



WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

Comments of the

World Shipping Council

Submitted to the

U.S. Environmental Protection Agency

In the matter of

Stakeholder Input; Listening Session Seeking Suggestions for Improving the Next National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of Vessels

**Docket Number:
EPA-HQ-OW-2010-0828
FRL-9218-8**

December 23, 2010

The World Shipping Council¹ files these comments in response to the notice published on October 29, 2010, 75 Fed. Reg. 66757, which invites public comment on the next Vessel General Permit (VGP), which is to become effective in December of 2013. The Council may have further comments on the next VGP as its terms are developed. At this stage, however, we wish to focus on a particular discharge – ballast water. That discharge was the focus of the litigation that led to the repeal of the exemption from NPDES permitting requirements for routine vessel discharges. How to treat ballast water remains the most difficult and contentious issue under the VGP.

There are many affected constituencies that are unhappy with the current state of ballast water regulation. The federal government, through the EPA and the Coast Guard, has recognized the need for improvement. Environmental advocates and some state governments wish to move beyond the current mid-ocean ballast water exchange requirements and see treatment technology installed aboard ships. Industry supports use of treatment technology but is unable to invest in treatment technologies because it does not know what treatment standard it will be required to meet, or when. Finally, the structure of the Clean Water Act has resulted in states, as part of their section 401 water quality certifications, promulgating conditions that differ from federal requirements and from one another – a result that can be wholly impractical when applied to mobile sources like ships that call in various states and countries.

As the EPA noted in the materials accompanying the current VGP, much of the current difficulty results from a lack of reliable information on the capabilities and availability of treatment technologies and a lack of scientific information about what concentrations of living organisms constitute an invasion risk. As discussed in more detail below, the Council believes that the next iteration of the VGP, in conjunction with the pending Coast Guard ballast water treatment rulemaking, presents an opportunity to resolve the issue of what treatment technology should be required, and when it is reasonable for that technology to be installed. In order for the next VGP to resolve rather than prolong the current situation, however, there are certain approaches that must be taken and certain results that must be secured:

1. **First, any ballast water treatment standard must be science-based.** EPA correctly determined for the first VGP that there was not enough scientific information available at that

¹ The Council is a non-profit trade association that represents over twenty-nine liner shipping companies that carry approximately 90% of U.S. international containerized trade. Liner vessels operate on fixed schedules among pre-determined ports. The Council's member lines operate containerships, roll-on/roll-off, and car carrier vessels. A list of the Council's members may be found at www.worldshipping.org.

time to set a numeric technology-based effluent standard. In response to the absence of reliable science, EPA, in conjunction with the Coast Guard, has tasked two panels of scientists to answer two different but related questions. A panel of the National Research Council has been asked to provide an invasion risk assessment based on different concentrations of living organisms in discharged ballast water. That panel's work should go a long way toward answering the question: "What standard would minimize the risk of invasion?" The second panel, under the auspices of the EPA Science Advisory Board, is determining the level of treatment that can be achieved by ballast water treatment systems, both now and in the reasonably near term. That panel's work will address the question of: "What treatment standard can technology meet in real-world operating conditions?" These reports are due at the end of May 2011.

The Council urges EPA both to use the results from the two panel reports next year to drive its internal deliberations and also to disseminate and discuss those reports with other stakeholders, especially states. One of the unmanageable aspects of addressing ballast water treatment under the NPDES program is the imposition of different section 401 certification conditions in different states. Having competing standards applicable to vessels that call in multiple states is obviously unworkable. Absent a change in that situation through legislation, the only way to resolve conflicts among jurisdictions is to develop a common understanding among regulators at the state and federal level of what is both prudent from the perspective of reducing invasion risk and also possible from a technical perspective. To the extent that the conclusions of the scientific panels provide a basis for such consensus, we urge EPA to coordinate closely with its federal and state partners to reach agreement on the science. Science – not years-old political negotiating positions or unsubstantiated vendor claims – must be the basis for national regulations that are credible to all affected constituencies.

2. The new VGP and the pending Coast Guard rules must be consistent, and both must allow a reasonable time to install treatment technology. Although it is implicit in the discussion above, it bears repeating that it is essential that the Coast Guard's ballast water regulations and EPA's next VGP create a unitary federal standard for ballast water treatment. Recognizing that EPA's authority comes from the Clean Water Act and that the Coast Guard's authority comes from the National Invasive Species Act, the fact is that the regulated community can only implement one set of rules for ballast water treatment, and there is no amount of legal analysis regarding the differences in the applicable statutes that will change that fact. This means that the regulated community must be told clearly what they have to do and when they have to do it, and they must be given a realistic period of time – matched with planned drydocking schedules – to procure and install whatever systems are required.

The Council is concerned that an overly restrictive reading of the Clean Water Act by the EPA could undermine timely adoption of an appropriate numeric discharge standard for ballast water. In the process leading to the first VGP, EPA questioned assertions by states, environmental advocacy groups, and industry that EPA had the authority to use compliance schedules and other means to allow for an orderly installation of new technologies. Specifically, for example, in response to a comment filed by the Michigan Department of Environmental Quality, EPA stated that: “In contrast, the CWA does not allow for inclusion of compliance schedules in the VGP for technology-based effluent limits, requiring compliance with such limits “in no case later than March 31, 1989.” EPA Response to Comments at 6-207, citing CWA §§ 304(b)(2)(C) through (F) and 40 C.F.R. §§ 122.47(a)(1) and 125.3(a)(2). In the same response, EPA suggests that unless a technology standard is susceptible of “immediate installation,” then such technology cannot be the basis of an effluent standard. *Id.*; *see also id.* at 6-214 (compliance schedules “not allowable”).

Although the Council appreciates the agency’s careful attention to its statutory authority, we respectfully suggest that the interpretation voiced in response to comments on the current VGP, if we understand that interpretation correctly, is at odds both with the purposes of the Clean Water Act and also with a logical implementation of the use of ballast water treatment technology on the vessels serving U.S. commerce. If in fact a technology standard may only be adopted in this situation if it is capable of full installation across the entire industry on the first day of the new permit, then one of two bad outcomes would result. The first possibility would be that no numeric standard is set, because as a matter of fact no technology could be installed and maintained by the entire industry on the first effective day of the new VGP. The second possibility would be that the agency does set a numeric standard that requires the installation of technology, but provides no time to do so. Under the first scenario, there is no progress toward the installation of technologies that current information suggests will be available during the term of the new VGP and that have the potential to substantially reduce invasion risk. Under the second scenario, the industry would be placed in non-compliance on the first day of the permit, with no improvement in environmental protection. Neither outcome is logical, legally acceptable or environmentally protective.

Although it might have some superficial appeal, it is no solution to set a compliance deadline of the first day of the new permit, and then enter into consent agreements with all vessel operators under which compliance schedules are set. First, this is simply a compliance schedule that has been run through an additional administrative step. The substance and the result are precisely the same as setting a compliance schedule in the first place. In other words, if the statute allows an unrealistic compliance date followed by a consent agreement, then the statute allows a compliance schedule. To find otherwise elevates form over substance. Second, a work-around involving individual consent agreements would be administratively

unworkable given the number of vessels covered under the VGP. Rather than expend the resources that would be necessary to implement a consent-agreement-based schedule, the Council submits that the agency's efforts would be more productively focused on crafting a statutory interpretation – limited if necessary to the unique circumstances presented here – that recognizes the need for compliance schedules in the next VGP.

Without seeking at this stage to provide a full legal analysis of the availability of compliance schedules in the context of technology-based standards in the next VGP, we offer a few observations. First, excessive emphasis on the statutory deadlines for compliance is misplaced in this situation. The 1989 deadline cited in EPA's response to comments quoted above, having passed over twenty years ago, rather obviously cannot be met under any circumstances with respect to ballast water. Equally obvious is the reason that it wasn't met before. Until the courts recently invalidated the exemption for routine vessel discharges at 40 C.F.R. § 122.3, compliance was not required. Rather plainly Congress never anticipated or addressed the situation in which the Agency and the regulated industry find themselves; i.e., a duty to meet a statutory deadline that only applied after that deadline had already passed. Equally clear is the fact that EPA's regulations on compliance schedules by definition did not consider this scenario, because those regulations were promulgated long before the court decisions that gave rise to NPDES coverage for vessel discharges.

Because Congress could not have foreseen the current situation and therefore did not make any specific provision for it in the Clean Water Act, the agency is not presented with a situation in which "Congress has directly spoken to the precise question at issue." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Because that is the case, the agency is free to fashion its own "permissible construction of the statute," which must "represent[] a reasonable accommodation of conflicting policies. . . ." *Id.* at 843, 845 (*quoting United States v. Shimer*, 367 U.S. 374, 382-3 (1961)).

Here, the competing policies appear to be: (1) refusing to employ necessary compliance schedules because they would conflict with a deadline which has long past in any case, or (2) making substantial progress toward the fundamental goal of the Act, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This should be an easy choice, and one that the courts would sustain in the face of any (unlikely) challenge to the use of a reasonable compliance schedule in support of the implementation of an environmentally protective and technologically attainable numeric discharge standard. Put differently, we do not believe that the courts would upset an agency decision that seeks the earliest practicable improvement in water quality in light of circumstances that were unforeseen by either the agency or the Congress. Especially because there is simply no way to implement the most effective commercially available technology at

the earliest practicable date without an implementation schedule, any outcome that does not include such a schedule would face a far greater risk of being found unreasonable under a *Chevron* step-two analysis than would a properly supported compliance schedule.

3. Conclusion. The World Shipping Council, consistent with its earlier comments to the Coast Guard, urges EPA to use scientific inquiries currently under way to determine what numeric treatment standard provides the greatest environmental protection attainable from commercially available ballast water treatment technology and to set a realistic schedule for the installation of that technology. We respectfully submit that in doing so, it is essential for EPA to:

- Coordinate with the U.S. Coast Guard so that the two agencies, although acting under different federal statutes, produce a consistent regulatory regime from the U.S. federal government;
- Fully inform the states of the scientific basis for the federal government's decision, so that there is a common understanding among regulators at the state and federal level of what is prudent from the perspective of reducing invasion risk and possible from using commercially available technology. A common understanding would enable the implementation of a de facto, uniform U.S. set of requirements applicable to vessels engaged in America's international commerce; and
- Establish a compliance schedule that will enable vessel operators a reasonable period of time to install the technology decided upon in the next VGP during their vessels' next scheduled drydocking.

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