



*Bill Rowland*

*Bill Analysis*  
*Legislative Service Commission*

## **H.B. 298**

127th General Assembly  
(As Introduced)

**Reps. Skindell, Ujvagi, Foley, D. Stewart, Letson, Koziura, J. McGregor, Yuko, Celeste, Okey, Brady, Chandler, Luckie, Sayre, Fende**

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### **BILL SUMMARY**

- Requires the Chief of the Division of Wildlife to establish a program for the issuance of ballast water discharge permits applicable to operators of oceangoing vessels for the purpose of preventing the introduction of aquatic nuisance species into the state waters of Lake Erie.
- Requires the Chief to adopt rules governing the program, including rules that identify aquatic nuisance species for purposes of the bill, establish the amount of the fee for a permit and procedures for the issuance, denial, modification, renewal, suspension, and revocation of permits, establish performance standards for ballast water discharge and the management of other vectors of aquatic nuisance species introduced from oceangoing vessels, establish a system of inspections applicable to oceangoing vessels, and establish civil penalties and other procedures and requirements.
- Establishes requirements governing the application for, the issuance of, and the denial of a ballast water discharge permit.
- Establishes procedures for civil enforcement actions, including procedures for civil actions brought by citizens to enforce the bill's requirements.
- Establishes the Aquatic Nuisance Species Prevention Fund for the purpose of funding programs for the reduction of aquatic nuisance species in the state waters of Lake Erie and for providing funding for the Division of Wildlife to administer the ballast water discharge permit program.

- Requires the Chief of the Division of Wildlife to facilitate the formation of a Great Lakes Aquatic Nuisance Species Coalition with other states in the Great Lakes basin and with Canadian Great Lakes provinces in order to address discharges of aquatic nuisance species from oceangoing vessels that damage water quality, aquatic habitat, or fish or wildlife.
- Requires the Chief to cooperate to the fullest extent practicable with other Great Lakes basin states, the Canadian Great Lakes provinces, and specified organizations concerned with Lake Erie to ensure development of standards for the control of aquatic nuisance species that are broadly protective of the waters of the state and other natural resources.

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## CONTENT AND OPERATION

### *Ballast water discharge permit program*

The bill requires the Chief of the Division of Wildlife in the Department of Natural Resources to establish a program for the issuance of ballast water discharge permits for the purpose of preventing the introduction of aquatic nuisance species into the state waters of Lake Erie<sup>1</sup> (sec. 1535.02(A)(1)). The bill defines "ballast water" to mean water and suspended matter that are taken on board an oceangoing vessel<sup>2</sup> to control or maintain trim, draught, stability, or stresses of the vessel regardless of how the water and suspended matter are carried (sec. 1535.01(C)). "Aquatic nuisance species" means a nonindigenous species that threatens the diversity or abundance of native species in or the ecological stability of infested waters or commercial, agricultural, aquacultural, or recreational activities that are dependent on such waters (sec. 1535.01(A)).

### *Rules*

The Chief is required to establish the permit program not later than 12 months after the bill's effective date (sec. 1535.02(A)(1)). In order to do so, the Chief must adopt rules within that 12-month time frame that do all of the following:

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<sup>1</sup> The bill defines "state waters of Lake Erie" to mean the waters under the jurisdiction of Ohio in Lake Erie and waters that discharge, flow, or otherwise are transferred into that portion of Lake Erie (sec. 1535.01(I)).

<sup>2</sup> The bill defines "oceangoing vessel" to mean a vessel that operates outside the waters of Lake Michigan, Lake Superior, Lake Huron, and Lake Erie and their tributaries (sec. 1535.01(E)).

(1) Identify aquatic nuisance species for the purposes of the bill;

(2) Establish the amount of the fee for a permit; procedures for the issuance, denial, modification, renewal, suspension, and revocation of permits; requirements governing the modification of permits; and grounds for the denial, suspension, or revocation of permits in addition to the grounds established in the bill (see "**Permit application, issuance, and denial**," below);

(3) Establish performance standards for ballast water discharge and the management of other vectors<sup>3</sup> of aquatic nuisance species introduced from oceangoing vessels, including sea chests, anchor chains, hull fouling, and sediment<sup>4</sup> in ballast tanks,<sup>5</sup> for the purpose of eliminating the risk of introduction of plant, animal, and human pathogens into the state waters of Lake Erie. The standards must identify environmentally sound technology and methods that must be used to prevent the discharge of aquatic nuisance species. The bill defines "environmentally sound technology and methods" to mean the best available technology, methods, efforts, actions, or programs to prevent introductions or control infestations of aquatic nuisance species that minimize adverse impacts to the structure and function of an ecosystem and adverse effects on nontarget organisms and ecosystems and that emphasize integrated pest management techniques and nonchemical measures (sec. 1535.01(D)).

(4) Establish a system of inspections to be conducted by the Division of Wildlife to ensure that oceangoing vessels comply with the rules governing performance standards (see above). The rules must include requirements for sampling of water or sediment, whichever is applicable, in ballast tanks, sea chests, anchor chains, hulls, and any other locations on an oceangoing vessel that the Chief determines are necessary. The rules also must establish requirements governing the imposition of inspection fees on oceangoing vessels that are subject to inspection.

(5) Establish the amount of the civil penalty that may be assessed under the bill (see "**Enforcement procedures**," below). The bill specifies that the amount of the penalty must be not less than \$25,000 for each violation.

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<sup>3</sup> The bill defines "vector" to mean the pathway and mechanism of entry for aquatic nuisance species into the state waters of Lake Erie (sec. 1535.01(J)).

<sup>4</sup> The bill defines "sediment" to mean matter that settles out of ballast water within the ballast tank of an oceangoing vessel (sec. 1535.01(H)).

<sup>5</sup> The bill defines "ballast tank" to mean a tank or hold on an oceangoing vessel that is used for carrying ballast water regardless of whether the tank or hold was designed for that purpose (sec. 1535.01(B)).

(6) Establish any other requirements and procedures that the Chief determines are necessary to administer and enforce the bill. (Sec. 1535.03(A).)

In adopting rules under the bill, the Chief must consult with the other states and Canadian provinces that border the Great Lakes in an effort to ensure uniform regulatory policies among the states and provinces. In addition, beginning January 1, 2008, the Chief, at least every three years, must review the rules governing performance standards to determine whether the performance standards established in those rules have prevented the introduction into and the reduction of the spread of aquatic nuisance species within the state waters of Lake Erie. If the Chief determines that the performance standards have not prevented the introduction into and the reduction of the spread of aquatic nuisance species within the state waters of Lake Erie, the Chief may adopt revised rules that establish alternative performance standards. (Sec. 1535.03(B) and (C).) The bill prohibits any person<sup>6</sup> from violating a rule adopted by the Chief (sec. 1535.03(D)).

**Permit application, issuance, and denial**

On and after the effective date of the rules adopted by the Chief, no person may operate an oceangoing vessel that is capable of discharging ballast water on the state waters of Lake Erie without a permit issued by the Chief (sec. 1535.02(A)(2)). The Chief or the Chief's authorized representative may assist an applicant for a permit during the application process by providing guidance and technical assistance. An applicant for a permit must submit an application to the Chief on a form that the Chief prescribes and provides, accompanied by a permit fee in an amount specified by rule (see above). The applicant must submit with the application a signed affidavit verifying that the applicant's oceangoing vessel is in compliance with the performance standards established in rules adopted under the bill. (Sec. 1535.02(B) and (C).)

Upon receipt of a complete application, permit fee, and signed affidavit, the Chief must issue or deny a permit. If the Chief issues a permit, the permit must include an identification number that is unique to that permit and terms that are necessary to ensure compliance with the bill and rules adopted under it. The Chief must issue a permit for an oceangoing vessel only if the operator who applies for the permit can demonstrate either that the oceangoing vessel will not discharge ballast water or other waste or effluent or, if the oceangoing vessel discharges

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<sup>6</sup> The bill defines "person" to include an individual, partnership, copartnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, or other legal entity, or the legal representative or agent of such an entity, that operates oceangoing vessels on the state waters of Lake Erie or that owns such vessels (sec. 1535.01(F)).

ballast water or other waste or effluent, that the operator of the oceangoing vessel will utilize environmentally sound technology and methods, as identified in rules, that can be used to prevent the discharge of aquatic nuisance species. In addition, the Chief must deny a permit if the application contains misleading or false information. Additional grounds for denial of a permit are required to be established in rules (see above). (Sec. 1535.02(D).)

A permit is valid for one year and may be renewed. An application for renewal of a permit must be submitted to the Chief at least 180 days prior to the expiration date of the permit and must comply with the requirements governing applications for permits that are established in the bill and in rules adopted under it. The Chief may modify, suspend, or revoke a permit in accordance with rules. No person that is issued a permit under the bill may violate the terms of the permit, including, but not limited to, any requirement in the permit that the person utilize environmentally sound technology and methods to prevent the discharge of aquatic nuisance species. (Sec. 1535.02(E), (F), and (G).)

### **Enforcement procedures**

Under the bill, the Chief of the Division of Wildlife may request the Attorney General, in writing, to bring an action for a civil penalty in a court of competent jurisdiction against any person who has violated or is violating the bill or a rule adopted or a term of a permit issued under it. The court may impose on the person a civil penalty in the amount established in rules (see above). (Sec. 1535.06(A).)

**Citizen suits.** In addition to actions brought by the Attorney General, any person may bring a civil action for a violation of the bill or a rule adopted or permit issued under it on behalf of the person or on behalf of the state. However, a person may not bring such an action against the state or a political subdivision, a department, board, office, commission, agency, institution, or other instrumentality of the state or a political subdivision, or an officer or employee of the state or a political subdivision. (Sec. 1535.06(B)(1).)

A copy of the complaint and written disclosure of substantially all material evidence and information that the person possesses must be served on the Attorney General pursuant to Ohio Civil Rules. The complaint must be filed in camera, must remain under seal for at least 60 days, and must not be served on the defendant until the court so orders. The state may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. (Sec. 1535.06(B)(2).)

The state, for good cause shown, may file motions with the court requesting extensions of the time during which the complaint remains under seal. Such a

motion may be supported by affidavits or other submissions in camera. The defendant must not be required to respond to a complaint until 28 days after the complaint is unsealed and served on the defendant pursuant to Ohio Civil Rules. (Sec. 1535.06(B)(3).) Before the expiration of the 60-day period within which the state may intervene or any extensions of that time period, the state must either proceed with the action or notify the court that it declines to proceed with the action. If the state proceeds with the action, the state must conduct the action. If the state declines to proceed with the action, the person bringing the action has the right to conduct the action. (Sec. 1535.06(B)(4).) When a person brings an action under the bill, no person other than the state may intervene or bring a related action based on the facts underlying that pending action (sec. 1535.06(B)(5)).

If the state proceeds with an action brought by a person under the bill, it has the primary responsibility for prosecuting the action and is not bound by an action of the person bringing the action. The person bringing the action has the right to continue as a party to the action. However, the state may dismiss an action notwithstanding the objections of the person initiating the action if the person has been notified by the state of the filing of the motion to dismiss and the court has provided the person with an opportunity for a hearing on the motion. In addition, the state may settle an action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the court may hold the hearing in camera. (Sec. 1535.06(C)(1) and (2)(a) and (b).)

Upon a showing by the state that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the state's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court, in its discretion, may impose limitations on the person's participation, including, but not limited to, limiting the number of witnesses that the person may call, limiting the length of the testimony of witnesses, limiting the person's cross-examination of witnesses, or otherwise limiting the participation by the person in the litigation (sec. 1535.06(C)(2)(c)).

Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating an action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit participation by the person initiating the action in the litigation (sec. 1535.06(C)(2)(d)).

If the state declines to proceed with an action brought by a person under the bill and the person conducts the action, the state may request to be served with copies of all pleadings filed in the action and to be supplied with copies of all deposition transcripts at the state's expense. When the person proceeds with the

action, the court, without limiting the status and rights of the person initiating the action, may permit the state to intervene at a later date upon a showing of good cause. (Sec. 1535.06(C)(3).)

Whether or not the state proceeds with the action, upon a showing by the state that certain discovery by the person initiating the action would interfere with the state's investigation or prosecution of a civil matter arising out of the same facts, the court may stay that discovery for a period of not more than 60 days. The showing must be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the state has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings. (Sec. 1535.06(C)(4).)

If the state proceeds with an action brought by a person under the bill, the person receive at least 15%, but not more than 25% of the proceeds of the action or settlement of the claim, depending on the extent to which the person substantially contributed to the prosecution of the action. However, if the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, the court may award the sums that it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person must be made from the proceeds. The person also must receive an amount for reasonable expenses that the court finds to have been necessarily incurred plus reasonable attorney's fees and costs. All expenses, fees, and costs must be awarded against the defendant. (Sec. 1535.06(D)(1).)

If the state does not proceed with an action brought by a person under the bill, the person bringing the action or settling the claim must receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount must be not less than 25% and not more than 30% of the proceeds of the action or settlement and must be paid out of the proceeds. The person also must receive an amount for reasonable expenses that the court finds to have been necessarily incurred plus reasonable attorney's fees and costs. All expenses, fees, and costs must be awarded against the defendant. (Sec. 1535.06(D)(2).)

If the state does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment (sec. 1535.06(D)(3)).



A person may not bring an action under the bill that is based on allegations or transactions that are the subject of a civil action proceeding in which the state is already a party. A person may not bring an action that is based on the public disclosure of allegations or transactions in a criminal, civil, legislative, or administrative hearing, report, audit, or investigation, or from the news media, unless the person bringing the action has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the state before filing an action based on the information. (Sec. 1535.06(E)(1) and (2).)

Finally, the state is not liable for expenses that a person incurs in bringing an action under the bill (sec. 1535.06(F)).

### **Aquatic Nuisance Species Prevention Fund**

All money collected by the Chief of the Division of Wildlife under the bill and all money from civil actions brought under the bill must be deposited in the state treasury to the credit of the Aquatic Nuisance Species Prevention Fund, which the bill creates. All investment earnings of the Fund must be credited to the Fund. (Sec. 1535.07(A).)

Money in the Fund must be used by the Chief for all of the following:

(1) Prevention of the introduction of aquatic nuisance species into the state waters of Lake Erie;

(2) Control of the spread of aquatic nuisance species that exist in the state waters of Lake Erie prior to the effective date of the bill;

(3) Reclamation of aquatic resources in the state that have been injured as a result of aquatic nuisance species; and

(4) The administration of the bill and rules adopted under it (sec. 1535.06(B)).

### **Great Lakes Aquatic Nuisance Species Coalition**

In order to address discharges of aquatic nuisance species from oceangoing vessels that damage water quality, aquatic habitat, or fish or wildlife, the Chief of the Division of Wildlife is required to facilitate the formation of a Great Lakes Aquatic Nuisance Species Coalition. The Coalition must be formed through an agreement entered into with other states in the Great Lakes basin and with Canadian Great Lakes provinces. The purpose of the Coalition is to recommend and implement on a basin-wide basis water pollution control laws that prohibit the discharge of aquatic nuisance species into the Great Lakes from oceangoing



vessels. The Chief must attempt to enter into the agreement so that the agreement is effective not later than 12 months after the effective date of the bill. The Chief must consult with other appropriate state and federal agencies prior to entering into the agreement, including, but not limited to, the Environmental Protection Agency and the United States Environmental Protection Agency. (Sec. 1535.04.)

**Cooperation with other states and Canadian provinces**

The bill also requires the Chief to cooperate to the fullest extent practicable with other Great Lakes basin states, the Canadian Great Lakes provinces, the Great Lakes Panel on Aquatic Nuisance Species, the Great Lakes Fishery Commission, the International Joint Commission, and the Great Lakes Commission to ensure development of standards for the control of aquatic nuisance species that are broadly protective of the waters of the state and other natural resources (sec. 1535.05).

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**HISTORY**

ACTION	DATE
Introduced	08-16-07

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