DISCHARGES INCIDENT TO THE NORMAL OPERATION OF A COMMERCIAL VESSEL

HEARING BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

TESTIMONY OF

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SUBMITTED ON BEHALF OF

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Good morning, Madame Chairman and Members of the Subcommittee. We appreciate the opportunity to provide this testimony today addressing the significant issues associated with application of the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act to commercial vessels.

Madame Chairman, we respectfully request that our testimony be entered into the written record for this hearing.

I am Kathy Metcalf, Director of Maritime Affairs for the Chamber of Shipping of America.

Today I am testifying on behalf of the Shipping Industry Ballast Water Coalition (the "Coalition"), an informal organization comprised of the American Waterways Operators, Chamber of Shipping of America, Cruise Lines International Association, Intertanko, Lake Carriers Association, and the World Shipping Council, which are maritime trade associations that represent member companies that own, operate or charter commercial vessels of all types engaged in both domestic and international trade and represent over 90% of the vessels calling in US ports. The types of vessels owned and operated by coalition members include oceangoing and coastwise containerships, tankers, roll-on/roll-off vessels, bulk carriers, and passenger vessels as well as tug/barge units which operate in oceangoing, coastwise and inland waters. While the testimony we provide today highlights points of agreement by the vast majority of the Coalition, individual members of the Coalition would respectfully reserve their right to provide written comments to this record to provide additional information as they deem necessary.

The Coalition was formed over six years ago by a number of entities that believed resolution of the complex issues associated with management of discharges incident to the operations of marine vessels (including ballast water) required the coordinated efforts of all stakeholders. Since that time, the Coalition has provided testimony and comments to both legislative and regulatory initiatives regarding these discharges and has worked with a number of environmental groups toward creation of a balanced and environmentally protective approach to evaluation of these discharges and, where appropriate, development of management strategies to mitigate their impacts.

One such example of the Coalition's involvement in these issues relates to our work with Congress and federal agencies in the development of a legislative strategy to manage discharges of ballast water from commercial vessels. The Coalition's goal is to establish a single, federal standard to govern vessel discharges and prevent a patchwork of overlapping and conflicting federal and state programs affecting vessel discharges. We understand this hearing is focused on the broader issue of whether the Clean Water Act's NPDES program can or should be applied to all operational discharges incident to the normal operation of all vessel types and thus we will focus our comments in this area as related to commercial vessels. We are also available to respond to any questions on ballast water management issues as well since they are a subset of the discharges at issue here.

As noted, the foundational question to be answered here is whether the Clean Water Act's NPDES program should be applied to incidental discharges from vessels that by their very nature are mobile sources moving in and out of ports and waterways on a variety of itineraries. We believe the answer to this question is a resounding "no" for the following reasons:

1) There is a compelling need to create national uniformity in legal requirements relating to all marine vessels in order to adequately address the international and interstate nature of marine transportation. This is best accomplished by amending the Act To Prevent Pollution From ships, The Oil Pollution Act or similar laws.

2) Many vessel discharges are already addressed in current international agreements to which the US is a party, US statutes and regulations. NPDES application could create conflicting law at the Federal level and between Federal and State applications.

3) The NPDES system is not appropriate for application to mobile sources such as marine vessels as it was created to manage point source discharges from fixed facilities and for other reasons.

4) The NPDES system is unnecessarily complex and too resource intensive to justify application to marine vessels.

It is important to note here that this response is not intended to suggest that some or all of these discharges should not be regulated when in fact a number of them are already regulated under existing international agreements, US statutes and regulations. Rather this response is intended to convey our belief that the NPDES program is not the appropriate vehicle to do so. The Coalition can support the methods suggested in the Vessel Discharge Evaluation and Review Act (H.R. 5594) that provides a strategic roadmap for the collection and analysis of pertinent information relating to vessel discharges.

<u>1) There is a compelling need to create national uniformity in legal requirements relating to all marine vessels in order to adequately address the international and interstate nature of marine transportation. This is best accomplished by amending the Act To Prevent Pollution From ships, The Oil Pollution Act or similar laws.</u>

As indicated above, shipping is international and the regulation of shipping should be also. The Coalition believes that the regulation of shipping through international requirements as established by the International Maritime Organization (IMO) is the optimum way to comprehensively regulate the industry in a clear and consistent manner. However, in cases where US environmental interests are best addressed in national legislation and regulation due to inaction by IMO in a particular area, any national initiatives should provide for a consistent and clear structure by which discharges are regulated.

Because of the structure of the CWA and the NPDES permitting program, vessels visiting ports in more than one state (which is very common in most sectors of the maritime industry) could be subjected to different permit requirements in each state that they visit. To the extent that different states impose different discharge standards and/or require different treatment technologies to be employed, vessels will be unable to comply with these multiple standards.

The United States needs a single standard for vessels to meet so that they can install, if required, the necessary treatment technology or management systems and know that it will be acceptable in whatever U.S. port they call. Vessels are built for a given service but not route and thus vessel builders would have no idea at which U.S. port a vessel would call during its service life making it impossible to match equipment requirements with variable discharge limits set by states.

The CWA provides predictable standards for facilities that operate in one state's jurisdiction. The structure of the CWA and the NPDES permitting system, however, virtually guarantees that a vessel making port calls in multiple states will be called upon to meet different and conflicting standards in each of those states. Under section 402(b) of the CWA (33 U.S.C. § 1342(b)), the EPA Administrator must delegate NPDES program authority to a requesting state unless the Administrator finds that one of the statutory disqualifying conditions exists. Once program authority is delegated, the Administrator loses authority to issue permits within the scope of the state's delegated program. There is no requirement that state programs be consistent with one another. Once a state program has met the minimum standards set by the EPA, the state is free to add additional, more stringent requirements to the permits that it issues.

The Clean Water Act's NPDES system works well for stationary sources, because the state in which the facility and the regulated discharge occur does not change. It has never been applied to international ship operations. With vessels, the point source (i.e., the ship) literally is a moving target. Most vessels serving America's foreign commerce spend most of their time outside the U.S., and when they do arrive, a single voyage may result in port calls in two, three, and sometimes four different states within a matter of weeks or even days. Vessels operating in domestic service also travel to and through the waters of multiple states. The vessel and its equipment cannot change between ports. The vessel is capable of doing only what the vessel is designed and built (or retrofitted) to do. There simply is no mechanism by which differing state requirements can all be met by a single vessel.

Attempting to apply the NPDES permitting system to vessels will weaken, not strengthen, the Clean Water Act and the NPDES system. A Clean Water Act regime would create a system that requires vessels either to violate a state's laws or cease making port calls in states with requirements that are inconsistent with the technology that the vessel has installed in response to an earlier-enacted regulation from another state.

An insistence on regulating vessel discharges under the NPDES program will have a substantial negative impact on international trade. It could cause ports to be dropped from vessel schedules. It would create confusion regarding what technology is required to serve U.S. commerce. It will create confusion and disincentives for those companies trying to develop treatment technologies – companies that need to have an assurance of what treatment standard their product needs to meet.

The issue of having multiple state standards applicable to point sources in the context of the Clean Water Act is not a new one. Addressing the question of whether a state affected by a discharge in another state could maintain a common law nuisance claim under the affected state's law against a NPDES-permitted discharge in the source state, the Supreme Court held that applying multiple standards to a single discharge would be unworkable and would undermine the Clean Water Act:

> **"After examining the Clean Water Act as a whole, its purposes and its history, we are convinced that if affected states were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the "full purposes and objectives of Congress."**

International Paper Co. v. Oullette, 479 U.S. 481, 478 (1987). The particular legal issue in *Oullette* was different, but the practical problem faced there was precisely the same as here: it is not workable in practice to submit a single point source to multiple permitting requirements. That is even more certainly true when that source is by necessity a mobile vessel engaged in interstate or foreign commerce. The practical differences between stationary sources and mobile ship sources require that the two situations be treated differently.

Also, the CWA approach is incompatible with the emerging international legal regime regulating ballast water. In contrast, the Senate's Ballast Water Management Act (S. 1578) is consistent in approach with the "International Convention for the Control and Management of Ships' Ballast Water and Sediments", and it can serve as the United States' implementation of that treaty (the convention allows the U.S. to establish a higher national treatment standard, which S.1578 does). The Clean Water Act's NPDES system would not be compatible with implementation of this treaty.

<u>2) Many vessel discharges are already addressed in current international agreements to which the US is a party, US statutes and regulations. NPDES application could create conflicting law at the Federal level and between Federal and State applications.</u>

A number of the discharges incident to the normal operation of a commercial vessel are already subject to control and management under international conventions/treaties and domestic law, including but not limited to MARPOL, the Act to Prevent Pollutions from Ships, the Oil Pollution Act of 1990 and their implementing regulations. In developing these regulations due regard was taken of the operational realities of

commercial shipping and took into the account the diversity of ship types, routes, available technologies to mitigate these discharges and variations in not only the discharge types but also the diverse discharge profiles of marine vessels and the diverse aquatic ecosystems into which these discharges occur. In evaluating any next steps relating to these discharges, each should be reviewed in the light of what, if any, existing statutes and regulations already manage these discharges. Any new regulations or changes to existing regulations should take the same logical approach which would evaluate the environmental impacts of each discharge type, determine if the impacts are at such a level so as to warrant additional management through application of technologies or discharge limits, and evaluate the suite of available technologies which could be applied to each discharge type.

3) The NPDES system is not appropriate for application to mobile sources such as marine vessels as it was created to manage point source discharges from fixed facilities and for other reasons.

There is no doubt of the value provided in environmental protection that the NPDES program has provided for over 35 years since its inception. However, this value has been provided by its application to stationary sources such as refineries, factories and other fixed industrial facilities which discharge in US navigable waters. Other than one exception relating to commercial fish processing units afloat, the NPDES program has not been applied to mobile sources. The existing NPDES program is structured around stationary point sources that discharge relatively consistent components into a waterbody. Within the NPDES program, both the technology based effluent guidelines and water quality based effluent limits presume the ability to identify and quantify a specific number of predictable discharges and the components of those discharges and then assess the impact of these collective discharges on a particular receiving waterbody. This presumption fails when applied to the operational reality of commercial shipping. Ships are highly mobile sources that move in inland, coastal and international waters. The population and collective operational profiles of ships in a given port over a given period of time is neither predictable nor quantifiable due to the realities of marine operations. While many of these discharges are relatively consistent for a particular ship, they are not consistent across the wide range of ship types and sizes. Based on these operational realities, we believe it is scientifically impossible to conduct the assessments required under the existing NPDES program for mobile marine transportation point sources.

4) The NPDES system is unnecessarily complex and too resource intensive to justify application to marine vessels.

The value of a logical and scientifically based approach cannot be understated or rushed. Sufficient time should be taken to identify, quantify and assess commercial vessel discharges in a deliberate and comprehensive manner. As a potential template for this work and as an example of the need for a deliberate and structured approach, we point out the timeline associated with the promulgation and implementation of Uniform National Discharge Standards (UNDS) for Armed Forces vessels. In 1990, the

Navy began preliminary discussions about developing uniform national discharge standards for discharges incident to the normal operation of Armed Forces vessels.

After much work, Phase I of the UNDS development process was completed in 1999 which resulted in the identification and description of 25 discharges and publication of a final rule which required control of these discharges. The identified discharges run the gamut from the relatively simple to manage as is the case with weather deck runoff (rain water) to the more complex systems and discharges associated with large propulsion systems. Whether simple or complex, each of the 25 discharges requires a focused assessment of management practices and technologies which might be used to minimize their environmental impacts. Phase II of the UNDS process which will establish performance standards based on technical analyses of these 25 discharges was begun in 2000 and based on our review of the UNDS website continues to this day. Phase III which will establish requirements for the installation and operation of marine pollution control devices to control these discharges has yet to begin. All total, it has taken 17 years for the UNDS process to reach its current Phase II stage. Even accepting the fact that a significant portion of the work done under the UNDS process relative to identification of discharges (Phase I) can be applied to commercial vessels, the Phase II process which to date has taken 7 years with all the resources available to the Department of Defense, is no way comparable to the potentially accelerated timeline which some would apply to the commercial shipping industry to complete the same tasks not the least of which is a federal district court decision (US District Court for the Northern District of California, ER-203-220, ER-350) which allotted little more than 18 months to EPA to finalize a regulation and issue permits to all covered vessels which, if including the recreational boating industry, would amount to over 16 million vessels. Meeting this timeline, is not only impractical, but also impossible based on the massive amounts of information that need to be collected and further analyzed to generate the needed assessments for the various discharges.

Furthermore, we believe it is practically impossible to regulate these discharges under the NPDES program based on the large number of vessels which would be regulated under such a program in a relatively short time frame. If applied broadly as would be the case under the court decision, the NPDES program would be applied to over 16,000,000 recreational boats, 110,000 commercial fishing vessels and 53,000 freight and tank vessels trading in US waters. Even removing the recreational vessels from this mix, over 160,000 permitting transactions would need to be completed by September 2008, a virtually impossible task when viewed in the light of the decade long struggle encountered by EPA in implementing the stormwater permitting provisions for a significantly fewer number of point sources. In addition, further support for our position is provided by the recognition that under the existing NPDES permitting program, both the EPA and state agencies, if the program is delegated to the state by EPA, would require a tremendous number of additional resources to administer the program at the federal and state level, counter to the current funding climate which results in less resources to administer these types of programs. As indicated in a report by a Panel of the National Academy of Public Administrators entitled "Understanding What States Need to Protect Water Quality" (2002), states' environmental budgets

have either been static or in decline for many years and as a result of this shortfall, as of the 2001 budget cycle, it was estimated that a budget shortfall of $700,000,000 to $900,000,000 existed for the implementation of state Clean Water Act programs. There is every reason to suggest that this shortfall has become even greater in the 6 years since this report was published.

In summary, we believe the way forward to address this issue in a scientific and environmentally protective manner, is to follow a logical and comprehensive approach to the evaluation of these discharges. The Coalition's goal is to establish a single, federal standard to govern vessel discharges and prevent a patchwork of overlapping and conflicting federal and state programs affecting vessel discharges. While the Coalition believes that EPA properly exempted these discharges by regulation 30 years ago, the decision of the District Court for the Northern District of California which is currently under appeal found otherwise. The Coalition believes that commercial vessels should be expressly exempted by statute from the NPDES program as it is not the appropriate method to regulate discharges incidental to the normal operation of vessels. Rather, the Coalition could support the methods suggested in the Vessel Discharge Evaluation and Review Act (H.R. 5594). We thank you for your efforts in addressing the need for a comprehensive national vessel discharges program and look forward to working with you and your colleagues to ensure enactment of an environmentally protective and technologically achievable program.

Thank you for the opportunity to provide this testimony. I will be happy to answer any questions you may have.