



Comments of the

## **World Shipping Council**

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Submitted to the

**U.S. Environmental Protection Agency**

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In the matter of

**Notice of Proposed Rulemaking  
Marine Sanitation Devices (MSDs): Proposed  
Regulation To Establish a No Discharge Zone (NDZ) for  
California State Marine Waters**

Docket Number:  
EPA-RO9-OW-2010-0438  
RIN 2009-AA04

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November 1, 2010



## **1. Introduction**

The World Shipping Council (“WSC” or the “Council”) files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) published on September 2, 2010 entitled: “Marine Sanitation Devices (MSDs): Proposed Regulation To Establish a No Discharge Zone (NDZ) for California State Marine Waters.” 75 Fed. Reg. 53914; Docket No. EPA-R09-OW-2010-0438. The Council is a non-profit trade association that represents over twenty-nine liner<sup>1</sup> shipping companies that carry approximately 90% of U.S. international containerized trade. The Council’s member lines operate containerships, roll-on/roll-off, and car carrier vessels. Most of the Council’s member companies provide international service to and from California ports, and they would therefore be directly affected by the proposed rule if it were adopted.

The Council supports the general purpose of the proposed rule, which we understand to be the reduction of vessel-based sewage discharges. The rule as proposed, however, suffers from several legal and logical flaws that must be corrected before a final rule is adopted. The legal problems undermine the sustainability of the rule if challenged, and the logical flaws undermine the rule’s environmental objectives. We explain first our concerns with the structure of the proposed rule. We then offer an alternative that flows naturally from the NPRM, but that is more consistent with the Clean Water Act provision upon which the NPRM is based, section 312(f)(4)(A), 33 U.S.C. § 1322(f)(4)(A).

## **2. Federal and State Statutory Bases of the Proposed Rule**

The state statutory provisions upon which California’s application is based were enacted as part of the California Clean Coast Act of 2005 (senate Bill 771), codified at Cal. Public Resources Code § 72440. That law provides in relevant part that:

“(a)(1) The board shall determine whether it is necessary to apply to the federal government for the state to prohibit the release of sewage or sewage sludge from large passenger vessels, sewage from oceangoing ships with sufficient holding tank capacity,

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<sup>1</sup> Liner shipping involves vessels engaged in regularly scheduled services among pre-set ports, in contrast to vessels whose itineraries vary depending on the voyage for which they are hired (such as tankers and bulk ships). A complete list of the Council’s members is available at [www.worldshipping.org](http://www.worldshipping.org).

and sewage sludge from oceangoing ships, into the marine waters of the state or to prohibit the release of sewage sludge from large passenger vessels and oceangoing ships into marine sanctuaries, as described in Section 72420 and subdivision (a) of Section 72420.1. If the board determines that application is necessary for either sewage or sewage sludge, or both, it shall apply to the appropriate federal agencies, as determined by the board, to authorize the state to prohibit the release of sewage or sewage sludge, or both, as necessary from large passenger vessels, sewage from oceangoing ships with sufficient holding tank capacity, and sewage sludge from oceangoing ships, into the marine waters of the state and, if necessary, to authorize the state to prohibit the release of sewage sludge from large passenger vessels and oceangoing ships into marine sanctuaries.

(2) It is not the Legislature's intent to establish for the marine waters of the state a no discharge zone for sewage from all vessels, but only for a class of vessels."

The phrase "sufficient holding capacity" is defined as "a holding tank of sufficient capacity to contain sewage and graywater while the oceangoing ship is within the marine waters of the state." Cal. Public Resources Code § 72410(s).

Although the relevant state law calls for the Board to ask EPA "to authorize the state to prohibit" the relevant sewage discharges, a form of permission that implicates section 312(f)(3) of the Clean Water Act, the State of California, through the California State Water Resources Control Board (the "Board"), applied in 2006 for EPA to adopt a direct federal regulation under section 312(f)(4)(A) of the CWA. Neither the Board's application nor the NPRM discusses why the Board did not proceed under section 312(f)(3) of the CWA. Absent such an explanation, it is impossible to be sure why the Board did not follow its statutory mandate, but it appears from the record that an application under 312(f)(3) would not have been able to satisfy that section's requirement that "adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply."<sup>2</sup> In any event, the Board in fact proceeded under section 312(f)(4)(A), which states that:

"If the Administrator determines upon application by a State that the protection and enhancement of the quality of specified waters within such State requires such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into such waters."

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<sup>2</sup> See Board Application at 2 ("California does not currently have waste reception facilities capable of handling sewage and graywater from cruise ships and other large oceangoing vessels.").

The EPA has adopted regulations to guide the application and evaluation process for section 312(f)(4)(A) applications. Those regulations read in relevant part as follows:

“Prohibition pursuant to CWA section 312(f)(4)(A): a State may make a written application to the Administrator, Environmental Protection Agency, under section 312(f)(4)(A) of the Act, for the issuance of a regulation completely prohibiting discharge from a vessel of any sewage, whether treated or not, into particular waters of the United States or specified portions thereof, which waters are located within the boundaries of such State. Such application shall specify with particularity the waters, or portions thereof, for which a complete prohibition is desired. The application shall include identification of water recreational areas, drinking water intakes, aquatic sanctuaries, identifiable fishing-spawning and nursery areas, and areas of intensive boating activities. If, on the basis of the State’s application and any other information available to him, the Administrator is unable to make a finding that the waters listed in the application require a complete prohibition of any discharge in the waters or portions thereof covered by the application, he shall state the reasons why he cannot make such a finding, and shall deny the application. If the Administrator makes a finding that the waters listed in the application require a complete prohibition of any discharge in all or any part of the waters or portions thereof covered by the application, he shall publish notice of such findings together with a notice of proposed rulemaking, and then shall proceed in accordance with 5 U.S.C. 553. If the Administrator’s finding is that applicable water quality standards require a complete prohibition covering a more restricted or more expanded area than that applied for by the State, he shall state the reasons why his finding differs in scope from that requested in the State’s application.”

40 C.F.R. §140.4(b).

### **3. The Application is Facially Inconsistent with the Requirements of Section 312(f)(4)**

There are two broad reasons why the application as submitted and as described in the NPRM may not be granted. The first reason is that all of subsection 312(f) deals with *complete* prohibitions of sewage discharges in specified areas. In contrast, the California application by its terms and under the state law that triggered it applies only to certain types of vessels. In short, the application seeks a remedy that the EPA is not authorized under federal law to grant. The second reason that the application may not be granted in its current form is that it presents no evidence as to why a prohibition on the discharge of vessel sewage from cargo vessels is required with respect to *all* California state marine waters. Put differently, there is no explanation of why “the *quality of specified* waters within such State requires such a prohibition.” 33 U.S.C. § 1322(f)(4)(A) (emphasis added). We discuss these two issues separately in more detail below.

**a. *The NPRM does not propose a “complete prohibition.”***

*i. The legal problem*

The Clean Coast Act clearly states that “[i]t is not the Legislature’s intent to establish for the marine waters of the state a no discharge zone for sewage from all vessels, but only for a class of vessels.” Cal. Public Resources Code § 72440(a)(2). Consistent with that legislative intent, the California statute only calls for a prohibition of discharges from “large passenger vessels” and from “oceangoing ships” (defined as “a private, commercial, government, or military vessel of 300 gross registered tons or more calling on California ports or places”) with “sufficient holding capacity” (i.e., the ability to hold while in the state). By definition, therefore, the Board’s application, which strictly tracks the authority in the state statute, excludes vessels below 300 tons, regardless of how many people they carry, where they operate, how much sewage they discharge, or how long they remain in California waters.

The NPRM carries forward the details and limitations of the Board’s application, with one change.<sup>3</sup> That is, the NPRM does not propose a complete prohibition of vessel sewage discharges in California waters, but only discharges from certain vessels. That approach is inconsistent with section 312(f)(4)(A) of the Clean Water Act, which states that, upon making the required finding of the need to protect “specified” state waters, the Administrator “shall by regulation completely prohibit the discharge from a vessel of any sewage. . . .” Because the NPRM proposes only a partial prohibition – covering some vessels and not others – it is inconsistent with the statute.

In general, environmental and other regulatory regimes do not mandate an “all or nothing” approach to regulation. Instead, incremental steps are allowed, and even encouraged. Section 312(f), however, does not work that way. That subsection was the result of a Congressional compromise on the issue of whether federal or state regulations would govern vessel sewage discharges in the nation’s waters. Because of the inherently mobile nature of vessels, Congress decided that some level of uniformity was necessary, and it enacted a broad federal preemption policy in section 312(f)(1). The ability of the States to regulate directly (under 312(f)(3)) or to ask EPA to regulate (under 312(f)(4)) was limited to an “either/or” choice – either prohibit discharges from all vessels, or prohibit none. The logic of that approach is rather plain; if the environmental case for prohibition can be made, then the

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<sup>3</sup> That change is to the definition of “sufficient holding capacity.” Instead of using the definition in the California Clean Coast Act (as incorporated in the Board’s application), EPA’s NPRM instead proposes that “sufficient holding capacity” be defined as two days storage capacity. We discuss the negative environmental and operational implications of that change separately below.

type of vessel from which the discharge comes is irrelevant. In order to avoid politicizing the process and injecting unequal treatment that would undermine the fundamental federal interest in uniformity, the Congress required States and the Administrator to focus, in the case of 312(f)(3), on the availability of pump-out facilities or, in the case of 312(f)(4), on the scientific case for further limitations on discharges in specific waters. In neither case, however, did the Congress give States or the EPA the authority to pick and choose among classes of vessels discharging within a given area. That, however, is precisely what the Board's application and the NPRM seek to do. The Clean Water Act simply does not allow that outcome.

The NPRM is notable for the fact that it does not explain EPA's reading of the Clean Water Act that would allow it to reach the proposed result. The absence of an EPA statutory interpretation is even more notable in light of the fact that the NPRM (at 53916) states that the proposed no discharge zone "would also be the first NDZ to only apply to discrete classes of vessels." At page 53923, the NPRM specifically seeks comment on "EPA's prohibition of sewage discharges from specific classes of vessels," but it nowhere acknowledges the statutory question discussed above, and it nowhere explains why EPA believes the Clean Water Act would allow it to do what the NPRM proposes. The absence of any discussion of this issue is highlighted by the fact that EPA explicitly raised the point in its July 20, 2006, letter to the Board. Neither that letter nor the Board's October 13, 2006, "Supplement" filed in response provides any explanation of why the statute may be ignored. Because this issue goes to the agency's fundamental authority to act, and because the EPA apparently recognizes that fact but has failed to provide its views, the NPRM fails to provide meaningful notice and opportunity to comment, because it is impossible to know EPA's theory for why it believes it may disregard its authorizing statute. If EPA intends to issue a final rule that regulates some, but not all, vessels, then it must first issue a supplemental notice explaining the legal basis for its action, and it must take and respond to comments on that point.

ii. *The environmental problem*

In addition to the legal problem with the NPRM that arises from its unprecedented discrimination among classes of vessels, the structure of the proposed rule undermines its environmental protection objectives and would create perverse incentives and compliance outcomes for vessel operators. With respect to cargo vessels, the EPA estimates that *almost twice as much* sewage is discharged annually (2.2 million gallons<sup>4</sup>) by large oceangoing vessels that will *not* be covered by the proposed rule than is discharged by vessels that *are* covered (1.2 million gallons<sup>5</sup>). The NPRM does not even attempt to quantify potential discharges by oceangoing vessels below 300 gross tons. Moreover, the EPA has estimated that the 20% of

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<sup>4</sup> NPRM at 53921.

<sup>5</sup> NPRM at 53920.

recreational vessels that can today legally discharge treated sewage discharge approximately 2.8 million gallons per year,<sup>6</sup> an amount *more than double* the amount potentially discharged by oceangoing vessels that would be subject to the rule. These disparities illustrate why Congress in the Clean Water Act limited the options for state-specific rules to an all-or-nothing approach when it came to classes of vessels.

Even if one were to leave recreational vessels and vessels below 300 gross tons out of the equation, the difference in treatment between those vessels that would be covered because they have at least two days holding capacity and those that would not be covered (because they lack that level of capacity) is illogical and self-defeating from an environmental and an operational perspective. The California legislature's approach was essentially to require vessels to hold to the extent of their ability. That is the effect of the operationally based definition of "sufficient holding capacity" in the Clean Coast Act. The NPRM, however, proposes to create a counter-productive result by changing the concept of "sufficient holding capacity" into a hard number (2 days of capacity). Under the NPRM's definition, a vessel capable of holding for 47 hours would not have to hold at all, no matter how long it stays in California waters, but a vessel capable of holding for 48 hours would be in violation as soon as it exceeds its holding capacity, whether that occurs on day 3 or day 30.

The setting of a rigid two-day capacity as the trigger for application of the rule also would create a disincentive for vessel owners to increase their holding capacity if they have less than two days of capacity (because to do so would bring them under the rule). It also would create an incentive for vessel operators to remove capacity in order to escape being covered. That incentive would be particularly strong for vessels with two days of capacity that regularly spend more than two days in California waters during a port call.

The primary reason for these unintended consequences is the inclusion of the two-day threshold, which is based on an "average" length of port stay. The problem with using an average in this situation is that it is by definition unlikely to fit any particular vessel. As California's Supplement to its application states at page 6, "[e]ach vessel typically . . . spends one to four days in port and State waters." Under those circumstances, there would be a substantial risk of noncompliance for those covered vessels whose length-of-stay is close to or exceeds their holding capacity. Subjecting those vessels to fines for incremental discharges after they reach their capacity, while vessels with less capacity are allowed to discharge without limit, would be the definition of arbitrary and capricious rulemaking. We address this issue further in the context of our proposed alternative approach in section 4, below.

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<sup>6</sup> NPRM at 53921.

**b. Neither the application nor the NPRM provides an adequate scientific basis for a statewide discharge prohibition.**

As discussed above in the context of the underlying state and federal statutory bases for the proposed rule, section 312(f)(4)(A) authorizes EPA adoption of NDZs for “specified” state waters that require additional protection. Although the section 312(f)(4) language discussing “protection and enhancement of the quality of specified waters” leaves some room for interpretation, EPA’s implementing regulations, which the agency is bound to follow,<sup>7</sup> make clear that there must be some showing of a causal nexus between the discharges to be prohibited and attainment of water quality standards applicable to the specific waters to be protected. EPA’s regulations direct the Administrator to determine independently whether “applicable water quality standards require a complete prohibition covering a more restricted or more expanded area than that applied for by the State. . . .” 40 C.F.R. §140.4(b). That determination of the proper area to be included in a no discharge zone necessarily requires a quantitative and qualitative consideration of the relationship between the discharge for which regulation is being considered and the water quality characteristics (both baseline levels and water quality standards) of the “specified” waters covered by the State’s application. Indeed, that is the *only* relevant analysis. The record here, however, is devoid of any evidence or analysis of that relationship. Therefore, EPA may not issue a final rule unless and until the Administrator provides an explanation of why – based on attainment of water quality standards – it is necessary to prohibit vessel discharges in *all* California marine waters.

Even a brief examination of the rationale for the proposed rule set forth in the Board’s application and the NPRM reveals that there is no explanation of why all of California’s state marine waters require protection over and above the federal standards. The Board’s application begins with a description of the underlying California statutes, followed by a very broad overview of the value of California’s ocean economy. The remainder of the application consists of a long, but generic, description of the natural attributes of California’s coastline. What is absent (but what is required by statute) is an explanation of why and how regulation of the discharges that the application estimates for the various classes of covered vessels is “required” for the “protection and enhancement of the quality of specified waters . . . .” 33 U.S.C. § 1322(f)(4)(A).

The NPRM, which relies entirely on the materials submitted by the Board, is similarly vague. For example, the NPRM at 53916 states that “[t]he information submitted by the State in its application for this NDZ (available in the docket for today’s proposal) documents the importance of California’s marine waters, the sensitivity of all of California’s marine waters to

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<sup>7</sup> See *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (“An agency is required to follow its own regulations.”).

sewage discharges, and the need for the proposed NDZ to protect and enhance those waters.” The problem is that simply saying this in the NPRM does not make it so.

On page 53918, the NPRM lists California waters that are designated as “impaired” for pollutants that are typically associated with sewage. At the same time, however, EPA recognizes that “other important pollutant sources include land-based wastewater treatment plant ocean outfalls, stormwater discharges, rivers and streams, thermal discharges from power plants, dredging and dredged material disposal operations, wind transport, and construction activities.” See *also* NPRM at 53915 (similar list). The NPRM never even attempts to rank these various sources, even at an order-of-magnitude level, in order to determine whether there is a scientific basis to conclude that the proposed reductions in vessel discharges would have any measurable impact on attainment of water quality standards in any “specified” waters. Indeed, the NPRM confirms that no such analysis has been done, stating that “[s]ite-specific evaluations would be needed to determine whether these vessel discharges would cause, have the potential to cause, or contribute to non-attainment of water quality standards.” NPRM at 53919; 53920 (same statement).<sup>8</sup> Similarly, there is no analysis of the effects of vessel discharges into waters that currently *do* meet water quality standards. If there are discharges statewide today (as the NPRM assumes), but there are receiving waters that meet applicable water quality standards, then by definition the “require[s] a complete prohibition” standard of section 312(f)(4)(A) cannot be met for all California waters. The NPRM does not even acknowledge that this issue exists.

The lack of any discussion in the NPRM of what evidentiary standard applies to the section 312(f)(4) threshold for protection of “specified waters,” and the lack of any factual showing related to that standard, are all the more glaring in light of the fact that the EPA in 2006 explicitly raised these issues with the State of California. In a letter dated July 20, 2006, from the EPA Region IX Director of the Water Division to the Executive Director of the California State Water Resources Control Board, EPA made very specific inquiries about the State’s justification for designating all California coastal waters as requiring the protections of a no discharge zone. Specifically, that letter stated that:

“EPA’s regulation at 40 CFR 140.4(b), which implements Section 312(f)(4)(A) of the Act, states that a State’s application “shall specify with particularity the waters, or portions thereof, for which a complete prohibition is desired.” However, the State’s application

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<sup>8</sup> These statements are made in the context of cruise ships, which EPA estimates could discharge 19.2 million gallons per year of treated sewage into California waters. NPRM at 53919. Without speculating on whether anything like that amount, if any, is in fact discharged by cruise vessels, that number is sixteen times EPA’s estimate for covered cargo vessels. If the agency is unable to describe the relationship between cruise ship discharges and water quality standards, then by definition it cannot describe that relationship for the much smaller cargo vessel discharges.

proposes to prohibit sewage discharges in all State waters, and only from large passenger vessels and other oceangoing ships. All existing no-discharge zones that have been designated under Section 312 of the CWA contain prohibitions that apply to specific geographic locations and apply to all vessels. Additional justification and documentation is needed to support the full geographic extent as well as the absence of application for smaller vessels in the State's request. The application is unclear why a prohibition is necessary for all waters, and why/how a prohibition addressing only large vessels would be most effective." (emphasis in original)

The Board's response to these questions is contained in a "Supplement" sent to EPA on October 13, 2006. The Supplement, however, does not answer EPA's questions. Specifically, on the issue of why all State waters require additional protection, the Supplement refers first and foremost to the State legislation on which the Board's application is based. See Board Supplement Addendum at 1 ("The State Water Resources Control Board (State Water Board) submitted its application to the U.S. Environmental Protection Agency (USEPA) to fulfill the California Legislature's directive in the California Clean Coast Act to protect and enhance the quality of State marine waters."). In preempting the states except under the 312(f) standards, Congress expressly rejected the notion that states could regulate merely on the theory that tighter controls are always better, or simply on the basis of state legislative enactments. It is precisely that congressionally rejected approach that California and EPA's NPRM propose here, however, and it cannot support a valid rule.

As a secondary response to EPA's questions about the lack of geographic specificity in the application, the Board's Supplement makes broad reference to State marine protected areas, but it says nothing about how the proposed regulations would address water quality concerns in those areas. Similarly, the Supplement speaks of protecting water quality in the four National Marine Sanctuaries in California. As the NPRM notes, however, those sanctuaries have in the interim already been designated as no discharge zones through a separate federal process,<sup>9</sup> and their protection cannot now serve as a basis for this proposed rule. Finally, the Supplement makes one-sentence references to both commercial and recreational fisheries, and makes a one-sentence reference to Areas of Special Biological Significance. There is absolutely no analysis of why the proposed regulations are needed to protect these resources. Equally important, there is no discussion of why waters unrelated to these protection goals are included in the application.

Finally, neither the NPRM nor the Board's application discusses – or even acknowledges – the fact that California's coastal waters encompass a broad range of different ecosystems. The waters that the Board asks to be covered range from high-energy, open-ocean locations off

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<sup>9</sup> NPRM at 53917.

of Cape Mendocino to enclosed estuaries such as Suisun Bay that are characterized by seasonal flushing and salinity variations – and everything in between. In addition to the differences in how these varied types of waters might be affected by the introduction of pollutants, they are very different in terms of the vessel and non-vessel pollutant loads that they experience. It is difficult to imagine a greater diversity of coastal ecosystems within a single state than exists in California. Yet the Board’s application and the NPRM treat all of California’s coastal waters from Mexico to Oregon and all its internal waters from San Pedro to San Francisco Bays as if they were a single, homogeneous ecosystem operating under evenly distributed pollution loads. That is contrary to the plain facts, and it is contrary to the waterbody-specific analysis required by section 312(f)(4)(A) of the Clean Water Act.

In short, EPA raised fundamental inadequacies in the Board’s application, and the Board’s Supplement does nothing to address those inadequacies. Any rule based on such a record would by definition not be supported by substantial evidence, and would be arbitrary and capricious. As discussed elsewhere in these comments, EPA’s regulations authorize and require the EPA Administrator to make an independent determination of: (1) whether a no discharge zone is warranted, and (2) whether the geographic scope of any such zone as requested by a State should be modified. The Council does not assert or believe that the relationship between discharges and the effect on applicable water quality standards with respect to specific waters has to be demonstrated with mathematical certainty. Based on the structure of section 312(f) of the CWA, however, and on the causation requirements inherent in EPA’s implementing regulations, *something* more is required than is set forth in this record. Unless and until EPA completes the necessary independent analysis of the need for and the proper geographic scope of any no discharge zones under consideration, the proposed NDZ as delineated in the NPRM and the proposed limitations on the scope of the action (based on vessel size classes and their relative contributions) are wholly inconsistent with the statutory requirements under section 312(f)(4)(A).

#### **4. Conclusion and Alternative Proposal**

The proposed rule would violate section 312(f)(4) of the Clean Water Act by seeking to prohibit sewage discharges from some, but not all, vessels that might discharge in California state marine waters. The lines drawn, both by vessel size and by minimum holding capacity, create a situation in which, by the EPA’s reckoning, more potential discharges are excluded from than are included in the scope of the rule. First, with respect to cargo vessels over 300 gross tons, more vessels – and more discharges by volume – are not covered than are covered. Second, non-recreational vessels up to 300 gross tons are not even discussed. Third, recreational vessels are estimated to have the potential to discharge more than twice the amount estimated to be discharged by covered cargo vessels, but recreational vessel discharges

are not covered. Finally, once covered, a vessel is prohibited from discharging no matter how long it remains in California waters, but a vessel that is not covered (because it does not have the threshold holding capacity) may discharge indefinitely without limitation. These results are insupportable as a matter of law, are arbitrary and capricious in that they discriminate among vessels in a manner that is contrary to the fundamental purpose of the proposed rules, and do not constitute a logical or cohesive regulatory strategy for defining and addressing the issue. Moreover, the NPRM does not address how actual water quality conditions in the vast expanse of waters covered by the proposed action support the proposed geographic scope. For these reasons, the Council urges EPA to amend its proposed rule to conform with the Clean Water Act requirements in section 312(f).

The Council believes that the proposed rule can be modified in a way that reduces the risk of legal challenge and that, equally important, increases the environmental benefits. Specifically, in keeping with the Clean Coast Act's mandate that discharges be prohibited for vessels that have "a holding tank of sufficient capacity to contain sewage and graywater while the oceangoing ship is within the marine waters of the state," the Council requests that EPA modify its proposed rule so that *all* vessels that are equipped with sewage holding tanks are required to enter California waters (if arriving from waters in which discharges are permitted) with empty tanks, and thereafter that they be required to hold to the maximum extent of their capacity until they leave California waters.<sup>10</sup> The agency should also review the spatial extent of the waters to be covered and apply the modified prohibitions in conformity with that analysis.

This approach, if adopted, would result in greater environmental benefits, would represent a more reasoned approach, and would be more consistent with section 312(f)(4)(A). This approach would: (1) address the failure to regulate all vessels, (2) remove the incentive to remove existing holding capacity and the incentive to avoid adding capacity; and (3) increase substantially the volume of discharges that will be covered. As such, while not all legal objections are removed, some of the more serious problems are mitigated, and the chances that any of the various affected constituencies will mount a challenge are reduced. Because this action is based on section 312(f)(4)(A), the Administrator has the flexibility, and indeed the duty, to adopt a rule that is different from what was proposed by the applying State where the record so requires.

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<sup>10</sup> To be clear, the Council opposes the suggestion in the NPRM that vessels could simply make special trips outside of the three-mile line to discharge. In addition to the fact that such voyages would in many cases be longer than three miles each way (see NPRM at 53923-24), there are many other reasons why this is not a workable solution. Among these are: (1) increased congestion in port access lanes and multiple entries into port facilities for a single voyage, (2) substantial and expensive inefficiencies associated with interrupting cargo operations and leaving berths unused for hours at a time, (3) substantial delays to cargo handling operations, (4) increased air emissions from cargo vessels and tugs; and (5) tug and line handling costs.

In addition to the advantages described above, this modified approach would simplify enforcement. Any prohibition – whether as proposed by the NPRM, as proposed by the Council, or otherwise – would require a means of establishing that no prohibited discharge has occurred. The two-day holding capacity threshold test proposed by the NPRM would require a preliminary extra step (i.e., a calculation based on holding capacity and crew size) in order to determine whether a vessel was covered in the first place. Under the Council’s proposal, all vessels would be covered, thus eliminating the need for that initial coverage determination. This would make compliance determinations a one-step rather than a two-step procedure, which would simplify recordkeeping and compliance monitoring.

The WSC proposal could be implemented by making the following changes to the proposed amendments to 40 C.F.R. § 140.4:

- (a) In the first sentence of proposed section 140.4(b)(i), delete the phrase “and from large oceangoing vessels that have two days or more holding capacity.”
- (b) Insert a new second sentence in 140.4(b)(i) to read as follows: “In addition, with respect to the following marine waters of the State of California: **[insert description of specified waters]**, all vessels other than large passenger vessels (to the extent they are arriving from waters in which discharge is permitted) must arrive with sewage holding tanks that have been discharged to the greatest extent operationally practicable, and all such vessels are prohibited from discharging sewage within such specified California State marine waters to the extent that they have the capability to hold such sewage in a holding tank of suitable design, construction and purpose, as determined by the vessel’s flag administration.”
- (c) In section (b)(2)(ii), strike proposed subsections (B), (C) and (D).

The World Shipping Council appreciates the opportunity to submit these comments on behalf of its members.

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