

Wisconsin Wildlife Federation

December 4, 2007

Christine Thomas, Chair
Natural Resources Board
P.O. Box 7921
Madison, WI 53707-7921

Matthew Frank, Secretary
Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Dear Chair Thomas and Secretary Frank:

The conservation community greatly appreciates the strong position that the Natural Resources Board and the Department of Natural Resources has taken to require regulation of the discharge of ballast water from international ships that contains aquatic invasive species and diseases. Wisconsin and the other Great Lakes states have been plagued by the impacts of the zebra mussel, the quagga mussel, the round goby, the white perch, the spiny water flea, VHS and other aquatic invasive species and diseases.

The Board and the Department have taken strong positions in support of state and federal legislation requiring permits prior to the discharge of international ballast water into the Wisconsin waters.

However there is further good news and a more direct ability for the Board and Department to finally require permits prior to the discharge of ballast water. Current state statutes do appear to give full authority to the agency to regulate ballast water discharge without further state legislation. This would be similar to the actions already taken by the State of Michigan.

The Wisconsin Pollutant Discharge Elimination System, WPDES, based on the Federal Clean Water Act is set out in Chapter 283, Wisconsin Statutes. Subsection 283.31 (1), Stats., states that “(t)he discharge of any ‘pollutant’ into any waters of the stateby any person is unlawful unless such discharge is under a permit issued by the department...”.

“‘Pollutant’ means any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, **sewage**, sludge, munitions, chemical wastes, **biological materials**, radioactive substance, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharge into water.” The Federal Courts have determined that not only is the discharged ballast water a pollutant under the Federal Clean Water Act but also that fish and fish remains are “pollutants” because they constitute “biological materials”. See National Wildlife Federation v. Consumer Power Co., 862 F. 2d 580,583 (6th Cir. 1988) and Northwest Environmental Advocates v. United

States Environmental Protection Agency, 2005 WL 756614 (N.D. Cal.) March 30, 2005.
The State of Wisconsin was a party in the latter case.

To-date, the Department of Natural Resources has not required a WPDES permit for the discharge of ballast water from international ships. This may have been based on a mistaken reliance on an administrative rule adopted by the Department. Subsection 283.31 (1), Stats., provides that the Department “may by rule exempt certain classes or categories of vessels from” the need to obtain a WPDES permit. The Board adopted NR 200.03 (3) (b) that exempts from the WPDES discharge permit requirements : “(s)ewage discharged from vessels”. However, as you can see from the above language “ biological materials” such as fish and fish remains are differentiated from “sewage” in the Wisconsin Discharge Elimination System definition of “pollutant”. This is also true under the Federal Clean Water Act and the line of cases mentioned above.

The really good news is that because of this review of agency authority the Board and the Department are in a current position to regulate the discharge of ballast water from international ships in Lake Michigan and Superior.

Several major conservation groups have come together to sign on to the attached petition which seeks to clarify further that the aforementioned exemption in NR 200.03 (3) (b), Wisconsin Administrative Code, does not include ballast water. However we do believe that current WPDES law is clear on this point and thereby request the Department to immediately initiate a process to require permits for the discharge of ballast water into the waters of the state. We all stand ready to participate in that process.

Thank you very much for your attention to this matter which is critically important to Wisconsin water and fishery resources.

Very truly yours,

George E. Meyer
Executive Director
Wisconsin Wildlife Federation