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## STAFF REPORT: REGULAR CALENDAR

**Consistency Determination No.:** CD-0007-20

**Federal Agency:** U.S. Environmental Protection Agency

**Location:** Statewide

**Project Description:** National Consistency Determination for Performance Standards for Discharges Incidental to Normal Operations of Commercial Vessels.

**Staff Recommendation:** Objection

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## SUMMARY OF STAFF RECOMMENDATION

The U.S. Environmental Protection Agency (EPA) has submitted a national consistency determination to establish national performance standards for discharges incidental to normal operations of commercial vessels. Discharges from commercial vessels have been regulated under the Clean Water Act section 402 National Pollutant Discharge Elimination System permitting regime through the 2013 Vessel General Permit (VGP). The principal effect of the 2018 Vessel Incidental Discharge Act (VIDA, which amended the Clean Water Act) is to transfer authority for establishing discharge requirements for commercial vessels from the VGP permitting program to the new uniform national regulation-based program under CWA section 312(p). The new statute and uniform standards do not include the VGP's state-specific requirements and do not allow for state-specific distinctions in the development of the technology-based standards.

After analysis of the proposed standards, consultation with the California State Lands Commission and the State Water Resources Control Board, and review of both agencies'

November 25, 2020 comment letters submitted to EPA on the proposed national standards, the staff recommends that the Commission find that these standards do not adequately protect California's coastal waters to the maximum extent practicable. These national standards include no provisions for California to strengthen the standards to meet the state's existing water quality protection standards. If implemented, these performance standards could lead to degradation of coastal water quality, adverse effects on marine habitat and resources, and further introduction and spread of invasive aquatic species. Therefore, the staff recommends that the Commission find that the proposed regulations and national standards are inconsistent with the water quality and marine resources protection policies of the Coastal Act (Sections 30230, 30231, and 30412).

In addition, Section 307(f) of the federal Coastal Zone Management Act (16 USC § 1456(f)), specifically incorporates all Clean Water Act-based requirements into the California Coastal Management Program (CCMP). Thus, in reviewing the impacts of proposed discharges on water quality, the Commission considers not only the marine resource and water quality policies in Chapter 3 of the Coastal Act, but also all of the applicable federal and state requirements established by or pursuant to the Clean Water Act, the California Ocean Plan, and California Water Code Section 13142.5, as well as the directive in Chapter 5 (Section 30412(a)) of the Coastal Act to coordinate with and rely on determinations of the RWQCBs and SWRCB. Employing that standard, the Commission objects to this consistency determination based on its finding that the potential discharges to coastal waters that would occur under EPA's proposed national performance standards for discharges incidental to normal operations of commercial vessels are not consistent with the policies set forth in Chapter 3, as well as these additional Clean Water Act-based requirements.

The staff therefore recommends that the Commission **object** to EPA's consistency determination CD-0007-20. The motion and resolution are on Page 4 of this report. The standard of review for this consistency determination is the Chapter 3 policies of the Coastal Act.

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### [EXHIBITS](#)

Exhibit 1 – November 25, 2020, letter from State Water Resources Control Board to U.S. Environmental Protection Agency.

Exhibit 2 – November 25, 2020, letter from California State Lands Commission to U.S. Environmental Protection Agency.

Exhibit 3 – November 25, 2020, letter from California State Lands Commission, California State Water Resources Control Board, Hawaii Department of Land and Natural Resources, Oregon Department of Environmental Quality, Washington Department of Ecology, and Washington Department of Fish and Wildlife to U.S. Environmental Protection Agency.

## I. FEDERAL AGENCY'S CONSISTENCY DETERMINATION

The U.S. Environmental Protection Agency has determined the project is consistent to the maximum extent practicable with the California Coastal Management Program.

## II. MOTION AND RESOLUTION

### MOTION:

I move that the Commission **concur** with consistency determination CD-0007-20 that the project described therein is fully consistent, and therefore consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).

Staff recommends a **NO** vote on the motion. Failure of this motion will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

### RESOLUTION:

The Commission hereby **objects** to consistency determination CD-0007-20 by the U.S. Environmental Protection Agency for the proposed national performance standards for discharges incidental to the normal operation of vessels on the grounds that the national standards described therein are not consistent to the maximum extent practicable with the enforceable policies of the California Coastal Management Program.

## III. 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.

### **Procedure if the Commission finds that the proposed activity is inconsistent with the CCMP.**

Section 930.43(a) of the federal consistency regulations (15 CFR § 930.43(a)) requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

(a) In the event the State agency objects to the Federal agency’s consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe: (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and (2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency’s objection.

As described in the Water Quality section below, the Environmental Protection Agency’s (EPA) proposed national standards for discharges incidental to the normal operation of vessels are not consistent with the water quality policies of the CCMP. Pursuant to the requirements of Section 930.43 of the federal regulations implementing the CZMA, the Commission is responsible for identifying measures, if they exist, that would allow the activity to be found consistent with the CCMP. EPA asserts that its proposed national standards cannot be modified to include any state-specific distinctions to protect unique water quality resources of individual states, including California, with the implication that there are no alternative measures that could bring the proposed national standards into compliance with the water quality policies of the CCMP. However, as discussed below in Section IV.B (Water Quality) and further analyzed in [Exhibits 1-3](#) of this report, the Commission notes that the State Lands Commission and State Water Resources Control Board concluded that EPA has exceeded its authority in proposing to regulate biofouling and in-water cleaning and capture systems as “incidental discharges.” EPA should eliminate from its national consistency determination those proposed standards that do not qualify under VIDA as “incidental discharges.” Doing so would ensure that California can continue to regulate biofouling more stringently than proposed by EPA, thereby bringing EPA’s proposed rule to proceed in a manner more closely in conformity with the CCMP.

### **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 projects is that the activity must be “consistent to the maximum extent practicable” (CZMA 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.”<sup>1</sup> EPA states in its consistency determination that Congress intended in the Vessel Incidental Discharge Act (VIDA) of 2018 that EPA

<sup>1</sup> 15 CFR Section 930.32.

promulgate uniform national vessel discharge standards without state-by-state distinctions. EPA further states that:

. . . the performance standards in the VIDA rulemaking are consistent to the maximum extent practicable. To the extent the standards would not be fully consistent, the subsequently enacted VIDA statute precludes EPA from full consistency with state-specific enforceable policies.

## **IV. FINDINGS AND DECLARATIONS**

### **A. PROJECT DESCRIPTION**

On October 26, 2020, EPA proposed new regulations under the federal Clean Water Act, as amended by the Vessel Incidental Discharge Act (VIDA) of 2018, to establish national performance standards for discharges incidental to the normal operation of primarily commercial vessels. On November 4, 2020, EPA submitted to the Commission (and numerous other coastal states) a national consistency determination for these discharge standards. The consistency determination states that:

The proposed rule would establish general and specific technology-based discharge standards of performance for approximately 82,000 domestic and international non-military, non-recreational vessels operating in the waters of the United States or the waters of the contiguous zone. Discharges from commercial vessels have been regulated under the CWA section 402 National Pollutant Discharge Elimination System permitting regime through the 2013 Vessel General Permit (VGP). The principal effect of the VIDA is to transfer authority for establishing discharge requirements for commercial vessels from the VGP permitting program to the new uniform national regulation-based program under CWA section 312(p). Absent certain narrow exceptions, VIDA requires that the proposed standards be at least as stringent as the general requirements contained in the 2013 VGP.

CWA section 312(p), captioned “uniform national standards for discharges incidental to normal operation of vessels,” directs EPA to promulgate performance standards that apply consistently throughout the country to the regulated vessel discharges covered by the proposed VIDA rule. Among Congress’ purposes in enacting the VIDA is to provide for uniform, environmentally sound standards and requirements for the management of discharges. The approach does not allow for state-specific distinctions in the development of the technology-based standards.

The Final VGP covered by EPA’s 2016 national consistency determination incorporated state-specific conditions identified by some of the states. That is not the case in the new national consistency determination submitted by EPA which arose from the 2018 VIDA. EPA states that:

In contrast to the VGP, it is clear that Congress intended VIDA to result in uniform national standards without state-by-state distinctions. For example, while CWA section 312(p)(4)(C) expressly allows EPA to distinguish between “classes, types, and sizes of vessels” as well as “between new vessels and existing vessels,” the statute makes no mention of state-based distinctions in the establishment of the performance standards. Moreover, while the statute requires the VIDA standards to be at least as stringent as the VGP, the statute does not include the VGP’s state-specific requirements (from Section 6 of the VGP) as part of the minimum requirements of stringency (see CWA section 312(p)(4)(B)(iii)). Lastly, the statute requires that the proposed standards be established based on the best available technology currently achievable, the best conventional pollutant control technology, or the best practicable control technology currently available. Therefore, based on the national consistency determination prepared for the VGP, EPA now determines that the performance standards in the VIDA rulemaking are consistent to the extent practicable. To the extent the standards would not be fully consistent, the subsequently enacted VIDA statute precludes EPA from full consistency with state-specific enforceable policies.

Finally, EPA states in its national consistency determination that: (1) the requirements in the proposed rule are not significantly different than those established under the 2013 VGP; (2) the proposed changes in the rule from the VGP requirements are not expected to generate new or different coastal effects; (3) any direct or indirect coastal effects resulting from the proposed rule are expected to be environmentally beneficial; and (4) the rule will reduce the volume of pollutants entering the waters of the United States and the contiguous zone.

The EPA has determined that the proposed rule, regulations, and national standards (which lack any state-specific distinctions) are consistent to the maximum extent practicable with the enforceable policies (outside of the statutorily imposed limitations under the CWA Section 312, described above) of all state coastal management programs, including the water quality policies of the California Coastal Management Program.

## **B. WATER QUALITY**

Coastal Act Section 30230 states:

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.

Coastal Act Section 30231 states:

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 water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, minimizing alteration of natural streams.

Coastal Act Section 30412 states in part:

(a) In addition to Section 13142.5 of the Water Code, this section shall apply to the commission and the State Water Resources Control Board and the California regional water quality control boards.

(b) The State Water Resources Control Board and the California regional water quality control boards are the state agencies with primary responsibility for the coordination and control of water quality. The State Water Resources Control Board has primary responsibility for the administration of water rights pursuant to applicable law. The commission shall assure that proposed development and local coastal programs shall not frustrate this section. The commission shall not, except as provided in subdivision (c), modify, adopt conditions, or take 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 or the administration of water rights.

Except as provided in this section, nothing herein shall be interpreted in any way either as prohibiting or limiting the commission, local government, or port governing body from exercising the regulatory controls over development pursuant to this division in a manner necessary to carry out this division.

The above Coastal Act policies are designed to protect water quality and marine resources of the coastal zone. The EPA states that its proposed national standards for discharges incidental to the normal operation of vessels will likewise protect coastal water quality. However, after analysis of the proposed standards, consultation with the California State Lands Commission and the State Water Resources Control Board, and review of both agencies' November 25, 2020 comment letters submitted to EPA on the proposed national standards, the Commission finds that the standards do not adequately protect California's coastal waters to the maximum extent practicable. If implemented, these performance standards could lead to degradation of coastal water quality, adverse effects on marine habitat and resources, and further introduction and spread of invasive aquatic species.

The potential adverse impacts to coastal water quality and marine habitat identified by the two aforementioned state agencies are incorporated into this report by reference and serve as the basis for the Commission's objection to the subject consistency determination.



[Exhibits 1 and 2](#) provide the complete letters sent by the two agencies to EPA. The following is a summary of the significant concerns with the proposed national standards raised by the State Lands Commission and the State Water Resources Control Board that are relevant to the Commission’s review under the CZMA:

1. The proposed regulations reveal EPA’s intent to abandon existing California water quality protections.
2. EPA identifies biofouling (the accumulation of aquatic organisms on vessel hulls or appendages) as a “discharge incidental to the normal operation of a vessel” in the proposed regulations, which as a result would preempt California from regulating vessel biofouling. California’s coastal and estuarine environments are particularly vulnerable to biofouling introductions of aquatic nuisance species. If EPA regulates biofouling under the 2018 Vessel Incidental Discharge Act (VIDA), California will be preempted from implementing a biofouling management program. EPA’s approach to biofouling is significantly less protective than California’s existing biofouling management regulations.
3. EPA’s proposed discharge standards for vessel in-water cleaning and capture operations are inadequate to protect California waters from invasive species and would violate existing water quality objectives in California. In addition, EPA lacks the authority to regulate effluents from in-water cleaning and capture systems under VIDA.
4. EPA did not perform an independent and adequate analysis of Best Available Technology for ballast water management systems, and without such an analysis EPA has no basis for proposing a national ballast water discharge standard for use in California.
5. EPA’s proposed regulations fail to be as stringent as the 2013 Vessel General Permit (contrary to the language of the 2018 VIDA) and weaken protections against aquatic nuisance species introductions from ballast water discharge.
6. EPA failed to consider best management practices that would enhance the effectiveness of Best Available Technology for ballast water discharges, including ballast water exchange plus ballast water treatment to control and abate ballast water discharges.

The Commission concurs with the State Water Resources Control Board’s statement of November 25, 2020, that “The proposed regulations would . . . compromise the State’s ability to protect public health and the environment” and the State Lands Commission’s statement on the same date that “USEPA’s proposed Vessel Incidental Discharge National Standards of Performance are not sufficiently stringent to protect California’s waters from the threat of species introductions.”

A November 25, 2020, joint letter to EPA from the two California agencies, Hawaii Department of Land and Natural Resources, Oregon Department of Environmental Quality, Washington Department of Ecology, and Washington Department of Fish and Wildlife, ([Exhibit 3](#)) states that:

The proposed standards of performance for discharges are far weaker than those states have used for decades to protect their waters from aquatic nuisance species and water pollution. Instead of seriously reviewing and

applying current state regulatory requirements, one of the deepest sources of this information based on decades of experience and application, USEPA chose to simply apply the lowest common denominator of the current standards of Part 2 of the VGP [Vessel General Permit] rather than reviewing and adopting the more stringent state-approved standards in Part 6 of the VGP.

The proposed water quality standards, or lack of standards in some cases, would allow discharges of pollutants in concentrations that are orders of magnitude higher than state standards for the same pollutants. For example, USEPA did not propose specific water quality standards for copper or zinc. Vessel owners and operators are told to “minimize” those discharges. Based on effluent data from in-water cleaning operations (without capture), the proposed regulations would allow discharge concentrations for total copper as high as 34,000 micrograms/liter or about 9,000 times greater than California’s water quality objective for that pollutant, and the proposed regulations would allow concentrations of total zinc as high as 29,000 micrograms/liter or about 300 times greater than California’s water quality objective. Essentially, USEPA is proposing to allow the discharge of an industrial waste stream directly into U.S. surface waters, undermining the Clean Water Act’s purpose of preventing, reducing, and eliminating pollution into the nation’s waters. USEPA must revise the proposed regulations to contain standards to be as stringent as those promulgated by States, in compliance with the intent of the Clean Water Act.

In conclusion, the Commission finds that EPA’s proposed new regulations under the federal Clean Water Act (as amended by the Vessel Incidental Discharge Act (VIDA) of 2018) to establish national performance standards for discharges incidental to the normal operation of primarily commercial vessels, and which include no provisions for California to strengthen the national standards to meet the state’s existing water quality protection standards, will lead to degradation of coastal water quality and marine resources in California coastal waters. Therefore, the Commission finds that the proposed regulations and national standards are inconsistent with the water quality and marine resources protection policies of the Coastal Act (Sections 30230, 30231, and 30412).

In addition, Section 307(f) of the federal Coastal Zone Management Act (16 USC § 1456(f)), specifically incorporates all Clean Water Act-based requirements into the California Coastal Management Program (CCMP). Thus, in reviewing the impacts of proposed discharges on water quality, the Commission considers not only the marine resource and water quality policies in Chapter 3, but also all of the applicable federal and state requirements established by or pursuant to the Clean Water Act, the California Ocean Plan, and California Water Code Section 13142.5, as well as the directive in Chapter 5 (Section 30412(a)) of the Coastal Act to coordinate with and rely on determinations of the RWQCBs and SWRCB. Employing that standard, the Commission objects to this consistency determination based on its finding that the potential discharges to coastal waters that would occur under EPA’s proposed performance standards for discharges incidental to normal operations of commercial vessels are not consistent with the policies set forth in Chapter 3, as well as these additional Clean Water Act-based requirements.

EPA asserts that, even if its proposed regulations are not fully consistent with the CCMP, they are consistent with the CCMP to the maximum extent practicable because VIDA requires a single, national standard and does not permit any state-by-state differences in regulation. However, the fact that VIDA requires uniform national standards does not mean that the proposed regulations are consistent to the maximum extent practicable with the CCMP. First, it appears that EPA has exceeded its authority in proposing to regulate biofouling and in-water cleaning and capture systems as “incidental discharges.” Eliminating the proposed federal regulation of these activities would permit California to continue regulating them in a manner that is more protective of coastal waters than currently proposed by EPA and would therefore help bring the proposed rule closer to conformity with the CCMP. In addition, existing law does not prevent EPA from taking that action, and may even require EPA to do so; thus, EPA cannot claim that federal law prevents it from modifying its proposed regulations in this manner, which would help achieve closer consistency with the CCMP.

In addition, even if EPA has the authority to regulate biofouling and vessel in-water cleaning and capture operations as “incidental discharges,” it cites no evidence that federal law prevents it from adopting more stringent nationwide discharge standards for such activities. Even if EPA cannot adopt different, more stringent standards that apply in different states or regions, the agency does not explain why it is unable to adopt more stringent nationwide standards that could help it achieve consistency with both the CCMP and other states’ coastal plans.

**APPENDIX A: SUBSTANTIVE FILE DOCUMENTS**

1. Consistency Determination CD-0007-20 (USEPA, National consistency determination to establish national performance standards for discharges incidental to normal operations of commercial vessels).
2. California Coastal Act of 1976.
3. Federal Coastal Zone Management Act.
4. Federal Clean Water Act.
5. Vessel Incidental Discharge Act (VIDA) of 2018.
6. California Water Code.
7. California Ocean Plan.
8. November 25, 2020, letter from State Water Resources Control Board to U.S. Environmental Protection Agency.
9. November 25, 2020, letter from California State Lands Commission to U.S. Environmental Protection Agency.
10. November 25, 2020, letter from California State Lands Commission, State Water Resources Control Board, Hawaii Department of Land and Natural Resources, Oregon Department of Environmental Quality, Washington Department of Ecology, and Washington Department of Fish and Wildlife to U.S. Environmental Protection Agency.