



November 9, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate

The Honorable Chuck Schumer
Democratic Leader
United States Senate

Toi Hutchinson
State Senator
Illinois
President, NCSL

Jon Heining
General Counsel
Legislative Council
Texas
Staff Chair, NCSL

The Honorable John Thune
Chairman
United States Senate
Committee on Commerce, Science and
Transportation

The Honorable Bill Nelson
Ranking Member
United States Senate
Committee on Commerce, Science and
Transportation

William Pound
Executive Director

The Honorable John Barrasso
Chairman
United States Senate
Committee on Environment and Public
Works

The Honorable Tom Carper
Ranking Member
United States Senate
Committee on Environment and Public
Works

Re: Pre-Emption of State Authority and The Vessel Incidental Discharge Act of 2018

Dear Majority Leader McConnell, Democratic Leader Schumer, Chairmen Thune and Barrasso, and Ranking Members Nelson and Carper:

On behalf of the National Conference of State Legislatures (NCSL), the bipartisan organization representing the legislatures of our nation's states, territories and commonwealths, I write to express NCSL's concerns surrounding the pre-emption of state authority contained in the revised version of the Vessel Incidental Discharge Act (VIDA), Senate Amendment 4054 to S. 140.

State legislators are supportive of increased protections against aquatic nuisance species and encourage Congress to provide for improved means for preventing the introduction of such ecologically and economically damaging invaders. However, we are concerned that the current text of VIDA goes well beyond what is necessary and pre-empts current state authority to adequately protect state waters. By stating that "no State, political subdivision of a State or interstate agency may adopt or enforce any law, regulation, or other requirement of the State, political subdivision, or interstate agency," the bill ignores the importance of taking a state's unique environmental and biological nature into account and instead imposes a one-size-fits-all approach.

Over 40 years ago, Congress enshrined the principle of cooperative federalism within the Clean Water Act (CWA)—explicitly stating that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." This model of cooperative federalism acknowledges

that a singular, universal approach to water protection and management fails to consider the unique water challenges individual states face, and instead affords states the flexibility required to address their water needs as they see fit, relying upon the expertise within their state to protect the unique chemical, physical and biological integrity of the nation's waters. The CWA, through sections 510 and 401, explicitly provides states the opportunity not only to adopt standards or discharge limitations that are equal to, or more stringent than federal standards, but also the ability to certify, or condition "any activity," which "may result in any discharge into the [Nation's] navigable waters." This ensures that decisions made in Washington will not negatively impact water quality across the nation.

We strongly urge you to reject any attempts to erode states' established authority to protect water quality within their boundaries. NCSL does support the inclusion of amendment language that encourages state consultation; however, we urge you to further bolster such consultation and provide a clear and consistent process for state engagement and coordination. Early, frequent, meaningful and comprehensive consultation with state governments is vital to ensure that a federal solution is not developed without sufficient dialogue amongst stakeholders. A possible suggestion would be to make the following red-lined edits:

Senate Amendment 4054 to S.140, Title IX, Sec. 903(4)(A)(i):

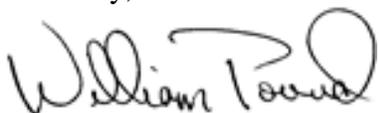
IN GENERAL: Not later than 2 years after the date of enactment of this subsection, the Administrator, in concurrence with the Secretary (subject to clause (ii)), ~~and in following~~ meaningful and timely consultation with ~~interested States and local officials and their~~ respective national organizations per Executive Order 13132, shall promulgate Federal standards of performance for marine pollution control devices for each type of discharge incidental to the normal operation of a vessel that is subject to regulation under this subsection.

Senate Amendment 4054 to S.140, Title IX, Sec. 903(5)(A)(i):

IN GENERAL: As soon as practicable, but not later than 2 years, after the date on which the Administrator promulgates any new or revised standard of performance under paragraph (4) with respect to a discharge, the Secretary, ~~in following~~ following meaningful and timely consultation with States and local officials and their respective national organizations per Executive Order 13132, shall promulgate the regulations required under this paragraph with respect to that discharge.

We look forward to working with Congress as actions surrounding VIDA move forward, to ensure state authority is not erased. To discuss this matter further, please contact NCSL staff Kristen Hildreth at kristen.hildreth@ncsl.org or 202.624.3597 and Ben Husch at Ben.Husch@ncsl.org or 202.624.7779.

Sincerely,



William T. Pound
Executive Director
National Conference of State Legislatures