# Comments of the World Shipping Council

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## Before the Environmental Protection Agency

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In the Matter of

National Pollutant Discharge Elimination System (NPDES)
General Permits for Discharges Incidental to the
Normal Operation of a Vessel

EPA-2008-0055
73 Fed. Reg. 34296

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August 1, 2008

# I. Introduction

The World Shipping Council (Council) files these comments in response to the Environmental Protection Agency's (EPA) Notice of Proposed Permit published on June 17, 2008 (73 Fed. Reg. 34296). The Council is a non-profit trade association of over twenty-five international liner shipping[1] ocean carriers, established to address public policy issues of interest and importance to the international liner shipping industry. The Council's Members include the leading ocean liner companies from around the world -- carriers providing efficient, reliable, and low-cost ocean transportation for America's international trade.[2] The Members of the World Shipping Council are major participants in an industry that has invested over $400 billion in the vessels, equipment, and marine terminals that are in worldwide operation today. Today, over 1,500 ocean-going liner vessels, mostly containerships, make more than 27,000 calls at ports in the United States each year -- more than 70 vessel calls a day. In 2007, approximately 29 million TEUs[3] of containerized cargo were imported into or exported from the U.S. The industry generates over a million American jobs and over $38 billion of wages annually to American workers. The industry provides the knowledge and expertise that built, maintains, and continually expands a global transportation network that provides seamless door-to-door delivery service for almost any commodity moving in America's foreign commerce. The Council's Member lines include the full spectrum of carriers from large global lines to niche carriers, offering container, roll on-roll off, and car carrier service as well as a broad array of logistics services.

The Members of the Council have worked closely with the U.S. government to address the need for improved environmental protection. The Council's comments on this proposed permit for incidental vessel discharges are made in a continued spirit of commitment to address these challenges with measures that are both meaningful and effective, and which continue to preserve the immense benefits that the American economy, American businesses and American consumers receive from the efficient and reliable flow of international maritime commerce.

With full support for the efforts of the EPA to protect the marine environment while ensuring the efficient flow of commerce, we offer the following comments to this proceeding.

[1] "Liner shipping" involves vessels engaged in regularly scheduled service to and from U.S. ports (e.g., ships leaving particular foreign ports for particular U.S. ports on a weekly schedule) in contrast to cargo vessels that call on U.S. ports for a particular voyage when hired (e.g., tanker and bulk shipping).
[2] A list of the World Shipping Council's Member companies is provided as Attachment A.
[3] A TEU is a standard container measure that represents a twenty-foot container. Most containers moving in the U.S. trades are forty-foot units equal to 2 TEU. 29 million TEU equates to about 18 million container loads of U.S. cargo.

## II. The Council Encourages the EPA to Continue to Seek Solutions that Will Maintain a Single National Standard for Vessel Discharges.

The Council recognizes the background of the proposed permit and agrees with EPA that the Clean Water Act (CWA) and the NPDES permitting program are not the most effective, efficient or appropriate authorities under which to regulate discharges from the normal operation of vessels. Although, as reflected in the Fact Sheet at page 13, there are no approved state NPDES programs that cover vessel discharges today, there is the possibility in the future that some states may seek to amend their NPDES programs to include such authority. That process is beyond the scope of this docket, but the Council notes that if programs are delegated to the states, and states choose to adopt differing standards, there is little question that we will see substantial disruption of maritime commerce. 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. Therefore, the Council encourages EPA's suggestion of finding a suitable method for allowing states to leave vessel discharge regulation under a federal regime through the recognition of partial NPDES programs. Alternatively, the adoption of appropriate international standards offers even greater value in protecting the resources of the Unites States and ecosystems across the globe.

In addition to causing serious operational disruptions that could include the dropping of some port calls and the loss of direct ocean service to some regions of the country, differing state approaches are also incompatible with the emerging international legal regime regulating ballast water: the International Convention for the Control and Management of Ships' Ballast Water and Sediments. The convention allows the U.S. to establish a higher national treatment standard, which pending Congressional legislation would do. In light of the probability that these more effective and practical international and national regulatory regimes will be adopted in the near future, the Council urges restraint and cooperation by the states, and encourages the EPA to continue its consideration of flexible solutions that protect the nation's waters while avoiding unnecessary disruptions to the flow of trade.

Our concerns noted above with respect to the need for a national, or, preferably, an international policy may, depending on state responses to EPA's request for section 401 certifications with respect to the General Permit, raise a more concrete issue within the permit issuance process. The Draft Permit and Fact Sheet mention only briefly the state certification process under section 401 of the Clean Water Act, 33 U.S.C. § 1341. In the context of vessel discharges associated with invasive species (primarily but not exclusively ballast water discharges), however, there is a substantial question that must be addressed in the event that states request the inclusion of permit conditions that go beyond the terms of the draft general permit. Specifically, the Plant Protection Act, 7

U.S.C. § 7756(a), expressly preempts state regulation of vessels in international commerce for the purpose of preventing the introduction or dissemination of a "plant pest" or "noxious weed." That statute therefore raises the question of whether states may validly request conditions under Section 401 with respect to discharges of invasive species from vessels that participate in international trades.[4]

The Plant Protection Act stipulates that "[n]o State or political subdivision of a State may regulate in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order –

> (1) to control a plant pest or noxious weed;
> (2) to eradicate a plant pest or noxious weed; or
> (3) [to] prevent the introduction or dissemination of a biological control organism, plant pest[5], or noxious weed[6]."

It is widely recognized in the scientific community that numerous invasive species consume significant concentrations of phytoplankton. Phytoplankton are microscopic plants, and since their consumption would be defined as damage, the introduced species consuming them is a "plant pest" under the statute. A well-known example of a plant pest of this type is the zebra mussel.

Similarly, it is well documented in the scientific literature that various species (e.g., *australis* and *lythrum salicaria* (purple loosestrife)) have been introduced via ballast water that would be considered "noxious weeds" under the Act.

Taking into account these definitions and the scientific literature, it appears that a significant portion of injurious invasives found in ballast water and ballast sediment consists of organisms that are directly or indirectly harmful to plants ("plant pests") and/or plants that are harmful to the environment and natural resources of the United States ("noxious weeds"). Since ships are a "means of conveyance" for "plant pests" and "noxious weeds," 7 U.S.C. § 7756(a) effectively preempts regulation by the states of the introduction of such pests and noxious weeds via ballast water and other vessel discharges.

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[4] The statute also sharply restricts the authority of states to regulate means of conveyance in interstate commerce, although there is a mechanism under which the Secretary of Agriculture can permit state regulations in exceptional circumstances. *See* 7 U.S.C. § 7756(b).

[5] "Plant pest" is defined at 7 U.S.C. § 7702(14) as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: a) protozoan, b) a non human plant, c) a parasitic plant, d) a bacterium, e) a fungus, f) a virus or viroid, g) an infectious agent or pathogen, or h) any article similar to or allied with any of the articles specified in the preceding subparagraphs.

[6] The term "noxious weed" means any plant or plant product that *can directly or indirectly* injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, *navigation, the natural resources of the United States, the public health, or the environment*. 7 U.S.C. § 7702(10)(emphasis added).

Returning to the Section 401 certification process, that section provides in part that "[i]n any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator." In addition, EPA's regulations provide with respect to more stringent state conditions that "the certifying State agency shall cite the CWA or State law references upon which that condition is based." 40 C.F.R. § 124.53(e). Thus, both the Clean Water Act and the agency's regulations require that any state permit conditions provided through the section 401 certification process must be based on valid state law or the Clean Water Act. Therefore, in a situation where any such state law is expressly preempted by federal statute, no such condition may be imposed, and the certification as to that proposed condition must be considered waived, because "[f]ailure to provide such a citation waives the right to certify with respect to that condition. . . ." *See* 40 C.F.R. § 124.53(e)(2).[7]

As a final observation on this point, the Council wishes to clarify that it does not here request the Administrator to make a finding that Title 7 of the U.S. Code prohibits states from attempting to enforce directly any state law requirements that they might have with respect to invasives associated with vessel discharges from vessels engaged in international commerce. That is a question for another day, and not one that the Administrator is charged with deciding. Because the agency's own regulations expressly provide that a state offering a stricter standard under the Section 401 process must cite valid legal authority for such a restriction or waive the right to have such a condition included in the federal permit, however, the Administrator will be called upon to make the preemption determination in the context of this proceeding if indeed states offer conditions here through the Section 401 process.

# III. Implementation Issues Raised by the Proposed Permit

The Council supports the overall approach that the agency has taken in this court-ordered permit action. Specifically, because mid-ocean ballast water exchange is the only commercially practicable option currently available to the industry for treatment of ballast water, and because other discharges are most effectively managed through operational and maintenance actions, the use of best management practices as the primary regulatory structure for near-term applications is appropriate. Numerical standards for certain discharges may be appropriate, but it is critical that numerical standards not be adopted for those discharges where numerical measurement would be highly impractical or unnecessary.

In the context of its overall support for the draft general permit, the World Shipping Council offers the following suggestions and makes the following requests for clarification.

[7] It is axiomatic that a citation to a preempted state law has the same legal effect as a citation to an inapplicable state law or to no state law at all.

1. Do the general permit's inspection and recordkeeping requirements apply outside of 3nm?

It is clear from the definition of "discharge of a pollutant" at subsection 502(12) of the Clean Water Act (CWA) and the definition of "navigable waters" and "territorial seas" at subsections 502(7) and (8) that the Act applies to vessel discharges only out to 3 nautical miles seaward of the shore baseline. That understanding is confirmed by the discussion at page 1 of the General Permit. What is less clear is whether it is also EPA's understanding that the geographic scope of the recordkeeping, inspection and repair requirements is similarly limited by the statute.

The Council understands the logic, for example, of conditioning the ability to discharge ballast water within three miles of the coastline on the requirement that the vessel exchange ballast water mid-ocean. The act of exchanging ballast water outside of the geographic reach of the statute in that instance is directly tied to the effectiveness of the discharge management measure; exchange near shore would defeat the purpose. On the other hand, with respect to discharges such as deck runoff that are unaffected by actions that may be taken thousands of miles from U.S. shores and weeks or months before a vessel makes a U.S. vessel call, the logic of requiring that records be kept of routine inspection and maintenance activities is not apparent. The question becomes more acute in light of the requirement that such inspections (and records relating thereto) be made once a week. Nor is it clear what regulatory purpose is served by requiring recordkeeping for corrective actions taken thousands of miles from the United States. In light of these questions, the Council requests that the recordkeeping and reporting requirements be clarified with respect to their geographic and temporal scope. Failure to clarify these issues in writing upon issuance of the permit will undermine compliance and make enforcement actions problematic due to a lack of notice to permittees of what is required of them.

2. Additional vessel compliance questions.

Further to item 1, above, if the intent is that the inspection and recordkeeping requirements apply worldwide, there are many specific questions that will arise regarding the applicability of the permit if a vessel spends the majority of its time outside of U.S. waters (as the vessels employed by most WSC members do). A few examples of such questions follow:

- If a vessel is only in U.S. waters for a few weeks spread out over the course of a year, when does it comply with the annual inspection requirement or the quarterly sampling of non-visible discharges?

- If a vessel spends the majority of its time outside the U.S., does it have to conduct weekly inspections? If not, what is expected of the vessel to be in compliance with that requirement on arrival in U.S. waters? Also, if a vessel is only in port in the U.S. for a few days each voyage, does it have to conduct its routine visual inspection while in port and working cargo?

- If a vessel has to fix something minor but is leaving the U.S., does it have the two weeks under the permit to fix the issue or until its next U.S. visit? In either case, why would such a requirement not constitute regulation of a discharge outside of three nautical miles?

- If a vessel is in a foreign yard, does it have to comply with the permit's dry dock inspection requirements? A foreign vessel, absent an emergency situation, will almost never visit a U.S. shipyard for dry docking.

- If a vessel called the United States after submitting an NOI but did not discharge ballast water during its stay in U.S. waters, would its records for time spent outside of U.S. waters prior to a U.S. port call be subject to inspection, and, if discrepancies were found, enforcement action? If the answer is "yes," what would the legal basis for such an enforcement action be in light of the fact that the statute only regulates discharges, and only discharges within three miles of shore?

In addition to raising specific compliance issues, these questions raise a more substantial issue regarding international comity. If every coastal nation were to adopt separate and different regulations that applied worldwide to every vessel that made periodic visits to the regulating country's ports, vessels in international commerce would be virtually assured of being out of compliance with many of those regulations. At some point, overlapping and inconsistent regulations reach a point at which compliance with all is either impossible or impracticable. Extensive recordkeeping requirements required by a single State or differing requirements by numerous coastal States quickly lead to the question of whether the respective requirements are indeed leading to an improvement in the basic problem that the regulations are designed to address. Fortunately, coastal nations have to date generally demonstrated restraint so as to avoid the imposition of regulations that are so pervasive as to be counter-productive to their goals. If the agency chooses to assert broad geographic regulatory jurisdiction (even though limited to recordkeeping purposes) it is important that a clear regulatory purpose and a very clear statement of the statutory interpretation that underlies that purpose and approach is articulated. That purpose and statutory interpretation are not set forth in the draft General Permit or the Fact Sheet.

In light of these concerns, the Council urges the EPA to consider carefully whether it believes that it is necessary or productive to seek to extend weekly inspection and recordkeeping requirements across a broad scope of both activity and geography to fulfill the purpose of the CWA, and to provide its analysis and rationale at the time the General Permit is issued. The Council also urges the EPA to consider a more targeted approach that would provide the same environmental benefits within the scope of the statute while avoiding the potential problems outlined above. One such approach, for example, might be that any vessel must inspect once a week for at least two consecutive weeks prior to arriving in U.S. waters. Such a requirement would ensure that any problems of a nature that could be corrected while the vessel is underway could be

discovered and corrected before any discharge to covered waters, and would at the same time avoid many of the problems discussed above.

3. The industry needs a permit system in place when the existing EPA regulation is vacated.

With the possibility of a reversal in the Ninth Circuit now removed, the industry needs EPA to have the General Permit in place by September 30, 2008. Without the permit, all vessel discharges would arguably be violations of the CWA. The only exception to this need would be if the EPA requested and obtained an extension of the September 30 deadline from the District Court. It is important to note that the industry does not seek to have EPA delay the effective date of the permit unless it has successfully obtained from the District Court an extension of the date upon with the vessel discharge exemption regulation is to be vacated. Moving the former without the latter would still leave the industry without a permit on September 30 and in violation of the CWA. The Council requests that whatever EPA decides to do regarding the lawsuit, it have a permit in place when the regulation is vacated.

4. The Master should not be required to sign inspection reports as a certification of the scope of the inspection.

The Fact Sheet at page 84 expressly asks whether the Master should be required to sign the record of the routine visual inspection if the Master is not the person performing the inspection. The answer to the question depends on what effect such a signature would have. If by signing the record the Master would be certifying personal knowledge of the details of the inspection, then such a requirement is unrealistic and could subject the Master to penalties in a situation in which it would be a violation of due process to do so. Whatever recordkeeping requirements are chosen in light of the discussion in items 1 and 2, above, the person making the inspection should be the person that causes the record entry to be made. In this regard, it may appear reasonable to identify the person making the inspection; however, we note that routine vessel records do not generally specify each individual that carried out a particular maintenance, repair, or inspection task. Requiring such detail on routine inspections undermines the stated intent of allowing regular ship's log procedures to be used for permit recordkeeping. The permit registrant is ultimately responsible for permit compliance; that responsibility and the ability to enforce it does not depend on the recordation of which specific tasks were conducted by which crewmember. Including such a requirement, like including a signature requirement from the Master, complicates recordkeeping, elevates form over substance, and may in the end cause the recordkeeping function to eclipse the inspection function, which would be an undesirable result.

5. The applicability of the Pacific near shore voyage requirements on ballast water should be clarified.

Section 2.2.3.6 states that it applies in part to "vessels engaged in the Pacific coastwise trade." The term "coastwise trade" is a term of art from the United States

cabotage laws that applies to the transportation of goods or passengers between two points in the United States. Only U.S. built and flagged vessels may engage in that trade. The Council believes that the EPA may not intend the coverage to be that narrow, and suggests that that the phrase "coastwise trade" be replaced with "vessels transiting between two or more Pacific coast ports" or a similar formulation.

6. There are additional potential discharges that should be added to the permit.

Council members have identified the following additional sources of potential discharges that should be covered by the permit: oil seals from thrusters, pod drives, stabilizer fins, etc.; and water-lubricated rudder bearings. These discharges could logically be grouped with controllable pitch propeller hydraulic fluid (2.2.9), rudder bearing lubrication discharge (2.2.19), or stern tube oily discharge (2.2.24), because they represent below-the-waterline, minor potential discharges that could be dealt with through management practices.

7. Existing Coast Guard and international safety regulations should take precedence over permit terms in the event of a conflict.

In section 2.1.5, the draft permit provides that the operator must comply with any other applicable regulations. This is a valid condition, but could lead to some confusion if there is a situation where the permit requires one thing while existing environmental or safety regulations require another. For example, IMO stowage regulations may require dangerous goods to be carried on deck in order to segregate them from other cargo. Furthermore, most IMO safety requirements and stowage requirements are also codified in U.S. law and regulations. The permit may require those same goods to be stored in locations where they would not be subject to ocean spray or precipitation (i.e., below deck). In this instance, following existing cargo regulations may violate the proposed permit.

In order to avoid such potential internal conflicts, we suggest that a sentence be added to the end of the first paragraph of section 2.1.5 reading, "In case of conflict between this permit and existing Coast Guard or international regulations for the safe transportation, handling, carriage and storage of pollutants, the Coast Guard or international regulations shall control."

8. It would be more efficient to submit reports to a central EPA office as opposed to regional EPA offices.

The proposed permit requires vessels to submit annual reports or discharge information to the EPA district in which they spend the majority of their time. This approach may cause confusion with respect to vessels which call on different ports in several states or even different coasts. A central location should be established for submission of reports due to the mobile nature of vessels. The EPA can then internally distribute the information to the regions that need it.

In addition, there is a question in section 6.4 of the permit's Fact Sheet (page 87) of whether operators should be required to submit certain reports to local authorities. Following on the general theme of the above paragraph that there should be a single reporting location, the Council would recommend that operators not be required to report to local authorities. Those authorities in many cases may not be known to vessel operators or readily identifiable, and multiple reports may hamper rather than facilitate response efforts. The Coast Guard's National Response Center was established as and has functioned well as a central clearinghouse for such reports, and the Council urges that that successful approach be maintained.

9. The Council requests clarification on Notice of Intent (NOI) procedures for existing vessels that do not commence U.S. vessel calls until after nine months following the effective date of the permit.

A vessel may not know it will call the United States far in advance. Under the proposed permit, it is unclear when an existing vessel, without a change in operator or ownership, must submit a NOI. A solution would be to add a category on to Table 1 which deals with a vessel's first call in the United States and authorizes discharges as of the date the NOI is filed.

10. The Notice of Termination (NOT) form should be valid as of the earlier of date of termination on the NOT or the effective date of a new NOI.

Section 1.6 requires an owner to file an NOT within 30 days of a change in ownership or termination of operation. The owner is responsible for discharges until the NOT is filed and posted on the EPA website. That approach should work when a vessel leaves service of the U.S. trades. As written, however, these rules may cause confusion in the case of the transfer of a vessel that will continue to serve the U.S. Because the new owner should have filed its NOI prior to operation, the previous owner should only be responsible up to the effective date of the new owner's NOI, provided the old owner timely files its NOT. Put differently, the vessel's new NOI would invalidate the old NOI when the new NOI is filed with EPA. These rules would eliminate the possibility of overlapping effective NOI's, a situation that could undermine compliance and complicate enforcement. In addition, it is inequitable to have the effective date of an NOT determined by the date it is posted on the EPA website, because the filer has no control over the date of posting (provided the filed NOT is complete), only the date of filing.

11. The Notice of Intent (NOI) (10.2) form should be changed to include also the option of using metric measurements.

# IV. Conclusion

The World Shipping Council and its Members sincerely appreciate the effort EPA is taking to develop a practical permit system in light of the many complications involved. We are available to provide any information or assistance that may prove helpful.

**Attachment A**

## Member Companies of the World Shipping Council

APL
A.P. Møller-Maersk (including Maersk Line and Safmarine)
Atlantic Container Line (ACL)
China Ocean Shipping Company (COSCO)
China Shipping Group
CMA-CGM Group
Compania Sud-Americana de Vapores (CSAV)
Crowley Maritime Corporation
Dole Ocean Cargo Express
Evergreen Marine Corporation
Great White Fleet
Hamburg Sud (including Alianca)
Hanjin Shipping Company
Hapag-Lloyd Container Line
Höegh Autoliners, Inc.
Hyundai Merchant Marine Company
Independent Container Line (ICL)
Kawasaki Kisen Kaisha Ltd. (K Line)
Malaysia International Shipping Corporation (MISC)
Mediterranean Shipping Company (MSC)
Mitsui O.S.K. Lines
NYK Line
Orient Overseas Container Line, Ltd. (OOCL)
United Arab Shipping Company
Wan Hai Lines Ltd.
Wallenius Wilhelmsen Logistics
Yangming Marine Transport Corporation
Zim Integrated Shipping Services, Ltd.