



National Association of Charterboat Operators

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August 6, 2007

Water Docket Environmental Protection Agency
1200 Pennsylvania Ave., NW.
Washington, DC 20460
Sent via Fax: (202) 564-6431

RE: Docket ID No. EPA-HQ-OW-2007-0483

To Whom It May Concern:

NACO is a national association of over 3,300 charter boat owner and operators across the United States; we are the premier voice for our industry. Our membership owns and operates a substantial number of recreational for-hire vessels that will be affected by any change in the current regulations.

Section 301(a) of the CWA provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other sections of the Act. 33 U.S.C. 1311(a). The CWA 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." 33 U.S.C. 1362(12). A "point source" is a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft." 33 U.S.C. 1362(14).

The term "pollutant" includes, among other things, "sewage, garbage * * * biological materials * * * and industrial, municipal, and agricultural waste discharged into water." \1 One way a person may discharge a pollutant without violating the section 301 prohibition is to obtain a section 402 NPDES permit. 33 U.S.C. 1342. Under section 402(a), EPA may "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)" upon certain conditions required by the Act.

Less than one year after the CWA was enacted, EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from NPDES permitting. 38 FR 13528, May 22, 1973. After Congress re-authorized and amended the CWA in 1977, EPA invited another round of public comment on the regulation. 43 FR 37078, August 21, 1978. In 1979, EPA promulgated the final revision that established the regulation in its current form. 44 FR 32854, June 7, 1979. That regulation identifies several types of vessel discharges as being subject to NPDES permitting, but specifically excludes discharges incidental to the normal operation of a vessel as follows:

The following discharges do 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.

In response to that petition, EPA first prepared a detailed report for public comment, Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options (September 10, 2001). After considering the comments received, EPA declined to reopen the exclusion for additional rulemaking and denied the petition on September 2, 2003. EPA explained that

ever since enactment of the CWA, EPA has consistently interpreted the Act to provide for NPDES regulation of discharges from industrial operations that incidentally occur onboard vessels (such as seafood processing facilities or oil exploration operations at sea) and of discharges overboard of materials such as garbage, but not of discharges incidental to the normal operation of a vessel (such as ballast water). EPA further explained that Congress had expressly considered and accepted the Agency's regulation in the years since EPA first promulgated it, and that Congress chose to regulate these discharges incidental to the normal operation of vessels through other statutes. Thus, it was EPA's understanding that Congress had acquiesced to EPA's long-standing interpretation of how to implement the CWA's "vessel or other floating craft" provisions. Denial of the petition did not reflect a dismissal of the significant impacts of aquatic invasive species, but rather that other specific programs had been enacted to specifically address the issue and that the CWA does not currently provide an appropriate framework for addressing ballast water and other discharges incidental to the normal operation of non-military vessels.

EPA pointed out that when Congress specifically focused on the problem of aquatic nuisance species in ballast water, it did not look to or endorse the NPDES program as the means to address the problem. Instead, Congress enacted new statutes in which it directed and authorized the Coast Guard, rather than EPA, to establish a regulatory program for discharges incidental to the normal operation of vessels, including ballast water. Nonindigenous Aquatic Nuisance Prevention and Control Act as amended, 16 U.S.C. 4701 et seq.; Act to Prevent Pollution from Ships, 33 U.S.C. 1901 et seq. Additionally, Congress demonstrated awareness of and made no effort to repeal legislatively EPA's interpretation or to expressly mandate that discharges incidental to the normal operation of vessels be addressed through the NPDES permitting program. EPA reasoned that such Congressional action and inaction in the face of Congressional awareness of the regulatory exclusion confirmed that Congress accepted EPA's interpretation and chose the Coast Guard as the lead agency under other statutes.

In addition, EPA found significant practical and policy reasons not to re-open the longstanding CWA regulatory exclusion, reasoning that there are a number of ongoing activities within the Federal government related to control of invasive species in ballast water, many of which are likely to be more effective and efficient than use of NPDES permits under the CWA. EPA also noted that nothing in the CWA prevents states from independently regulating ballast water discharges under State law, should they choose to do so. See, CWA section 510.

We encourage EPA and Congress to codify the current blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 CFR 122.3(a). Clearly we are concerned that any requirement to obtain additional permits to operate vessels in a normal way will be extremely costly to the industries. This additional cost of operation would have to be passed on to the consumer and would create a serious negative economic impact to the industries. Other problems and expenses that would occur would be causing industries to develop and utilize device to capture and treat various waste waters from engine cooling devices, normal rain water runoff, other water discharges that simply exchange heat or cold, and a multitude of other discharges that clearly have no or very little environmental impacts.

In addition to the increased regulatory burden, increased operating expenses, increased consumer negative economic impacts, any change to the current exemptions will create an overwhelming burden on the regulatory agencies issuing permits for compliance, thus causing more expense to the industries by creating new taxes to cover such a burden. There are over 13 Million recreational vessels alone. Any agency confronted with identifying and issuing over 13 Million permits and attempting to enforce such a requirement would clearly be overwhelmed.

We also seriously question current technology and the ability of government to capture and treat the water discharges identified. How will engine cooling water be collected and treated on small vessels using outboard motors where the cooling water is discharged thru the propeller? How large of a tank would be required and what treatment would be required to collect any rain runoff and what would that tank capacity do to the vessel stability which affects the safe operation of the vessel? How would you contain all runoff on a vessel and ensure that the vessel would not sink if the containment exceeded the treated discharge capability? These are just a few questions that need serious concern as the safety of passengers and normal operating procedures of vessels is of primary concern. As is stated in your federal register notice, Congress has recognized the difficulty of this act and has provided guidance to the USCG on how to handle ballast water invasive species issues. In addition affected states have also dealt with ballast water invasive species issues and we support those efforts.

We strongly encourage the continuance of the current exemptions and fully support both EPA and Congressional action to do so. Please keep us informed of any actions regarding this matter.

Thank you,

Robert F. Zales, II

Robert F. Zales, II
President

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