

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FEDNAV LIMITED,
CANADIAN FOREST NAVIGATION CO. LTD.,
NICHOLSON TERMINAL AND DOCK CO.,
THE SHIPPING FEDERATION OF CANADA,
THE AMERICAN GREAT LAKES PORT ASSOCIATION,
SEAWAY GREAT LAKES TRADE ASSOCIATION,
THE UNITED STATES GREAT LAKES SHIPPING ASSOCIATION,
BAFFIN INVESTMENTS LTD. and CANFORNAV INC.,

Plaintiffs,

v.

Case No.: 2:07-CV-11116
Hon. John Feikens

STEVEN E. CHESTER,
Director of the Michigan Department of Environmental Quality,
and MICHAEL COX, Attorney General for the State of Michigan,

Defendants,

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
MICHIGAN UNITED CONSERVATION CLUBS,
ALLIANCE FOR THE GREAT LAKES,
and NATIONAL WILDLIFE FEDERATION,

Defendants-Intervenors.

**AMICI BRIEF OF MICHIGAN STATE SENATOR PATRICIA L. BIRKHOLZ,
MINNESOTA STATE SENATOR ANN H. REST,
ILLINOIS STATE REPRESENTATIVE KAREN MAY,
WISCONSIN STATE SENATOR ROBERT L. COWLES,
AND WISCONSIN STATE REPRESENTATIVE JON RICHARDS
IN SUPPORT OF DEFENDANTS AND DEFENDANTS-INTERVENORS**

Respectfully submitted,

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TABLE OF CONTENTS

CONCISE STATEMENT OF THE ISSUES PRESENTED ii

CONTROLLING OR MOST APPROPRIATE AUTHORITY iii

INTRODUCTION 1

ARGUMENT 4

I. STATE LEGISLATIVE EFFORTS ARE CONSISTENT WITH THE
COLLABORATIVE APPROACH PROVIDED BY FEDERAL LAW FOR
ADDRESSING AQUATIC NUISANCE SPECIES IN THE GREAT LAKES 4

II. THE MICHIGAN STATUTE AND BILLS PENDING IN OTHER STATES
SEEK TO AVOID CONFLICTING STATE REQUIREMENTS THROUGH
FORMATION OF THE GREAT LAKES AQUATIC NUISANCE SPECIES
COALITION..... 6

III. PLAINTIFFS’ COMMERCE CLAUSE AND FEDERAL PREEMPTION
CLAIMS THREATEN NUMEROUS OTHER STATE LAWS IN EVERY
GREAT LAKES STATE 8

CONCLUSION..... 10

CONCISE STATEMENT OF THE ISSUES PRESENTED

I. Whether Plaintiffs fail to state a claim for violation of the Supremacy Clause?

Amici state lawmakers answer: Yes

II. Whether Plaintiffs fail to state a claim for violation of the Commerce Clause?

Amici state lawmakers answer: Yes

III. If the Court finds that Plaintiffs have stated a claim for violation of the Supremacy Clause, whether summary judgment in favor of Plaintiffs is appropriate?

Amici state lawmakers answer: No

IV. If the Court finds that Plaintiffs have stated a claim for violation of the Commerce Clause, whether summary judgment in favor of Plaintiffs is appropriate?

Amici state lawmakers answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

I. Plaintiffs' claim for violation of the Supremacy Clause:

Hillsborough County v. Automated Med. Labs., 471 U.S. 707 (1985).
Chevron v. Hammond, 726 F.2d 483 (9th Cir. 1984).

II. Plaintiffs' claim for violation of the Commerce Clause:

Maine v. Taylor, 477 U.S. 131 (1986).
Ferndale Labs., Inc. v. Cavendish, 79 F.3d 488 (6th Cir. 1996).

INTRODUCTION

Michigan State Senator Patricia L. Birkholz,¹ Minnesota State Senator Ann H. Rest,² Illinois State Representative Karen May,³ Wisconsin State Senator Robert L. Cowles,⁴ and Wisconsin State Representative Jon Richards⁵ (collectively “state

¹ Michigan State Senator Patricia L. Birkholz (Republican, Saugatuck Township) represents Michigan’s 24th Senate District (Allegan, Barry and Eaton Counties in western Michigan). Senator Birkholz is Chair of the Michigan Senate’s Natural Resources and Environmental Affairs Committee. Senator Birkholz is one of the state of the Michigan’s representatives to the Great Lakes Commission, is the current chair of the Midwestern Legislative Conference of The Council of State Governments, and founded and currently chairs the Great Lakes Legislative Caucus. Senator Birkholz was the primary sponsor of Michigan Public Act 33 of 2005, the state legislation that is the focus of this litigation.

² Minnesota State Senator Ann H. Rest (Democratic-Farmer-Labor, New Hope) represents Minnesota’s 45th Senate District (Crystal, Golden Valley, New Hope, Plymouth, and Robbinsdale). Senator Rest is Chair of the Minnesota Senate’s Committee on State and Local Government Operations and Oversight and Chair of the Minnesota Senate’s Subdivision on Airways, Railways and Waterways (Transportation Policy). Senator Rest has been an active member of the Great Lakes Legislative Caucus since its inception. Senator Rest is the primary sponsor of Minnesota Senate File 53, which is currently pending before the Minnesota legislature and is modeled after Michigan Public Act 33 of 2005.

³ Illinois State Representative Karen May (Democrat, Highland Park) represents Illinois’ 58th Assembly District (Bannockburn, Deerfield, Glencoe, Highland Park, Highwood, Lake Bluff, Lake Forest, Northbrook and Riverwoods in the Chicago metropolitan area by Lake Michigan). Representative May serves as Chair of the General Assembly Environmental Caucus and Chair of the House Environmental Health Committee.

⁴ Wisconsin State Senator Robert L. Cowles (Republican, Green Bay) represents Wisconsin’s 2nd Senate District (parts of Brown, Oconto, Shawano, Outagamie and Waupaca counties in northeastern Wisconsin). Senator Cowles currently serves on the Senate Utilities, Commerce and Rail Committee, the Joint Audit Committee, and the Senate Public Health, Senior Issues, Long Term Care and Privacy Committee. He is also a member of National Conference of State Legislatures and serves on the Science, Energy, and Environmental Resources Committee. Senator Cowles is the primary sponsor of Wisconsin Senate Bill 119, which is intended to address ballast water discharges in the Great Lakes to prevent the spread of aquatic nuisance species.

⁵ Wisconsin State Representative Jon Richards (Democrat, Milwaukee) represents Wisconsin’s 19th Assembly District (Milwaukee’s East Side, Downtown and Bay View neighborhoods). Representative Richards has been the Assistant Minority Leader since

lawmakers”) respectfully submit this amici brief in support of the Defendants Steven E. Chester and Michael Cox (“State Defendants”) and Defendants-Intervenors Natural Resources Defense Council, Inc., Michigan United Conservation Clubs, Alliance for the Great Lakes, and National Wildlife Federation (collectively “Intervenors”).

The State Defendants and Intervenors have thoroughly presented to this Court information regarding the devastation that aquatic nuisance species cause to the Great Lakes and their fisheries and wildlife. Aquatic nuisance species like the zebra mussel, the round goby, and Eurasian ruffe, are causing unacceptable environmental and economic damage. The cause of this problem can often be traced to ballast water discharges. The problem is both historic and ongoing, as the Great Lakes are now infested with over 180 aquatic nuisance species and a new aquatic nuisance species comes into the Great Lakes, on average, about once every six months. The costs of aquatic nuisance species to the Great Lakes region are staggering, as the region is spending tens of millions of dollars to combat the billions of dollars in damage they cause.

Obviously the problem of aquatic nuisance species has not been adequately addressed by the federal government. The State Defendants and Intervenors detail the shortcomings of the federal government’s response to this devastating regional problem.

2003. He currently serves on the Committee on Assembly Organization, Committee on Financial Institutions, Committee on Rules, Joint Committee on Legislative Organization, and the Special Committee on the Great Lakes Water Resources Compact. Representative Richards is a sponsor of Wisconsin Assembly Bill 86, which is intended to address ballast water discharges in the Great Lakes to prevent the spread of aquatic nuisance species.

State lawmakers, just a few of whom are before this Court as amici,⁶ have responded by proposing and enacting coordinated state programs. They have done so as the elected representatives of their states' citizens, as stewards of their states' natural resources, and as concerned citizens themselves. The state lawmakers' obligation to protect their states' natural resources is not merely rhetorical. For example, Michigan state lawmakers have a Constitutional obligation to protect Michigan's natural resources. Article IV, section 52 of the Michigan Constitution (1963) provides: "The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

The Plaintiffs now challenge the results of the state lawmakers' efforts to protect their states' natural resources with a sound, coordinated regional policy response. The State Defendants and Intervenors have provided the Court with ample authority to reject the Plaintiffs' claims. Mindful of the thorough briefing before the Court,⁷ the state lawmakers will avoid presenting duplicative arguments and incorporate by reference the statements of facts and arguments presented by the State Defendants and Intervenors. The state lawmakers will simply offer three additional points for the Court's consideration. First, the state legislative efforts are consistent with (and certainly not

⁶ The state lawmakers before the court as amici are merely representative of the broad bipartisan support among state lawmakers for addressing the problem of aquatic nuisance species from ballast water discharges. For example, while Michigan State Senator Patricia Birkholz was the primary sponsor of Michigan Public Act 33 of 2005 (the state legislation that is the focus of this litigation), the legislation was passed unanimously by the Michigan Senate (38-0) and nearly unanimously by the Michigan House (109-1). *See Michigan Votes Report on Senate Bill 332 of 2005, available at <http://www.michiganvotes.org/Legislation.aspx?ID=37825>.*

⁷ In addition to the briefing before the Court, amici would respectfully refer the Court to a recent law review note that directly addresses the claims being made in this litigation. *See Joel T. Bowers, Note, "Little Leviathans: Michigan's Battles Against Invasive Species in the Great Lakes," 52 Wayne Law Review 1249 (2007).*

preempted by) the federal-regional-state collaborative approach provided by federal law for addressing aquatic nuisance species in the Great Lakes. Second, while Plaintiffs claim that the Michigan state law and similar bills under consideration in other Great Lakes states create the potential for conflicting compliance requirements, the Michigan statute and other bills actually provide for a cooperative process among Great Lakes states, specifically calling for the formation of the Great Lakes Aquatic Nuisance Species Coalition. Finally, while the focus of this litigation is Michigan Public Act 33 of 2005, there are numerous other state laws in every Great Lakes state that are threatened by Plaintiffs' commerce clause and federal preemption claims.

ARGUMENT

I. STATE LEGISLATIVE EFFORTS ARE CONSISTENT WITH THE COLLABORATIVE APPROACH PROVIDED BY FEDERAL LAW FOR ADDRESSING AQUATIC NUISANCE SPECIES IN THE GREAT LAKES.

Plaintiffs' federal preemption and commerce clause claims fail to recognize that federal law provides for a collaborative regional process between state and federal governments to address aquatic nuisance species in the Great Lakes. The state lawmakers' response to the problem of aquatic nuisance species is consistent with these federal statutory provisions, and thus certainly not preempted by federal law. Further, Congress' sanctioning and encouragement of state programs to address aquatic nuisance species undermines Plaintiffs' commerce clause claims.

Congress has authorized and even encouraged individual states to implement ballast water management programs to control aquatic nuisance species. The federal Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"), as amended by the National Invasives Species Act of 1996 ("NISA"), 16 U.S.C. §§ 4701-4751, includes numerous provisions allowing for state efforts to prevent aquatic nuisance species. Congress recognized that addressing aquatic nuisance species requires efforts at

the federal, regional and state level. In NANPCA/NISA, Congress put the Great Lakes at the forefront of this federal-regional-state approach.

The Great Lakes Panel was the first regional aquatic nuisance species panel to be established under NANPCA, with multi-jurisdictional representation from the geographic region of the Great Lakes states including Illinois, Indiana, Ohio, Michigan, Minnesota, New York, Pennsylvania and Wisconsin. *See* 16 U.S.C. § 4723. The Great Lakes Panel on Aquatic Nuisance Species is staffed and coordinated by the Great Lakes Commission, a regional entity established through the Congressionally-approved Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968). Pursuant to the Congressionally-approved Great Lakes Basin Compact, the Great Lakes Commission can offer recommendations for state “laws, ordinances, or regulations relating to the development, use and conservation of the Basin’s water resources.” Great Lakes Basin Compact, art. VI(G), 82 Stat. at 417. The Great Lakes Commission is itself comprised of many state lawmakers, including amici Michigan State Senator Birkholz. The Great Lakes Panel further includes representatives from “federal, state and local agencies and from private environmental and commercial interests.” 42 U.S.C. § 4723(a)(1).

Complementing this federal-regional-state cooperative approach is a provision in NANPCA/NISA that clearly and unambiguously preserves state authority to prevent of aquatic nuisance species: “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.” 16 U.S.C. § 4725. Both this clear language and the statutory provisions for cooperative federal-regional-state governance demonstrate that Congress anticipated ongoing state efforts to prevent aquatic nuisance species. Congress sought to encourage – certainly not preempt – innovative and cooperative state aquatic nuisance species prevention measures in the Great Lakes region.

It is also noteworthy that just last year, Congress considered but ultimately declined to pass statutory amendments to expressly preempt state efforts to address aquatic nuisance species from ballast water discharges. Bills in both the United States Senate and House of Representatives (S. 363 and H.R. 5030) included the following draft provision:

[The subsections on treatment standards and best management practices] supersede any provision of State or local law that is inconsistent with the requirements of those subsections or that conflicts with the requirements of those subsections. The imposition, by State or local law, of greater penalties or fees for acts or omissions that are violations of such law and also violations of this Act shall not be considered to be inconsistent with, or to conflict with, the requirements of those subsections. Nothing in the preceding sentence limits the scope of state or local law provisions that are not to be considered to be inconsistent with, or to conflict with, the requirements of those subsections.

S. 363 section (r)(2) and H.R. 5030 section (t)(1). Instead of preempting state efforts, Congress chose to leave in place the federal-regional-state cooperative approach that allows states to protect their natural resources from aquatic nuisance species.

II. THE MICHIGAN STATUTE AND BILLS PENDING IN OTHER STATES SEEK TO AVOID CONFLICTING STATE REQUIREMENTS THROUGH FORMATION OF THE GREAT LAKES AQUATIC NUISANCE SPECIES COALITION.

Plaintiffs claim that the Michigan state law and similar bills under consideration in other Great Lakes states create the potential for conflicting compliance requirements for ships discharging ballast water throughout the Great Lakes. (Pls. Mot. Summ. J. at 22). However, the Michigan statute and other bills actually provide for a Great Lakes basin-wide cooperative process among Great Lakes states, specifically calling for the formation of the Great Lakes Aquatic Nuisance Species Coalition. Michigan Public Act 33 of 2005, MCL 324.3104(2) provides:

In order to address discharges of aquatic nuisance species from oceangoing vessels that damage water quality, aquatic habitat, or fish or wildlife, the [Michigan Department of Environmental Quality] shall facilitate the formation of a Great Lakes aquatic nuisance species coalition. The Great Lakes aquatic nuisance species coalition shall be formed through an agreement entered into with other states in the Great Lakes basin to implement on a basin-wide basis water pollution laws that prohibit the discharge of aquatic nuisance species into the Great Lakes from oceangoing vessels.

Similarly, Minnesota Senate File 53 and Minnesota House File 145 (Pls. Mot.

Summ. J. Exhibit 4 at 3) provide:

The commissioner [of the Minnesota Department of Natural Resources] shall facilitate and participate in the formation of a Great Lakes invasive species coalition with other states in the Great Lakes basin to address discharges of invasive species from oceangoing vessels. The commissioner shall facilitate and participate in the formation of this coalition to promote the implementation, on a Great Lakes basinwide basis, of water pollution laws that prohibit the discharge of invasive species into the Great Lakes from oceangoing vessels.

State lawmakers do not want create a patchwork of conflicting state requirements, and instead are striving to provide a cooperative state-based approach to protecting the Great Lakes. This cooperative state-based approach to regional resource management builds on similar recent regional governance efforts in the Great Lakes region.⁸ It is an ongoing effort that is obviously not yet complete, but progress is being made. State

⁸ In addition to the Great Lakes Aquatic Nuisance Species Coalition, the Great Lakes states are also currently considering a proposed Great Lakes-St. Lawrence River Basin Water Resources Compact. The proposed compact would protect and manage the world's largest freshwater resource pursuant to common minimum standards administered primarily under the authority of individual states. This new model for interstate governance can be described as "cooperative horizontal federalism," in which states jointly develop common minimum legal standards to manage a shared resource, but leave the individual states with the flexibility and autonomy to administer those standards under state law. See Noah D. Hall, "Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region," 77 *University of Colorado Law Review* 405, 406, 448-456 (2006).

lawmakers are currently working through the Great Lakes Legislative Caucus to address aquatic nuisance species with coordinated state efforts.⁹

III. PLAINTIFFS' COMMERCE CLAUSE AND FEDERAL PREEMPTION CLAIMS THREATEN NUMEROUS OTHER STATE LAWS IN EVERY GREAT LAKES STATE.

While the focus of this litigation is Michigan Public Act 33 of 2005, there are many other state laws in every Great Lakes state that may apply to the discharge and intake of ballast water containing aquatic nuisance species or other biota¹⁰ and are thus threatened by Plaintiffs' commerce clause and federal preemption claims. These include fisheries conservation laws, water pollution and littering laws, and general water management laws. The many potentially preempted state laws are far too numerous to list in this amici brief, but the following are some examples specific to Michigan:

- Michigan's fishing law requires licenses for taking any aquatic species and makes it a misdemeanor for adults to take or possess an aquatic species without a license. *See* Mich. Comp. Laws §§ 324.43532, 324.43533, and 324.43558. This prohibition could thus include the removal or killing of fish when they are pulled into a ship's ballast tank.

⁹ The Great Lakes Legislative Caucus is a nonpartisan group of state (and provincial) lawmakers from the eight Great Lakes states (and two Canadian Great Lakes provinces). It has three primary goals: (1) facilitate the regional exchange of ideas and information on key Great Lakes issues, (2) strengthen the role of state and provincial legislators in the policymaking process, and (3) promote the restoration and protection of the Great Lakes. Michigan Senator Birkholz serves as chair of the Great Lakes Legislative Caucus, and all state legislators are welcome to participate. It is staffed by the Council of State Governments. *See* <http://www.csgmidwest.org/About/GLLC.htm>.

¹⁰ While Plaintiffs assert that they have "cooperated and continue to cooperate with ... state authorities (principally the State of Michigan)" (Pls. Mot. Summ. J. at 2), they offer no evidence of compliance with these state laws to support this factual assertion.

- Michigan law prohibits littering on land or in the water and from motor vehicles or vessels. *See* Mich. Comp. Laws § 324.8901 to 324.8904.
- Michigan law similarly prohibits littering of infectious or pathological waste, with sanctions that include reimbursing the state for the cost of damages to any land, water, wildlife, or other natural resources and impoundment of the vessel or vehicle involved in the violation. *See* Mich. Comp. Laws §§ 324.8905, 324.8905a, 324.8950b, and 324.8905c.
- Michigan's laws for protecting wilderness and natural areas and its endangered species law may also apply to ballast water intakes or releases in the event that such actions remove vegetation, extract minerals, or otherwise disturb or transport endangered or threatened plants or fish that are so designated either on state or federal lists of such species. *See* Mich. Comp. Laws §§ 324.35101 and 324.5105, 324.6105 to 324.4507.
- Michigan's Fish and Game law further protects fish in its waters, including the Great Lakes, from taking or killing unless authorized by state regulation. *See* Mich. Comp. Laws §§ 324.41101 to 324.41104.
- Moreover, possessing any aquatic species or taking them from any state waters without a license is explicitly prohibited. *See* Mich. Comp. Laws § 324.43509. All fish found in the portions of the Great Lakes within Michigan's jurisdiction are declared to be the property of the state. *See* Mich. Comp. Laws § 324.47301. As a result, the state has adopted ... prohibitions on operation of vessels in a manner likely to alter the behavior of aquatic species, and protections from interfering with

spawning or propagation of fish. *See* Mich. Comp. Laws §§ 324.47301, 324.37301a, 324.37302, and 324.47311 to 324.47319

CONCLUSION

For the reasons stated in this brief and the briefs of State Defendants and Intervenor, amici curiae state lawmakers respectfully request that Defendants' Motion to Dismiss be granted, or, in the alternative, that Plaintiffs' Motion for Summary Judgment be denied.

Date: May 21, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2007, I electronically filed the foregoing Amici Brief with the Clerk of the Court using the ECF system, which will send notification of such filing to Norman C. Ankers, Robert P. Reichel, Neil S. Kagan, Christopher E. Tracy, Randal M. Brown, and Amy Kullenberg. I also sent copies by email to Shannon Fisk and Sara R. Gosman.

Date: May 21, 2007

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