



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 21 2008

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Barbara Boxer
Chairman
Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Madam Chair:

Thank you for considering our comments on S. 2766, a bill to amend the Federal Water Pollution Control Act to address certain discharges incidental to the normal operation of a recreational vessel, which was ordered reported out of your committee today without amendment.

Summary of Bill

S. 2766 would amend § 402 of the Clean Water Act (CWA) by adding a new § 402(r) to exempt discharges incidental to the normal operation of recreational vessels from the National Pollutant Discharge System (NPDES) permitting program. The bill instead would provide for the control of such discharges by adding a new § 312(o) to the CWA.

Under the bill's new CWA § 312(o), the Environmental Protection Agency (EPA), in consultation with the US Coast Guard (USCG), the Department of Commerce, and interested States, would evaluate discharges incidental to the normal operation of recreational vessels, identify those discharges for which it is reasonable and practicable to develop management practices, develop such management practices, and then promulgate performance standards for the management practices. Following EPA promulgation of the performance standards, the USCG would be responsible for promulgation of regulations governing the installation and use of management practices on recreational vessels. Thereafter, the operation of a recreational vessel or any discharge incidental to their normal operation would be prohibited in waters of the US or contiguous zone, unless the vessel owner or operator is using an applicable management practice meeting the EPA performance standards. The bill provides for EPA review (at five year intervals) of the determinations to require management practices and of the performance standards. Unlike other provisions in § 312 (addressing vessel sewage and discharges incidental to the normal operation of vessels of the Armed Forces), new § 312(o) would not preclude the development of management practices or discharge standards by the States for recreational vessels.

General Comment

As a result of a US District Court decision (*Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI, (N.D. Cal., September 18, 2006)), barring judicial or legislative action, as of September 30, 2008, discharges incidental to the normal operation of vessels, both commercial and recreational, will be subject to NPDES permitting. We do not believe that the NPDES program provides the appropriate tools for addressing discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port-to-port, state-to-state, and country-to-country, and we thus support the objective of the bill, which would exempt discharges incidental to the normal operation of recreational vessels from NPDES permitting.

At the same time, however, we strongly believe that the Administration's alternative legislative text, which was developed after extensive inter-agency coordination, provides the best way forward to establish an appropriate and effective regulatory program to address discharges incidental to the normal operation of vessels. Unlike S. 2766 (and its House counterpart H.R. 5949), which address only those discharges incidental to the normal operation of recreational vessels, the Administration proposal more comprehensively addresses discharges incidental to the normal operation of all vessels. In particular, in lieu of using NPDES permits, it provides for the evaluation, development, and implementation of environmentally sound, nationally uniform and enforceable best management practices, based on the "best available technology" factors of the CWA. It would exclude recreational vessels less than 79 feet in length from this new program, as well as from NPDES permitting, while still leaving the States free to regulate those vessels if they deem it appropriate. This approach is preferable to that in S. 2766 as it provides for the development of national uniform enforceable controls focusing on discharges from commercial and large recreational vessels, which are more likely to be of concern due to their discharge constituents and volume.

A copy of that Administration alternative proposal appears as section 4 of the legislative text attached to the Administration's April 1, 2008, views letter on S. 1578. That attachment also included additional legislative text that would amend the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA) to make important and necessary improvements to the USCG's authority to more strongly regulate discharges of ballast water and other vessel-related vectors of aquatic nuisance species. While we support simultaneous and comprehensive action to better address aquatic nuisance species by the USCG through a strengthened NANPCA and to address other discharges incidental to the normal operation of vessels through national uniform standards developed under separate authority by EPA, we recognize that Congress appears to be proceeding to address these issues in separate legislative vehicles. In light of that, in order to better address the issue of NPDES permitting of discharges incidental to the normal of vessels, we have reformatted § 4 of the Administration

proposal as an amendment to S. 2766, and which, like S. 2766, would place the new program under § 312 of the CWA. A copy of that text is attached for your consideration.

Specific comments on drafting of S. 2766

1) **Scope of vessels covered:** As noted above, the current scope of S. 2766 is limited to discharges incidental to the normal operation of recreational vessels. We strongly recommend that it also include creation of a regulatory program for discharges incidental to the normal operation of commercial vessels as well, in lieu of NPDES permitting.

2) **Enforcement:** The current draft of S. 2766 creates a prohibition against discharges incidental to the normal operation of recreational vessels unless an applicable management practice is used. However, the bill does not clearly specify an enforcement mechanism in the event that prohibition is violated. We recommend, at a minimum, amending the second sentence of existing CWA § 312(j) to insert immediately after the reference to subsection (h) an additional specific reference to the bill's new subsection (o).

3) **Development of regulatory controls:** With respect to EPA actions, the bill in effect provides for a three step process consisting of first, evaluate and identify discharges for which management practices are reasonable and practicable, second, develop management practices, and third, promulgate performance standards for the management practices. It is unclear as to why performance standards are made a separate and third step, and we recommend a more straight forward two step process under which discharges would first be evaluated to determine when controls are reasonable and practicable, and then best management practices (which would include any necessary performance standards), are developed. In addition, we note the bill provides one year time periods for each of its three steps, which is an insufficient timeframe for the activities required by the bill.

4) **State regulation:** We note that unlike the case for the other discharges subject to § 312, under which States are pre-empted from regulation except through the implementation of no discharge zones, S. 2766 would allow for State regulation as well. It is unclear why this departure from the existing model of CWA § 312 was chosen, or why the federal government would be mandated to develop federal standards for the universe of recreational vessels when they already are, and would remain, subject to State regulation.

5) **Geographic scope:** We note that the bill's prohibition against discharge extends to waters of the contiguous zone. That is a greater geographic scope than NPDES permitting for vessels being used as a means of transportation, which as a general matter is tied to the three mile outer limit of the territorial sea. See, CWA § 502(12)(B).

6) **Authorization of Appropriations:** Despite creating a new program for regulation of discharges from upwards of 18 million recreational vessels, the bill contains no authorization of appropriations to EPA or the USCG to carry out these new duties. We recommend that the bill authorize to EPA and the USCG "such sums as are necessary for each of fiscal years 2008 through 2012 to carry out responsibilities assigned by the Act," which is consistent with the approach taken in the Administration legislative proposal.

The Office of Management and Budget advises that there is no objection to the transmission of this letter from the viewpoint of the President's program. Again, thank you for your consideration of these comments. If you have any further questions, please contact me or your staff may contact Ms. Christina J. Moody in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0260.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Bliley', written in a cursive style.

Christopher P. Bliley
Associate Administrator

Attachment

cc: James M. Inhofe, Ranking Member

AMENDMENT TO S. 2766

OFFERED BY _____

Strike the text and insert the following:

A Bill

To amend the Federal Water Pollution Control Act to provide for the establishment of nationally uniform environmentally sound standards for certain discharges incidental to the normal operation of vessels, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE

This Act may be cited as the "Clean Vessel Act of 2008".

SEC. 2. PURPOSE

The purpose of this section is to—

(a) provide for the evaluation of, and establishment of nationally uniform, environmentally sound standards for, discharges incidental to the normal operation of vessels; and

(b) establish procedures for designation of no discharge zones as necessary to protect waters within the jurisdiction of a State from the effects of discharges incidental to the normal operation of vessels.

SEC 3. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

Section 312 of the Federal Water Pollution Control Act (33 U.S.C. 1322) is amended by adding at the end the following:

“(o) DEVELOPMENT AND IMPLEMENTATION OF STANDARDS FOR CERTAIN DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF VESSELS. —

“(1) EVALUATION.—Within 3 years after the date of enactment of the Clean Vessel Act of 2008 the Administrator, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall conduct an evaluation of vessel discharges into navigable waters, other than discharges identified in paragraphs (6) and (7) of this subsection, incidental to the normal operation of vessels. The evaluation shall include but need not be limited to—

“(A) a characterization of the various types and composition of such discharges by different classes of vessels;

“(B) the volumes of such discharges for representative individual vessels and by classes of vessels in the aggregate;

“(C) an analysis of technologies or best management practices, and their associated costs, for the control of such discharges;

“(D) an analysis of the extent to which such discharges are currently subject to regulation under existing federal laws or binding international obligations of the United States;

“(E) the locations of such discharges;

“(F) analyses and conclusions as to the nature and extent of potential effects of such discharges on human health, welfare, and the environment; and

“(G) recommendations as to steps, including regulatory changes, together

with a schedule for implementation, that are appropriate to address such discharges.

“(2) INSPECTIONS, MONITORING, AND ENTRY; COOPERATIVE AGREEMENT.—The Administrator may use the authorities provided by sections 308 (a) and (b) of this Act (33 U.S.C. 1318(a)-(b)) whenever required to carry out the objectives of this subsection. The Administrator also may enter into cooperative agreements with other appropriate Federal agencies, with respect to use of their facilities, equipment, or personnel in carrying out activities relating to implementation of this subsection. The Administrator may use the authorities provided in section 309 of this Act (33 U.S.C.1319) to enforce any actions taken under this paragraph.

“(3) PUBLIC COMMENT.—The Administrator shall make a draft of the evaluation available for public comment, including publication of a notice of availability in the Federal Register, and shall complete the evaluation after taking into account any comments received.

“(4) REGULATION OF DISCHARGES.—

“(A) IN GENERAL.—Notwithstanding any other provision of this Act, any requirement to obtain a permit under section 402 of this Act (33 U.S.C. 1342) for a discharge incidental to the normal operation of a vessel subject to paragraph (1) of this subsection is suspended for a period of 6 years from the date of enactment of Clean Vessel Act of 2008. The Administrator, taking into account the evaluation prepared under paragraph (1) of this subsection, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall promulgate a final rule to establish an appropriate program for discharges incidental to the normal operation of vessels into navigable waters. Following promulgation of the final rule

required by this paragraph, no permit under section 402 of this Act (33 U.S.C. 1342) shall be required for discharges incidental to the normal operation of a vessel subject to paragraph (1) of this subsection. The program established under this subsection shall be designed to establish enforceable uniform national discharge standards for discharges warranting such regulation and may be modeled in whole or in part on the regulatory program for vessels of the Armed Forces under subsection (n) of this section (33 U.S.C. 1322(n)), provided, however, that such standards shall be based upon the best available technology as determined in accordance with section 304(b)(2)(B) of this Act (33 U.S.C. 1314(b)(2)(B)) and its implementing regulations.

“(B) SAVINGS CLAUSE.—Except as expressly provided in this subsection, nothing in this subsection alters any existing requirements of any other federal law, including, but not limited to, section 311 of this Act (33 U.S.C. 1321), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 *et seq.*), and Title XIV, Pub. L. 106-554 (Dec. 31, 2000, 114 Stat. 2763) [Certain Alaska Cruise Ship Operations] (codified at 33 U.S.C. 1901 note).

“(C) ONE TIME EXTENSION.—Following opportunity for public comment, and with 6 months notice in advance to the Senate Committees on Commerce, Science, and Transportation and on Environment and Public Works, and the House of Representatives Committee on Transportation and Infrastructure, the Administrator may extend the deadline in paragraph (4)(A) of this subsection one time for a period not to exceed two years to allow for completion of the regulation specified therein.

“(D) ENFORCEMENT.—Any national uniform discharge standards or

prohibitions under this section shall be enforced by the Secretary of the Department in which the Coast Guard is operating or by a State in the same manner as provided for in subsections (i), (j), (k), (l), and (m) of this section (33 U.S.C. 1322(i), (j), (k), (l), and (m)).

“(E) JUDICIAL REVIEW.—

“(i) An interested person, including any State or other sovereign entity, may file a petition for review of a final action by the Administrator under this subsection in the United States Court of Appeals for the District of Columbia Circuit. Any such petition shall be filed within 120 days from the date of such final action, except that if such petition is based solely on grounds arising after such 120th day, then any petition for review under this paragraph shall be filed within 120 days after such grounds arise.

“(ii) Final action for which review could have been obtained under paragraph (E)(i) is not subject to judicial review in any civil or criminal proceeding for enforcement.

“(5) EFFECT ON STATE AUTHORITY.—

“(A) Notwithstanding any other provision of law, except as provided in this paragraph and section 1411(b) of Title XIV, Pub. L. 106-554 (Dec. 31, 2000, 114 Stat. 2763) [Certain Alaska Cruise Ship Operations] (codified at 33 U.S.C. 1901 note), no State or political subdivision thereof may adopt or enforce any statute or regulation of the State or political subdivision with respect to a discharge incidental to the normal operation of a vessel subject to paragraph (1) of this subsection—

“(i) prior to expiration of the suspension under paragraphs

(4)(A) or (4)(C) of this subsection; or

“(ii) after the promulgation of the final rule specified in paragraph (4)(A) of this subsection.

“(B) If any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit one or more discharges incidental to the normal operation of a vessel, whether or not treated, from all vessels other than those specified in paragraphs (6) and (7) of this subsection, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and effective removal and treatment of the relevant discharges from vessels are reasonably available for such waters. The State shall include in its request to the Administrator such information that the Administrator determines necessary to evaluate the State's request.

“(C) The Governor of any State may submit a petition requesting that the Administrator review the regulations promulgated under paragraph (4)(A) of this subsection if there is significant new information, not available previously, that could reasonably result in a change to the regulation. The petition shall be accompanied by the scientific and technical information on which the petition is based.

“(6) DISCHARGES UNAFFECTED.—Nothing in this subsection shall be interpreted to apply to:

“(A) a vessel of the Armed Forces;

“(B) a discharge of vessel sewage; or

“(C) any discharge not subject to the permit exclusion contained in section

122.3(a) of Title 40 of the Code of Federal Regulations, as in effect on March 29, 2005.

“(7) EXCLUSIONS.—No permit under section 402 of this Act (33 U.S.C. 1342) shall be required for, nor shall any uniform national discharge standard issued under paragraph (4)(A) of this subsection apply to—

“(A) a discharge incidental to the normal operation of a recreational vessel as defined in 46 U.S.C. 2101(25) that is less than 79 feet in length;

“(B) a discharge of vessel ballast water or sediment or a discharge of aquatic nuisance species from other vessel-related sources subject to section 1101 of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4711);

“(C) the placement, release, or discharge of equipment, devices, or other material from a vessel for the sole purpose of conducting research on the aquatic environment or its natural resources in accordance with generally recognized scientific methods, principles, or techniques;

“(D) any discharge from a vessel authorized by an On-Scene Coordinator in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601, *et seq.*), the Federal Water Pollution Control Act, (42 U.S.C. 1321), the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq.*);

“(E) discharges from a vessel that are necessary to secure the safety of the vessel or human life or to suppress fires onboard or at shoreside facilities; or

“(F) a vessel owned or operated by a foreign nation when engaged only in government non-commercial service.

“(8) AUTHORITY OF ADMINISTRATOR TO PRESCRIBE REGULATIONS.—The Administrator

is authorized to prescribe such regulations as are necessary to carry out his functions under this subsection.”

SEC 4. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to the Administrator for each of fiscal years 2008 through 2012 to carry out responsibilities assigned by this Act.