



U.S. House of Representatives
Committee on Transportation and Infrastructure

Washington, DC 20515

James L. Oberstar
Chairman

John L. Mica
Ranking Republican Member

David Heysfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

James W. Coon II, Republican Chief of Staff

June 9, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Water Resources and Environment

FROM: Subcommittee on Water Resources and Environment Staff

SUBJECT: Hearing on "Discharges Incidental to the Normal Operation of a Commercial Vessel"

PURPOSE OF THE HEARING

On June 12, 2008, at 10 a.m., the Subcommittee on Water Resources and Environment will hold a hearing on discharges incidental to the normal operation of a commercial vessel, and the implications of such discharges under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act. The Subcommittee will receive testimony from the Environmental Protection Agency ("EPA"), representatives of State agencies, and other interested stakeholders.

BACKGROUND

Section 301(a) of the Clean Water Act ("Act") provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with a permit issued under the Act. Section 502 of the Act defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." A "point source" is defined as a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft." The term "pollutant" includes, among other things, "sewage¹, garbage . . . biological materials . . . and industrial, municipal, and agricultural waste discharged into water."

¹ For the purposes of section 312 of the Clean Water Act, the term "sewage" includes graywater discharges from commercial vessels operating in the Great Lakes. "Graywater" is defined in section 312(a)(11) as "galley, bath, and shower water."

Section 402(a) of the Act authorizes EPA to “issue a permit for the discharge of any pollutant, or combination of pollutants” upon certain conditions required by the Act. Section 402 permits are commonly called National Pollutant Discharge Elimination System permits, or NPDES permits. NPDES permits can be either individual permits or less-burdensome general permits when the discharge of pollutants will cause only minimal adverse environmental effects to the environment when discharged separately and will have only minimal cumulative adverse effect on the environment.

In 1973, EPA promulgated a regulation that excluded “discharges incidental to the normal operation of vessels” from NPDES permitting (38 Fed. Reg. 13528, May 22, 1973). After Congress reauthorized and amended the Clean Water Act in 1977, EPA conducted an additional round of public comment on the regulation (43 Fed. Reg. 37078, August 21, 1978). In 1979, EPA promulgated the final revision that established the regulation in its current form (44 Fed. Reg. 32854, June 7, 1979). That regulation identifies several types of vessel discharges as being subject to NPDES permitting (such as trash, garbage, or other discharges related to energy production, mining, or seafood production), but specifically excludes discharges incidental to the normal operation of a vessel. *Note: In February, 1996, Congress enacted separate legal authority to regulate discharges incidental to the normal operation of a vessel of the Armed Forces (see below for further explanation).*

Under EPA regulations, found at 40 CFR 122.3(a), the following discharges did not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

In March, 2005, the U.S. District Court for the Northern District of California ruled that the Clean Water Act exemption for “discharges incidental to the normal operation of a vessel” exceeded the Agency's authority under the Act.

This decision, *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, was primarily focused on the authority of the Clean Water Act to regulate discharges of ballast water from vessels. The Court concluded that, because of the potential impact that invasive species pose to receiving waters, the underlying goals of the Clean Water Act to restore and protect the chemical, physical, and biological integrity of the Nation's waters, and the fact that Congress had “‘directly spoken’ in the [Clean Water Act] and specifically requires NPDES permits for vessels discharging pollutants in the nation's waters,” EPA acted in excess of its authority in “exempting an entire category of discharges” from the NPDES permit program.²

² See *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 2005 WL 756614, at *13 (N.D. Cal. Mar. 30, 2005).

On September 18, 2006, the U.S. District Court for the Northern District of California issued an order vacating (revoking) the regulatory exclusions for “discharges incidental to the normal operation of a vessel” as of September 30, 2008. On November 16, 2006, the United States filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit. Oral arguments before the Ninth Circuit Court of Appeals occurred in August 2007, and the decision in this case is currently pending.

According to EPA, a consequence of the *Northwest Environmental Advocates* decision is that all discharges of pollutants from vessels, other than those that are specifically otherwise addressed by the Clean Water Act (i.e., discharges of sewage, oil and hazardous substances, and discharges incidental to the normal operation of a vessel of the Armed Forces under section 312 of the Act), could potentially be required to have a NPDES permit. These NPDES permits could be either individual permits or general permits, and would include discharges of pollutants from all non-military vessels, including recreational boats and commercial vessels. The federal government estimates that, in U.S. maritime commerce, between 8,400 cargo vessels (foreign and domestic) equipped with ballast tanks enter U.S. waters from outside the exclusive economic zones (EEZs) of the United States and Canada and make approximately 86,000 port calls in the U.S. ports each year. In addition, the Coast Guard estimates that there are an additional 81,000 commercial fishing vessels operating in U.S. waters, and another nearly 13 million state-registered recreational vessels in the United States.

EPA has testified that it does not currently possess sufficient information on the nature, extent, and potential environmental harm of discharges from non-military vessels (other than aquatic invasive species in ballast water); however, the agency’s experience with the regulation of discharges incidental to the normal operation of vessels of the Armed Forces has demonstrated that such discharges can have a significant impact on the marine environment and water quality.³

On June 21, 2007, EPA published a notice of intent/request for comments and information in the *Federal Register* to “make the public aware of this matter and obtain their input, in the form of public comment or relevant information, to further help the Agency in the timely development of an NPDES permitting framework.” The Agency has not taken further formal action on this issue, but is continuing to work on the development of an appropriate regulatory mechanism to comply with the Court imposed September 30, 2008 deadline.

³ See Declaration of James A. Hanlon, found at <http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf>.

UNIFORM NATIONAL DISCHARGE STANDARDS FOR VESSELS OF THE ARMED FORCES

In February, 1996, Congress approved the National Defense Authorization Act for fiscal year 1996 (Pub. L. 104-106), that included an amendment to section 312 of the Clean Water Act to address discharges from vessels of the Armed Forces. This provision created uniform national discharge standards ("UNDS") to address discharges incidental to the normal operation of over 7,000 vessels of the Armed Forces.⁴

The UNDS provision in section 312 of the Clean Water Act required the Administrator of EPA and the Secretary of Defense to develop uniform national discharge standards to control certain discharges from vessels of the Armed Forces. This provision requires that UNDS be developed in three phases: (1) a determination for which pollutants it is reasonable and practicable to require control with a marine pollution control device; (2) promulgation of Federal performance standards for control devices, including the potential for differing standards for vessel classes, sizes, and types; and (3) establishment of requirements for the design, construction, installation and use of control devices in vessels of the Armed Forces. After completion of the third phase of UNDS, neither States nor local governments may adopt or enforce any State or local statutes to address pollutants requiring control devices, except to establish "zero-discharge zones" within the waters of the State.

In May, 1999, EPA and the Department of Defense issued a final rule implementing phase 1 of the UNDS provisions of the Clean Water Act.⁵ In developing this regulation, EPA and the Department of Defense identified 39 pollutants considered to be "incidental to the normal operation of vessels of the Armed Forces." Of these, the Federal agencies agreed there are 25 pollutants with sufficient potential for adverse impact to the marine environment to require implementation of marine pollution control devices. These include chain locker effluent, clean and dirty ballast water, compensated fuel ballast, deck runoff, gas turbine water wash, graywater, machinery wastewater, and small boat engine wet exhaust. Many of these pollutants identified as having sufficient potential for adverse impact to the marine environment are common to nearly all vessels (both vessels of the Armed Forces and commercial vessels).

EPA and DOD are currently carrying out phase 2 of the UNDS program.

LIMITED INFORMATION ON THE IMPACTS OF DISCHARGES FROM VESSELS

Over the past decade, EPA has conducted limited study on the potential impact of discharges common to vessels of the Armed Forces and cruise ships to the marine environment and water quality.

The first study, completed in 1999, under the authority of the UNDS provisions in section 312 of the Clean Water Act, identified 39 pollutants considered to be incidental to the normal

⁴ The UNDS provisions, located at section 312(n) of the Clean Water Act do not apply to commercial vessels; privately owned vessels; vessels owned or operated by State, local, or tribal governments; vessels under the jurisdiction of the U.S. Army Corps of Engineers; vessels owned or operated by other Federal agencies that are not part of the Armed Forces; vessels preserved as memorials and museums; time- and voyage-chartered vessels; vessels under construction; vessels in drydock; and amphibious vessels.

⁵ 64 Fed. Reg. 25125 (May 10, 1999).

operation of vessels of the Armed Forces. Of this number, EPA believes that 25 pollutants would be applicable to non-military vessels. In addition, according to EPA, because “commercial and recreational vessels (e.g., cruise ships, cargo vessels, fishing boats) are different in nature than military vessels, EPA expects there could be an additional number of operational discharges from non-military vessels,” which EPA does not have a sufficient information.⁶

The second study, entitled “Draft Cruise Ship Discharge Assessment Report,” was completed in December of 2007. This study analyzed the nature, amounts, and environmental implications of the following pollutants common to cruise ships: (1) sewage; (2) graywater; (3) oily bilge water; (4) solid wastes; and (5) hazardous wastes. However, the December 2007 study specifically noted that other “waste streams” (such as ballast water, desk runoff, and hull coat leachate) may be generated from commercial vessels, but the environmental implications of such additional waste streams were not analyzed in this report.

No additional Federal studies have been undertaken to assess the environmental or water quality implications of discharges incidental to the normal operation of a commercial vessel.

ADMINISTRATION’S LEGISLATIVE PROPOSAL TO ADDRESS VESSEL DISCHARGES

During consideration of H.R. 2830, the Coast Guard Authorization Act of 2007, the Bush administration formally transmitted to Congress a legislative proposal to address discharges of vessels, including a proposal to address discharges incidental to the normal operation of a non-military vessel.

The administration’s proposal would suspend the NPDES requirements of the Clean Water Act for a period of 6 years to allow the Environmental Protection Agency, in consultation with the Coast Guard, to evaluate the types, volumes, and environmental effects of discharges from vessels, including commercial vessels (other than discharges of aquatic invasive species, which are addressed in a separate section of the administration’s proposal). This moratorium is consistent with the concerns expressed by the Agency that EPA’s information on the nature, extent, and environmental implications of discharges from non-military vessels is “exceedingly limited,” and such discharges are likely to be “different in nature” and quantity than vessels covered by the UNDS program.⁷

After completion of this evaluation, the Administrator, in consultation with the Coast Guard, would be required to conduct a rulemaking to “establish an appropriate program” for discharges incidental to the normal operation of a vessel that provides for “enforceable uniform national discharge standards” for discharges from vessels, based on the best available technology (as determined by the Clean Water Act). The administration’s proposal states that this program “may be modeled in whole or in part” on the UNDS program contained in section 312(n) of the Clean Water Act.

⁶ See Declaration of James A. Hanlon, found at http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf.

⁷ In a legal declaration to the U.S. District Court for the Northern District of California, the Director of the Office of Wastewater Management in EPA’s Office of Water testified that EPA “does not have all of the needed information on how to categorize classes of vessels, what types of discharges exist and what they are composed of, and the cost and availability of technologies to address such discharges.” See Declaration of James A. Hanlon, found at http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf.

Under the administration's proposal, upon completion of the uniform national discharge standards program for vessels, no Federal or State permit would be required for discharges from vessels meeting the requirements of the new program; however, states would reserve the right to completely prohibit the discharge of one or more pollutants from vessels into state waters.

The administration's proposal contains several exclusions and exemptions to ensure that other Federal statutes are unaffected by this proposal. For example, the proposal would not affect the following discharges from vessels: (1) oil or other hazardous substances (regulated under section 311 of the Clean Water Act); (2) sewage (regulated under section 312 of the Clean Water Act); and (3) discharges of ballast water, sediment, or aquatic nuisance species (subject to the Nonindigenous Aquatic Nuisance Prevention and Control Act). In addition, the proposal would specifically exempt discharges incidental to the normal operation of a recreational vessel that is less than 79 feet in length, and would not affect the UNDS program for vessels of the Armed Forces (subject to section 312(n) of the Clean Water Act).

PRIOR LEGISLATIVE ACTIVITY

On May 24, 2007, Representative Gene Taylor introduced H.R. 2550, the Recreational Boating Act of 2007. This legislation amends the Clean Water Act to exclude from the statutory definition of "pollutant" discharges considered to be incidental to the normal operation of a recreational vessel.

On May 1, 2008, Representative Steven LaTourette introduced H.R. 5949, the Clean Boating Act of 2008. This legislation provides a targeted Clean Water Act exemption for discharges incidental to the normal operation of a recreational vessel, which is defined as "any vessel that is ... manufactured or used primarily for pleasure, or ... leased, rented, or chartered to a person for the pleasure of that person." The definition of recreational vessel specifically excludes a vessel "subject to Coast Guard inspection that ... is engaged in commercial use, or ... carries paying passengers."

H.R. 5949 also amends section 312 of the Clean Water Act to establish management practices for any discharges from a recreational vessel excluded by this Act (other than the discharge of sewage regulated under section 312 of the Act). This provision directs the Administrator to develop "reasonable and practicable" management practices to mitigate the adverse impacts that may result from discharges from a recreational vessel excluded by this Act. Under this provision, the Administrator must complete its evaluation of management practices for discharges excluded by this Act within one year of the date of enactment, and review its evaluation, and revise, if necessary, every 5 years thereafter.

H.R. 5949 also requires the Administrator, in consultation with the Coast Guard, the Department of Commerce, and other interested Federal agencies, to develop performance standards for management practices based on the class, type, and size of the vessel, and directs the Coast Guard to conduct a rulemaking governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet these performance standards.

Finally, this legislation includes a savings clause to ensure that this Act does not affect existing Clean Water Act prohibitions against discharges of oil or hazardous substances under section 311 of the Act.

Neither legislative proposal was introduced in previous Congresses.

On May 15, 2008, the Committee on Transportation and Infrastructure met in open session, and ordered H.R. 5949 reported to the House by voice vote. During consideration of H.R. 5949, several members of the Committee expressed an interest in addressing discharges incidental to the normal operation of commercial fishing vessels, and potentially other small commercial vessels. During this meeting, Chairman Oberstar committed to scheduling today's hearing before the Subcommittee on Water Resources and Environment to further explore this issue.