

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 300
SAN FRANCISCO, CA 94105-2219
FAX (415) 904-5200
TDD (415) 904-5400



Th6a

CD-0007-20 (EPA, Statewide)

January 14, 2021

CORRESPONDENCE



OFFICE OF THE GOVERNOR

December 23, 2020

The Honorable Andrew Wheeler
Administrator, USEPA
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

RE: California Governor's Objection to the Proposed Vessel Incidental

Discharge National Standards of Performance [Docket No. EPA-HQ-OW-2019-0482]

Dear Administrator Wheeler,

I write in response to your announcement in the Federal Register of the U.S. Environmental Protection Agency (USEPA) proposed Vessel Incidental Discharge National Standards of Performance (Docket No. EPA-HQ-OW-2019-0482). **Whereas Governors are afforded an opportunity to submit an "objection to the proposed standard of performance"** under Clean Water Act (CWA) Section 312(p)(4)(A)(iii)(III), I, as Governor of California, object to the proposed standards of performance for the reasons stated below.

California is the fifth largest economy in the world, with some of the busiest ports in the nation. California's ports, including Long Beach, Los Angeles, and Oakland, are ground zero for invasive species introductions into coastal waters. Approximately 80 percent of the more than 250 invasive species in California coastal waters are the result of shipping activity at California ports. Thus, effective, science-based vessel discharge standards are imperative to safeguard California's strong economy, public health and safety, and coastal environment.

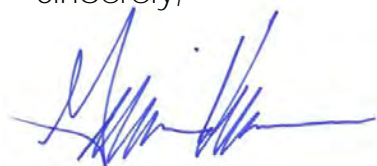
California stood ready to provide USEPA with scientific evidence and support during the development of the proposed regulations, but USEPA declined to engage in meaningful consultation with State Governors; as a result, the proposed Standards of Performance will fail to protect California waters from the threat of species introductions and impacts to beneficial uses, human health, and water quality. USEPA refused to adequately assess best available technology and instead proposed discharge standards based on convenience rather than science, in violation of the Vessel Incidental Discharge Act and the Clean Water Act.

Please find the enclosed comprehensive scientific, technical, and operational factors that form the bases of California's objection to the proposed national Standards of Performance, with a particular focus on ballast water, biofouling management, and the management of vessel hulls and associated niche areas. I look forward to USEPA's written response to each of the concerns expressed in the enclosed letter in accordance with Clean Water Act Section 312(p)(4)(A)(iii)(III)(bb).

California remains committed to working with USEPA to support federal efforts to establish strong, science-based vessel discharge standards. With internationally-recognized expertise in our water quality and marine invasive species programs, we believe that California and USEPA can still work cooperatively to develop standards that will protect California's resources for the benefit of current and future generations of Californians.

If you have any questions, please contact Katie Wheeler Mathews at katie.wheelermathews@wdc.ca.gov.

Sincerely,



Gavin Newsom
Governor of California

Enclosure: Letter from the California State Water Resources Control Board and State Lands Commission



December 18, 2020

The Honorable Gavin Newsom
Governor of California
1303 10th Street, Suite 1173
Sacramento, CA 95814

RE: Objection to the Proposed U.S. Environmental Protection Agency
Vessel Incidental Discharge National Standards of Performance [Docket
No. EPA-HQ-OW-2019-0482]

Dear Governor Newsom:

The U.S. Environmental Protection Agency (USEPA) published proposed regulations in the Federal Register on October 26, 2020, to establish Vessel Incidental Discharge National Standards of Performance (Docket No. EPA-HQ-OW-2019-0482).

The proposed Vessel Incidental Discharge National Standards of Performance are not sufficiently stringent to protect California waters from the threat of species introductions and impacts to beneficial uses and water quality.

Pursuant to Clean Water Act (CWA) Section 312(p)(4)(A)(iii)(III), state Governors may formally object to the proposed national standards of performance. The objection must include the scientific, technical, and operational factors that form the basis of the objection. The California State Lands Commission and the State Water Resources Control Board offer the following scientific, technical, and operational information to support an objection to USEPA from California regarding the following proposed standards:

- Ballast Water

- Biofouling Management
- Hulls and Associated Niche Areas

Ballast Water

1. USEPA failed to perform an adequate analysis of Best Available Technology for ballast water management systems; therefore, the USEPA proposed ballast water discharge standards are arbitrary and capricious.

The Vessel Incidental Discharge Act (VIDA) requires that the national standards of performance for nonconventional pollutants, including Aquatic Nuisance Species (ANS), must require the application of Best Available Technology economically achievable (BAT).¹ In setting the national standards for ballast water discharges based on the application of BAT, USEPA failed to independently review available technologies. Instead of reviewing the available technologies for ballast water treatment, USEPA deferred to the U.S. Coast Guard's (USCG) previous review of ballast water management systems (BWMS) performance data as part of the USCG type approval process. USEPA states that "these approved" BWMS have "been demonstrated to achieve the existing" USCG requirements "and therefore are technologically available."²

While USEPA concludes that BWMS approved by the USCG are capable of meeting the current ballast water discharge performance standards,³ that does not equate with a determination that USCG approved BWMS constitute BAT. To adequately conduct an independent BAT analysis for ballast water treatment, USEPA must analyze all available data submitted by independent laboratories to USCG as part of the type approval process. The raw biological performance data held by USCG in the reports submitted by independent laboratories provides the necessary information for USEPA to conduct an independent analysis to determine whether there are treatment systems available that can reduce the concentration of living organisms in ballast water discharge to a level below the standard in the 2013 Vessel General Permit (VGP) or USCG regulations.⁴

¹ 33 U.S.C. § 1322(p)(4)(B)(i)(III).

² 85 Fed. Reg. 67837 (Oct. 26, 2020).

³ The current federal ballast water discharge standards are found in 33 CFR § 151.2030 and incorporated into the EPA's 2013 Vessel General Permit.

⁴ See 33 C.F.R. § 151.2030.

While USEPA failed to conduct an independent BAT assessment, USEPA claims that technology is not available to meet a ballast water discharge standard stricter than the standards in the VGP. The Court of Appeals for the Second Circuit held in 2015 in *NRDC v. EPA* that USEPA acted “arbitrarily and capriciously” in setting the numeric ballast water discharge standards in the VGP because it failed to review data on BAT that was available at that time.⁵ USEPA is now making the same arbitrary and capricious decision on the same standards under a similar statutory command. Having failed to conduct a BAT assessment, USEPA does not know what standards the BAT could meet yet concludes that current technology cannot meet a standard more stringent than the VGP's standards.

Instead of basing its proposed ballast water standard on a BAT analysis, USEPA appears to have set the standard by working backwards toward the VGP standards that are already in place. To properly set national standards for ballast water discharges, USEPA must:

- Determine the BAT for ballast water discharges based on reviewing the test reports from all USCG type approved BWMS and any test reports for BWMS that are pending review by the USCG.
- Review the BAT based on “classes, types and sizes of vessels.”⁶

USEPA did not consider if there are separate BATs for different vessel classes because USEPA failed to review the performance of the USCG type approved BWMS and any other data from test reports that have been submitted to the USCG for type approval.

- Determine the technology that “will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.”⁷
- Disregard international consistency of discharge standards.

In the supplemental materials, USEPA claims that it must consider the International Maritime Organization (IMO) discharge standards in setting the federal performance standards.⁸ This consideration is inconsistent with VIDA, which requires USEPA to independently determine the BAT for setting *national* standards.⁹ Striving to achieve consistency with the IMO standards or any foreign requirements could undermine an independent

⁵ *Natural Resources Defense Council v. EPA*, 808 F.3d 556 (9th Cir. 2015).

⁶ 33 U.S.C. § 1322(p)(4)(C).

⁷ 33 U.S.C. § 1311(b)(2)(A).

⁸ 85 Fed. Reg. 67837 (Oct. 26, 2020).

⁹ 33 U.S.C. § 1322(p)(4).

assessment. The United States should act as a world leader in environmental protection, not defer to the IMO or other governments.

2. The proposed regulations fail to be as stringent as the 2013 VGP and weaken protections against ANS introductions from ballast water discharges.

VIDA requires that:

the combination of any equipment or best management practice comprising a marine pollution control device shall not be less stringent than the following provisions of the Vessel General Permit:

(l) All requirements contained in parts 2.1 and 2.2.¹⁰

Under Section 2.2 of the VGP, USEPA requires that vessel operators implement the following management measures to minimize or avoid uptake of ballast water in the following areas and situations:

- Areas known to have infestations or populations of harmful organisms and pathogens (e.g., toxic algal blooms).
- Areas near sewage outfalls.
- Areas near dredging operations.
- Areas where tidal flushing is known to be poor or times when a tidal stream is known to be turbid.
- In darkness, when bottom-dwelling organisms may rise up in the water column.
- Where propellers may stir up the sediment.
- Areas with pods of whales, convergence zones, and boundaries of major currents.¹¹

USEPA intends to abandon these protective measures in the proposed regulations, explaining that:

such measures are not practical to implement. These conditions are usually beyond the control of the vessel operator during the uptake and discharge of ballast water and thus it is not an available measure

¹⁰ 33 U.S.C. § 1322(p)(4)(B)(iii).

¹¹ Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels, section 2.2. Mandatory Ballast Water Management Practices: Management measures required of all vessel owner/operators, pg. 27-28.

or practice to minimize or avoid uptake of ballast water in those areas and situations.¹²

USEPA asserts that the States' power to petition for issuance of an emergency order will fill the gap created by discontinuing these protective measures.¹³ Simply put, USEPA asserts that the States could identify exigent circumstances requiring additional protective measures and ask USEPA to impose case-by-case requirements. This is not a workable solution and would not be as protective as continuing to require these protective measures. Additionally, the proposed regulations require that USEPA grant or deny a petition for an emergency order no later than 180 days after the petition is submitted.¹⁴ This 180-day period is a long time during which vessels could continue to uptake and discharge ballast water from areas more likely to contain organisms and potentially impacting the beneficial uses of California waters.

USEPA's claim that the protective measures are not practical is false. Whether an ocean condition is under the control of a vessel operator cannot determine whether a protective measure is practical. No ocean conditions are under the control of vessel operators. Nevertheless, vessel operators are still capable of adjusting vessel operations to minimize or avoid environmental impacts from ballast water discharges. For example, operators cannot control light conditions but can plan their ballast water management to avoid or minimize uptake in darkness. There is no practical challenge to assessing whether daylight or darkness conditions exist. Similarly, operators cannot control the siting of sewage outfalls, but they can take note of where the outfalls are and avoid them.

Moreover, VIDA requires that USEPA regulations not be less stringent than the VGP requirements. Two exceptions apply only when there is new information not previously available that supports a less stringent standard or USEPA determines that **there was a previous "material technical mistake or misinterpretation of law."**¹⁵ In the rulemaking materials, USEPA offers no justification to invoke either exception. Thus, USEPA must retain these existing protective measures or develop new protective measures that are no less stringent.

¹² 85 Fed. Reg. 67835 (Oct. 26, 2020).

¹³ 85 Fed. Reg. 67835 (Oct. 26, 2020).

¹⁴ 85 Fed. Reg. 67890 (section 139.50) (Oct. 26, 2020).

¹⁵ 33 U.S.C. § 1322(p)(4)(D)(ii)(II).

3. The proposed regulations contain standards for ballast water discharge that do not adequately protect California's aquatic environment and human health.

Clean Water Act Section 303(c) allows States to promulgate water quality standards that are at least as stringent as those standards contained in the Clean Water Act itself, if approval is granted by the USEPA. The USEPA has approved numerous standards that currently apply to the California waters. However, the proposed regulations contain standards that are less stringent than those promulgated by California, which violates the Clean Water Act. Table 1, pertaining to residual chlorine discharges, illustrates one such **discrepancy between California's standards and the standards contained in the proposed regulation regarding ballast water management system discharges.**

Table 1: Residual Chlorine Standards in the Proposed Regulation Versus California Water Quality Objectives

Constituent	Jurisdiction	Standard	Source
Chlorine Dioxide	Federal	200 µg/L*	Proposed regulations, subpart C § 139.10(d)(2)(i)
Total Residual Oxidizer (Chlorine or Ozone)	Federal	100 µg/L*	Proposed regulations, subpart C § 139.10(d)(2)(ii)
Total Chlorine Residual	State of California (Ocean Waters)	60 µg/L	Water Quality Control Plan for Ocean Waters of California, Chapter II, Table 3
Total Chlorine Residual	State of California (Inland Surface Waters, Enclosed Bays, and Estuaries)	20 µg/L	U.S. EPA Ambient Water Quality Criteria for Chlorine as used to interpret narrative aquatic toxicity water quality objectives in Water Quality Control Plans for Regional Water Quality Control Boards of California

California requests that the USEPA revise the proposed regulations to contain standards at least as stringent as those promulgated by the States, in compliance with the intent of the Clean Water Act.

Biofouling

4. USEPA is violating VIDA by attempting to regulate biofouling as an incidental discharge.

Introduction

VIDA preempts the States from regulating discharges incidental to the normal operation of vessels.¹⁶ Congress added VIDA to an existing statute that defines *discharge incidental to the normal operation of a vessel*. As discussed below, biofouling does not fit within the statutory definition. Nonetheless, USEPA identifies biofouling as a *discharge incidental to the normal operation of a vessel* in its proposed regulations, which would preempt the States from regulating vessel biofouling. California, as a world leader in biofouling regulation, opposes this construction because it would expand the statutory definition and preemptive effect far beyond Congressional intent.

Background

Vessel biofouling is the accumulation of aquatic organisms on vessel hulls or appendages. Fouling organisms can include microorganisms, algae, or small animals, such as barnacles and mussels. If left unmanaged, vessel biofouling can cause structural damage to vessels and decrease vessel efficiency due to increased hydrodynamic drag. Vessel biofouling also results in the transport of aquatic organisms to new environments, where they can spawn or detach and disperse. Maintaining vessel integrity and efficiency incentivizes vessel owners and operators to manage biofouling on some underwater portions of the vessels, but they do not have as strong of an interest in preventing the attachment of aquatic organisms on underwater crevices, piping intakes, and other structures that do not affect fuel efficiency, but which also accumulate biofouling. Many governments, including California, seek to reduce the risk of vessels transporting aquatic nuisance species (ANS) to their territories because invasive species harm the environment, ecosystems, economy, and public health. Vessel biofouling is believed to be responsible for up to 60 percent of the established ANS along the California coast, including bays, harbors, and estuaries (Ruiz et al. 2011).

Vessel owners and operators can manage biofouling by utilizing hull coatings or actively cleaning their vessels. Most hull coatings contain biocides such as copper and zinc to create an undesirable surface for organisms to attach;

¹⁶ 33 U.S.C. § 1322(p)(9)(A)(i).

others are designed to impair the adhesive traits of fouling organisms, preventing them from attaching to vessel hulls. While not the subject of this comment letter, these hull coatings can release pollutants such as heavy metals, which is a discharge incidental to the normal operation of a vessel, as covered in section 139.22(b) of the proposed regulations.¹⁷ Neither coating type works perfectly, especially as the coating ages, so vessels generally have some degree of biofouling.

Active cleaning of vessels is necessary when biofouling grows and covers more surface area of a vessel. Cleaning and maintaining the hull is referred to as hull husbandry or underwater ship husbandry. Cleaning tools include brushes, high pressure water jets, or similar instruments to forcibly remove biofouling. While brushing or scraping fouling organisms from a vessel, the owners or operators incidentally remove some of the coating material. The removed organisms and coating material can cause negative impacts, especially to the aquatic environment.

The ideal time to clean vessels is during “dry dock,” where the vessel is removed from the water. During dry dock, any organisms or materials removed from the hull fall into a controlled environment and are contained. However, dry docking is expensive and inconvenient, so vessel owners and operators generally choose to dry dock their vessels only once every five years to align with federal and international safety standards (e.g., **International Maritime Organization’s Safety of Life at Seas Convention**). Between scheduled dry dockings, vessel owners and operators may need to conduct in-water cleaning. During in-water cleaning, some or all removed materials enter the open water, depending on the level of containment. These underwater ship husbandry discharges cause environmental impacts and are the subject of section 139.22(c) of the proposed regulations.¹⁸

States can continue to regulate biofouling without frustrating the federal **government’s efforts to regulate incidental discharges**. Although the States would be preempted from regulating in-water cleaning or establishing hull coating requirements under the new regulations, the States can impose limits on how much biofouling a vessel can have while present in their territories. In other words, VIDA does not prevent the States from establishing thresholds for how much wetted surface area on a vessel may be covered in biofouling and imposing remedies for exceeding the thresholds, including penalties or

¹⁷ 85 Fed. Reg. 67889 (Oct. 26, 2020).

¹⁸ 85 Fed. Reg. 67889 (Oct. 26, 2020).

orders to remove the vessel from state territory or conduct in-water cleaning in accordance with USEPA's regulations. While the States could not establish requirements on how to conduct in-water cleaning and any state remedies would need to avoid frustrating USEPA's incidental discharge regulations, a role remains for the States to limit biofouling in order to prevent the introduction of ANS into state waters.

California's Interest in Regulating Vessel Biofouling

California's coastal and estuarine environments are particularly vulnerable to biofouling-mediated introductions of ANS. Up to 60 percent of the currently established ANS in the State's coastal and estuarine waters were first introduced via biofouling (Ruiz et al., 2011). Biofouling presents an ongoing risk for introducing these species. Biofouling has been a historical driver of ANS introductions over centuries, and it continues to be actively responsible for the transportation of ANS into California waters.

Two separate underwater vessel surveys have demonstrated the presence of ANS within the biofouling on vessels arriving at California ports. Davidson et al. (2013) surveyed 23 commercial merchant or passenger vessels in California ports and identified 124 different invertebrate or algae species. Twenty-four of these species were nonindigenous to the U.S. Pacific coast and 14 were not yet established in California. Davidson et al. (2014) followed up with surveys of another nine commercial merchant or passenger vessels in California ports and identified 99 different invertebrate or algae species or groups of species. Nearly one-third of those that were identified down to the species level were categorized as nonindigenous to California or of unknown origin, including two that were not yet established in California. These two studies establish that vessels arriving at California ports are transporting ANS into California waters.

ANS typically associated with vessel biofouling communities are now becoming established in California's open coast environments (i.e., away from ports). Through surveys of open coast sites, Zabin et al. (2018) found a common biofouling species, the bryozoan *Watersipora* sp., at multiple sites in central and northern California, sometimes in high abundances. Proximity to harbors was correlated with abundance of *Watersipora* sp. and other ANS.

The likelihood of successful ANS introductions depends on many factors, including the number and frequency of vessel arrivals, the geographic locations in which these vessels trade, and the environmental similarities between where the species originated and the receiving water. These

factors vary greatly between states and even ports within a state and require regional or location-specific protections to reduce the likelihood of successful ANS introductions. A biofouling standard that is protective of the Great Lakes may not be the most appropriate for California, and vice versa. A one-size-fits-all approach may protect certain waterbodies at the expense of others. For example, some States have copper-impaired waters that may favor non-native species; some states have vulnerable coral reefs; some states have freshwater ports whereas most have marine ports. California's unique coastal and estuarine environments and its strong coastal economy are dependent on effective natural resource management that is designed to address the specific environmental threats to California. For these reasons, the States can more effectively regulate biofouling than the federal government can.

USEPA Improperly Treats Biofouling as an Incidental Discharge

VIDA has the severe effect of preempting the States from regulating “discharge[s] incidental to the normal operation of a vessel.”¹⁹ Consequently, it is imperative that USEPA accurately construct this defined term to avoid preempting state authority that Congress intended to remain undisturbed. Unfortunately, in the proposed regulations, USEPA has improperly interpreted biofouling as a “discharge incidental to the normal operation of a vessel.”

EPA understands the statutory definition of “discharge incidental to the normal operation of a vessel” (incidental discharge) at 33 U.S.C.1322(a)(12) to include any discharge of biofouling organisms from vessel equipment and systems. Consistent with the VGP discharges of biofouling organisms from vessel equipment and systems while the vessel is immersed or exposed to the aquatic environment are incidental to the normal operation of a vessel. Such discharges during normal operation of the vessel include, but are not limited to, those from maintenance and cleaning activities of hulls, niche areas, and associated coatings.²⁰

USEPA identifies in-water cleaning and maintenance discharges of biofouling to be incidental discharges. California does not challenge USEPA's conclusion that discharges of biofouling organisms during in-water cleaning are incidental discharges. Such discharges qualify as “a discharge in connection with the testing, maintenance, and repair of a [protective, preservative, or absorptive application to the hull of the vessel].” California's concern is that USEPA impliedly concludes that the mere presence of

¹⁹ 33 U.S.C. § 1322(p)(9)(A)(i).

²⁰ 85 Fed. Reg. 67830 (Oct. 26, 2020).

biofouling, in the absence of in-water cleaning or maintenance, is also an incidental discharge.

The proposed regulations include a requirement to “minimize” the transportation of biofouling organisms and to develop and follow a biofouling management plan.²¹ USEPA explains that the goal of the biofouling management plan is to “prevent macrofouling, thereby minimizing the potential for the introduction and spread of [aquatic nuisance species] ANS.”²² In some of the proposed regulations, USEPA would require minimization of biofouling for the purpose of avoiding introductions of ANS. For example, “EPA is proposing that vessel hulls and niche areas must be cleaned regularly to minimize biofouling” in proposed section 139.22(c).

USEPA also proposes to regulate biofouling in section 139.13 Cathodic Protection. The section title is misleading because it is written to regulate biofouling, not discharges associated with cathodic protection: “[s]paces between any flush-fit anode and backing must be filled to remove potential hotspots for biofouling organisms.”²³ Similarly, the proposed regulation of seawater piping in section 139.28 is focused entirely on preventing biofouling.²⁴ However, in the VGP, the corresponding section (2.2.20) was focused on minimizing the “amount of biofouling chemicals needed to keep fouling under control.”²⁵ Through these provisions, USEPA is effectively treating the mere presence of biofouling as an incidental discharge.

*Biofouling is Not a Discharge Incidental to the Normal Operation of a Vessel,
as Defined in VIDA*

Congress did not define *discharge incidental to the normal operation of a vessel* when it adopted VIDA. Rather, Congress added VIDA as a new subparagraph to an existing statute that already included a definition of

²¹ 85 Fed. Reg. 67889 (section 139.22(c)(1)) (Oct. 26, 2020); 85 Fed. Reg. 67884 (section 139.5) (Oct. 26, 2020).

²² 85 Fed. Reg. 67830 (Oct. 26, 2020).

²³ 85 Fed. Reg. 67887 (section 139.13) (Oct. 26, 2020). Note that in the VGP, the corresponding provision (2.2.7) included requirements to prevent discharges of metals from sacrificial anodes. USEPA has not included any BMPs to address these discharges. It is unclear how the abandonment of the BMPs complies with 33 U.S.C. section 1322(p)(4)(B)(iii).

²⁴ 85 Fed. Reg. 67890 (Oct. 26, 2020).

²⁵ VGP, Section 2.2.20 Seawater Piping Biofouling Prevention, pg. 52 (2013), italics added.

*discharge incidental to the normal operation of a vessel.*²⁶ Specifically, the term:

(A) means a discharge, including—

- (i) graywater, bilge water, cooling water, weather deck runoff, ballast water, oil water separator effluent, and any other pollutant discharge from the operation of a marine propulsion system, shipboard maneuvering system, crew habitability system, or installed major equipment, such as an aircraft carrier elevator or a catapult, or from a protective, preservative, or absorptive application to the hull of the vessel; and
- (ii) a discharge in connection with the testing, maintenance, and repair of a system described in clause (i) whenever the vessel is waterborne; and

(B) does not include—

- (i) a discharge of rubbish, trash, garbage, or other such material discharged overboard;
- (ii) an air emission resulting from the operation of a vessel propulsion system, motor driven equipment, or incinerator; or
- (iii) a discharge that is not covered by part 122.3 of title 40, Code of Federal Regulations (as in effect on February 10, 1996).²⁷

Note that the definition includes two subparagraphs: one specifying what it includes (Subparagraph (A)) and one specifying what it does not include (Subparagraph (B)).

Biofouling does not fit within the subparagraph specifying what is included in the definition of an incidental discharge. Most biofouling organisms are present on the hull of a vessel, so if Congress intended to include biofouling it would only be logical to include biofouling on the hull of a vessel. However, under Subparagraph (A), the only language that could potentially reflect Congressional intent to include biofouling on the hull is “pollutant discharge . . . from a protective, preservative, or absorptive application to the hull of the vessel.” However, this language refers to a chemical discharge from the “application to the hull,” rather than a discharge of organisms from the “hull”

²⁶ 33 U.S.C. § 1322.

²⁷ 33 U.S.C. §1322(a)(12).

itself. Interpreting the language any differently would read the phrase “from a protective, preservative, or absorptive application to the” out of the statute. However, each word in a statute must be given meaning, pursuant to the rule against surplusage, under which courts strive to give meaning to every clause and word of a statute. If Congress intended the provision to apply to biofouling, it would have phrased the provision as “pollutant discharge (or release) from the hull of the vessel” or included other similar language.

Additionally, assuming Subparagraph (A) covered biofouling on the hull of a vessel, it would fail to cover biofouling comprehensively. Although most fouling occurs on vessel hulls, biofouling also occurs in niche areas such as sea chests, dry-dock support strips, and anchor chain lockers. While some of these niche areas could be considered to be part of a “marine propulsion system, shipboard maneuvering system . . . or installed major equipment” described in Subparagraph (A), others, including the dry-dock support strips, would not be considered to be encompassed by any of these systems or equipment. There is no rational basis for Congress to apply VIDA to biofouling on a vessel’s hull and some but not all niche areas. The lack of explicit reference to the niche areas, and failure to include all niche areas within the named vessel systems, indicates that Congress did not intend for Subparagraph (A) to cover biofouling.

Notably, Subparagraph (A) contains the word *including*. Generally, *including* is illustrative, not exhaustive.²⁸ However, reading *including* in Subparagraph (A) as illustrative, not exhaustive, would render the subparagraph meaningless. As quoted above, the definition of *discharge incidental to the normal operation of a vessel* “means a discharge, including”²⁹ Under VIDA, *discharge* is itself a defined term, which “includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping.”³⁰ Reading *discharge incidental to the normal operation of a vessel* to be illustrative would give it the same meaning as *discharge*. This reading would contravene the rule against surplusage.³¹ In this case, reading *discharge incidental to the normal operation of a vessel* to be exhaustive, despite its use of the word *including*, is the only way to avoid rendering it meaningless. Additionally, Congress used “includes, but is not limited to” in the *discharge*

²⁸ See *Samantar v. Yousuf* (2010) 560 U.S. 305, 317.

²⁹ 33 U.S.C. § 1322(a)(12).

³⁰ 33 U.S.C. § 1322(a)(9).

³¹ See *Duncan v. Walker* (2001) 533 U.S. 167, 174.

definition to clarify that the definition of *discharge* is illustrative, not exhaustive. No such language appears in Subparagraph (A). Presumably, Congress was intentional with its diction. Had it intended for Subparagraph (A) to be illustrative, it would have used the same clarifying language.

Even if Congress intended for Subparagraph (A) to be illustrative, not exhaustive, interpretation of the subparagraph would be limited by the canon of construction *eiusdem generis*. Under *eiusdem generis*, “**where** general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding **specific words.**”³² In Subparagraph (A), the relevant objects enumerated are pollutants discharged by a *marine propulsion system, shipboard maneuvering system, crew habitability system, or installed major equipment, such as an aircraft carrier elevator or a catapult*. These enumerated objects are all types of pollutants that result from the operation of vessel equipment or infrastructure, not the accumulation of marine organisms. They may be discharged during in-water cleaning, but none of the systems or equipment listed actively pumps, pours, or otherwise discharges fouling organisms. Thus, biofouling would not fit within the class of objects identified in Subparagraph (A) even if it were read to be illustrative.

The provision specifying what is not included in the definition of a *discharge incidental to the normal operation of a vessel* also indicates that Congress did not intend for the definition to include biofouling. Subparagraph (B)(iii) provides that a *discharge incidental to the normal operation of a vessel* does not include “a discharge that is not covered by part 122.3 of title 40, Code of Federal Regulations (as in effect on February 10, 1996).”³³ EPA promulgated 122.3 in an unsuccessful attempt to exempt certain marine discharges from Clean Water Act sections 301(a) and 402.³⁴ Section 122.3 provided that “[t]he following discharges do not require [National Pollutant Discharge Elimination System (NPDES)] permits:”

³² *Official Committee of Unsecured Creditors of Cybergeneics Corp. ex rel. Cybergeneics Corp. v. Chinery* (3rd Cir. 2003) 330 F.3d 548, 562-63.

³³ 33 U.S.C. § 1322(a)(12)(B)(iii).

³⁴ Environmental groups joined by a number of states argued that the Clean Water Act did not authorize the exemptions of vessel discharges and therefore USEPA acted *ultra vires*. The Ninth Circuit agreed and invalidated 122.3 in *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d 1006 (9th Cir. 2008).

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 such other materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation.³⁵

After the Ninth Circuit invalidated the regulation, USEPA released the VGP to regulate such discharges. As the title indicates, the purpose of the VGP is to cover “discharges incidental to the normal operation of vessels.” The VGP, in effect, represents a lengthy and detailed elaboration upon the meaning of a discharge incidental to the normal operation of vessels, of which Congress was aware when it adopted VIDA.

The VGP defines *discharge incidental to the normal operation of a vessel* as “those discharges that were excluded from the NPDES permitting program by operation of 40 CFR §122.3(a) as in effect on September 29, 2008.”³⁶ It further clarifies that:

“Discharges that are outside the scope of the former exclusion from NPDES permitting for discharges incidental to the normal operation of a vessel as set out in 40 CFR §122.3(a), as in effect on December 18, 2008, are ineligible for coverage under this permit.”³⁷

Congress’s intent to exclude the same types of discharges from VIDA as those excluded under section 122.3(a) indicates that VIDA and the VGP apply to many, if not all, the same discharges. Consistent with USEPA’s statement that “Congress intended to preserve the existing VGP requirements as a regulatory floor,” the scope of VIDA and the VGP are very similar.³⁸ In the section 1.2.2 (“Vessel Discharges Eligible for Coverage”) of the VGP, USEPA identifies 27 types of incidental discharges. While the list includes seawater piping biofouling prevention and underwater hull husbandry, biofouling itself (or any other term it is known by) does not appear on this list. Instead of identifying biofouling as an incidental discharge in section 1.2.2 of

³⁵ 40 C.F.R. § 122.3(a), italics added.

³⁶ VGP, Appendix A, Definitions, pg. 143 (2013).

³⁷ VGP, Section 1.2.3.1 Discharges Not Subject to Former NPDES Permit Exclusion and Vessel Discharges Generated from Vessels when they are Operated in a Capacity Other than as a Means of Transportation, pg. 10 (2013).

³⁸ 85 Fed. Reg. 67827 (Oct. 26, 2020).

the VGP, USEPA addressed biofouling as a best management practice to minimize the need for in-water cleaning, thereby reducing in-water cleaning discharges.³⁹ Thus, excluding biofouling from the scope of VIDA is consistent with the VGP.

Lastly, the U.S. Supreme Court has held that:

[I]n all pre-emption cases, and particularly in those in which Congress has “legislated ... in a field which the States have traditionally occupied,” ... we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁴⁰

In this instance, the States have traditionally occupied the field of environmental protection, including prevention of ANS introductions. Additionally, VIDA provides no “clear and manifest purpose of Congress” to preempt the States from regulating biofouling. First, as discussed above, the definition of *discharge incidental to the normal operation of a vessel* excludes biofouling. Second, it would not be clear and manifest for Congress to delegate authority to USEPA to interpret, through regulation, *discharge incidental to the normal operation of a vessel* to include biofouling. A clear and manifest purpose would be express identification of biofouling in the statutory definition. The absence of such a clear and manifest purpose triggers the presumption against preemption. Accordingly, the definition of *discharge incidental to the normal operation of a vessel* must be read narrowly to avoid expanding VIDA’s preemptive effect beyond Congressional intent.

The “Stringency Provision” Does Not Provide a Basis for Regulating Biofouling as a *Discharge Incidental to the Normal Operation of a Vessel*

Citing subsection (p)(4)(B)(ii) (the Stringency Provision)⁴¹ as justification, USEPA proposes to regulate the discharge of biofouling organisms:

With one of the legislative purposes of the VIDA being to establish uniform national incidental discharge regulations that are as stringent as the VGP . . .

³⁹ VGP, Section 2.2.23 Underwater Ship Husbandry and Hull Fouling Discharges, pgs. 53-54 (2013).

⁴⁰ *Wyeth v. Levine* (2009) 555 U.S. 555, 565, quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485.

⁴¹ 33 U.S.C. § 1322(p)(4)(B)(ii).

EPA is proposing to include requirements for the discharge of biofouling organisms from vessel equipment and systems in this rulemaking.⁴²

The Stringency Provision states:

[T]he combination of any equipment or best management practice comprising a marine pollution control device shall not be less stringent than the following provisions of the Vessel General Permit:

(l) All requirements contained in parts 2.1 and 2.2 (relating to effluent limits and related requirements).⁴³

According to USEPA, the Stringency Provision requires that biofouling must be covered in its regulations to the same extent that it is covered in the VGP.⁴⁴ This reading misconstrues the Stringency Provision to require incorporation. The Stringency Provision requires that “the combination of any equipment or best management practice [in the VIDA regulations] shall not be less stringent than [the VGP].” “Shall not be less stringent” does not mean incorporate. Instead, it means only that the marine pollution control devices in USEPA’s regulations need to be at least as protective as those in the VGP. More simply put, if the VGP required best management practices (BMPs) A and B, USEPA’s regulations can require BMPs X and Y as long as X and Y are as stringent as A and B. Thus, USEPA’s requirement of a BMP in the VGP does not incorporate that BMP as an incidental discharge under VIDA.

In the VGP, USEPA included minimizing biofouling as a BMP for hull husbandry discharges, requiring regulated parties to “minimize the transport of attached living organisms.”⁴⁵ However, USEPA misconstrues the Stringency Provision to require that biofouling, addressed as a BMP in the VGP for hull husbandry discharges, be incorporated in the regulations as an incidental discharge.⁴⁶ Read more carefully, the Stringency Provision requires only that the proposed hull husbandry regulations include marine pollution control devices that are collectively as stringent as hull husbandry requirements in the VGP. It is important to distinguish between regulating biofouling and identifying biofouling as an incidental discharge. The Stringency Provision provides no

⁴² 85 Fed. Reg. 67830 (Oct. 26, 2020).

⁴³ 33 U.S.C. § 1322(p)(4)(B)(iii).

⁴⁴ 85 Fed. Reg. 67830 (Oct. 26, 2020).

⁴⁵ VGP, Section 2.2.23 Underwater Ship Husbandry, pgs. 53-54.

⁴⁶ 85 Fed. Reg. 67830 (Oct. 26, 2020).

authority or requirement that biofouling be regulated as an incidental discharge in the proposed regulations.

Moreover, such a construction would create a conflict within VIDA. As discussed above, biofouling does not fit within the definition of incidental discharge under VIDA. Reading biofouling into VIDA through the stringency provision would effectively amend the incidental discharge definition. However, the definitions in legislation are meant to clarify the applicability and scope of the statute. Consequently, pursuant to the interpretive-direction canon, definitions and statements of applicability should be carefully followed.⁴⁷ To the extent that a conflict exists, the plain meaning of the definitions should prevail. In this case, even if the VIDA stringency provision would incorporate biofouling as an incidental discharge, biofouling nevertheless falls outside the VIDA incidental discharge definition. Thus, the most consistent VIDA construction would be to read the Stringency Provision as incorporating only discharges that fit within the VIDA definition of incidental discharge.

Biofouling is Not a *Discharge*

Congress defined *discharge* in VIDA, stating that it “includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping.”⁴⁸ The accumulation of organisms on a vessel does not fit within any of these examples. While the definition provides a non-exhaustive list, items not specifically listed include only those that are sufficiently similar to the examples provided.⁴⁹ The examples given in the definition of *discharge* indicate that Congress did not contemplate biofouling as a discharge. The attachment of organisms to the wetted surfaces is a natural process that does not require any human action to occur; “pumping,” “pouring,” “emptying,” “dumping,” “spilling,” “leaking,” and “emitting” all require a person to act. In order for a substance to spill or leak, someone must have taken action to bring aboard a fluid which has the potential to spill or to leak. To pump something requires human input, like operating a pump. Pumping does not occur spontaneously—neither does pouring, emptying, or dumping. Because each of these examples requires some human action to occur, the definition of *discharge* is limited to activities that require human action.

⁴⁷ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012, Thompson/West; St. Paul, Mn.) at 225; see also *Babbitt v. Sweet Home Chapter of Communities for a Great* (1995) 515 U.S. 687, 697-98, fn. 10.

⁴⁸ 33 U.S.C. § 1322(a)(9).

⁴⁹ See discussion above regarding *ejusdem generis*.

Biofouling organisms act independently of vessel operators. A vessel operator does not have to take any action to recruit organisms; marine organisms will attach to any suitable surface that is submerged in water. The natural detachment of these organisms is also an independent process that does not require “pumping,” “pouring,” “emptying,” “dumping,” “spilling,” “leaking,” or “emitting” by the vessel owner or operator. Organisms may detach from the hull of a vessel by swimming or falling off, or they may spawn. This natural process of organism attachment and detachment, which occurs independently of any human action, is dissimilar from human-dependent actions encompassed by the word *discharge*. Thus, biofouling is not a *discharge*.

Congress Intended to Exclude Biofouling

In VIDA’s legislative history, biofouling as a topic of discussion is conspicuously absent. Dissimilarly, ballast water appears as a frequent discussion topic. The 17-page Senate Report cited by USEPA in the rulemaking materials uses the word *ballast* 77 times. The Report details the risks of ballast water discharges, especially the impacts of ANS introductions. For example, the Report identifies the zebra mussel as a ballast-water introduced species that is causing significant damage in, and beyond, the Great Lakes.⁵⁰ It is clear from the Report that Congress was focused on addressing ANS introductions mediated through ballast water discharges.

However, the Report does not discuss the subject of biofouling at all. In fact, the words *biofouling* and *fouling* are not mentioned anywhere in the Report.⁵¹ Ballast water and biofouling are the two primary vectors for vessel-mediated ANS introductions, with biofouling being responsible “for up to 60 percent of the established ANS along the California coast.”⁵² Consequently, if Congress had intended for VIDA to apply to biofouling, it would have afforded a significant amount of discussion of biofouling in the legislative history.⁵³ Legislative history presents an opportunity for Congress to identify problems and explain how it intends to address them in legislation. Interpreting VIDA to cover biofouling would require the reader to conclude that Congress: (1) identified biofouling as a discharge incidental to the normal operation of a vessel; (2) identified vessel biofouling as a significant

⁵⁰ Errata to S. Rep. No. 115–89, pgs. 1-3 (2019)

⁵¹ Errata to S. Rep. No. 115–89 (2019).

⁵² Ruiz et al. 2011.

⁵³ Note that Congress defined *ballast water* in VIDA but provided no definition for *biofouling*. 33 U.S.C. § 1322(p)(1)(B)(i).

threat to aquatic ecosystems; and (3) failed to discuss the significant threat at all in the explanation of bill's purposes. The only reasonable reconciliation of the legislative history and enacted law is that Congress did not view the mere presence of biofouling as a *discharge incidental to the normal operation of a vessel*.

State Regulation of Biofouling Is in Harmony with VIDA

The States can continue to regulate biofouling without impeding federal government efforts to regulate incidental discharges. Although the states would be preempted from regulating in-water cleaning or establishing hull coating requirements, the states can impose limits on how much biofouling a vessel can have while present in their territories. In other words, VIDA allows the states to establish thresholds for how much wetted surface area on a vessel may be covered in biofouling. The remedies for violating such a law could include a penalty, orders to remove the vessel from state territory, or orders to conduct in-water cleaning in accordance with USEPA's regulations. To be clear, the States could not establish requirements on how to conduct in-water cleaning, and any state remedies would need to avoid frustrating USEPA's incidental discharge regulations.

Hulls and Associated Niche Areas

5. In-water cleaning should be prohibited in state-protected waters.

The proposed regulations state that “there may be places where in-water cleaning should not occur, notably in federally-protected waters, based on the unique resources present in those areas.”⁵⁴ California supports the protection of unique federal waters. However, the proposed regulations do not include language to prohibit in-water hull and niche cleaning in state-protected waters and should be revised accordingly. For instance, the Water Quality Control Plan for Ocean Waters of California (California Ocean Plan) allows for the designation of State Water Quality Protection Areas, including Areas of Special Biological Significance and General Protection areas, to protect and enhance ocean waters of the State.

There are presently 34 Areas of Special Biological Significance in California's ocean waters. The State has designated these areas to protect species or biological communities and assure maintenance of natural water quality. The California Ocean Plan contains implementation provisions for Areas of Special Biological Significance that include a prohibition on the discharge of

⁵⁴ 85 Fed Reg. 67868 (Oct. 26, 2020).

waste. General Protection areas, as well as other types of marine managed areas described in the California Ocean Plan, such as State Marine Reserves, also have restrictions that may prohibit or discourage in-hull and niche cleaning in or near these regions. To ensure the continued protection of **these areas and attainment of California's water quality standards**, the proposed regulations should be revised, consistent with the purpose of the Clean Water Act and USEPA's acknowledgment that there are places where in-water cleaning should not occur, to include language that prohibits in-water hull and niche cleaning in these state-protected waters.

Furthermore, the proposed regulations should include language that prohibits in-water hull and niche cleaning in areas which are listed for impairments, as prescribed by Section 303(d) of the Clean Water Act, for constituents associated with in-water hull cleaning and niche activities (without capture). For example, in-water hull cleaning on ships with copper- or zinc-based hull coatings may release quantities of copper or zinc that are harmful to the environment and human health. As such, in-water hull cleaning without the use of a capture system on ships with copper- or zinc-based hull coatings should be prohibited, at a minimum, in waters that are listed as impaired for copper or zinc. Examples of waterbodies that are listed as impaired for copper or zinc in California and have associated water-quality attainment strategies, such as prohibitions, include San Diego Bay, Newport Bay, Los Angeles/Long Beach Harbor, Santa Barbara Harbor, Morro Bay, and San Francisco Bay. While VIDA provides a mechanism to establish State No-Discharge Zones upon application by a State and approval by the USEPA Administrator, the process is onerous and it is unnecessary for these waters in particular, as the California State Water Resources Control Board has already made compelling cases to USEPA regarding the need for their protection and established special requirements to protect their water quality.

6. USEPA is incorrectly applying the U.S. Navy Fouling Rating (FR) Scale in the proposed regulations.

The proposed VIDA regulations incorporate the U.S. Navy FR scale to differentiate between levels of biofouling (from FR-0 to FR-100 by 10s) and to determine if in-water cleaning or in-water cleaning and capture is appropriate.⁵⁵ The FR scale was developed, and is used, to estimate the impact of drag on vessel operational efficiency and to determine when to

⁵⁵ 85 Fed. Reg. 67889 (section 139.22(c)) (Oct. 26, 2020); see also Naval Ships' Technical Manual, Chapter 81, Waterborne Underwater Hull Cleaning of Navy Ships, Revision 5, S9086-CQ-STM-010, 2006).

employ cleaning operations to improve operational efficiency.⁵⁶ The primary metric used to differentiate between categories is the height of the biofouling above the vessel surface (in simple terms, more height equals more drag).⁵⁷ It is not a tool to determine the risk of introducing ANS, and it does not reflect the extent of biofouling communities across the underwater surface area of a vessel. For example, a vessel can have a score of FR-40, FR-50, FR-60, or FR-70 if it is fouled with barnacles, tubeworms, or both. These scores apply whether the biofouling is present at 5% or 100%; there is no increase in score even though the biofouling extent increases 20-fold. Similarly, a vessel with 100% cover of “soft” biofouling made up of invasive tunicates or sea squirts (a clear risk) would be scored as only FR-30 because these organisms have a low profile and are considered “soft” fouling, whereas a vessel with a single barnacle or a small patch of barnacles would score FR-40. For these reasons, the FR scale is inappropriate for proposed regulations that are aimed at reducing the risk of introducing ANS. California recommends removing the FR scale from the proposed regulations.

The sole purpose for the use of the FR scale in the proposed regulations is to differentiate between microfouling (i.e., microscopic biofilm) and macrofouling (i.e., large, distinct organisms that are visible to the naked eye). In addition to removing the use of the FR scale, California suggests defining and using the terms “microfouling” and “macrofouling.” California also suggests using a size threshold to differentiate between the two, specifically categorizing organisms > 0.5 cm as macrofouling (as indicated in Morrisey et al., 2015).

7. The standards for hull and niche area cleaning in the proposed regulations are vague, do not protect against ANS introduction and water quality impacts, and do not meet technology-based requirements in VIDA.

VIDA states that applicable standards shall require “(I) with respect to conventional pollutants, toxic pollutants, and nonconventional pollutants (including aquatic nuisance species), the application of the best practicable control technology currently available; (II) with respect to conventional pollutants, the application of the best conventional pollutant control technology; and (III) with respect to toxic pollutants and nonconventional

⁵⁶ Naval Ships' Technical Manual, Chapter 81, Waterborne Underwater Hull Cleaning of Navy Ships, Revision 5, S9086-CQ-STM-010, pg. 81-1-1, 2006).

⁵⁷ Naval Ships' Technical Manual, Chapter 81, Waterborne Underwater Hull Cleaning of Navy Ships, Revision 5, S9086-CQ-STM-010, pg. 81-1-4, 2006).

pollutants (including aquatic nuisance species), the application of the best available technology economically achievable for categories and classes of vessels, which shall result in reasonable progress toward the national goal of eliminating discharges of all pollutants.”⁵⁸

However, the standards in the proposed regulation do not meet these technology-based requirements. For instance, the standards for hull cleaning are vague and make no reference to specific cleaning methods or technologies, which contradicts requirements for technology-based standards set forth in VIDA.

California recommends that USEPA prohibit in-water cleaning discharges where a capture system is not used, and require the use of drydock wherever possible, except potentially in the case of preventative cleaning of microfouling.

As written, proposed regulations allow in-water cleaning *without* capture under two scenarios: 1) if the biofouling is microfouling only or 2) if macrofouling is local in origin.⁵⁹

If biofouling is composed of microfouling only, the risk of introducing ANS is minimal, but the risk of releasing biocides from the antifouling coating remains. In-water cleaning without capture should not be allowed for vessels with biocide-based antifouling coatings unless independent data are available that demonstrate that the cleaning technology does not release biocides above an acceptable threshold. A standard for paint discharge that simply requires that no plume or cloud of paint result from the cleaning neither satisfies the technology-based standards applicable to VIDA nor protects water quality. California suggests allowing in-water cleaning without capture on vessels with microfouling only if the antifouling coating is biocide-free or if independent data show that biocide release is below an appropriate threshold.

The proposed regulations do not include guidance on how to determine whether organisms are local in origin, rendering this requirement too vague to enforce. This option should be available only to vessels that remain in the same water body *and* do not leave their home port. That is the only way to

⁵⁸ 33 U.S.C. § 1322(p)(4)(B)(I).

⁵⁹ 85 Fed. Reg. 67889 (section 139.22(c)) (Oct. 26, 2020).

be sure that the organisms are of local origin. Any active trading vessel with macrofouling will likely have existing biofouling from outside of the local area, and these should not be cleaned without capture. Biocide release is also a concern, especially when using more rigorous cleaning actions necessary for removing macrofouling. California suggests removing this exception.

8. USEPA violates VIDA by proposing to regulate in-water cleaning and capture operations as an incidental discharge.

In-water cleaning and capture (IWCC) technologies generally include two connected units: 1) a cleaning unit with rotating brushes, high-pressure water jets, or other mechanisms that remove biofouling and particulate and dissolved biocides and 2) a treatment/filtration unit (i.e., reception facility) where these removed organisms or biocides are filtered from the waste stream prior to the water being returned to the local water body. The cleaning unit is operated underwater alongside the hull of the vessel, but the waste stream is then brought topside through an umbilical and associated pumps to the reception facility that is typically located on an adjacent barge or dock. In either case, these topside filtration and treatment systems are owned or operated by the in-water cleaning company that has been hired to manage the waste.

The supporting material to USEPA's proposed regulations states:

IWCC systems reduce the discharge of fouling organisms and coating particles into the surrounding environment, and allow solids removed from the vessel hulls to be collected and disposed of onshore. Cleaning of hulls and niche areas, such as with IWCC systems, is necessary for vessel maintenance, and therefore the discharge of treated or filtered effluent from these systems is considered incidental to the normal operations of a vessel and **authorized under the VIDA. IWCC discharges result 'from a protective, preservative . . . application to the hull of a vessel'** (33 U.S.C. § 1322(a)(12)(a)(i)).⁶⁰

This description is inaccurate. The effluent is not a discharge from a protective or preservative application to the vessel hull. The waste stream that results from the filtration and treatment system is now an industrial discharge that is the responsibility of the business entity that owns and operates the reception facility, not the vessel owner or operator. As such,

⁶⁰ 85 Fed. Reg. 67868 (Oct. 26, 2020).

discharges from in-water cleaning with capture technologies are not incidental to the normal operation of the original vessel and therefore fall outside the scope of discharges subject to VIDA. Additionally, cleaning with IWCC should not be viewed as necessary for vessel maintenance, since there are other proactive approaches that would not require reactive IWCC, such as the appropriate use of antifouling coatings or proactive periodic cleaning to prevent or remove biofilms.

Discharge of a treated waste stream from IWCC technologies is analogous to discharge of treated ballast water from barge-based or shore-based ballast water reception and treatment facilities. That treated ballast water is not an incidental discharge under the **existing VGP requirements or under USEPA's proposed regulations**. This is logical because the discharge is no longer the result of normal operation of a vessel; it is the result of treatment by a facility that is separate from the vessel. Section 2.2.3.5.1.2 of the VGP reads:

EPA notes that transferring ballast water to a treatment barge for **eventual treatment and discharge could constitute "on-shore treatment"** for purposes of Part 2.2.3.5.1.2. The discharge of treated ballast water (transferred from other vessels) from a treatment barge is not eligible for coverage under the VGP as this is a discharge from an industrial operation, not a discharge incidental to the normal operation of a vessel. Instead, these vessels must apply for individual NPDES permit coverage from the appropriate NPDES permit authority, generally the State in which they are operating.⁶¹

The same logic applies to the waste stream generated by reception facilities for in-water cleaning with capture. The waste stream is processed by a vendor, not the vessel that it originated from, and the point source of the discharge is the reception facility, not the vessel. As with the discharge of treated ballast water from a barge-based or shore-based treatment facility, the discharge of effluent from in water cleaning with capture should be regulated through appropriate NPDES permitting authorities, either the USEPA or states that have been delegated NPDES authority, not under VIDA.

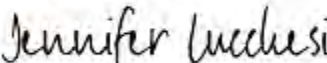
In conclusion, the State Lands Commission and the State Water Resources Control Board request that you, as Governor of California, issue an objection letter to USEPA stating that the proposed Vessel Incidental Discharge National Standards of Performance are **not sufficiently protective of California's**

⁶¹ VGP, Section 2.2.3.5.1.2 Onshore Treatment of Ballast Water, pg. 37.

environment and human health based upon the objections set forth in this letter and the intent of the Clean Water Act.

If you have any questions regarding the objections in this letter, please do not hesitate to contact us.

Sincerely,

DocuSigned by:

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Jennifer Lucchesi
Executive Officer
California State Lands Commission

DocuSigned by:

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Eileen Sobeck
Executive Director
State Water Resources Control Board

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January 8, 2020



To: Steve Padilla, Chair, California Coastal Commission

CC: John Ainsworth, Executive Director, California Coastal Commission
Larry Simon, Manager, Energy and Ocean Resources, California Coastal Commission

Re: Item Th6a, National Consistency Determination for Performance Standards for Discharges Incidental to Normal Operations of Commercial Vessels

Dear Chair Padilla,

Please accept the following comments in support of the staff recommendation on Item Th6a on the Coastal Commission's January 14 agenda. As reflected in the staff report, the proposed national performance standards for discharges incidental to normal operations of commercial vessels fail to ensure consistency with the California Coastal Management Program (CCMP). Because the CCMP incorporates all Clean Water Act-based requirements, the Commission appropriately considers the Clean Water Act, the Ocean Plan and the Water Code in determining consistency.

EPA's proposed standards inappropriately characterize bio-fouling and in-water cleaning and capture systems as "incidental discharges" under the Clean Water Act. In-water cleaning and capture system discharges result from the use and operation of systems that are intended to "capture coatings and biofouling organisms, filter biofouling organisms from the effluent, and minimize the release of biocides." (85 Fed. Reg. 67868.) These discharges are not incidental because the effluent is transported to a processing facility where it is discharged. Thus, these discharges are not incidental to normal operation of a vessel and are therefore particularly appropriate for additional treatment and heightened scrutiny. In addition, because the proposed standards include no provisions for California to strengthen the national standards to meet the state's existing water quality protection standards, they will lead to degradation of coastal water quality and marine resources in California coastal waters, including the state's network of Marine Protected Areas and Areas of Biological Significance.

Further, the proposed regulations allow in-water hull and niche cleaning in waters which are already impaired and thus unable to meet beneficial uses. This would result in copper and zinc discharges in water bodies already impaired for these pollutants. San Diego in particular has numerous water bodies impaired for these metals. Any additional water quality impact from increased pollutant loads would frustrate efforts to establish Total Maximum Daily Loads, monitor existing and



future discharges, and accurately model efforts to improve water quality in impacted water bodies.

Therefore, we strongly support the State Water Resources Control Board, the State Lands Commission, and Commission staff's recommendation to object to EPA's consistency determination.

Sincerely,

Mandy Sackett
California Policy Coordinator
Surfrider Foundation

Dave Grubb
Board Member
Environmental Center of San Diego