



United States Environmental Protection Agency  
Office of Water, Office of Wastewater  
Management Water Permits Division



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## FACTSHEET

### Overview of Litigation and Clean Water Act Permit Scheme Regarding Discharges Incidental to Normal Vessel Operations

#### **Why was a lawsuit filed?**

In January 1999, a number of interested parties submitted a rulemaking petition to EPA asking the Agency to repeal its long-standing regulation at 40 C.F.R. 122.3(a) that excludes certain discharges incidental to the normal operation of vessels, including ballast water, from the requirement to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA). The petition seeking repeal expressed concern over discharges of ships' ballast water containing invasive species and other matter. In September 2003, EPA denied the petition. Following EPA's denial decision, several groups filed a lawsuit in December 2003 in the U.S. District Court for the Northern District of California (Northwest Environmental Advocates et al. v. EPA, No. C 0305760 SI).

#### **What was the court's ruling?**

On March 30, 2005, the District Court ruled that the EPA regulation excluding discharges incidental to the normal operation of a vessel from NPDES permitting exceeded the Agency's authority under the CWA. In subsequent proceedings before the Court, EPA argued that any relief granted by the Court should be limited to ballast water matters alone. However, on September 18, 2006, the Court issued an order vacating (revoking) the regulatory exclusion at 40 C.F.R. 122.3(a) in its entirety as of September 30, 2008. EPA appealed the District Court's decision, and on July 23, 2008, the Ninth Circuit upheld the decision, leaving the September 30, 2008 vacatur date in effect. The district court has subsequently extended the date of vacatur to December 19, 2008.

#### **What Action has Congress Taken?**

On July 29, 2008, Senate bill S. 2766 ("the Clean Boating Act of 2008") was signed into law (P.L. No. 110-288). This law provides that recreational vessels shall not be subject to the requirement to obtain an NPDES permit to authorize discharges incidental to their normal operation. It instead directs EPA to evaluate recreational vessel discharges, develop management practices for appropriate discharges, and promulgate performance standards for those management practices. It then directs the Coast Guard to promulgate regulations for the use of the management practices developed by EPA and requires recreational boater compliance with such practices.

On July 31, 2008, Senate bill S. 3298 was signed into law (P.L. No. 110-299). This law generally imposes a two-year moratorium during which time neither EPA nor states can require NPDES permits for discharges incidental to the normal operation of vessels of less than 79 feet and commercial fishing vessels of any length. It also directs EPA to conduct a study of vessel discharges and issue a report to Congress within 15 months. Among other things, the moratorium does not apply to ballast water.

#### **What types of vessels and discharges are potentially affected by the District Court's ruling?**

Because the District Court's decision was not limited to vessels with ballast water tanks, it implicated an extremely large number of vessels and a range of discharges. After excluding the vessels addressed

by the two news laws discussed above, there are an estimated 50,000 commercial vessels operating in U.S. waters that could be affected. As described below, the Vessel General Permit authorizes 28 kinds of operational discharges including ballast water, bilgewater, deck runoff, and graywater.

### **Are there any exemptions relevant to vessel discharges unaffected by the Court's ruling?**

The Court's ruling does not affect vessel discharge exemptions from permitting that are specifically provided for in the CWA itself. For example, § 502(6)(A) excludes from the Act's definition of "pollutant" sewage from vessels (including graywater in the case of commercial vessels operating on the Great Lakes) and discharges incidental to the normal operation of a vessel of the Armed Forces within the meaning of the CWA § 312. As another example, the CWA provides in § 502(12)(B) that discharges from vessels (i.e., discharges other than those when the vessel is operating in a capacity other than as a means of transportation) do not constitute the "discharge of a pollutant" when such discharges occur beyond the limit of the three mile territorial sea. Because both "a pollutant" and a "discharge of a pollutant" are prerequisites to the requirement to obtain an NPDES permit, these two statutory provisions have the effect of exempting the vessel discharges they address from the requirement to obtain an NPDES permit. In addition, as discussed above, Congress also took action in July 2008 to preclude, or temporarily suspend, NPDES permitting of certain vessel types.

### **What are the implications of the Court's ruling and what is EPA doing in response?**

Section 301(a) of the CWA generally prohibits the "discharge of a pollutant" without an NPDES permit. This means that, as of September 30, 2008, that regulatory exclusion will no longer exempt such discharges from the prohibition in CWA section 301(a). The CWA authorizes civil and criminal penalties for violations of the prohibition against the discharge of a pollutant without a permit, and also allows for citizen suits against violators.

These types of discharges pose unique challenges, because vessels are highly mobile and the vessel universe is extremely diverse. In light of this, the Agency issued a Federal Register notice on June 21, 2007, seeking information from the public on matters related to vessels and their discharge characteristics as well as potential technologies or practices for discharge control. Approximately 1,600 responses were received by the end of the comment period. On June 17, 2008, EPA published a Federal Register Notice proposing general permits for public comment with the intent of having the final permits issued by September 30, 2008.

### **What are the Conditions/Terms in the Proposed General Vessel Permits?**

EPA proposed two draft NPDES vessel permits and accompanying fact sheets which provide detailed explanation of the permits' contents. As proposed, the Vessel General Permit (VGP) would have covered all commercial and non-recreational vessels and those recreational vessels longer or equal to 79 feet, and the proposed Recreational General Permit (RGP) covered recreational vessels less than 79 feet in length. However, due to the enactment of the Clean Boating Act of 2008, which now excludes recreational vessels from NPDES permitting, the RGP will not be finalized. In addition, due to P.L. 110-299, which places a two year moratorium on NPDES permitting of commercial fishing vessels and all other commercial vessels that are 79 feet or less in length, the VGP will be revised prior to finalization to reflect that new law.

The VGP would incorporate the Coast Guard mandatory ballast water management and exchange standards and add some additional requirements for ballast water management. It would also provide technology-based effluent limits (most in the form of Best Management Practices) for 28 other discharge types including deck runoff, bilgewater, aqueous film forming foam (AFFF), hull leachate, underwater husbandry, and cathodic protection. The permit would establish additional technology-based requirements for certain discharges from eight (8) specific classes of vessels, such as cruise ships, research vessels, and large ferries and water quality-based effluent limits that include requirements for

impaired waterbodies. Under this permit, certain discharge types would be limited or prohibited in waters protected for conservation purposes (i.e. national marine sanctuaries and national parks). The VGP would also establish specific corrective actions, inspections and monitoring requirements as well as recordkeeping and reporting requirements.

The VGP would require a submission of a Notice of Intent for a subset of permittees if the vessel is greater or equal to 300 tons or has a ballast water capacity of at least 8 cubic meters. All other vessels covered by the VGP would not have to submit an NOI.

**For more information:**

Send an email to [commercialvesselpermit@epa.gov](mailto:commercialvesselpermit@epa.gov) or contact Ryan Albert, Water Permits Division, (202) 564-0763, Juhi Saxena, Water Permits Division, (202) 564-0719 or John Lishman, Oceans and Coastal Protection Division, (202) 566-1364,

**Documents related to the rulemaking petition and the Courts' rulings are available on-line at: [http://www.epa.gov/owow/invasive\\_species/ballast\\_water.html](http://www.epa.gov/owow/invasive_species/ballast_water.html); Documents related to the proposed permits are available on-line at: <http://www.epa.gov/npdes/vessels>**

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