

## **CHANGE ENVIRONMENTAL STANDARDS FOR PORT OPERATIONS PERMIT**

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**House Bill 5095 as reported from committee w/ amendment**  
**Sponsor: Rep. Dan Lauwers**  
**Committee: Commerce and Trade**  
**Complete to 11-9-17**

Analysis available at  
<http://www.legislature.mi.gov>

### ***BRIEF SUMMARY:***

House Bill 5095 would amend the Natural Resources and Environmental Protection Act (NREPA) to adopt U.S. Coast Guard standards as the basis for issuing permits to oceangoing vessels engaged in port operations in Michigan. These standards would take the place of existing standards promulgated by the Michigan Department of Environmental Quality (DEQ).

### ***FISCAL IMPACT:***

House Bill 5095 would have an indeterminate fiscal impact on the Department of Environmental Quality. The bill would require the DEQ to employ U.S. Coast Guard standards for issuing surface water discharge permits to oceangoing vessels engaged in port operations, rather than the current DEQ-specific standards. It is unclear whether these new standards would affect the costs realized by the department in the enforcement of the NREPA-required water protection. It is also unclear whether these new standards would affect Ballast Water Control General (BWCG) Permit revenue. These permit fees include a \$75 application fee effective for 5 years as well as a \$150 annual renewal fee. A BWCG Permit is just one type of Surface Water Discharge Permit, which collectively generate approximately \$2.8 million in annual revenue for the DEQ. This revenue is deposited to the National Pollutant Discharge Elimination System (NPDES) Fund, which supports the NPDES Nonstormwater Program to protect Michigan's surface waters from pollution discharges. This fee is scheduled to sunset October 1, 2019.

### ***THE APPARENT PROBLEM:***

Aquatic nuisance species (ANS) have been introduced into the Great Lakes for centuries. These non-native organisms threaten the diversity or abundance of existing native species and the ecological stability of impacted waters. This can lead to adverse effects for the commercial, agricultural, and recreational activities that rely on a strong and stable ecosystem. Zebra mussels are a classic example. One of the largest sources of the unintended introduction of aquatic nuisance species has been the ballast water discharge of oceangoing vessels.

In 2005, with federal ballast water discharge regulations seen as inadequate, the state passed 2005 PA 33. The law tasked the DEQ with creating a permit program for oceangoing vessels engaging in port operations in the state. In order to receive a permit, a

vessel was required to show that it would not discharge aquatic invasive species or, if the vessel discharged ballast water, that the vessel would use environmentally sound technology and methods, as determined by DEQ, to prevent the discharge of ANS. To date, DEQ has approved four treatment methods and can issue individual permits to operators seeking to use alternative treatment methods. The legislation also required DEQ to facilitate the formation of a Great Lakes coalition to address water pollution laws that could prevent the discharge of aquatic nuisance species into Great Lakes waters.

It has been suggested that, while well-intentioned, these standards have not met their stated goals of protecting Michigan waters, as ANS have still been discovered and as other states have employed differing discharge standards. Additionally, the unique state-based standards have reportedly all but ended the shipping of exports from Michigan. Legislation has been introduced for Michigan to replace its standards with those issued by the U.S. Coast Guard.

### ***THE CONTENT OF THE BILL:***

House Bill 5095 would amend the Natural Resources and Environmental Protection Act (NREPA) to adopt U.S. Coast Guard standards as the basis for issuing permits to oceangoing vessels engaged in port operations in Michigan.

Currently under Part 31 (Water Resources Protection) of NREPA, oceangoing vessels engaged in port operations in Michigan are required to obtain a permit from the Michigan Department of Environmental Quality (DEQ). DEQ issues a permit only if the applicant can demonstrate that the vessel will not discharge aquatic nuisance species or, if the vessel discharges ballast water or other waste or waste effluent, that the vessel will use environmentally sound technology and methods, as determined by DEQ, to prevent the discharge of aquatic nuisance species.<sup>1</sup>

Under HB 5095, a permit would still be required, but DEQ would issue a permit only if the applicant could demonstrate that the vessel complies with the “federal aquatic nuisance rule” as then in effect. If the rule were amended after the enactment date of the proposed bill, and the DEQ director determined that the amended rule was less protective of state waters from aquatic nuisance species, the applicant would be required to demonstrate that the oceangoing vessel complied with the rule as in effect immediately *before* the effective date of the amendment to the federal rule. Additionally, if pursuant a compact of Great Lakes states that Michigan were party to, Michigan adopted more protective standards than the federal rule, those standards adopted pursuant to the compact would apply.

Currently, DEQ also must cooperate with other entities, including Great Lakes states and Canadian provinces, to ensure the development of standards for the control of aquatic nuisance species that are protective of waters of the state and other natural resources. HB 5095 would delete this requirement.

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<sup>1</sup> For more information on the DEQ permitting process, see the “Ballast Water Control” webpage, available online: [http://www.michigan.gov/deq/0,4561,7-135-3313\\_71618\\_3682\\_3713-153446--,00.html](http://www.michigan.gov/deq/0,4561,7-135-3313_71618_3682_3713-153446--,00.html)

Finally, the bill adds intent language that adopting the federal rule is to help harmonize regulatory programs in the Great Lakes states for preventing the introduction and spread of aquatic nuisance species and to allow regulatory agencies to cooperate in the development of stronger programs.

The bill would define “federal aquatic nuisance rule” as 33 CFR Part 151, Subpart C, and applicable requirements of 33 CFR 151.2050, 151.2060, and 151.2070.<sup>2</sup>

MCL 324.3112

### ***BRIEF BACKGROUND INFORMATION:***

Michigan’s port operations permit went into effect on January 1, 2007. That same year, shipping companies and shipping associations, as well as a port company and port association, brought suit against the DEQ and Attorney General of Michigan seeking an injunction against enforcement of the law and a declaration that it was unconstitutional. The shipping companies and associations argued that the law violated the due process clause of the Fourteenth Amendment to the United States Constitution, the commerce clause of the Constitution, and the supremacy clause of the Constitution, as well as three clauses of the Michigan Constitution. The state moved to dismiss the case for failure to state a claim.

The case was heard in July 2007 in the U.S. District Court for the Eastern District of Michigan. The judge ruled that the Court lacked the jurisdiction over the three counts regarding the Michigan Constitution and dismissed the counts. For the counts regarding the U.S. Constitution, the judge ruled that the plaintiffs failed to state a claim and dismissed them.<sup>3</sup>

The plaintiffs appealed to the U.S. Court of Appeals for the Sixth Circuit. A three judge panel heard the case in September 2008. In its ruling, the court first determined that the port company and port association did not have standing to challenge the statute, and that the only remaining challenge pertained to the permit requirement, not the treatment requirement. The Court of Appeals then address the plaintiff’s claims—federal preemption, commerce clause, and due process—and dismissed each, therefore affirming the District Court Ruling. In its judgment, the court wrote, “Michigan, for undisputedly legitimate reasons, has enacted legislation of a type expressly contemplated by Congress.”<sup>4</sup>

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<sup>2</sup> For text of 33 CFR Part 151, Subpart C (“Ballast Water Management for Control of Nonindigenous Species in the Great Lakes and Hudson River”) see <https://www.ecfr.gov/cgi-bin/text-idx?SID=7701e74135f60ea5878d137945943a3d&mc=true&node=pt33.2.151&rgn=div5#sp33.2.151.c>

<sup>3</sup> See *Fednav v. Chester* [https://www.gpo.gov/fdsys/pkg/USCOURTS-mied-2\\_07-cv-11116/pdf/USCOURTS-mied-2\\_07-cv-11116-0.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-mied-2_07-cv-11116/pdf/USCOURTS-mied-2_07-cv-11116-0.pdf)

<sup>4</sup> See *Fednav, Limited, et al. v. Chester, et al.* <https://www.gpo.gov/fdsys/pkg/USCOURTS-ca6-07-02083/pdf/USCOURTS-ca6-07-02083-0.pdf>

## ***ARGUMENTS:***

### ***For:***

The bill will promote and develop the export shipping industry in Michigan. This industry has all but ceased because of the state's unique ballast water treatment requirements, which are time-consuming and costly for vessels to comply with. Michigan is the only state in the region that requires active technology to treat ballast water before discharge, and the state is losing business because of the regulation. In many instances, Michigan products are loaded on to rails or trucks to be exported at ports in neighboring states or provinces. Michigan products—from agricultural outputs to finished manufactured goods—should rightfully be exported from the state that produced them. By aligning Michigan standards to the federal standards and removing a regulatory barrier, businesses will compete on a level playing field with other states and provinces. The bill will grow the export industry in Michigan and help Michigan businesses that export goods.

### ***For:***

Michigan's ballast water discharge treatment standards simply aren't effective, and are not meeting the intended goal. Michigan is the only state in the region to adopt such standards. Michigan has no control over what ships do in the waters of Wisconsin, Ohio, or Ontario. It is unreasonable to believe that if a discharge anywhere in the Great Lakes contained ANS—performed maybe just miles away and in compliance with the laws of another state—that the ANS won't eventually travel into Michigan waters. It was hoped that Michigan would lead in setting treatment standards, but Michigan has simply become an outlier in regulation, with no clear environmental benefit as a result.

### ***Against:***

Michigan's legislative action in 2005 established the state as a leader in the prevention of ANS, and Michigan should not relinquish that leadership role. The 2005 legislation spurred action by neighboring states and provinces, as well as the federal government. The federal ballast water management requirements will gradually rise to Michigan's level, so the state will be best off by leaving the current regulations in place. Additionally, there is no way to know if Michigan's ballast water standards are the sole reason that the export shipping industry has decreased, and no promise that the industry will return as a result of this legislation.

### ***Against:***

Michigan is best positioned to create environmental standards that fit the state's needs and reflect the appropriate balance of commerce and environmental protection. The U.S. Coast Guard standards are not tailored to the state's needs, and are step backward in the effort to protect the Great Lakes from invasive species. The Coast Guard standards allow for certain ballast water management practices which are currently not allowed under the DEQ permit program. Invasive species can cause irreparable harm to an ecosystem and cost hundreds of millions of dollars to manage. It would be a dangerous proposition for the state to roll back an existing policy to one that could introduce additional invasive species. Any growth

in the shipping industry could be offset or eliminated by new costs to taxpayers or businesses in controlling invasive species. Prevention is a far more cost-effective policy.

***No Position:***

While the U.S. Coast Guard standards appear to largely comport with Michigan's existing standards, the key issue is when the Coast Guard standards will take effect. Eventually, Coast Guard standards will require some form of active technology, based on the vessel's capacity and date constructed; however, there have been numerous extensions to this requirement. While the fully implemented Coast Guard standards may comport with Michigan standards, in the interim the Coast Guard standards will be less protective.

***No Position:***

It may be too early to tell whether the Coast Guard standards will meet Michigan's environmental protection needs. The federal standards are based on an output measure of discharge, while Michigan's standards are based on a specific treatment method. As federal standards allow for an output range depending on the size and concentration of an organism, it is not known if these output ranges are acceptable to current Michigan practices.

***POSITIONS:***

Representatives from the following organizations testified in support of the bill:

- Lake Carriers' Association (10-24-17)
- Detroit Regional Chamber (10-24-17)
- Michigan Agri-Business Association (10-24-17, 10-31-17)
- Zeeland Farm Services (10-24-17)
- Nicholson Terminal and Dock Company (10-31-17)

Representatives from the following organizations indicated support of the bill:

- Michigan Aggregates Association (10-24-17)
- Michigan Farm Bureau (10-24-17)
- Michigan Forest Products Council (10-24-17)
- American Great Lakes Ports Association (10-24-17)
- Michigan Manufacturing Association (10-24-17)
- Great Lakes Bay Regional Alliance (10-24-17, 10-31-17)
- Detroit/Wayne County Port Authority (10-31-17)
- Grand Rapids Area Chamber of Commerce (10-31-17)
- International Association of Machinists and Aerospace Workers Task Force Coalition (10-31-17)

Representatives from the following organizations testified in opposition to the bill:

- National Wildlife Federation (10-24-17)
- Michigan United Conservation Clubs (10-24-17)
- Michigan Environmental Council (10-24-17)
- Michigan League of Conservation Voters (10-31-17)

Representatives from the following organizations indicated opposition to the bill:

- Sierra Club Michigan Chapter (10-24-17)
- Tip of the Mitt Watershed Council (10-24-17)

Representatives from the Michigan Department of Environmental Quality testified with no position on the bill. (10-31-17)

Legislative Analyst: Patrick Morris  
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.