *Chevron* --- the environmental impact of discharging ballast water --- "has long been regarded by the Court as particularly suited to local regulation."[72] Therefore, the *Chevron* court held that "the holding of *Ray*, which involved a subject matter different from that involved here, cannot be applied mechanically to control the disposition of the present case."[73] Simply put, whether or not there is a strong federal interest for the Congress to preempt the states' authority largely depends on the subject matter that involved in the cases.

Similarly, in *Fednav*, the court distinguished the facts from the facts in *United States v. Locke*. The basic preemption issue in *Locke* is the same as in *Ray*: the Washington state law

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[69] *Id.*

[70] *Ray v. Atlantic Richfield Company,* 435 U.S. 151, 159 (1978*)*

[71] *Ray v. Atlantic Richfield Company,* 435 U.S. 151, 166 n. 15 (1978*)*

[72] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 487 No. 81-3700, LEXIS 25801, quoted *Askew v. American Waterways Operators, Inc*., 411 U.S. 325, 36 L. Ed 2d 280, 93 S. Ct. 1590 (1973), the Court indicated that it disfavored "allow[ing] federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage -- an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." 411 U.S. at 328-29

[73] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 487 No. 81-3700, LEXIS 25801

regulates oil tanker design and equipment.[74] However, the federal law, the federal rule Ports and Waterways Safety Act ("PWSA") establishes a field preemption regime with respect to "the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification and manning of taker vessels.[75] The *Locke* court ruled that the PWSA preempted the state law.

By distinguishing the issues in *Ray*, the court in *Fednav* ruled that PWSA applies only to a tank that carries oil or hazardous material in bulk as cargo or cargo residue. But none of the plaintiffs allege that their ships include oil tankers. Therefore, "*Locke's* specific holdings regarding the PWSA's preemptive effect upon various aspects of tanker regulation are simply inapposite in this case. Plaintiffs have identified no federal interest that supports a finding that Congress intended to preempt the field of ANS prevention."[76]

To summarize, case law has found that there is no federal interest in regulating ballast water discharge so strong as to left no room for the state legislation.

C. The State Ballast Water Law Does Not has Actual Conflict With the Federal Ballast Water Law

When Congress has not occupied the field-explicitly or implicitly - states are free to pass laws that supplement the federal regulatory regime, unless such laws "actually conflict with federal law."[77] Actual conflict occurs when either (1) "compliance with both federal and state

[74] Wash. Admin. Code § 317-21-010 et seq.

[75] *United States v. Locke*, 529 U.S. 89, 94 (2000)

[76] *Fednav, Ltd. v. Chester*, 547 F.3d 607, 622 (6th Cir. 2008)

[77] Kyle H. Landis-Marinello, NOTE: Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water, 106 Mich. L. Riev. 135, 164, quoted *Silkwood v. kerr-McGee Corp*., 464 U.S. 238, 248 (1984)

regulation is a physical impossibility;"[78] or the state law "stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress."[79]

The courts in *Fednav* and *Chevron* have both discussed this issue. In *Fednav*, for the shipping company to follow the Michigan State law, they only have to pay $ 225 in fees and fill out several forms. "It is not physically impossible to comply with both Michigan's permit requirement and NISA."[80] Moreover, just because the state law has more strict ballast water management than the federal law, it does not frustrate the federal purpose of preventing ballast water discharge pollution. "NISA's purpose is 'to prevent unintentional introduction and dispersal of nonindigenous species into waters of the United States through ballast water management and other requirement. That purpose is shared, not obstructed, by Michigan Ballast Water Statute."[81]

Similarly, the court in *Chevron* also did the actual conflict analysis. "The purpose of both the Alaska deballasting prohibition and the CWA is the same: to eliminate damage to the marine environment from the discharge of pollutants into the nation's wastes.[82] As such, the court should be reluctant to infer preemption.[83]

Therefore, the Alaska state law, like that of Michigan, does not either make it impossible for the shipping company to comply with both federal law and state law or frustrate the federal law purpose while pursuant to the state law.

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[78] *Florida Lime & Avocado Growers, Inc v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)

[79] *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)

[80] *Fednav, Ltd. v. Chester*, 547 F.3d 607, 622 (6th Cir. 2008)

[81] *Id*.

[82] *Chevron U.S.A., Inc v. Hammond* 726 F.2d 483, 494 No. 81-3700, LEXIS 25801

[83] *Id*. at 497.

VI. Conclusion.

It is undeniable that the federal agency plays an important role in protecting the Great Lakes ecological environment from attacking of ANS brought in ballast water. However, individual states also enjoy broad discretion in enacting home rule to protect the local environment.

The state law should not be found preempted by federal law, because Congress never explicitly indicated that the ballast water management issue is exclusively reserved to the federal government. Even where there are overlaps between the federal law and the state law, the Congress does not implicitly preempt state authority on this issue, and it actually encourages states to participate in the process. Admittedly, it is true that states' general permit standards may cause extra burden to shipping company. However, such additional burdens do not make it impossible for those companies to follow both state law and federal law.