

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT AND RECOMMENDATION ON CONSISTENCY DETERMINATION

Consistency Determination	CD-042-08
Filed:	7/11/2008
Commission Staff:	MPD-SF
60 th Day:	9/13/2008
75 th Day:	Extended to 12/12/08
Hearing Date:	12/10/2008

FEDERAL AGENCY: Environmental Protection Agency (EPA)

PROJECT LOCATION: California State Waters

**PROJECT
DESCRIPTION:**

General National Pollutant Discharge Elimination System (NPDES) permit for Vessel General Permit (VGP) for discharges incidental to the normal operation of commercial vessels greater than or equal to 79 feet in length, except commercial fishing vessels, which are only covered with respect to their ballast water discharges.

**SUBSTANTIVE FILE
DOCUMENTS:**

See page 18.

Staff Recommendation: Conditional concurrence. Motion and condition are on pages 10-11.

EXECUTIVE SUMMARY

The U.S. Environmental Protection Agency (EPA) has submitted a consistency determination for the issuance of a General National Pollutant Discharge Elimination System (NPDES) permit called a "Vessel General Permit (VGP) for Discharges Incidental to the Normal Operation of Commercial Vessels" The VGP would cover all commercial vessels 79 feet or longer (excluding vessels of the U.S. Armed Forces, and commercial fishing vessels are only covered with respect to their ballast water discharges).

EPA's consistency determination stems from a court order that EPA's previous interpretations that these vessels' discharges were exempt from Clean Water Act requirements is illegal. The court (federal District Court) ordered issuance of the NPDES permit by December 30, 2008.

EPA initially proposed two draft NPDES vessel permits, one (VGP) for all commercial and other non-recreational vessels and those recreational vessels longer or equal to 79 feet, and a second "RGP" (Recreational General Permit) for recreational vessels less than 79 feet in length. However, in July 2008, the Clean Boating Act of 2008 was signed into law (Public Law (P.L.) No 110-288) exempting recreational vessels from NPDES permit requirements; instead it authorized the Coast Guard to issue regulations implementing EPA best management practices for recreational vessels. Congress also imposed a 2-year moratorium on NPDES permits for vessels of less than 79 feet and non-ballast water discharges from commercial fishing vessels (P.L. No. 110-299). Therefore, recreational vessels, non-ballast water discharges from fishing vessels, and vessels less than 79 feet in length are excluded from these proposed permits, and only one permit (the VGP, modified to reflect these changes) is now proposed.

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 provide technology-based effluent limits, mostly in the form of Best Management Practices (BMPs), for 28 types of discharges including ballast water, deck runoff, bilgewater, hull leachate, underwater husbandry, and cathodic protection. The effluent limits are intended to control a variety of materials discharged incidental to the normal operation of vessels classified into 7 major groups: Aquatic Nuisance Species (ANS or invasive species), conventional pollutants (BOD, oil and grease, pH, TSS), metals, nutrients (nitrogen and phosphorus), pathogens (E. Coli and fecal coliform), and other toxic and non-conventional pollutants with toxic effects (phthalates, phenol, tetrachloroethylene, chlorine residuals, chlorides, etc.). The permit also establishes additional technology-based requirements for certain discharges from 8 specific classes of vessels, including cruise ships, research vessels, and large ferries, and water quality-based effluent limits for impaired waters. Certain discharge types would be limited or prohibited in nearshore waters and waters protected for conservation purposes such as 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 (NOI) for vessels greater or equal to 300 gross tons or with a ballast water capacity of at least 8 cubic meters. EPA estimates that this requirement would affect 44,363 domestic and 7,834 foreign flagged vessels. All other vessels covered by the VGP would not have to submit an NOI (but would nevertheless be subject to the requirements of the VGP).

Discharges not authorized under the VGP (i.e., prohibited discharges) include discharges from vessels not operating as a means of transportation (such as seafood processing facilities, casinos, or oil and gas exploration facilities), sewage discharges, used or spent oil, garbage or trash, photo processing wastes, effluent from dry cleaning operations, medical wastes, and discharges of noxious liquid substance residues. As noted earlier, the VGP does not apply to commercial

vessels less than 79 feet, non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels.

Although it did not conduct state-by-state separate analyses for specific policies in individual states' coastal management programs, EPA nevertheless concluded in the consistency determination it submitted to the Commission that:

EPA has determined that issuance of these permits is consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program for a number of reasons. Because the vessel discharges that would be authorized for discharge under the two NPDES general permits are currently not subject to NPDES permit requirements, upon final issuance, the permits will provide increased protection to coastal waters by imposing enforceable NPDES permit limits on those discharges. In addition, both permits establish technology-based effluent limitations based on [Clean Water Act] CWA section 304(b)(2), ensure that vessel discharges will be in compliance with applicable State water quality standards under CWA section 303, and establish requirements for the permittee to conduct monitoring and inspections. In addition, because these general NPDES permits would be issued by the federal government, they are subject to State water quality certifications requirements under CWA section 401. Under CWA section 401, the State of California has been asked to certify that the permits will comply with State water quality standards and other appropriate requirements of State law, and the final permits, when issued, will incorporate applicable requirements or conditions required by that certification.

Because EPA's proposed permit is nationwide, and different states will have differing state requirements, EPA's consistency determination further states: "EPA requests your review, and if necessary, conditions, based on specific enforceable policies, that would permit the [Commission] ... to concur with EPA's consistency determination." [Emphasis added]

While EPA's overall intent is to increase water quality protection through issuance of the permit, the Commission nevertheless has the following concerns over EPA's proposal:

(1) While the intent of the permit is to benefit marine resources and improve water quality, it does not fully address specific requirements of Sections 30230 and 30231 of the Coastal Act. Section 30230 requires: (a) not only maintenance, but also enhancement (and where feasible, restoration) of marine habitat and biological productivity; (b) special protection for areas and species of special biological or economic significance; and (c) sustenance of the biological productivity of coastal waters and maintenance of healthy populations of all species of marine organisms. Section 30231 requires the maintenance, and where feasible restoration, of the biological productivity and quality of coastal waters through, among other means, minimizing adverse effects of waste water discharges and entrainment.

(2) While EPA's conclusions of overall benefits presume compliance with State standards, the State Water Resources Control Board's (SWRCB's) review is not yet complete

and the SWRCB staff has indicated the proposed NPDES permit is not, as currently drafted, consistent with all applicable state water quality standards.

The Commission is therefore unable to find the NPDES permit as proposed consistent with the requirements of Sections 30230 and 30231 listed above. Among other issues raised by the SWRCB, the Commission notes that NPDES permit would allow for adverse impacts to the quality of coastal waters and to the optimization of populations of marine organisms because:

- 1) It would permit the discharge of graywater from cruise ships in coastal waters even when some of those ships have the capacity to store those waters and discharge them either to shoreside facilities or outside of state waters; and
- 2) It would permit the discharge of ballast water containing “rust inhibitors, flocculent compounds, epoxy coating materials, zinc or aluminum (from anodes), iron, nickel, copper, bronze, silver, and other material or sediment from inside the tank, pipes, or other machinery.”

In order to bring the NPDES permit into compliance with Sections 30230 and 30231 of the Coastal Act, EPA would need to modify the permit to comply with California’s state water quality standards to prohibit graywater discharges in state waters when ships have the holding capacity to store them, and regulate ballast water discharges in a manner to prohibit discharges currently violating state standards. The Commission is therefore conditioning this concurrence to include the following condition, which, if agreed to by EPA, would allow the proposed NPDES permit to be found consistent with Sections 30230 and 30231 of the Coastal Act, and with the California Ocean Plan.

Condition 1: Graywater and Ballast Water Discharges. EPA will revise the proposed NPDES permit to: (1) prohibit graywater discharges in state waters from large passenger ships and from other large oceangoing ships which have the holding capacity to store graywater until outside of the marine waters of the state; and (2) regulate ballast water discharges in a manner which prohibits discharges currently violating state standards.

STAFF SUMMARY AND RECOMMENDATION:

I. Project Description/Background. The U.S. Environmental Protection Agency (EPA) has proposes the issuance of a General National Pollutant Discharge Elimination System (“NPDES”) permit called a “Vessel General Permit (VGP) for Discharges Incidental to the Normal Operation of Commercial Vessels,” which would cover all commercial vessels 79 feet or longer (excluding vessels of the U.S. Armed Forces, and commercial fishing vessels are only covered with respect to their ballast water discharges).

EPA has published fact sheets explaining the relevant Court and subsequent Congressional actions associated with its original submittal of a consistency determination for, initially, two draft NPDES permits. (The current fact sheet can be found at:

http://www.epa.gov/npdes/pubs/vessel_commercial_factsheet.pdf.) These fact sheets provide the following background and revised permit descriptions:

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.

EPA further describes the permit as follows:

3.1 GEOGRAPHIC SCOPE OF THE PROPOSED PERMIT

*The proposed permit is applicable to discharges incidental to the normal operation of a vessel identified in Part 1.2 of the proposed permit and Part 3.5 of this fact sheet into waters subject to the proposed permit, which means "waters of the U.S." as defined in 40 CFR 122.2. This includes the territorial seas, defined in section 502(8) of the CWA, extending to three miles from the baseline. *Pacific Legal Foundation v. Costle*, 586 F.2d 650, 655-656 (9th Cir. 1978); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 863 F.2d 1420, 1435 (9th Cir. 1988).*

The proposed general permit will cover vessel discharges in the waters of the U.S. in all states and territories, regardless of whether a state is authorized to implement other aspects of the NPDES permit program within its jurisdiction. While, pursuant to CWA section 402(c), EPA typically is required to suspend permit issuance in authorized

states, EPA may issue NPDES permits in authorized states for discharges incidental to the normal operation of a vessel because 402(c)(1) of the Clean Water Act prohibits EPA from issuing permits in authorized states only for “those discharges subject to [the state’s authorized] program.” Discharges excluded under 40 CFR 122.3 are not “subject to” authorized state programs. The vessel discharges that will be covered by the proposed permit are discharges excluded from NPDES permitting programs under 40 CFR 122.3. Therefore the discharges at issue are not considered a part of any currently authorized state NPDES program. See 40 CFR 123.1(i)(2) (where state programs have a greater scope of coverage than “required” under the federal program, that additional coverage is not part of the authorized program) and 40 CFR 123.1(g)(1) (authorized state programs are not required to prohibit point source discharges exempted under 40 CFR 122.3).

EPA will continue to work with state CWA permitting authorities on authorization issues associated with discharges incidental to the normal operation of vessels and plans to provide guidance on such issues in the near future. In particular, EPA plans to outline how states are to obtain approval to implement NPDES permitting for vessel discharges within their jurisdictions. In addition, EPA plans, to the extent permitted by the CWA, to provide states with the opportunity to decline to regulate these discharges by obtaining status as a partial NPDES program under CWA 402(n). See, e.g. section 402(n)(3) (allowing the Administrator to approve a partial program if the state authority administering the NPDES program does not have the legal authority to regulate vessel discharges). In those states, NPDES permit coverage for the discharges would continue to be provided by EPA.

3.2 STRUCTURE OF THE PROPOSED PERMIT (PART 1.1)

The proposed general permit is designed to apply to all commercial vessels and large recreational vessels. Many characteristics of vessels and vessel discharges generally apply to all vessel classes. Hence, general requirements that apply to all eligible vessels are found in Parts 1 through 4 of the proposed permit. Part 1 of the proposed permit contains general conditions, authorized and ineligible discharges, and explains who must file a notice of intent to receive permit coverage. Part 2 of the proposed permit discusses effluent limits applicable to vessels. Part 3 of the proposed permit lists required corrective actions that permittees must take to remedy deficiencies and violations. Part 4 of the proposed permit lists visual monitoring, self-inspection, and recordkeeping and reporting requirements. Due to specific concerns arising from certain types of vessels, in Part 5 of the proposed permit, EPA has identified select categories of vessel types that have supplemental requirements. States, territories, and certain Tribes have the authority to require additional requirements under Section 401 of the CWA. These additional requirements will be later incorporated into Part 6 of the proposed permit (see also Part 8 “Other Legal Requirements”).

The Appendices, listed in this proposed permit as Parts 7 through 13, include definitions, the notice of intent form, and the notice of termination form.

VGP

In today's draft permit, EPA is proposing effluent limitations to control a variety of materials, which, for the purposes of this fact sheet, have been classified into 7 major groups: Aquatic Nuisance Species (ANS), most conventional pollutants (Biochemical Oxygen Demand, oil and grease, pH, Total Suspended Solids), metals, nutrients, pathogens (including E. Coli & fecal coliform), and other toxic and non-conventional pollutants with toxic effects. EPA is proposing effluent limitations to control these materials, because such materials are constituents in the, depending on the particular vessel, industrial waste, chemical waste and/or garbage "pollutant" discharge resulting from the activities of these vessels. "Industrial waste," "chemical waste" and "garbage" are expressly included in the CWA's definition of "pollutant," which governs, among other things, which discharges are properly subject to CWA permitting. See CWA § 402(a) (allowing EPA to issue permits for a "discharge of any pollutant"); CWA § 502(12) (defining "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source"); and CWA § 502(6) (defining "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water" [emphasis ... [in original]]). The discharge from vessels addressed in today's draft permit – a worthless or useless flow discharged during a vessel's normal operations – falls within those broad pollutant categories. See, e.g., Webster's II New Riverside University Dictionary (1988) (defining "waste" as "a worthless or useless by-product" or "something, such as steam, that escapes without being used"; "industrial" as "of, relating to, or derived from industry" and "industry as "the commercial production and sale of goods and services"; "chemical" as "of or relating to the action of chemicals"; and "garbage" as "worthless matter, trash").

The VGP would cover the following discharges:

*Deck Washdown and Runoff
Bilgewater
Ballast Water
Anti-Fouling Leachate from Anti-Fouling Hull Coatings
Aqueous Film Forming Foam (AFFF)
Boiler/Economizer Blowdown
Cathodic Protection
Chain Locker Effluent
Controllable Pitch Propeller Hydraulic Fluid
Distillation and Reverse Osmosis Brine
Elevator Pit Effluent
Firemain Systems
Freshwater Layup
Gas Turbine Water Wash
Graywater
Motor Gasoline and Compensating Discharge*

*Non-Oily Machinery Wastewater
Refrigeration and Air Condensate Discharge
Rudder Bearing Lubrication Discharge
Seawater Cooling Overboard Discharge (Including Non-Contact Engine Cooling Water,
Non-Oily Machinery Wastewater
Refrigeration and Air Condensate Discharge
Rudder Bearing Lubrication Discharge
Seawater Cooling Overboard Discharge (Including Non-Contact Engine Cooling Water,
Hydraulic System Cooling Water, Refrigeration Cooling Water)
Seawater Piping Biofouling Prevention
Small Boat Engine Wet Exhaust
Stern Tube Oily Discharge
Sonar Dome Discharge
Underwater Ship Husbandry Discharges
Welldeck Discharges
Graywater Mixed with Sewage from Vessels
Exhaust Gas Scrubber Washwater Discharge*

Additional background from EPA's Proposed Vessel General Permit Fact Sheet is attached as Appendix A.

II. Federal Agency's Consistency Determination. The EPA has determined the proposed NPDES permit to be consistent with California's Coastal Management Program (CCMP).

III. Staff Recommendation: The staff recommends that the Commission adopt the following motion:

MOTION: I move that the Commission conditionally concur with consistency determination CD-042-08 that the NPDES permit described therein, if modified in accordance with the condition below, would be fully consistent, and thus consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).

RESOLUTION TO CONDITIONALLY CONCUR WITH CONSISTENCY DETERMINATION:

The Commission hereby conditionally concurs with the consistency determination CD-042-08 by EPA on the grounds that, if modified as described in the Commission's conditional concurrence, the NPDES permit would be consistent with the enforceable policies of the CCMP, provided that EPA satisfies the condition specified below pursuant to 15 CFR §930.4.

Condition:

1. **Graywater and Ballast Water Discharges.** EPA will revise the proposed NPDES permit to: (1) prohibit graywater discharges in state waters from large passenger ships and from other large oceangoing ships which have the holding capacity to store graywater until outside of the marine waters of the state; and (2) regulate ballast water discharges in a manner which prohibits discharges currently violating state standards.

IV. Applicable Legal Authorities. Section 307 of the Coastal Zone Management Act (CZMA) provides in part:

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

A. Conditional Concurrences. 15 CFR § 930.4 provides, in part, that:

(a) Federal agencies, ... agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under Subpart C ... would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable Subpart...

(2) The Federal agency (for Subpart C) ... shall modify the applicable plan [or] project proposal ... pursuant to the State agency's conditions. The Federal agency ... shall immediately notify the State agency if the State agency's conditions are not acceptable; and ...

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable Subpart.

15 CFR § 930.34 (d) and (e) elaborate, providing that:

(d) ... At the end of the ... [statutory time] period the Federal agency shall not proceed with the activity over a State agency's objection unless: (1) the Federal

agency has concluded that under the “consistent to the maximum extent practicable” standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§930.32(a) and 930.39(a)), or (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

B. Consistent to the Maximum Extent Practicable. Section 930.32 of the federal consistency regulations provides, in part, that:

(a)(1) The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

The Commission recognizes that the standard for approval of Federal activities is that the activity must be “consistent to the maximum extent practicable” (Coastal Zone Management Act Section 307(c)(1)). This standard allows a federal activity that is not fully consistent with the CCMP to proceed, if compliance with the CCMP is “*prohibited [by] existing Federal law applicable to the Federal agency's operations*” (15 C.F.R. § 930.32). EPA did not provide any documentation to support a maximum extent practicable argument in its consistency determination. Therefore, there is no basis to conclude that existing law applicable to the Federal agency prohibits full consistency.

V. Findings and Declarations.

The Commission finds and declares as follows:

A. Marine Resources and Water Quality. Section 30230 of the Coastal Act provides:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 provides:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms

and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Coastal Act § 30412(a) indicates that "... the provisions set forth in Section 13142.5 of the California Water Code, apply to the Commission, as well as to the SWRCB and the Regional water quality control boards (RWQCBs). Section 13142.5 of the California Water Code states in part:

In addition to any other polices established pursuant to this division, the policies of the state with respect to water quality as it relates to the coastal marine environment are that:

- (a) *Wastewater discharges shall be treated to protect present and future beneficial uses, and, where, feasible, to restore past beneficial uses of the receiving waters. Highest priority shall be given to improving or eliminating discharges that adversely affect any of the following:*
- (1) Wetlands, estuaries, and other biologically sensitive areas.*
 - (2) Areas important for water contact sports.*
 - (3) Areas that produce shellfish for human consumption.*
 - (4) Ocean areas subject to massive waste discharge.*

Ocean chemistry and mixing process, marine life conditions, other present or proposed outfalls in the vicinity, and relevant aspects of areawide waste treatment management plans and programs, but not of convenience to the discharger, shall for the purposes of this section, be considered in determining the effects of such discharges....

Additionally, Section 307(f) of the CZMA directs that federal, State and local provisions established pursuant to the Clean Water Act shall be incorporated into State coastal management programs and shall be the water pollution control requirements applicable to such program. The general water pollution control policies and objectives of the State are contained in the requirements of the California Ocean Plan.

The water quality objectives of the Ocean Plan (Chapter 2) include:

E. Biological Characteristics

- 1. Marine communities, including veterbrate, inveterbrate, and plant species, shall not be degraded.*
- 2. The natural taste, odor, and color of fish, shellfish, or other marine resources used for human consumption shall not be altered.*

3. *The concentrations of organic materials in fish, shellfish or other marine resources used for human consumption shall not bioaccumulate to levels that are harmful to human health.*

The Ocean Plan's general requirements for management of waste discharge to the ocean are:

- a. *Waste management systems that discharge to the ocean must be designed and operated in a manner that will maintain the indigenous marine life and a healthy and diverse marine community.*
- b. *Waste discharged to the ocean must be essentially free of:*
 1. *Material that is floatable or will become floatable upon discharge.*
 2. *Settleable material or substances that may form sediments which will degrade benthic communities or other aquatic life.*
 3. *Substances which will accumulate to toxic levels in marine waters, sediments or biota.*
 4. *Substances that significantly decrease the natural light to benthic communities and other marine life.*
 5. *Materials that result in aesthetically undesirable discoloration of the ocean surface.*
- c. *Waste effluents shall be discharged in a manner which provides sufficient initial dilution to minimize the concentrations of substances not removed in the treatment.*
- d. *Location of waste discharges must be determined after a detailed assessment of the oceanographic characteristics and current patterns to assure that....*
 1. *Pathogenic organisms and viruses are not present in areas where shellfish* are harvested for human consumption or in areas used for swimming or other body-contact sports. ...*
 3. *Maximum protection is provided to the marine environment.*

To protect marine aquatic life, the Ocean Plan also contains numerical effluent limitations for oil and grease, and water quality criteria for other priority pollutants such as arsenic, cadmium, benzene, ethylbenzene, naphthalene, toluene, and zinc.

Finally, Section 30412(b) of the Coastal Act notes that the State Water Resources Control Board (SWRCB) and the California regional water quality control boards (RWQCBs) are the state agencies with primary responsibility for the coordination and control of water quality. This Section also directs the Commission to, among other things, avoid taking "...any action in conflict with any determination by the State Water Resources Control Board or any California regional water quality control board in matters relating to water quality"

EPA has submitted this NPDES permit to the Commission under the Coastal Zone Management Act, and to the SWRCB under the Clean Water Act (CWA) (i.e., a CWA Section 401(c) water quality certification).¹ The SWRCB has not yet taken substantive action on the 401(c) certification, as it has denied the certification “without prejudice,” stating that it needs more time to comply with the requirements of the public notice requirements of the California Environmental Quality Act (CEQA). The SWRCB staff has, however, in comments on the Draft NPDES permit, indicated that the permit needs to be strengthened to comply with existing California water quality laws, including the Clean Coast Act of 2005 and the Marine Invasive Species Act of 2003, which, respectively, prohibit certain large vessel discharges in State waters, including sewage and graywater discharges if sufficient holding capacity is available, and regulate ballast water discharges in state waters (SWRCB, ltr to EPA, August 1, 2008 – Exhibit 3). The SWRCB staff also noted that while it recognized that the goal of the NPDES permit was to benefit the marine environment, some of the Best Management Practices could themselves “... cause detrimental effects.” (SWRCB, ltr to EPA, August 5, 2008 – Exhibit 2).

The Commission recognizes that EPA’s proposed new NPDES permit is intended to benefit marine resources and water quality overall, compared to currently unregulated discharges. However several questions remain. The Commission notes that EPA’s overall conclusion that the regulated discharges “will not cause unreasonable degradation of the marine environment” is based, in part, on the *presumption* that the discharges will, in addition to the terms of the current draft NPDES permit, be required to comply with each state’s adopted water quality standards. Accordingly, EPA states (in its VGP Fact Sheet, p. 41):

Finally, this permit applies to discharges to the outer limit of the three mile territorial sea. State water quality standards also apply within these waters and the draft permit thus would contain effluent limitations as necessary to meet those applicable water quality standards (section 6). In addition, because the proposed permit would be issued by EPA, it is subject to State certification as to compliance with such standards under section 401 of the Clean Water Act and we will be initiating such certification process with the States. Under 40 CFR 125.122(b), discharges in compliance with State Water Quality Standards shall be presumed not to cause unreasonable degradation of the marine environment with respect to specific pollutants or conditions specified in such standards.

In light of the foregoing, EPA has determined that issuance of the draft permit would not cause:

1. Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities,

¹ EPA has also submitted a consistency determination under the CZMA to the San Francisco Bay Conservation and Development Commission (BCDC) for San Francisco Bay Discharges (BCDC Consistency Determination No. CN 8-07).

2. Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or

3. Loss of aesthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge.

Accordingly, in accordance with 40 CFR 125.123(a), the Agency has determined that issuance of the draft permit with the controls proposed would not cause unreasonable degradation of the marine environment.

While EPA's approach is appropriate, additional measures are needed to accomplish EPA's goal of bringing the permit into compliance with California state water quality standards. The Commission therefore finds:

(1) While the intent of the permit is to benefit marine resources and improve water quality, it does not fully address specific requirements of Sections 30230 and 30231 of the Coastal Act. Section 30230 requires: (a) not only maintenance, but also enhancement (and where feasible, restoration) of marine habitat and biological productivity; (b) special protection for areas and species of special biological or economic significance; and (c) sustenance of the biological productivity of coastal waters and maintenance of healthy populations of all species of marine organisms. Section 30231 requires the maintenance, and where feasible restoration, of the biological productivity and quality of coastal waters through, among other means, minimizing adverse effects of waste water discharges and entrainment.

(2) While EPA's conclusions of overall benefits presume compliance with State standards, the SWRCB's review is not yet complete, and the SWRCB staff has indicated the proposed NPDES permit is not, as currently drafted, consistent with applicable state water quality standards.

The Commission is therefore unable to find the NPDES permit as proposed consistent with the requirements of Sections 30230 and 30231 listed above. Among other issues raised by the SWRCB, the Commission notes that NPDES permit would allow for adverse impacts to the quality of coastal waters and to the optimization of populations of marine organisms because:

(1) It would permit the discharge of graywater from cruise ships in coastal waters even when some of those ships have the capacity to store those waters and discharge them either to shoreside facilities or outside of state waters; and

(2) It would permit the discharge of ballast water containing "rust inhibitors, flocculent compounds, epoxy coating materials, zinc or aluminum (from anodes), iron, nickel, copper, bronze, silver, and other material or sediment from inside the tank, pipes, or other machinery."

In order to bring the NPDES permit into compliance with Sections 30230 and 30231 of the Coastal Act, EPA would need to modify the permit to comply with state water quality standards to prohibit graywater discharges in state waters when ships have the holding capacity to store

them, and regulate ballast water discharges in a manner to prohibit discharges currently violating state standards. The Commission is therefore conditioning this concurrence to include the following condition, which, if agreed to by EPA, would allow the proposed NPDES permit to be found consistent with Sections 30230 and 30231 of the Coastal Act and the California Ocean Plan.

Condition 1: Graywater and Ballast Water Discharges. EPA will revise the proposed NPDES permit to: (1) prohibit graywater discharges in state waters from large passenger ships and from other large oceangoing ships which have the holding capacity to store graywater until outside of the marine waters of the state; and (2) regulate ballast water discharges in a manner which prohibits discharges currently violating state standards.

B. Related Commission Action. On July 14, 2006, the Commission conditionally concurred with the National Oceanic and Atmospheric Administration's (NOAA's) consistency determination for a revised management plan for activities in the Channel Islands National Marine Sanctuary (CINMS). The Commission's condition, which NOAA eventually agreed to, required the Sanctuary regulations to comply with existing state water quality standards, by prohibiting vessels of 300 gross registered tons or more that have sufficient holding tank capacity from discharging sewage or graywater into the waters of the Sanctuary. The Commission found:

NOAA's current proposed revisions to the Sanctuary's discharge regulations are inconsistent with recently enacted State of California discharge prohibitions. These prohibitions became effective on January 1, 2006 and apply to vessels over 300 gross registered tons. Among other regulations, the recently enacted policy prohibits the discharge of graywater and sewage within State waters from vessels that have sufficient holding tank capacity to retain these discharges. This policy currently applies to only the inner half of the CINMS (waters within three nautical miles of Santa Barbara Island, Santa Cruz Island, Anacapa Island, San Miguel Island and Santa Rosa Island). The Commission believes these discharges should be prohibited throughout the Sanctuary, and thus that NOAA's proposed regulation which would allow sewage and graywater discharges in the Sanctuary's waters from vessels over 300 gross registered tons, if these discharges are first treated by a marine sanitation device, would be inconsistent with coastal zone marine resource protection. NOAA understands the condition and agrees to fully analyze how NOAA might address that condition in order to be as consistent with it to the maximum extent practicable. Accordingly, the Commission finds that, as proposed, the discharge regulations would be inconsistent with Sections 30230 and 30231 of the Coastal Act; however, as conditioned to revise the regulatory provisions to provide equivalent State standards in the federal waters of the Sanctuary, the proposal would be consistent with the marine resource and water quality protection and enhancement provisions of the Coastal Act (Section 30230 and 30231).

Subsequent management plan updates for the other three national marine sanctuaries in California have prohibited the discharge of sewage or graywater into the waters of the Sanctuary by vessels of 300 gross registered tons or more that have sufficient holding tank capacity. While the NPDES permit

does not address waters outside of the three mile limit, these waters are protected by these federal management plans.

VII. SUBSTANTIVE FILE DOCUMENTS:

1. Consistency Determination CD-036-06, NOAA, Revised Management Plan, Channel Islands National Marine Sanctuary.

2. Senate Bills S. 2766 (“the Clean Boating Act of 2008”) (Public Law (P.L.) No. 110-288), and S. 3298 (P.L. No. 110-299).

Appendix A (attached): Additional EPA Background Discussion

Exhibits (attached):

1. EPA Consistency Determination, dated July 3, 2008.
- 2-4. SWRCB letters to EPA (one dated August 5, 2008, and two dated August 1, 2008).

Appendix A

Additional EPA Background Discussion, from EPA's Proposed Vessel General Permit Fact Sheet

2. BACKGROUND

2.1 THE CLEAN WATER ACT

Section 301(a) of the Clean Water Act (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, “garbage... chemical wastes ...and industrial, municipal, and agricultural waste discharged into water.” The Act's definition of “pollutant” specifically excludes “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of CWA §312. 33 U.S.C. 1362(6).

One way a person may discharge a pollutant without violating the section 301 prohibition is by obtaining authorization to discharge (referred to herein as “coverage”) under a section 402 National Pollutant Discharge Elimination System (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.

2.2 HISTORY OF THE EXCLUSION OF VESSELS FROM THE NPDES PERMITTING PROGRAM

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 largely 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. The exclusion reads:

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. 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. 40 CFR 122.3(a).

1. Although other subsections of 40 CFR 122.3 and its predecessor were the subject of legal challenges (See *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977)), following its promulgation, the regulatory text relevant to discharges incidental to the normal operation of vessels went unchallenged, and has been in effect ever since.

2.3 LEGAL CHALLENGE TO THE EXCLUSION OF VESSELS

In December 2003, the long-standing exclusion of discharges incidental to the normal operation of vessels from the NPDES program became the subject of a lawsuit in the U.S. District Court for the Northern District of California. The lawsuit arose from a January 13, 1999, rulemaking petition submitted to EPA by a number of parties concerned about the effects of ballast water discharges. The petition asked the Agency to repeal its regulation at 40 CFR 122.3(a) that excludes certain discharges incidental to the normal operation of vessels from the requirement to obtain an NPDES permit. The petition asserted that vessels are “point sources” requiring NPDES permits for discharges to U.S. waters; that EPA lacks authority to exclude point source discharges from vessels from the NPDES program; that ballast water must be regulated under the NPDES program because it contains invasive plant and animal species as well as other materials of concern (e.g., oil, chipped paint, sediment and toxins in ballast water sediment) and; that enactment of CWA section 312(n) (Uniform National Discharge Standards, also known as the UNDS program) demonstrated Congress’ rejection of the exclusion.

In response to the 1999 petition, EPA first prepared a detailed report for public comment, *Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options* (September 10, 2001). See 66 FR 49381, September 27, 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 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 (e.g., seafood processing facilities or oil exploration operations at sea) and of discharges overboard of materials such as trash, but not of discharges incidental to the normal operation of a vessel (e.g., ballast water) subject to the 40 CFR 122.3(a) exclusion. EPA further explained that Congress had expressly considered and accepted the Agency’s regulation in the years since its promulgation, and that Congress chose to regulate discharges incidental to the normal operation of vessels through programs other than CWA section 402 permitting. Thus, it was EPA’s understanding that Congress had acquiesced to EPA’s long-standing interpretation of how the CWA applies to vessels.

Denial of the petition did not reflect EPA’s dismissal of the significant impacts of aquatic invasive species, but rather the understanding that other 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.

In the denial of the petition, EPA noted 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 which directed and authorized the U.S. Coast Guard, rather than EPA, to establish a regulatory program for discharges incidental to the normal operation of vessels, including ballast water (e.g., 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.) Furthermore, Congress made no effort to legislatively repeal EPA's interpretation of the NPDES program or to expressly mandate that discharges incidental to the normal operation of vessels be addressed through the NPDES permitting program. EPA reasoned that this Congressional action and inaction in light of Congress' 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, pursuant to CWA section 510.

After EPA's September 2003 denial of the petition, a number of groups filed a complaint in the U.S. District Court for the Northern District of California. *Nw. Env't'l Advocates et al. v. EPA*, 2005 WL 756614 (N.D. Cal.). The complaint was brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., and set out two causes of action. First, the complaint challenged EPA's promulgation of 40 CFR 122.3(a), an action the Agency took in 1973. The second cause of action challenged EPA's September 2003 denial of their petition to repeal the Section 122.3(a) exclusion.

2.4 DISTRICT COURT DECISION

On March 30, 2005, the Court determined that the exclusion exceeded the Agency's authority under the CWA. Specifically, the District Court granted summary judgment to the plaintiffs:

The Court DECLARES that EPA's exclusion from NPDES permit requirements for discharges incidental to the normal operation of a vessel at 40 CFR 122.3(a) is in excess of the Agency's authority under the Clean Water Act . . .

After this ruling, the Court granted motions to intervene on behalf of the Plaintiffs by the States of Illinois, New York, Michigan, Minnesota, Pennsylvania, and Wisconsin, and on behalf of the Government-Defendant by the Shipping Industry Ballast Water Coalition.

Following submission of briefs and oral argument by the parties and intervenors on the issue of a proper remedy, the Court issued a final order in September 2006 providing that:

The blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 CFR 122.3(a), shall be vacated as of September 30, 2008.

This means that, effective September 30, 2008 (if the order is not overturned or altered on appeal), discharges incidental to the normal operation of vessels currently excluded from NPDES permitting by that regulation, will become subject to CWA section 301's prohibition against discharging, unless covered under an NPDES permit. The CWA authorizes civil and criminal enforcement for violations of that prohibition and also allows for citizen suits against violators.

Because the Government respectfully disagrees with the District Court's decision, on November 16, 2006, EPA filed an appeal in the U.S. Court of Appeals for the Ninth Circuit. Oral argument was held on August 14, 2007, and a decision is pending. Additional material related to the lawsuit is contained in the docket accompanying this proposed permit and fact sheet.

If the Ninth Circuit reverses or otherwise modifies the District Court's decision on appeal, this proposed permit or any final permit may be terminated, reopened, or modified, as appropriate.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION IX
 75 Hawthorne Street
 San Francisco, CA 94105-3901

CD-042-08

JUL 3 2008

Mark Delaplaine
 Federal Consistency Coordinator
 California Coastal Commission
 45 Fremont Street, Suite 2000
 San Francisco, CA 94105-2219

RECEIVED
 JUL 14 2008
 CALIFORNIA COASTAL COMMISSION

Dear Mr. Delaplaine:

By this letter, the U.S. Environmental Protection Agency ("EPA") provides a national consistency determination to the California Coastal Commission ("CCC") pursuant to section 307(c)(1) of the Coastal Zone Management Act ("CZMA"), including implementing regulations at 15 C.F.R. 930.31(d) and 930.36(e). As further described below, the activity for which EPA has prepared this national consistency determination consists of the issuance of two general National Pollutant Discharge Elimination System ("NPDES") permits for discharges incidental to the normal operation of vessels. EPA proposed these two general permits, which are national in scope, pursuant to section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. These EPA general permits are subject to the regulations that implement CZMA section 307(c)(1) because they do not involve case-by-case or individual issuance of a permit by EPA. Public notice of the draft permits was published in the *Federal Register* on June 17, 2008 (enclosed), and the 45-day public comment period is scheduled to end on August 1, 2008.

CWA section 301(a) prohibits the discharge of pollutants into waters of the United States, including the 3 nautical mile territorial sea, except in compliance with certain other sections of the CWA, including compliance with an NPDES permit. Discharges incidental to the normal operation of vessels are currently excluded from regulation under the NPDES permitting program pursuant to a regulatory exclusion that is codified at 40 C.F.R. § 122.3(a). This exclusion has been in place since shortly after enactment of the CWA in 1972 and has undergone only minor changes over the past 35 years. EPA's proposed action to control these discharges under the NPDES permit program is being undertaken in light of a U.S. District Court order vacating the NPDES exclusion for discharges incidental to the normal operation of a vessel. The vacatur order goes into effect on September 30, 2008. See *Nw. Env't Advocates, et al. v EPA*, 2006 WL 2669042 (N.D. Cal). For your further background information, enclosed is a brief overview of the underlying litigation.

In light of the differences between commercial vessels and recreational vessels, EPA has proposed to issue two NPDES general permits, both of which are the subject of this national consistency determination. The Vessel General Permit for Discharges Incidental

EXHIBIT NO.	1
APPLICATION NO.	
	CD-42-08

to the Normal Operation of Commercial and Large Recreational Vessels ("VGP") would apply to discharges incidental to the normal operation from all commercial and those large (greater than 79 feet) recreational vessels. The Recreational Vessel General Permit for Discharges Incidental to the Normal Operation of a Vessel (RGP) would apply to those discharges from all recreational vessels that are less than 79 feet in length.

EPA has determined that issuance of these permits is consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program for a number of reasons. Because the vessel discharges that would be authorized for discharge under the two NPDES general permits are currently not subject to NPDES permit requirements, upon final issuance, the permits will provide increased protection to coastal waters by imposing enforceable NPDES permit limits on those discharges. In addition, both permits establish technology-based effluent limitations based upon CWA section 304(b)(2), ensure that vessel discharges will be in compliance with applicable State water quality standards under CWA section 303, and establish requirements for the permittee to conduct monitoring and inspections. In addition, because these general NPDES permits would be issued by the federal government, they are subject to State water quality certification requirements under CWA section 401. Under CWA section 401, the State of California has been asked to certify that the permits will comply with State water quality standards and other appropriate requirements of State law, and the final permits, when issued, will incorporate applicable requirements or conditions required by that certification. A detailed discussion of the permit terms and conditions and their underlying basis is set forth in the enclosed permits and their accompanying Fact Sheets.

In light of the above, pursuant to section 307(c)(1) of the CZMA, EPA has determined that these proposed permits are consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program. EPA requests your review, and if necessary, conditions, based on specific enforceable policies, that would permit the CCC to concur with EPA's consistency determination.

If you have any questions, please contact Eugene Bromley of the NPDES Permits Office at (415) 972-3510.

Sincerely,

Laura Tom Bee

for
Douglas E. Eberhardt, Chief
NPDES Permits Office

Enclosures:

1. *Federal Register* notice
2. Overview of Litigation
3. Vessel General Permit
4. Vessel General Permit Fact Sheet
5. Recreational General Permit
6. Recreational General Permit Fact Sheet

cc: Peter M. Douglas, Executive Director, CCC
Cassidy Teufel, Federal Consistency Unit, CCC
Paul D. Thayer, Executive Officer, California State Lands Commission
Renan Jauregui, Division of Water Quality, SWRCB



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Executive Office

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Arnold Schwarzenegger
Governor

AUG 05 2008

Mr. Douglas E. Eberhardt, Chief
NPDES Permits Office
United States Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

Dear Mr. Eberhardt:

DENIAL WITHOUT PREJUDICE OF THE REQUEST FOR A FEDERAL CLEAN WATER ACT (CWA) SECTION 401 WATER QUALITY CERTIFICATION FOR THE GENERAL PERMITS FOR DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF COMMERCIAL AND LARGE RECREATIONAL VESSELS AND DISCHARGES ASSOCIATED WITH RECREATIONAL VESSELS (GENERAL PERMITS)

The U.S. Environmental Protection Agency (USEPA) has requested that the State Water Resources Control Board (State Water Board) issue a CWA § 401 Water Quality Certification (Certification) for the draft General Permits, authorizing discharges from these vessels throughout the United States, including waters of the State of California. We received this request on July 3, 2008. State Water Board staff reviewed the information submitted by USEPA describing the project activities and the proposed water quality protection measures.

Pursuant to Title 23, § 3838 of the California Code of Regulations, I hereby deny without prejudice the 401 Water Quality Certification for the General Permits for the following reasons:

California Water Quality Certifications pursuant to CWA § 401 are subject to the requirements of the California Environmental Quality Act (CEQA). (Public Resources Code § 21000 et seq.) The requirements of CEQA are triggered when a public agency takes a discretionary action that has either a direct or foreseeable indirect detrimental environmental effect. (Public Resources Code § 21065.) The Legislature has specifically stated that the issuance of licenses, permits, or certificates constitutes such an action. (Public Resources Code § 21006.) Even though we recognize that the intent of the General Permits is to protect the marine environment, it appears that some of the best management practices specified in the General Permits may themselves cause detrimental environmental effects. Under our regulatory requirements for completing a

California Environmental Protection Agency

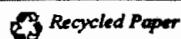


EXHIBIT NO. 2
APPLICATION NO.
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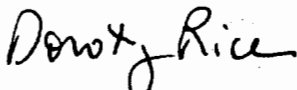
Certification, we must have ample time to consider any environmental effects and, when acting as the lead agency under CEQA, must prepare the proper environmental documents. One requirement for preparing environmental documents for CEQA compliance is a notice and comment period which cannot be less than 30 days. This notice and comment period cannot begin until after staff have had a chance to conduct their analysis. (California Code Regulations, Title 14, § 15073.) Given the requested response date in your letter dated June 27, 2008, it is not possible for the State Water Board to comply with CEQA within the requested time frame.

State Water Board regulations only permit us to either approve or deny a request for Water Quality Certification before the federal period for Certification expires. (California Code Regulations, Title 23, § 3859.) Because of our inability to comply with the requirements of CEQA during the time limit prescribed (45 days from the date that the draft permits were mailed to the State Water Board), we have no choice but to deny without prejudice the Water Quality Certification for the General Permits unless we can receive an extension on the federal period set forth in your letter. If we receive such an extension, then State Water Board staff could conceivably comply with CEQA requirements and certify the General Permits with conditions that ensure compliance with existing State statutes and water quality plans and policies. A minimum extension of 18 months would be needed in order to complete the CEQA environmental analysis required for the activities authorized by these General Permits. If the above requested extension of federal time-period is submitted to this office within one year of the date of this denial, we will reactivate your application and take appropriate action. If one year passes without evidence of compliance, a new application and associated fees for Certification will be required. Please notify us if USEPA plans to grant such an extension.

State Water Board staff have concerns about the General Permits, and have submitted comments to USEPA under docket OW-2008-0055 and docket OW-2008-0056. We will send you a copy of both comment letters.

If you require further assistance, please contact Renan Jauregui, the staff person most knowledgeable on the subject, at (916) 341-5505 (riauregui@waterboards.ca.gov). You may also contact Phil Isorena, Chief of the NPDES Unit, at (916) 341-5544 (pisorena@waterboards.ca.gov).

Sincerely,



Dorothy Rice
Executive Director

cc: (See next page)

cc: (Continuation page)

Ms. Alexis Strauss, Director
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Executive Officer
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State Water Resources Control Board



Linda S. Adams
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Arnold Schwarzenegger
Governor

AUG 1 2008

Water Docket EPA-HQ-CW-2008-0055
Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

To Whom It May Concern

COMMENTS ON THE PROPOSED VESSEL GENERAL PERMIT (VGP)

Thank you for the opportunity to comment on the draft VGP. The enclosed document provides the State Water Resources Control Board's (State Water Board) comments on the draft VGP.

On June 27, 2008, the State Water Board received a letter requesting the issuance of a water quality certification pursuant to Clean Water Act Section 401 from Mr. Douglas Eberhardt from the United States Environmental Protection Agency's (USEPA) Region 9 Office. State Water Board staff will be issuing a letter denying the certification request without prejudice for specified reasons. The primary reason for issuing this denial was the compressed time-schedule for states to respond to this proposed rule, which has resulted in insufficient time for the State Water Board to comply with the California Environmental Quality Act (CEQA).

If you have questions on the above and the detailed comments in the attached document, please contact me at (916) 341-5458 (dpolhemus@waterboards.ca.gov) or Kim Ward, the staff most knowledgeable on this subject, at (916) 341-5586 (kward@waterboards.ca.gov).

Sincerely,

Darrin Polhemus, Deputy Director
Division of Water Quality

Enclosure

cc: Mr. Doug Eberhardt, USEPA
USEPA REGION 9
75 Hawthorne Street
Mail Code: WTR-5
San Francisco, CA 94105

California Environmental Protection Agency

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EXHIBIT NO. 3
APPLICATION NO.
CD-42-08

Docket ID No. EPA-HQ-OW-2008-0055

COMMENTS ON THE DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) GENERAL PERMIT FOR DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF COMMERCIAL VESSELS AND LARGE RECREATIONAL VESSELS (VGP)

State Water Board staff has the following comments:

- 1 California Clean Coast Act of 2005.** Certain permit provisions conflict with California law. Specifically, some of the waste streams listed in the VGP are prohibited from being discharged from vessels under the "California Clean Coast Act of 2005" or Act [Public Resources Code (PRC) Section 72400 et seq.]. Thus, in California, waste streams discharged from certain classes of large commercial vessels would make these vessels ineligible for NPDES permits. Waste streams prohibited from discharges from large commercial vessels include hazardous waste as defined under Section 25177 of the California Health and Safety Code (HSC), oily bilgewater, "other wastes" (these are subsets of "hazardous wastes"), and discharges of graywater from cruise ships. For other large commercial vessels regulated under the California Clean Coast Act of 2005, the discharge of graywater is prohibited if the vessel possesses sufficient holding capacity to refrain from discharging.

Hazardous wastes, whether regulated under the federal Resource Conservation and Recovery Act (RCRA) and/or regulated as "non-RCRA" hazardous wastes in California pursuant to HSC Section 25117 et seq., may be present in vessel waste streams such as those studied for purposes of the Department of Defense's Uniform National Discharge Standards' (UNDS) technical reports and in USEPA's Draft Cruise Ship Discharge Assessment Report. Because of the apparently limited information now available on specific waste streams associated with the other major classes of commercial vessels, it is unclear how many of these "incidental" waste streams would be prohibited from discharge under the California Clean Coast Act of 2005. However, information obtained from the UNDS technical reports and the USEPA's Draft Cruise Ship Discharge Assessment Report indicates that these wastes may be present in several of the 28 waste streams; particularly noteworthy is the latter report's identification of potential RCRA hazardous waste constituents in graywater on cruise ships.

- 2. California Marine Invasive Species Act of 2003 and Ballast Discharges.** The proposed permit may also conflict with California law regarding ballast water. Under the Marine Invasive Species Act (PRC Section 71204.7 et seq.), which is primarily administered by the California State Lands Commission, regulations have been adopted to ensure that ballast water exchanges are conducted in a way that minimizes the risk of transmission of nonindigenous species via this process, and

which also set performance standards for the treatment of ballast water to further reduce the release of nonindigenous species.

PRC Section 71201.5 disallows the discharge of "oil, noxious liquids, or other pollutants in a manner prohibited by state, federal, or international laws or regulations."

However, USEPA states (p. 27 of the *VGP Factsheet*) that ballast water discharges may contain "rust inhibitors, flocculent compounds, epoxy coating materials, zinc or aluminum (from anodes), iron, nickel, copper, bronze, silver, and other material or sediment from inside the tank, pipes, or other machinery." Such discharges may violate one or more laws or regulations mentioned above.

3. There are differences between the definitions of the large commercial vessels regulated under the California Clean Coast Act of 2005 and the VGP. For example, "Large passenger vessels" [PRC Section 72410(f)] have a capacity of "300 gross registered tons or greater" and are "engaged in the carrying of passengers for hire." An "Oceangoing ship" [PRC Section 72410(j)] is a "private, commercial, government, or military vessel of 300 gross registered tons or more calling on California ports or places." By contrast, the VGP (depending on the type of waste stream under consideration) regulates vessels of either 300 or 400 gross registered tons or greater, and large passenger ferries of 100 gross registered tons or greater, and so on.
4. **Deficiencies in Technical Information Needed for Determining Effluent Limits.** USEPA references technical reports prepared by the Department of Defense on the 28 waste streams in preparation for the adoption of vessel discharge regulations for armed forces vessels under the UNDS program. Although there is undoubtedly some similarity between many of the waste streams generated by both vessel fleets, there are also some notable differences. For example, in the chemical composition of hydraulic fluids typically used in specialized military applications when compared with less expensive hydraulic fluids used in general commerce such as the transportation industry. In addition, certain waste streams generated by cruise ships (i.e., sewage, graywater, hazardous waste, oily bilgewater, and solid waste) are described in USEPA's December 2007 Draft Cruise Ship Discharge Assessment Report. However, information on these same waste streams generated by other classes of commercial vessels (California's records indicate these vessels consist mainly of container ships, tankers, and bulk-carriers operating within California's navigable waters) seems somewhat lacking. Therefore, State Water Board staff members are concerned that, at present, there may be insufficient technical information on some of the waste streams for purposes of adopting appropriate effluent limits as described in the proposed VGP.
5. **Potential Water Quality Effects of 28 VGP Waste Streams.** Although the intent of the VGP is to protect receiving water quality from pollutants discharged in 28 separate vessel waste streams listed as "incidental to the normal operation of a

vessel," State Water Board staff members have concerns that some of the best management practices listed may themselves cause detrimental environmental effects. It should be noted that this is particularly problematic in those segments of water bodies listed under Clean Water Act (CWA) Section 303(d) as impaired due to copper and pollutants such as pathogens, which may be partly attributable to on-going vessel discharges. Many of these pollutants are currently attributed to undifferentiated "nonpoint sources" or "unknown" sources pursuant to CWA Section 303(d) that are awaiting further investigation normally undertaken during the development of subsequent Total Maximum Daily Load allocations. Two examples of discharges "incidental to the normal operation of a vessel" that may continue to contribute to significant water quality impairments due to releases of copper and microbial pathogens are: (1) in-water boat hull cleaning of vessels coated with copper-based anti-foulant paints; and (2) discharges of untreated graywater.



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U.S. Environmental Protection Agency
Mail Code: 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern

WATER DOCKET ID NO. EPA-HQ-OW-2008-0056

Thank you for the opportunity for the State Water Resources Control Board staff to comment on the proposed Recreational General Permit (RGP). We appreciate the U.S. Environmental Protection Agency's efforts in developing these important regulations. While the intent of the RGP is to protect the marine environment, we have some concerns over its administration, and some of the technical components of this permitting program. Although we believe that a regulatory permit will improve existing voluntary programs for recreational vessels, we need more time to evaluate the required best management practices (BMPs). California's unique ecosystems, extensive water conveyance systems, large population of recreational vessels, and mild climate (leading to year-round mooring of recreational vessels) apparently were not considered when developing this RGP. In fact, many of the assumptions used to develop the BMPs did not consider the large amount of recreational vessels that are moored year-round as well as liveaboards.

Administrative Issues:

1) The following classes of recreational vessels should be exempt from the RGP because only a few of the BMPs in Section 2.1.3 (Trash Management) and Section 2.1.4 (Deck and Hull Cleaning and Preventing Transport of Visible Living Organisms) may apply to these classes of recreational vessels.

- Any vessel propelled manually, including kayaks, canoes, rowboats, surfboards or sailboards.
- Sailboats with no motor and eight feet or less in length.
- A ship's lifeboat (i.e. dingy).

California Environmental Protection Agency

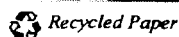


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Requiring these recreational vessel owners to abide by the terms of the RGP is inappropriate and inefficient.

2) How are dischargers going to be aware of and understand the BMPs required under this RGP?

The RGP should be accompanied with a companion document intended to clearly communicate the requirements to the lay boater. The State may require the Department of Motor Vehicles (DMV) to issue this companion document as a component of the vessel registration process. This companion document should include the appropriate state (rather than federal) contacts and resources.

3) There is no mechanism to track or enforce the RGP if a Notice of Intent is not required of the discharger. Perhaps a Memorandum of Agreement between the State and the DMV could be used to help gather basic data on vessel class, size, location, owner information, type of anti-foulant coating used (if any), and mooring location (if applicable).

4) The RGP should explain in more detail, the requirements contained in Clean Water Act §1322. Since this RGP is intended for recreational vessel owners and could have extensive readership, it should contain as much information as possible regarding the potential water polluting activities associated with boating. Bacteria and pathogens are a water quality concern for poorly flushed marinas and boat basins throughout California. Improper use and installation of marine sanitation devices on liveboards and vessels moored seasonally or permanently are thought to be contributing to bacteria and pathogen loading in some of these marinas and boat basins.

Technical Issues:

1) Copper (both dissolved and total) concentrations in the majority of marinas located in salt and brackish waters exceed the California Toxics Rule (CTR) values. Some freshwater marinas also have copper concentrations that exceed CTR values (California Department of Pesticide Regulations, Draft Report on Copper-based Antifoulant Paints 2008). BMPs provided in Section 2.1.5 (Vessels with Anti-foulant Paint) may not be protective enough to limit copper-discharges related to underwater hull cleaning of vessels coated with copper-based anti-foulant paint. Additionally, due to California's mild climate, many vessels are moored year-round and/or are liveboards. Passive leaching of copper from vessels coated with copper-based anti-foulant paint is thought to contribute to elevated levels of dissolved copper found in many of California's marinas and boat basins. Numeric effluent limits may be more appropriate for copper than BMPs especially for vessels moored year-round and

liveboards. Implementation of the following BMPs, in addition to those listed in Section 2.1.5, may limit the release of copper and improve water quality:

- Store infrequently used vessels on land.
- "Soft" sloughing and ablative (self polishing) hull paints release copper when cleaned underwater. Refrain from underwater cleaning if using these paints.
- Use hard finish, conventional anti-fouling paints rather than soft sloughing and ablative (self polishing) hull paints.
- Hire only certified professional underwater vessel hull cleaning services to perform underwater hull cleaning activities.
- Do not sand or strip hull paint underwater.
- Use stainless steel brushes and pads on non-painted, metal areas *only*.
- Repair paint bonding problems at haul-out areas to avoid further chipping and flaking of paint into the water.

Please refer to <http://commserv.ucdavis.edu/cesandiego/seagrant/hullclean.htm> for more information on the BMPs listed above.

2) The term "waste stream" in Section 2.1.3 is confusing. If the intention is to make sure that this waste ends up in the appropriate waste stream, i.e., the municipal landfill rather than the open ocean or marina basin, then please clarify and/or define "waste stream" or replace with "discharges" to be consistent.

3) Section 2.1.4 (Deck and Hull Cleaning and Preventing Transport of Visible Living Organisms) may not be protective enough to prevent the potential spread of quagga mussels. Particularly in the following reservoirs which have bans on recreational boating: Lake Casitas and Westlake Lake. For more information, please refer to <http://www.dbw.ca.gov/BoaterInfo/QuaggaLoc.aspx>.

Suggestion: zero discharge for transport of quagga mussels in waterbodies with active bans on recreational boating due to potential quagga mussel infestation.

- Modify the second bullet, "Inspect the visible areas of the vessel for any attached or stowaway visible living organisms. If organisms are found, they must be removed *and disposed of in appropriate trash receptacle on-land.*"
- Modify the third-bullet of the third bullet, "Rinse hull *with a high-pressure spray of hot tap water after each use when possible.*"
- Add the following bullet, "Check with the appropriate waterway management agency prior to launching boat; some inland reservoirs and lakes have bans and restrictions on recreational boating."

4) Section 2.1.7 (Graywater) is not protective of Lake Shasta where there is a prohibition on graywater discharges.

Suggestion: Numeric limit for Lake Shasta, zero discharge.

If you have questions regarding our comments, please contact me at (916) 341-5615 (dprice@waterboards.ca.gov) or Molly Munz, the staff person most knowledgeable on this subject, at (916) 341-5485 (MMunz@waterboards.ca.gov).

Sincerely,



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