

Docket ID No. EPA-HQ-OW-2008-0055

Comments on Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel (Federal Register, June 17, 2008, pages 34296 – 34304)

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RE: Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel (Federal Register, June 17, 2008, pages 34296 – 34304)

Dear Sir or Madam:

The Chamber of Shipping of America (“Chamber”) and the International Association of Independent Tanker Owners (“INTERTANKO”) appreciate the opportunity to comment on the proposed NPDES General Permit for Discharges Incidental to the Normal Operation of a Vessel (“VGP”).

The Chamber represents 31 U.S.-based companies that own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities that maintain a commercial interest in the operation of such oceangoing vessels. Collectively, the entities comprising the Chamber represent, at a minimum, 70% of large commercial vessels calling on U.S. ports.

INTERTANKO represents more than 260 independent tanker owners. The combined fleet comprises some 2,900 tankers totaling more than 236 million dwt, which is 75% of the world's independent tanker fleet. INTERTANKO's associate membership stands at some 300 companies with an interest in shipping of oil and chemicals.¹

For over 35 years, the Chamber and INTERTANKO have been actively involved in international and domestic discussions relating to discharges from commercial vessels, particularly those involving ballast water. Beginning with the discussions leading up to the adoption of MARPOL in 1973, our activities have included participation at the International Maritime Organization deliberations addressing a number of these discharges as a Non-Governmental Organization Member (INTERTANKO) and as an industry advisor to the U.S. delegation (Chamber). Both of our organizations have also been actively involved in the legislative and regulatory processes addressing many of these discharges, with the ultimate goal of producing environmentally protective standards of operation that reflect the operational realities of commercial shipping and the wide variations in discharge types, volumes, and the temporal and spatial distributions across the many types of commercial vessels.

I. INTRODUCTION AND OVERVIEW

A. More Time Is Necessary To Ensure That A Program To Regulate Incidental Vessel Discharges Is Effective And Appropriate Under The Clean Water Act.

The Chamber and INTERTANKO appreciate the complexity of the issues which EPA has tried to address in the proposed VGP. The proposed VGP was issued in an unusually short time frame, having been precipitated by a judicial determination that the three-decade-old current exemption from the Clean Water Act's NPDES program for discharges incident to the normal operation of vessels be vacated on September 30, 2008. *See Northwest Env'tl. Advocates v. EPA*, 2008 U.S. App. LEXIS 15576 (9th Cir. July 23, 2008). While we continue to believe that EPA properly exempted discharges incident to the normal operation of vessels 35 years ago by regulation, we acknowledge the fact that, barring any further legal action, this vacatur will go into effect on that date regardless of whether EPA has issued the VGP. With this situation, the regulated community is left with a difficult choice. On the one hand, it can provide information to the agency demonstrating that the proposed VGP is fundamentally flawed and legally unsupportable under applicable law, thus potentially leaving the commercial shipping industry without a required permit program in place on October 1, 2008. On the other, it could accept the permit as proposed, which would result in a program that imposes requirements that are in large part impractical and, further, that imposes massive unnecessary costs on the industry without the desired environmental benefits, necessary scientific justification, or cost-benefit analysis required by applicable law.

¹ Section II below describes in more detail the scope and nature of the commercial shipping industry impacted by these comments and whose interests, directly or indirectly, are reflected in this submission.

As explained in our comments below, EPA can and must extend the time for developing this program and for industry to comply with it. Absent such an extension, EPA cannot ensure that the program ultimately constitutes an effective means of preventing any harmful discharges of pollutants into waters of the United States using practical and effective measures that meet applicable legal requirements.

We believe a deliberate and comprehensive assessment of discharges incident to the normal operation of commercial vessels should be conducted. Such an assessment would result in a program that would manage these discharges in a scientifically justified manner, would give due regard for the relative environmental impacts of these discharges, and would take into account the diverse nature of the vessels covered under the program and the costs of management controls compared to environmental benefit. We do not believe EPA's assessments made under this hurried regulatory proposal meet these legally mandated criteria, which we discuss in greater detail below.

Finally, consistent with the comments proposed by the Cruise Lines International Association ("CLIA") during this comprehensive assessment, we recommend restructuring the list of discharges into two categories. The first category would include those discharges already regulated under existing international instruments, federal legislation and regulation, namely bilge water/oily water separator effluent, graywater, underwater hull husbandry, ballast water, and anti-fouling coatings, general housekeeping, and mixtures containing oil and hazardous materials. The requirements as they currently exist should become the methods of management of these discharges in the first round of the VGP and such requirements should be incorporated by reference in the body of the permit and designated as the primary compliance mechanism for those vessels already covered under these legal requirements. For those vessels not currently covered under these existing programs, compliance with these programs should be deemed an alternate compliance mechanism for purpose of compliance with the VGP. The second category of discharges would include those that would be managed through BMPs or other methods once an environmental impacts analysis has been properly done and reviewed through the lens of which ones can be designated *de minimis* and which ones impact the marine environment to such a degree as to warrant legally mandated controls.

B. The Factual Basis Underlying The Proposed VGP – The Battelle Report – Is Fundamentally Flawed And Inappropriate For This Program.

The Clean Water Act's NPDES program was never intended or designed to apply to discharge points other than those associated with stationary sources and, consequently, is not the appropriate vehicle to regulate mobile sources, such as vessels that trade globally and among the various states. Nonetheless, the maritime industry has worked closely with EPA and the U.S. Coast Guard, first in assisting the agency's contractor in the preparation of a vessel survey questionnaire, and then by submitting extensive comments to the docket in EPA's request for comments. As is readily apparent from review of this docket, as well as the Battelle Report (*Technical Support for EPA Development of a Permitting Framework to Address the Vacatur of the NPDES Vessel Exclusion*, Battelle, September 2007) ("Battelle Report"), there are huge data gaps relating to the volumes of discharges incidental to the normal operation of vessels relative to the wide diversity of vessel types and sizes, the number of individuals aboard these vessels

(passengers and/or crew), and the spatial and temporal distribution of these discharges. We believe that if the EPA were to make the underlying data, surveys and other information used to develop the Battelle Report public, the defects in relying on that report would be clear. However, because that was not done, further comment on this precise point is not possible. We believe, for example, that the survey results (assuming the questions that were asked were appropriate) relied upon for various conclusions regarding the identified discharge streams and proposed best management practices fail to represent any valid segment of the commercial vessel industry and, therefore, fail to be representative of any set of facts upon which the proposed VGP is based.

Conclusions reached in the Battelle Report and stated justifications for the proposed VGP attempt to extrapolate Uniform National Discharge Standards for Armed Forces Vessels (“UNDS”) assessment findings to the discharges of commercial vessels. However, the Battelle Report makes it clear that such an extrapolation as a basis for this rulemaking lacks a factual foundation. This is evident, for example, by the following express caveat on page 41 of the Battelle Report:

[a] caveat to this information that bears repeating is that the discharge information provided by EPA and DoD relates to Armed Forces vessels.....(and) Battelle’s ability to associate discharges to particular civilian vessel types was limited, given the specific applicability of the UNDS reports to Armed Forces vessels.

Further review of the Battelle Report and comments to the docket show numerous instances where discharges are identified as relevant but no additional information relative to variations by ships types, volumes of discharges and spatial and temporal distributions is provided.

In addition, an examination of the lengthy process conducted in connection with the UNDS program further demonstrates that EPA’s attempted extrapolation of UNDS assessment findings to the discharges of commercial vessels is inappropriate. Phase I of the UNDS development process took 9 years from initial discussions between EPA and DOD and was completed in 1999. Phase I resulted in the identification and description of 39 discharges and publication of a final rule that required control of 25 of these discharges. The remaining 14 discharges were considered *de minimis* and thus not subject to any discharge controls. The universe of vessels considered numbered about 7,000 and were all under the control of the DOD. *Vessels of the Armed Forces*, UNDS Tidings, Uniform National Discharge Standards at 1 (Summer 2006). As is the case with commercial vessels, the discharges identified by Phase I run the gamut from the relatively simple to manage, such as 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 required a focused assessment of management practices and technologies which could 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. Thus, it has taken *17 years* for the UNDS process just to reach its current Phase II

stage. The accelerated process being applied by EPA to 75,000+ commercial shipping industry vessels attempts to apply the equivalent of UNDS Phase III control strategies to commercial vessel discharges in a two-year time frame.

Simply put, the Battelle Report and the yet-to-be-completed UNDS process do not provide EPA with a legally sufficient basis for the requirements imposed by the VGP. Vessel discharges should be thoroughly evaluated, as was the case with the UNDS program. As even EPA's own experts have acknowledged, two years is simply insufficient time in which to gather the relevant data and assess the impacts of incidental vessel discharges on the marine environment in the comprehensive manner required by law. EPA, with industry support, has worked very hard to collect the necessary data to meet the scientific and cost/benefit criteria required by law. As these comments demonstrate, there just has not been enough time.

C. The EPA Should Return To The District Court And Seek Additional Time To Develop and Implement This Massive Program.

For the reasons discussed in these comments, we respectfully request EPA to return to the district court and seek additional time to enable the type of analysis and assessment that is required by law prior to promulgation of a final VGP.² In requesting additional time from the district court, we urge EPA to make the following points.

First, acknowledging the fact that some of these discharges are quite likely to be found *de minimis*, EPA should focus first on actual discharge streams from vessels that contain pollutants. Many of those listed in the proposed VGP are unlikely to contain pollutants or if they do, contain them at concentrations that would be found to be *de minimis* under current EPA assessment protocols. The current accelerated process did not provide sufficient time for this type of assessment to be conducted. EPA should point out that while it tried to jump start this process using the experiences gained from the evaluation of military vessels under the UNDS process, it has learned that this effort though laudable, is not enough to ensure that the permit program focuses on discharges that are of legitimate concern.

Second, despite best efforts to do so, the proposed VGP contains provisions that are either ambiguous or operationally unrealistic with regard to normal vessel operations and thus will make compliance with the requirements problematic at best. We comment extensively on those provisions in the Appendix included as part of this submission.

Third, while we generally agree with EPA's conclusion that best management practices ("BMPs") are the appropriate control strategies to address these discharges, the district court should be informed that comments received by the agency demonstrate that the wide variation in vessel types, sizes and discharge profiles make defining a single BMP for each discharge type

² We have alternatively suggested that the agency could finalize the draft permit with significant changes, and provide itself and the regulated community with additional time to develop and implement best management practices, just as it did for the Consolidated Animal Feeding Operations ("CAFO") program. See discussion below at Section VI.C.

both inappropriate and impossible, given the diverse universe of vessels which would be covered by the proposed VGP. Without question, additional analysis of the discharges and of the various management practices in place for the many different types of vessels covered is required. We believe that given the complex and massive nature of this effort, and the technical, mechanical and scientific considerations that must be taken into account when developing Clean Water Act effluent limitations, including BMPs, more time is urgently needed.³

Finally, the district court should be made aware of the simple reality that once the discharges are identified and BMPs established, some reasonable period of time is needed to allow the shipping industry to establish and implement these practices. It is unreasonable for the agency to announce new practices on September 30, 2008 and demand that each and every one be incorporated and operational on October 1, 2008. Congress never intended or required such a result when it enacted the Clean Water Act.

EPA's good faith attempt to hastily construct this massive program in light of the district court's decision could hardly be doubted. If the agency explains this undertaking, and provides the court with a specific and detailed plan for proceeding, the court would almost certainly extend the vacatur deadline. A plan of action which could be provided to the court would include the following elements: (1) a characterization of the various types and composition of discharges incidental to the normal operation of vessels, broken down by vessel type; (2) an assessment of the volumes of these discharges for representative individual vessels and by types of vessels in the aggregate; (3) an analysis of current technologies or BMPs and their associated costs broken down by vessel type; (4) an analysis of the extent to which incidental vessel discharges are currently subject to regulation under existing laws or binding international obligations of the United States, and an incorporation by reference of these requirements into the terms of the proposed VGP; (5) a spatial and temporal analysis of incidental vessel discharges; and (6) a comprehensive analysis of the nature and extent of potential effects of incidental vessel discharges on human health, welfare and the environment. Finally, EPA should propose a timeline for completion of the six (6) tasks noted above and promulgation of a final VGP with terms that reflect the outcomes justified by this comprehensive assessment of discharges incidental to the normal operation of vessels. It is only through completion of this type of analysis that a legally justifiable and defensible VGP can be finalized. While the military vessel experience demonstrates that this effort could take well over a decade, we believe asking the court for three years in which to develop and establish the program, and for industry to then implement it before enforcement begins, would be eminently reasonable.

Should EPA proceed on its current course, without collecting and vetting the data EPA typically uses in NPDES permitting, the resulting program may not properly protect the environment consistent with requirements of the Clean Water Act, and will run the increased risk that any resulting permit program adopted by the agency will face court challenges by a variety of parties. The results of such challenges could be catastrophic to the shipping industry, which could be left with an obligation to obtain a NPDES permit, where there is no NPDES permit

³ See discussion, *infra*, addressing EPA's *Guidance Manual for Developing Best Management Practices*.

program in place, thus presenting many with only one option – cease commercial shipping operations in waters of the United States. This could endanger the entire country given the large role that shipping plays in the economy. EPA has an obligation to the regulated community and the public to take the necessary steps to avoid such a scenario.

II. THE CHAMBER, INTERTANKO AND THE SHIPPING INDUSTRY BALLAST WATER COALITION HAVE SIGNIFICANT INTERESTS AT STAKE IN THE PROMULGATION OF THE VESSEL GENERAL PERMIT

While these comments are submitted on behalf of the Chamber and INTERTANKO, trade associations whose constituents are described in the opening paragraphs, both organizations have been actively involved as participants in the Shipping Industry Ballast Water Coalition (“Coalition”). The Coalition is an informal organization comprised of the American Waterways Operators, the Chamber, Cruise Lines International Association, INTERTANKO, Lake Carriers Association, and the World Shipping Council. Each is a maritime trade association that represents member companies that own, operate or charter commercial vessels of all types engaged in both domestic and international trade. Together they represent over 90% of the vessels calling on U.S. 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. These comments do not represent every concern of each member. It is expected that members of the Coalition will be submitting individual comments to the proposed VGP as well. However, we believe it is instructive to describe the Coalition here as evidence of our collective appreciation and knowledge of the diverse types of vessels and vessel operations that would be covered by the VGP. As is indicated above, the Coalition represents owners of virtually every type and size of commercial vessel engaged in both international and domestic trade and registered under U.S. and foreign flags.

Every member of the Coalition has a strong commitment to operating their vessels in a safe and environmentally responsible manner. To do so effectively, however, it is essential that the incredibly diverse nature of this industry and its vessels be considered. Within the population of vessels covered by the Chamber and INTERTANKO, a wide variety of vessel types and sizes can be found. Vessel types owned or operated by our members include crude oil tankers, petroleum product tankers, chemical tankers, bulk carriers, container vessels, roll-on/roll-off vessels, tugs, barges and integrated tug/barge units with sizes ranging from small harbor tugs (150’) to large supertankers over 1000’ in length. These vessels sail under a variety of flags (countries of registry) including the U.S., Bahamas, Panama, Liberia and the Marshall Islands. They are manned with professional mariners from a number of different nations and cultures, providing additional challenges in ensuring these mariners receive the proper training and certifications across these fleets. The diversity of trade routes followed by these vessels include international voyages to all major maritime ports, domestic coastwise routes and inland water routes. Furthermore, variations in voyages and ports of call may result in variations of BMPs, many times depending on the existence (or lack thereof) of adequate reception facilities in receiving ports. Finally, the same vessel may be required to vary its management practices over

time with regard to the type of cargo carrying agreement (charters) in which the vessel is engaged. As noted later in these comments, some of the reporting and recordkeeping requirements are problematic for vessels on spot or voyage charters. In those cases, the vessel operator may not know its next port of call in advance. Consequently, the same vessel may have different compliance issues with the terms in the proposed VGP depending on the commercial agreement under which it is sailing.

Our members recognize the importance and right of every nation to protect its marine environment. Furthermore, we recognize the need for every nation to be able to rely on international shipping to meet its export and import needs and the importance of international shipping to national economies. In this respect, we believe that the effective regulation of shipping is best accomplished through international organizations, such as the International Maritime Organization (“IMO”), supplemented, where necessary, by clear and unambiguous national requirements. A number of IMO instruments and U.S. laws and regulations already address a number of vessels discharges, including those addressed in the proposed VGP. Examples of the international instruments addressing discharges also addressed by the VGP include:

- the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and its six (6) pollutant focused annexes (addressing oil, noxious liquid substances, packaged goods, sewage, garbage and air pollution);
- the International Convention on Oil Pollution, Preparedness, Response and Cooperation (OPRC 90);
- the International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS 01);
- the International Convention for the Control and Management of Ships’ Ballast Water and Sediments (BWC 04);
- the International Convention for the Safety of Life at Sea (SOLAS 74);
- the International Safety Management Code (ISM 98); and
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78).

U.S. implementing legislation and regulations addressing discharges also addressed in the VGP include the Act to Prevent Pollution from Ships (APPS), the Oil Pollution Act of 1990, and regulations found in Chapters 33 and 46 of the Code of Federal Regulations.

The legal requirements cited above contain a significant number of substantive provisions that already regulate the management and control of discharges included in the proposed VGP as well as training and certification requirements for mariners. They also include implementation of the International Safety Management Code (“ISM Code”), which establishes a mandatory

framework for the development, implementation and assessment of safety and pollution prevention management to ensure safety, to prevent human injury or loss of life, and to avoid damage to the marine environment. In particular, implementation of the ISM Code aboard individual vessels mandates the codification of management practices in the form of operating and procedure manuals for every critical operation undertaken aboard a vessel. As such, many of the recordkeeping and reporting requirements contained in the proposed VGP are already addressed, albeit in a different manner, within the body of existing international requirements, U.S. law and regulations. In cases where the proposed VGP conflicts or duplicates existing requirements, the permit should incorporate by reference these existing provisions as alternative compliance mechanisms. A comprehensive effort to identify these overlaps, consistencies, and inconsistencies cannot be done in 45 days, but is necessary if the VGP program is to work correctly.

III. AN NPDES PROGRAM REGULATING DISCHARGES INCIDENTAL TO NORMAL COMMERCIAL VESSEL OPERATIONS MUST MEET SEVERAL FUNDAMENTAL LEGAL REQUIREMENTS

In developing this new and unprecedented regulatory program, several legal requirements must be met. First, EPA must comply with Clean Water Act requirements for establishing effluent limits for discharges incidental to normal vessel operations. Second, EPA must ensure that the record supports the effluent limits (including BMPs) selected. Third, EPA must provide notice to the regulated community regarding exactly what is expected of it in order to comply with the selected effluent limits.

A. The Effluent Limits Imposed For Discharges Incidental To Normal Vessel Operations Under The VGP Must Comply With The Requirements Of The Clean Water Act.

The NPDES permit obligation applies exclusively to “discharges of pollutants.” 33 U.S.C. § 1311(a). The Clean Water Act defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). “Pollutant,” in turn, means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6).

NPDES permits are intended to include substantive restrictions on the discharge of pollutants. The effluent limitations contained in an NPDES permit in most cases specify the quantity or concentrations of specific pollutants that may be discharged from the point source. In general, there are two types of substantive restrictions imposed. First, all point sources are required to meet “technology-based” limitations. 33 U.S.C. §§ 1311, 1316. Technology-based limits are determined by the level of control that is technologically and economically achievable through the use of existing technology, and they are developed independently of any consideration of the impact of the discharge on receiving water. 33 U.S.C. §§ 1314, 1316; *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1041 (D.C. Cir. 1978). In addition to technology-based limitations, a point source may be subject to more stringent effluent limitations, known as

“water quality based effluent limitations” (“WQBELs”), necessary to assure attainment of state water quality standards. 33 U.S.C. § 1311(b). State water quality standards consist of three elements: “designated uses” that specify the intended uses or goals for each water body or segment of water in the state; criteria that are generally specific maximum numerical concentrations of pollutants in the water body that will not preclude attainment of the designated use; and an “anti-degradation” policy that may impose limits on the issuance of NPDES permits to point sources that will degrade existing water quality. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.

As EPA is aware, in formulating national effluent limitation guidelines, the Clean Water Act directs EPA to institute progressively more stringent effluent discharge guidelines in stages. Congress intended EPA to consider numerous factors - *including costs to varying degrees* - in addition to pollution reduction: “The Committee believes that there must be a reasonable relationship between costs and benefits if there is to be an effective and workable program.” Clean Water Act of 1972, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. (86 Stat.) 3713.

At the first stage of pollutant reduction, EPA is to determine the level of effluent reduction achievable within an industry with the implementation of the “best practicable control technology currently available” (BPT). 33 U.S.C. § 1314(b)(1)(A). In general, BPT is the average of the best existing performances by industrial plants of various sizes, ages, and unit processes within the point source category or subcategory. In arriving at BPT for an industry, EPA is to consider several factors, including the *total cost* of the application of the technology in relation to the effluent reduction benefits to be achieved from such application. 33 U.S.C. § 1314(b)(1)(B). For most point sources, BPT was to be achieved by July 1, 1977. *Id.* at § 1311(b)(1)(A).

At the second stage, EPA is to set generally more stringent standards for toxic and conventional pollutants. For toxic pollutants, EPA is to set the standard for the “best available technology economically achievable” (BAT). BAT represents, at a minimum, the best economically achievable performance in the industrial category or subcategory. *See NRDC, Inc. v. EPA*, 863 F.2d 1420, 1426 (9th Cir. 1988) (citing *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64, 74 (1980)). Compared to BPT, BAT calls for more stringent control technology that is both technically available and *economically achievable*. Among the factors that EPA must consider and take into account when setting BAT are the *cost of achieving such effluent reduction* and the non-water quality environmental impact including the energy requirements of the technology. 33 U.S.C. § 1314(b)(2)(B). For most point sources, BAT was to be achieved by July 1, 1987. 33 U.S.C. § 1311(b)(2)(A).

Conventional pollutants are treated differently from toxics under the Clean Water Act. Pursuant to 1977 amendments to the Act, a new standard was conceived for conventional pollutants entitled “best conventional pollutant control technology” (BCT). This standard is designed to control conventional pollutants about which much is known but for which stringent BAT standards might require unnecessary treatment. Congress intended for BCT to prevent the implementation of technology for technology’s sake. BCT is not an additional level of control, but replaces BAT for conventional pollutants. Consequently, the technology chosen as BCT must pass a two-part “*cost reasonableness*” test. *See American Paper Institute v. EPA*, 660 F.2d

954 (4th Cir. 1981). According to the Clean Water Act, the Administrator shall include in the determination of BCT:

[a] consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works [POTWs] to the cost and level of reduction of such pollutants from a class or category of industrial sources

33 U.S.C. § 1314(b)(4)(B). The first part of the BCT cost test is referred to as the “industry cost-effectiveness test”; the second part is known as the “POTW test.”

Finally, the Clean Water Act directs the EPA to establish a separate standard for new sources of pollutants. These “new source performance standards” (NSPS) require application of the technology chosen as BAT to remove all types of pollutants from new sources within each category. 33 U.S.C. § 1316. Factors to be considered in formulating NSPS include the *cost* of achieving such effluent reduction and any non-water quality environmental impact and energy requirements. 33 U.S.C. § 1316(b)(1)(B).

B. It Is Essential That The Identification Of Discharges Containing Pollutants And The Effluent Limits Selected Under The VGP Are Supported By The Record.

EPA’s proposal is governed by the Clean Water Act and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* These laws require that the final permit proposal be supported by the *facts in the record*, and that the final permit proposal not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). EPA’s decisions must be supported by “substantial evidence” in the record. *Association of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971).

While EPA may be given some deference on its scientific judgments, *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), it is nevertheless obligated to ensure that the judgments are well reasoned and based on articulated facts in the record. *See, e.g., American Trucking Associations v. EPA*, 175 F.3d 1027, 1054-55 (D.C. Cir. 1999), *reh’g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *aff’d in part and rev’d in part on other grounds, Whitman v. Am. Trucking Assn’s*, 531 U.S. 457 (2001) (EPA’s decision to regulate coarse particulate matter (PM) indirectly, using indicator of PM₁₀, was arbitrary and capricious; administrative convenience of using PM₁₀ cannot justify using an indicator poorly matched to the relevant pollution agent); *Tex Tin Corp. v. EPA*, 992 F.2d 353, 354-55 (D.C. Cir. 1993) (EPA’s reliance upon generic studies in face of conflicting detailed and specific scientific evidence held arbitrary and capricious). A court will carefully “review the record to ascertain that the agency has made a reasoned decision based on ‘reasonable extrapolations from some reliable evidence,’” *Natural Resources Defense Council v. EPA*, 902

F.2d 962, 968 (D.C. Cir. 1990), to ensure that the agency has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).⁴

In this instance, EPA is making two substantive judgments. First, EPA is proposing to identify the discharges that are incidental to normal vessel operations and that contain pollutants. Second, the agency is seeking to identify the means by which those pollutants can be eliminated or minimized, consistent with the requirements of the Clean Water Act. With respect to the first judgment, EPA’s determination that a particular pollutant may be harmful to the environment is at the core of its expertise. At the same time, however, whether that pollutant is even present in a particular vessel discharge stream, or whether its presence represents a threat to the environment when discharged in connection with normal vessel operations, requires careful consideration and factual support. Similarly, effective management of pollutants in a mobile, marine environment requires judgment and expertise regarding vessel operations – expertise that EPA admittedly does not have. In this regard, we urge the agency to consider carefully these relevant and significant comments, as they are made by those with expertise regarding vessel operations. Because the EPA does not profess to be familiar with the industry, it is crucially important that the agency develop an adequate record to support any NPDES permitting program ultimately adopted.

It is also crucially important that the EPA provide reasoned and logical explanations for its choices, and not merely conclusory statements. *See, e.g., Chemical Mfrs. Ass’n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (unsupported and conclusory statement regarding scientific model “added nothing to the agency’s defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary”). EPA should, likewise, not infer facts not in the record. *See National Gypsum Co. v. EPA*, 968 F.2d 40, 43-44 (D.C. Cir. 1992) (agency cannot infer “facts” not in the record); *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (agency actions based upon speculation are arbitrary and capricious).

EPA must also adequately respond to “relevant” and “significant” public comments that the Chamber, INTERTANKO and others are providing. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *United States Satellite Broad. Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984) (agency must respond in reasoned manner to significant comments received). “For an agency’s decisionmaking to be rational, it must respond to significant points raised during the public comment period.” *Allied Local & Regional Mfrs.*

⁴ In *State Farm*, the Supreme Court offered several examples of circumstances in which an agency action normally would be considered arbitrary and capricious: situations where “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

Caucus v. EPA, 215 F.3d 61, 80 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 1018 (2001); *accord Louisiana Federal Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1079 (D.C. Cir. 2003) (remanding rule to agency where agency failed to address substantive comments); *National Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980) (remanding standards based, in part, on EPA's failure to respond to significant comments). "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public. A response is also mandated by *Overton Park*, which requires a reviewing court to assure itself that *all relevant factors* have been considered by the agency." *Home Box Office*, 567 F.2d at 35-36 (emphasis added); *see also State Farm*, 463 U.S. at 43 (an agency decision is arbitrary if the agency "failed to consider an important aspect of the problem").

As applied here, EPA must develop a record that contains an adequate factual basis

- establishing that each of the discharge streams it seeks to regulate contain harmful pollutants; and
- establishing that the effluent limits imposed, whether they be BMPs or numeric, meet the applicable requirements of the Clean Water Act for technology-based and water-quality based effluent limits.

C. EPA Must Ensure That The Regulated Community Has Been Given Proper Notice Of The Standards It Is Expected To Meet.

The agency must sufficiently identify and specify effluent limits (BMPs or otherwise) for each waste stream in order to give the regulated community adequate notice of the standard it is expected to meet.

Under the Fourteenth Amendment to the United States Constitution, a person is protected against a deprivation of his life, liberty, or property without "due process of law." "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co., Inc. v. Federal Communications Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987).⁵ "The due process clause thus prevents deference [to the agency's interpretation of its regulations] from validating the application of a regulation that fails to give fair warning of

⁵ In *Satellite Broadcasting Co., Inc. v. Federal Communications Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987), the FCC dismissed Satellite's application for a microwave radio station because it was filed in Washington, D.C., not in Gettysburg, Pa., as the FCC determined the regulations required. But the specific regulation governing the appropriate location to file, and other regulations, offered "baffling and inconsistent" advice. *Id.* at 2. Assuming *arguendo* that the FCC's interpretation was reasonable, the court ruled that the FCC should not have dismissed Satellite's application: "[T]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class *for reasonably interpreting Commission rules* The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation." *Id.* at 4 (emphasis added).

the conduct it prohibits or requires.” *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (indications of quotation omitted).

Because the proposed VGP is based on the use of BMPs, it is essential that the BMPs be sufficiently specific to meet these due process requirements. This is especially necessary where, as here, failure to comply with the BMPs can subject a vessel operator to administrative, civil and criminal penalties and potential citizen suits. *See* 33 U.S.C. §§ 1319, 1365; *see also NRDC v. SW Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (upholding award of injunctive relief and civil penalties in citizen suit alleging violation of BMPs in NPDES permit).

The D.C. Circuit’s decision in *General Electric Co.*, provides a useful illustration of the application of this legal principle to the proposed VGP. In *General Electric Co.*, EPA fined General Electric for distilling used solvents and incinerating only the contaminated portion instead of immediately incinerating the entire solution. *Id.* at 1326-27.⁶ General Electric argued that the regulation at issue did not provide it with reasonable notice of EPA’s expectation that it immediately incinerate the entire solution. The relevant inquiry, the D.C. Circuit explained, was:

whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.

53 F.3d at 1329. The D.C. Circuit held that the regulation could be interpreted in the manner suggested by EPA, but nevertheless held that EPA could not fine General Electric for its failure to comply with an interpretation that was “so far from a reasonable person’s understanding of the regulations that [the regulations] could not have fairly informed GE of the agency’s perspective.” *Id.* at 1330; *see also United States v. Chrysler Corporation*, 158 F.2d 1350, 1354-57 (D.C. Cir. 1998) (holding that agency failed to provide fair notice of specific requirements of compliance testing and government therefore could not seek an automobile recall on the ground that Chrysler had failed to properly to perform testing); *Rollins Envtl. Svcs. (NJ) Inc. v. EPA*, 937 F.2d 659, 653 (D.C. Cir. 1991) (rescinding fine assessed by EPA because regulation was ambiguous). In other words, the court in *General Electric* refused to permit an agency to sanction a company

⁶ GE and EPA agreed that the regulations required the incineration of the solvent. They disagreed about whether GE’s intervening distillation and recycling process violated the regulations. EPA argued that its regulations required GE to dispose of all the dirty solvent by immediate incineration. GE did not think that the regulations prohibited it from taking intermediate steps like distillation prior to incineration. To GE, other regulatory provisions authorized intermediate processing “for purposes of disposal” - processing such as distillation - as long as it complied with applicable regulatory requirements. EPA did not alleged that GE’s distillation process failed to comply with those requirements. In fact, as the ALJ later concluded, distillation reduced the amount of contaminated materials, thus producing environmental benefits. *Id.*

based on the failure of the company to comply with an expectation held by the agency but not shared with the regulated public.

Here, as in *General Electric*, EPA's proposed permitting program does not provide the regulated community with constitutionally adequate notice of the expectations that provide the basis for the sanctions EPA may impose. Take, for example, the following vague BMPs imposed by the proposed permit:

- “Consistent with *good marine practices* that prevents excessive discharge....”
- “Minimize by practicing *proper maintenance*”
- “Owner/operators must use these non-fluorinated substitutes for training when *practicable and achievable*”
- “*Not all* biodegradable soaps are appropriate”
- “Most effective BMP is to conduct maintenance and training activities *as far from shore as possible*”
- “Vessels that generate wet exhaust must be maintained in *good operating condition*”

To correct these and other amorphous BMPs throughout the proposed VGP, EPA should conduct a more in depth survey to identify particular and specific industry standards and practices that it can refer to in the proposed permit. Some of those standards are provided in these comments, but because of the short time afforded the regulated community to comment, it is not possible to catalogue the variety and depth of training, maintenance and other practices that might meet the general BMPs that are proposed in the VGP.

In addition, the EPA has a 200-page guidance document on the development of BMPs. *See* Guidance Manual for Developing Best Management Practices, 833-B-93-004, EPA Office of Water (1983). The agency should provide a clear explanation: (a) as to whether, and how, it relied upon this guidance in the development of the BMPs imposed by the proposed permit; and (2) of the extent to which the regulated community can rely upon this guidance to develop BMPs.

IV. THE PROPOSED PERMIT RECORD LACKS A FACTUAL BASIS FOR CONCLUDING THAT ALL 28 WASTE STREAMS IDENTIFIED CONTAIN POLLUTANTS THAT MUST BE REGULATED UNDER THE CLEAN WATER ACT

A. EPA's Almost Exclusive Reliance Upon Studies Of Armed Forces Vessels And Cruise Ships Is Fundamentally Flawed.

The record upon which the EPA based the identification of the 28 streams is exclusively based on studies of armed forces vessels and cruise ships and does not contain any facts to support a conclusion that the concerns regarding discharges from those vessels are transferable to other, completely unrelated, vessels.⁷ Virtually the entire factual basis for identifying and characterizing the 28 discharge streams eligible for coverage under the proposed VGP permit originates from a technical document entitled "Phase I Uniform National Discharge Standards for Vessels of the Armed Forces" ("UNDS") and the Battelle Report. The Phase I UNDS document includes reports that describe the discharge characteristics (*e.g.*, constituents, rates, concentrations, etc.) of 39 discharges as applicable to vessels of the Armed Forces. The discharge information included in this technical document applies only to a universe of 7,000 Armed Forces vessels. *Vessels of the Armed Forces*, UNDS Tidings, Uniform National Discharge Standards, at 1 (Summer 2006). The Battelle Report acknowledges that while a few other sources were helpful, the UNDS reports served as the "greatest single source" of information on vessel discharges. Battelle Report at 15. Some of the only other pollutant-specific factual or scientific studies of vessels actually regulated under the permit that were relied upon by the EPA in identifying pollutants, discharge characteristics, and their environmental impacts were done of Alaskan cruise ships. However, EPA has estimated that there are only 30 large cruise ships certified to operate in Alaskan waters. *See* 73 Fed. Reg. at 34,298 (June 17, 2008). Yet, EPA currently estimates that more than 75,000 commercial vessels may be regulated under the proposed permit. (As explained above, despite the agency's best efforts, it is extraordinarily difficult to see how it could develop a rational and fact-based program for incidental discharges from a diverse universe of more than 75,000 vessels in a matter of months, when it has taken it and the Defense Department more than 17 years to do the same for just 6,000 vessels far less diverse than commercial ones.)

These findings that only reflect discharge characteristics of Armed Forces vessels, which are specifically exempted from regulation by the permit, and Alaskan cruise ships, which represent only one segment and a tiny fraction of the total number of vessels that will be regulated under the permit, do not provide a sufficient basis for the identification and regulation of the discharges identified in the proposed VGP. The factual data concerning the characteristics, volume, and environmental effects of these discharges from the limited sector of vessels relied upon by the EPA in identifying these 28 discharges cannot logically and reasonably be applied to the significantly larger and considerably more diverse universe of vessels that fall under the permit's purview. Again, notwithstanding the agency's good faith

⁷ This concern is also addressed in general terms, in section I.B above.

efforts, this cannot be justified based on administrative convenience. *See, e.g., American Trucking*, 175 F.3d at 1055; *Texas Tin Corp. v. EPA*, 992 F.2d 353, 354-55 (D.C. Cir. 1993).

Indeed, EPA stated “although these reports focus on Armed Forces vessels, some of the discharge studies *may be* instructive for the evaluation of discharges from civilian vessels.” Battelle Report at 14 (emphasis added). However, it never explains in the Fact Sheet for the VGP or any other document that has been made public, the factual basis for this statement. In fact, as noted above, the Battelle Report states:

A caveat to this information that bears repeating is that the discharge information provided by EPA and DOD relates to Armed Forces vessels. If data on discharge rates or concentrations were available and are included in this section, they apply specifically to the type(s) of Armed Forces vessel(s) discussed in the UNDS reports. In a similar vein, Battelle’s ability to associate discharges to particular civilian vessel types was limited, given the specific applicability of the UNDS reports to Armed Forces vessels. Some discharges can be easily connected to certain types of vessels while other discharges may or may not apply to any number of vessels.

Battelle Report at 41.

It is essential that the VGP permit be based on substantial and relevant evidence - appropriate research regarding discharges from the *actual* vessels that will be regulated so that the permit can be properly tailored to the sector being regulated. *See Association of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984); *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

Several examples illustrate how the lack of this data creates arbitrary results. First, EPA found that several metals and organic pollutants in firemain systems discharge exceeded water quality criteria in firemain water aboard Armed Forces vessels. However, in the VGP Fact Sheet, EPA states that it “assumes that similar discharge characteristics will be found in civilian vessels.” *2008 Proposed Issuance of National Pollutant Discharge Elimination System Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial and Large Recreational Vessels Fact Sheet* (“VGP Fact Sheet”), Environmental Protection Agency, 2008, at 71. Such an assumption does not take into account the various distinctions between Armed Forces vessels and commercial vessels, including the various vessel types, classes, sizes, operational characteristics, practices, discharge volumes, and the specific environmental impact to the particular receiving water bodies that may be affected by discharges from the vessels that will actually be regulated by the proposed VGP. For example, an aircraft carrier carries a crew complement of over 5000 people, while most non-passenger commercial vessels carry crews which rarely exceed 30 people, a difference which clearly delineates the difference in graywater profiles and volumes between the two types of vessels. Similarly, a majority of Armed Forces vessels have technologically sophisticated propulsion systems (*e.g.*, gas turbine, nuclear) while commercial vessels are typically powered with either steam or diesel systems, yet another

distinction which explains the vast difference in discharge profiles and volumes generated on these two very different types of ships. *See also* Appendix at § 2.2.4.

Second, the UNDS document listed the constituents of aqueous film-forming foam (“AFFF”), hull coating leachate, and gas turbine water wash, although the Battelle Report recognized that those constituents are “specific to the brand of concentrate used by the Armed Forces and are not necessarily relevant to civilian vessels.” Battelle Report at 42. Also, with respect to firemain systems, gas turbine water wash, and underwater ship husbandry, the report acknowledges civilian vessels will have an entirely different set of variables to consider when determining rate and concentration values because the discharge characteristics were assessed in the context of practices for Armed Forces vessels. *Id.* at 52. For example, most Armed Forces vessels have washdowns at least once every 48 hours of operation. *Id.* at 53. To highlight the danger of extrapolating UNDS findings to civilian vessels, in the case of civilian vessels which are required by law to charge their firemain once per week, washdown of civilian vessels occurs at a widely variable frequency depending on vessel type and weather conditions, but by no means are washdowns performed every 48 hours on average across the widely disparate universe of civilian vessels.

Furthermore, EPA’s June 2007 Advanced Notice of Proposed Rulemaking requested that commenters provide information to help EPA comprehend the universe of vessels and discharges that would be regulated under the proposed permit. *See* 72 Fed. Reg. 34,241 (June 21, 2007). In response, six commenters (representing tugboats, towboats, barges, liner shipping services, large cruise lines, bulk carriers, and floating and shorebased seafood processors) provided specific lists and characterizations of the discharges that were relevant to their vessels types. Battelle Report at 38. Notably, none of the commenters cited motor gasoline compensating discharge, photographic laboratory drains, or sonar dome discharges as relevant to their vessels’ operations, yet these discharge streams are proposed to be regulated under the VGP. Including discharge streams that are simply not present in the sectors being regulated complicates the regulatory process, confuses the regulatory community, and results in the imposition of obligations that are unnecessary and will undermine the ability of the regulated community to address discharges that actually do exist and contain pollutants.

It may well be that after an actual analysis of discharges from the sector being regulated that some or all of these 28 streams contained in the VGP should be regulated. Still others may need to be addressed in ways far different than that which the agency has proposed, based on facts that have not yet been determined due to the hurried nature of this proceeding. It may also be the case that some may be excluded as nonexistent or that because of the *de minimis* nature of the discharges, the stream might be excluded or BMPs might be *de minimis* as well. Such exemptions can be an appropriate exercise of agency discretion. *See Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2000); *Ohio Valley Envtl. Coalition v. Horinko*, 279 F. Supp.2d 732, 767-71 (S.D. W. Va. 2003). Indeed, the district court stated that EPA may consider whether any vessel discharges produce only *de minimis* pollution on remand. *See Northwest Envtl. Advocates v. EPA*, 2006 U.S. Dist. LEXIS 69476 at *29 (N.D. Cal. Sept. 19, 2006).

Furthermore, while it might be safe to conclude after factual investigation that some of the *types* of discharges identified in Phase I of the UNDS program do occur on civilian vessels, extrapolation of the conclusions reached in the UNDS process here does not take into account that neither the second half of the Phase I process, which required characterization of each discharge to determine if controls should be required, nor Phase II analysis of the appropriate standards to be applied to each discharge, have been conducted with regard to civilian vessels. A breakdown of the deliberative process required under the UNDS analysis can be found at <http://www.epa.gov/owow/oceans/regulatory/unds/batchruleprocess.html#1> and provides in relevant part:

The Phase I rule identified all discharges incidental to the normal operation of armed forces vessels, **and characterized each discharge to determine if it required control, based on its potential to have an environmental impact.** The rule determined the types of vessel discharges that require control by a marine pollution control device (MPCD) and those that do not require control. EPA and DOD identified 39 discharges, 25 of which would require control by an MPCD.

In Phase II, EPA and DOD, in consultation with the U.S. Coast Guard, are developing standards for each discharge that was determined to require control in Phase I. EPA and DOD have agreed to establish performance standards in batches, rather than promulgating standards for all 25 discharges at one time. This is referred to as batch rulemaking.

The batch rulemaking approach allows EPA and DOD to **conduct technical analyses and develop discharge standards** in batches (approximately five discharges per batch). A major advantage of this approach is that it speeds up the implementation of performance standards, thus more quickly realizing the goals of the Uniform National Discharge Standards (UNDS).

(emphasis added).

Also of relevance here is the requirement in the UNDS process that EPA and DOD must consider seven statutory factors in determining whether it is reasonable and practicable to require the use of an MPCD, namely: (1) the nature of the discharge; (2) environmental effects of the discharge; (3) practicability of using a MPCD; (4) effect of using a MPCD on the operation of a vessel; (5) applicable United States law; (6) applicable international standards; and (7) costs of an MPCD installation and use.

To justify regulation of civilian vessels based on the outcomes of the yet-to-be-completed UNDS program requires that discharges from civilian vessels be subject to the same or at least similar, scrutiny as that provided to Armed Forces vessels under the process described above. Clearly, this is not the case. Under the circumstances, UNDS data and conclusions are inappropriate for application to the universe of civilian vessels, which have some of the same types of discharge, but vary widely across ship types, sizes, discharge volumes and the spatial and temporal distribution of these discharges.

In sum, will the EPA be providing a factual justification for the identification and regulation of each particular discharge under the VGP as it applies to the various segments of the maritime industry? If the EPA needs more time in order to develop an adequate factual basis for regulating the commercial vessel sector, will it be seeking such time from the district court as suggested by the Ninth Circuit? *See Northwest Envtl. Advocates v. EPA*, 2008 U.S. App. LEXIS 15576 (9th Cir. July 23, 2008).

B. BMPs Rather Than Numerical Standards Are Appropriate.

Effluent limitations, whether based on technology or water quality standards, are typically expressed as a numerical limit in the quantity or concentration in the discharge of specific pollutants, and effluent limitations in NPDES permits are generally achieved through the use of waste water treatment systems that remove pollutants from the industrial effluent. In some cases, however, end-of-pipe treatment may not be feasible, and EPA regulations allow for permit limitations that require a permittee to employ BMPs to minimize the discharge of pollutants. *See* 40 C.F.R. § 122.44(k)(3) (BMPs may be used when numeric limits are infeasible). In contrast to end-of-pipe numerical limits, BMPs may require modification of industrial processes or other management practices that minimize the release of pollutants in the first place. EPA's regulations broadly authorize the use of BMPs where necessary to "carry out the purposes and intent of the CWA," 40 C.F.R. § 122.44(k)(4), and, as far back as 1977, courts have recognized that BMPs can be used by the agency where numerical limitations are infeasible. *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

The Chamber and INTERTANKO support EPA's determination that the use of BMPs, rather than numerical limits, is appropriate for the VGP. As EPA recognized, because of the nature of vessel discharges, it is not practicable to rely on end-of-pipe numerical effluent limits to achieve applicable levels of control for the large majority of discharges. Constituents of discharges vary widely based upon vessel type, size, and activities occurring on board the vessel. Thus, the use of BMPs is appropriate for the VGP.

C. The Clean Water Act Requires That Differences In Industry Sectors Be Recognized When Identifying BMPs.

As recognized by both EPA's *Guidance Manual for Developing Best Management Practices* and *NPDES Permit Writers' Manual*, there are vast differences in industry sectors when it comes to identifying and implementing BMPs. The identification and implementation of an effective BMP program is not a straight-forward task. The universe of vessel sectors covered by the VGP is diverse in type, operation, persons onboard, and geographic distribution as indicated previously in these comments. Covered vessels will include the smallest harbor tugs over 79 feet in length with a crew of 4, large non-passenger commercial ships over 1,000 feet in length carrying thousands of tons of various cargo types with crews of 20, and large cruise ships of similar length that carry 4,000 passengers and 1,500 crew. Because of those vast differences in vessel types, many discharge streams, while present on most vessel types, will vary widely in volume and frequency of discharge and thus environmental impacts will vary widely. The same

fatal flaw in applying UNDS program conclusions to civilian vessels exists here, as well, in attempting to apply a “one size fits all” BMP philosophy for all vessels. BMPs by definition are devices, practices, or methods used to manage discharges. This umbrella term lumps widely varying techniques into a single category.

With the existence of such a wide variety of underlying oftentimes vessel-specific, or industry segment-specific, conditions, any adoption of a one-size-fits-all approach to a BMP program for commercial vessels is infeasible and inherently arbitrary. Discharges from commercial vessels vary in type, frequency, space, and intensity. Receiving water bodies for the discharges are all non-uniform, again leading to temporal and spatial variation concerning pollutant loads. An effective BMP program for commercial vessels must incorporate this variability to produce reliable data and results.

EPA recognizes that not all vessels types, sizes, and classes from the various industry sectors operate in the same way. Take, for example, EPA’s proposed BMPs for antifouling hull coating leachate.⁸ EPA suggests in determining how the vessel operators should comply with these BMPs, the vessel operators should consider the vessel’s operational profile, including operating speed, drydocking requirements, and the waters in which the vessels will be traveling, because such factors affect the fouling rate of the hull. VGP Fact Sheet at 66-67. Using hortatory language, the EPA correctly and properly recognizes that various antifouling coating options are available, takes into account the multiplicity of industry sectors and their operating characteristics and environments, and grants vessel owners and operators the discretion to select the most appropriate and feasible antifouling coatings for their vessels.

The permit also imposes different requirements with respect to graywater treatment for large cruise ships and medium cruise ships because the EPA expects that fewer medium sized vessels to have the treatment capacity to meet the more stringent standards imposed on larger vessels. “This extra flexibility for medium cruise ships allows owner/operators to comply with the requirements of the permit, while offering a more environmentally protective approach than allowing the discharge of graywater into nutrient-impaired estuaries while stationary.” VGP Fact Sheet at 96.⁹

EPA should be commended for recognizing the diversity among vessel types in these instances, but an evaluation based on the distinct characteristics of these sectors needs to be conducted for each BMP proposed in the VGP in order to meet the requirements of the Clean Water Act. *See Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554 (D.C. Cir. 2002) (“EPA has considerable discretion in determining a technical approach that will ensure that effluent limitations reasonably account for expected variability in plant operations while still maintaining an effective level of control”). At a minimum, the EPA must incorporate recognition of its own analytical approach to the development of BMPs, set out in its *Guidance Manual for Developing*

⁸ This is also discussed in the Appendix at § 2.2.4.

⁹ EPA’s recognition of the difference in vessels is appropriate, but as noted in the Appendix, item 9, other substantive concerns with the proposed BMP for graywater still exist.

Best Management Practices, and permit the regulated community to rely on that manual to develop theirs. In addition, given the agency's recognition that the process of developing let alone implementing BMPs is long and often difficult, the agency must, as discussed below, give the regulated community additional time to comply and protection from enforcement during that interim period.

D. The BMPs Proposed For Certain Discharge Streams Are Not Supported By The Record.

The Appendix to this submission contains a comprehensive discussion of each proposed discharge stream and comments on the extent to which each lacks a factual foundation for the BMPs.

The EPA fails to provide an adequate factual record that supports its decision to impose the BMPs it has selected for compliance by permittees. For example, the VGP proposes that vessels greater than 400 gross tons that regularly sail outside of the territorial sea (at least once per month) shall not discharge treated bilgewater within 1 nautical mile (nm) of shore unless the discharge is necessary to maintain the safety of the ship. EPA states that "the cumulative impact of numerous vessels releasing bilgewater in nearshore, estuarine environments or in waters with limited circulation can be of concern" without providing information as to the specific nature of the concern and a nexus between alleviating that concern and the VGP's 1 nm requirement. VGP Fact Sheet at 58. EPA has not demonstrated that restricting bilgewater discharges to beyond 1 nm of shore will have any measurable impact on the estuarine environments near shore, especially given the limited quantities of bilge water discharged as compared to other more voluminous vessel discharges. *See* Appendix at § 2.2.2. Without scientific or actual data supported by facts in the record justifying the 1 nm restriction, the 1 nm requirement is necessarily arbitrary and capricious.

Similarly, for vessels greater than 400 gross registered tons, operational limits in the VGP would prohibit the discharge of graywater within 1 nm of shore unless the graywater has been treated in accordance with treatment standards imposed by the VGP. Discharges between 1 nm and 3 nm of shore would have to either meet effluent limits outlined in the permit or be discharged while the vessel is moving at a speed of at least 6 knots. *Id.* at 90-91. However, the agency, again, does not include a justification for the 1 nm requirement or the requirement that the vessel be moving at a speed of at least six knots.

The proposed VGP also specifies that vessels engaged in Pacific nearshore voyages must conduct ballast water exchanges at least 50 nm from shore between ballasting events, if their voyage track is not expected to exceed a distance of 200 nm. This requirement is not currently mandated by federal law. Currently, only California and Washington state ballast water management laws require ballast water exchange for Pacific nearshore voyages. *See Economic and Benefits Analysis of the Proposed Vessel General Permit, Abt Associates Inc., June 2008*, at 9; Appendix at § 2.2.3. EPA is proposing to mandate this requirement for the Pacific Coast and is considering extending this ballast water exchange requirement to the coastwise trade on the Atlantic or Gulf Coasts. Recognizing the differences between oceanography and environmental characteristics between the Pacific and Atlantic and Gulf Coasts, EPA notes it will not impose

the 50 nm requirement for coastwise trade on the Atlantic or Gulf Coasts without “convincing data or analysis as to whether ballast water exchange would mitigate or increase the risk of the spread of ANS on the Atlantic or Gulf Coasts.” VGP Fact Sheet at 62. The agency cannot and should not impose this requirement until it has found reliable data to support the imposition of this requirement on vessels engaged in coastwise trade on the Pacific, Atlantic or Gulf Coasts. *See* Appendix at § 2.2.3.

In sum, the law requires EPA to provide an adequate factual basis for the BMPs it has selected for compliance by permittees and sufficiently articulate that basis in the agency record. *See, e.g., State Farm*, 463 U.S. at 48-49, 52 (1983).

E. The Proposed BMPs Do Not Adequately Specify What Is Required Of The Permittee To Comply With BMPs.

As indicated, the Appendix includes comments on the extent to which associated BMPs lacks adequate specificity concerning what is required of the permittee to comply with them.

The proposal fails to adequately specify the steps a permittee must take to comply with the permit’s proposed BMPs. For example, the proposed VGP requires that ballast water exchange must be commenced “as early in the vessel voyage as possible,” as long as the vessel is more than 200 nm from any shore. Proposed VGP at 17. Similarly, the EPA has determined that for AFFF, the most effective BMP is to conduct maintenance and training activities “as far from the shore as possible.” *Id.* at 68; *see also* Appendix at § 2.2.5. A vessel operator’s determination as to what is possible will be based upon a consideration of matters including weather conditions, transportation schedule, and availability of the crew, among other factors. The permit does not specify which factors may not be included in this determination, nor is the difference between “possible” and “feasible” or “practical” clear. Is any practice that is not *impossible* possible?

The proposed VGP also contains BMPs that require vessel operators to minimize bilgewater generation by practicing “proper maintenance” of vessels and equipment, that small engines that generate wet exhaust must be maintained in “good operating condition,” and that vessel owners and operators must use the minimum amount of biocide needed to keep seawater biofouling “under control.” VGP Fact Sheet at 57, 74-75. The meaning of “proper maintenance,” “good operating condition,” or “under control” will necessarily differ between vessel classes, types, and purposes. EPA should not discount the myriad of operating conditions that exist within the universe of vessels to be regulated under the permit and arbitrarily and illogically impose one standard with which they must all comply. *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 939 (5th Cir. 1998) (“EPA is authorized—indeed, is required—to account for substantial variations within an existing category or subcategory of point sources”).

F. The Lack Of Specificity In Identifying The BMPs Renders The Factual Basis For Concluding That The Costs Associated With Achieving These Standards Meet The Applicable Statutory Requirements For BPT, BCT Or BAT, Unsupportable.

As EPA is aware, in formulating national effluent limitation guidelines, the Clean Water Act directs the agency to institute progressively more stringent effluent discharge guidelines in stages. Congress intended EPA to consider numerous factors - including costs - in addition to pollution reduction. *See* discussion above at Section III.A.

Promulgation of final permit requirements requires some assessment of the compliance costs of the measures being imposed. The ambiguity of many terms used can be read with varying degrees of stringency. In our review of the proposed VGP, our members that own and operate commercial vessels, were unable to ascertain what was being required by the general terms used in the proposed VGP. The terms and requirements in the proposal are ambiguous to the point that the industry cannot assess for itself the range of compliance costs that could be associated with implementation of a particular requirement. We can safely say, however, that the upper range of these costs would be in the millions of dollars on an industry-wide basis. Some BMPs included in the permit would require significant operational changes where systems on existing vessels would require redesign, retrofit or replacement of equipment in total to control discharges which have yet to be shown to have a negative impact on the marine environment. *See* Appendix at §§ 2.2.3, 2.2.5, 2.2.20. There is also no indication that EPA has attempted to conduct an appropriate cost-benefit analysis as required by law, which is a fatal flaw in moving the proposed VGP to final status. 33 U.S.C. § 1314(b). The lack of specificity in identifying the BMPs, or consideration of the range of ways in which a vessel owner or operator might comply with the BMPs, calls into question the factual basis for EPA's conclusion that the costs associated with achieving these standards meet the applicable statutory requirements for BPT, BCT or BAT.

The cost benefit analysis accompanying the permit proposal fails to provide an estimate or analysis of the cost to vessel operators of compliance with the VGP with respect to several discharges regulated by the VGP. *Economic and Benefits Analysis* at 29. For these discharges, the analysis simply states, "[n]o requirements within this discharge category require cost analysis because these practices are assumed to have negligible costs and/or the industry is assumed to currently practice the VGP requirements." *Economic and Benefits Analysis* at 35. For example, the VGP requires that vessels must give consideration to applying hull coatings with the lowest effective biocide release rates, rapidly biodegradable components, or non-biocidal alternatives, such as silicone coatings. The proposal does not provide a cost estimate for compliance because it assumes, without providing any support, that the cost difference between anti-fouling paints with the lowest effective biocide release rates as compared to the anti-fouling paints that a vessel is currently using is negligible. *Id.* at 45. While the use of copper-based coatings is discouraged, the costs associated with the use of alternative coatings, *e.g.* self-polishing, are not considered relative to both: (1) the differences in cost between the use of copper based versus self-polishing coatings; and (2) recognition of the fact that non-copper based coatings are likely to require replacement or recoating more frequently than copper based coatings thus requiring more

frequent drydockings, more cost over the life of the ship since coatings will be replaced more frequently and potentially increased risk of hull borne invasive species and impacts on fuel efficiency where the coatings are not changed at any appropriate frequency. The type of coating to use is appropriately left to the vessel owner to determine, but EPA has no basis for its assumption that a change in the type of coating used would entail a negligible cost.

Underscoring the defects in the *Economic and Benefits Analysis* that have been put forth in support of the proposed VGP, EPA is operating under the assumption that compliance with the proposed permit's recordkeeping requirements will not pose significant costs for permittees. This is based on the assumption that the universe of regulated permittees is currently performing most of the recordkeeping activities included in the permit, and any additional recordkeeping activities required by the permit will only pose minimal administrative and labor costs to regulated vessel owners and operators. But there are no facts in the record to support this assumption.

The VGP Fact Sheet states that, in establishing the recordkeeping requirements in the permit, the agency relied on existing recordkeeping requirements as a framework. VGP Fact Sheet at 85. However, the permit imposes additional recordkeeping requirements that go far beyond existing requirements. For example, the permit requires that vessel owners and operators conduct comprehensive annual inspections that cover all areas of the vessel affect by the requirements in the permit. Proposed Vessel General Permit at 32. Vessel owners and operators may use applicable portions of the results from annual inspections conducted by the Coast Guard or the classification society to meet some requirements of the comprehensive annual inspection required by the permit. However, for portions of the vessel that are not inspected by the Coast Guard or classification society for environmental performance, it appears that the owner or operator must perform the additional inspection tasks required by the permit. VGP Fact Sheet at 84. There is nothing in the record supporting the proposal that discusses the scope of the annual inspections conducted by the Coast Guard or classification society nor does it include an estimate of the costs imposed upon vessel owners and operators for performing the additional inspection tasks required by the permit with respect to each vessel type. Therefore, there does not appear to be a basis for concluding that the cost of compliance with the permit's recordkeeping requirements are minimal.

Undoubtedly, there is tremendous diversity among vessels that are greater than 79 feet and consequently regulated by the permit. This universe of vessels currently operates under various recordkeeping requirements. It stands to reason that the cost of compliance with the permit's recordkeeping requirements will vary dependent upon each vessel's existing recordkeeping practices, which are not specified in the record. Without researching the recordkeeping practices that each of the regulated vessel types is currently required to perform by law to determine the ways in which the permit requirements differ from, duplicate, or expand existing recordkeeping requirements, it is not possible to accurately compare the cost of complying with existing recordkeeping practices to the cost of complying with the recordkeeping practices required by the permit. Moreover, without this important inquiry, there is no factual basis for determining that the cost of compliance is negligible. Regulation based purely on

speculation is impermissible. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988).

The permit imposes additional obligations on permittees, including conducting a visual inspection of deck and cargo areas and all accessible areas where chemicals, oils, dry cargo or other materials are stored, mixed, and used, at least once per week or per voyage, whichever is more frequent. Proposed Vessel General Permit at 31. Effluent streams that are not readily visible, such as those discharged below the waterline, are subject to, at a minimum, quarterly visual sampling and inspection. *Id.* at 83. Each routine visual inspection must be noted in the official logbook or other recordkeeping documentation and include basic information relating to the inspection. *Id.* at 84. Given that this visual sampling requirement is unprecedented, EPA has not provided an adequate factual basis for its cost assessment.

As evidenced by these examples, the record does not sufficiently support EPA's cost analysis, considering the lack of specificity in identifying the BMPs. Given the diverse universe of regulated vessel types and the range of ways in which various permittees may comply with the multitude of vague BMPs proposed in the permit, the cost analysis included in the proposed VGP is inadequate. Additional research is necessary to comprehensively assess the cost of compliance with the BMPs proposed in the permit. EPA should survey the various ways in which a vessel owner or operator would comply with the BMPs required in the VGP with respect to each BMP and recordkeeping, inspection, or monitoring requirement associated with each discharge stream and conduct a cost-benefit analysis based on the information provided in the survey before determining the cost burden to vessels. In this cost analysis, EPA should consider the class of vessels, where they operate, the type of cargo they transport, and how often they traverse U.S. waters, among other considerations. For instance, vessels that regularly call in U.S. ports will have the system to comply with the VGP; however, many vessels only call in U.S. ports very infrequently, making a continually operating system to comply with the VGP very expensive on a per visit basis. Until EPA undertakes this cost analysis, it has not provided a factual basis from which to accurately assess the economic impact of the regulated industry. *See National Gypsum Co. v. EPA*, 968 F.2d 40, 43-44 (D.C. Cir. 1992).

V. DISCHARGES COVERED BY OTHER LAWS SHOULD BE DEEMED TO BE COMPLIANT WITH THE VGP AS LONG AS COMPLIANCE WITH SUCH OTHER LAWS IS ACHIEVED

Section 2.1.5 of the proposed VGP requires compliance with other statutes and regulations. Specifically, the permit would require compliance with all federal environmental laws and regulations that establish controls on oily or hazardous discharges, including among others, sections 311 of the Clean Water Act, 33 U.S.C. § 1321, the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 190-1915, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, and the Oil Pollution Control Act (OPA '90), 33 U.S.C. §§ 2701-2761. In order to avoid overlap and the imposition of additional, and potentially inconsistent, burdens on the regulated community, EPA should expressly provide that vessel operators are deemed to be in compliance with applicable provisions of the VGP so as long as the identified statutes and regulations are complied with.

For example, the proposed VGP requires that all ballast water discharges must comply with Coast Guard regulations; however the proposed VGP *also* imposes mandatory BMPs for all vessels taking up or discharging ballast water, mandatory ballast water exchange for vessels traveling outside the U.S. EEZ and near coast voyages on the Pacific Coast, and mandatory reporting and provisions for ballast water management. The cost benefit analysis accompanying the proposed permit recognizes that these requirements overlap with existing Coast Guard regulations. *Economic and Benefits Analysis* at 9. Similarly, the Economic Analysis acknowledges that the requirements imposed for bilgewater complement current requirements found in the Coast Guard regulations governing Oily Mixture (Bilge Slops) Discharges on Ongoing Ships Over 400 Tons, implemented under the authority of the Act to Prevent Pollution from Ships. *Id.* at 11.

To impose requirements for these discharges in the VGP that are already imposed by governing regulations is unnecessarily duplicative and may cause confusion for those who must comply with the VGP. This overlap can and should be avoided by deeming compliance with the governing laws and regulations compliance with the VGP. In fact, EPA has acknowledged the sufficiency of the standards and requirements contained in these statutes and regulations. In the VGP, EPA explains that:

Reliance on other statutes and regulations to develop the VGP requirements is a reasonable exercise of [best professional judgment] because these statutes and regulations have gone through an extensive process of evaluation and analysis by federal agencies and international organizations that have considerable expertise in vessel management. Furthermore, many of the [best management practices] considered by EPA were covered by these other authorities. These statutes and regulations are currently being implemented and therefore are technically and economically practicable (BPT) and achievable (BAT) in light of the best marine practice . . . EPA had determined, based on BPJ, that incorporation of these statutes and regulations by reference is reasonable.

VGP Fact Sheet at 54.

Given the rigorous evaluation, assessment, and analysis undertaken to establish the existing requirements contained in the applicable laws and regulations, EPA has provided no basis for including duplicative and overlapping requirements in its VGP and should deem compliance with the applicable laws and regulations to be compliance with the VGP.

VI. THE REGULATED COMMUNITY MUST BE GIVEN REASONABLE TIME TO ACHIEVE COMPLIANCE WITH THE PERMIT REQUIREMENTS

The Ninth Circuit invited the agency to petition the district court if the agency believed more time was needed beyond September 30, 2008 to develop a permit program. In light of the serious deficiencies in the proposed VGP, we urge EPA to accept the Ninth Circuit's invitation to request an extension of the September 30, 2008 deadline from the district court for two reasons. First, Congress expressly recognized, when it passed the Federal Water Pollution Control Act

Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), that it would take time to develop and implement NPDES permitting programs and standards governing discharges. Second, the concerns that EPA has expressed about the soundness of its efforts in this short time, have come to fruition.

A. The Clean Water Act Supports EPA Seeking An Extension Of Time Before The Vacatur Order Becomes Effective.

As a result of the district court's vacatur of the 30-year-old vessel discharge exception, EPA and the regulated vessel community, as of September 30, 2008, will effectively find themselves where they would have been at the adoption of the Federal Water Pollution Control Act Amendments of 1972 – having to regulate for the first time, certain kinds of discharges from certain sources. When it passed the 1972 amendments, Congress *expressly* recognized that, as a practical matter, it would take time to initially implement the permit provisions of the 1972 amendments. Specifically, § 1342(k) provides that:

Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

33 U.S.C. § 1342(k). Congress expected that it would take at least a full two years after adoption of the 1972 amendments just to process and issue permit applications. For example, in the House debates on the conference report, Representative Clark commented:

Section 402(k) states that until December 31, 1974, a discharge shall not be in violation of law if a permit has been applied for, and the applicant has furnished all information reasonably required or requested. Hopefully, the program will be in the hands of the States by December 31, 1974, and permits will be issued. But, if not, Congress may have to extend this date.

1 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 274 (Environmental Policy Div., Congressional Research Serv. ed., 1973) (House consideration of the conference report).

In the same vein, the citizen suit provision states that a citizen may bring an action against a person allegedly committing an unlawful act under § 1311(a) “effective July 1, 1973.” 33 U.S.C. § 1365(f)(1). The legislative history expressly states that Congress delayed the availability of a citizen suit based on an allegedly unlawful act under § 1311(a) in order to give EPA, states, and the regulated community time to issue all of the permits required by the Clean Water Act:

Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act. Such standards or limitations are defined in subsection (f) of [§ 1365] to include the enforcement of an unlawful discharge under [§ 1311(a)], effective after July 1, 1973. By limiting the effective date of citizens suits for violation of this provision the Committee believes sufficient time is available for the State and Federal governments to develop fully, and execute the authority contained in [§ 1342, which provides for NPDES permits].

S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971).

Congress, by the foregoing provisions, recognized that it was necessary to prevent the use of enforcement mechanisms before the agency had sufficient time to put a new, significant program in place. Congress recognized that permitting enforcement by EPA or citizens against the regulated community before such a program could be crafted and practically implemented served no valid purpose.

As recognized by the Ninth Circuit, and the district court's underlying decision, courts may leave an agency action in place when equity so demands. The Clean Water Act clearly anticipated that the regulated community would be given more time to comply with new requirements and those equitable considerations should apply here.

B. The Complexities Of Developing A New NPDES Program Require More Time Be Taken.

As EPA explained in a May 23, 2007 declaration submitted in connection with the *Northwest Env'tl. Advocates* litigation, the agency, at this time, lacks the type of information that it typically acts upon when beginning new permitting regimes. *See* May 23, 2003 Declaration of James A. Hanlon. EPA, in its notice of proposed permit issuance, readily acknowledges that this extensive information gap remains. *See, e.g.,* 73 Fed. Reg. at 34298. In the past, it has taken longer than two years for EPA to develop original data about regulated facilities and their discharges before implementing new permitting programs. *See* Hanlon Declaration. The commercial shipping industry alone is an important and complex part of the United States economy and EPA must have sufficient time to understand the industry, its discharges, and available treatment methods. *Id.* In fact, this may be the largest single industrial sector that the agency has ever sought to create effluent limits for, and the most varied. This concern is especially important where, as here, EPA has not previously regulated vessels in this way. *Id.*

EPA should not “proceed without the full extent of information the Agency typically takes into account when creating a new permitting program.” *See* Hanlon Declaration. Reliance by EPA on assumptions and data gaps inherent in such an approach “obviously increases the chance that any permit program that results may not ultimately ensure effective permitting of discharges incidental to the normal operation of a vessel.” *Id.* Proceeding in such a fashion, moreover, “obviously increases” the chance that any permit program adopted by the agency will be remanded by the courts pursuant to 5 U.S.C. § 706(2)(A). Instead of proceeding without the original data EPA typically uses in NPDES permitting, the agency should request that the district

court extend the September 2008 vacatur date so that the agency can proceed with the approach it would typically take in the absence of an arbitrary deadline.

These comments demonstrate that despite best efforts over the last year, the agency still lacks the essential comprehensive factual basis for making the important decisions and judgments necessary to create an effective NPDES permit program for incidental discharges from commercial vessels and that more time is needed to achieve that goal.

C. Section 402(k) Authorizes The EPA To Give The Regulated Community Reasonable Time To Meet The New Program Requirements.

The history of the development of effluent standards, including BMPs, for other industries demonstrates that substantially more time is needed than has been provided for by the district court's order. EPA's recent experience with effluent limits and permitting requirements for concentrated animal feeding operations, or CAFOs, is illustrative. A final rule issued July 24, 2007 (72 Fed. Reg. 40248) extends the deadline, establishing February 27, 2009 as the new date for newly defined CAFOs to seek NPDES permit coverage and for permitted CAFOs to develop and implement nutrient management plans (NMPs) as required by EPA's 2003 CAFO rule. In a February 2006 rulemaking, EPA extended the same compliance dates to July 31, 2007 (71 Fed. Reg. 6978). EPA revised the dates to allow time to finalize the regulations in response to the Second Circuit Court of Appeals decision in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005). The deadline extensions are, according to EPA, necessary to allow EPA time to respond adequately to an array of public comments on issues raised by the Second Circuit's decision before certain compliance dates take effect. According to the agency, the February 27, 2009, deadlines will provide additional time, after the final rule in response to *Waterkeeper* is promulgated, to allow States, the regulated community, and other stakeholders the opportunity to adjust to the new regulatory requirements. 72 Fed. Reg. 40248.

EPA's 2003 CAFO rule further supports reliance on Section 402(k) of the Clean Water Act to seek more time from the district court for implementation of the proposed VGP. EPA reasoned in the 2003 CAFO rule, and reiterated in the February 2006 date change rule, that allowing newly regulated entities *three years* to come into compliance was consistent with Congressional intent, as expressed in Section 402(k) Clean Water Act with respect to newly established point sources. Moreover, the Agency stated that the three-year timeframe was necessary for States authorized to administer the NPDES permit program to provide permit coverage for CAFOs that were not previously required to be permitted and to revise State regulatory programs. *See* 68 Fed. Reg. 7204.

If EPA stays on its current course, then it must give the regulated community reasonable time to adjust to, and achieve compliance with, the new regulatory requirements. BMPs are

schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

40 C.F.R. § 122.2. By definition, therefore, BMPs will take some reasonable period of time to establish and implement.

It would be arbitrary and capricious for the agency to announce the BMPs on September 30 and demand *instant compliance* with those ‘practices’ on October 1. EPA can exercise the discretion it showed in connection with the 2003 CAFO rule and cure this potential problem by amending the “corrective action” provisions of the proposed permit to provide the regulated community with reasonable time in which to implement the BMPs once the permit becomes final.

VII. THE CONSTITUTION REQUIRES THAT THE EPA RECOGNIZE AND ESTABLISH IN THE PERMIT CERTAIN CONSTRAINTS ON THE ABILITY OF STATES TO IMPOSE CONTRADICTIONARY STANDARDS ON VESSEL DISCHARGES REGULATED UNDER THIS NEW PROGRAM

Since the Supreme Court’s decision in *The Lottawanna*, 88 U.S. 558 (1874), it has been recognized that, as a matter of the structure of our government, uniformity is key to the application of the maritime law.

One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. . . . The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader or (it may be added) narrower than the judicial power may determine those limits to be.

88 U.S. at 575-76. Federal law should apply to the exclusion of state law unless the issue is “peculiarly a matter of state and local concern.” *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961) (declining to apply New York Statute of Frauds to maritime contract). State law also “cannot be used to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.” *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev’d on other grounds* 486 U.S. 140 (1988). *See Just v Chambers*, 312 U.S. 383 (1941) (state action may “not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.”).

The Supreme Court made clear the limitations of state regulation of maritime environmental standards in *United States v. Locke*, 529 U.S. 89 (2000). The Supreme Court concluded that Washington State laws enacted in the wake of the *Exxon Valdez* oil spill, which

established certain vessel design, operations, and personnel requirements as a condition to entering Washington's waterways, were largely preempted by Titles I and II of the Federal Ports and Waterways Safety Act of 1972 ("PWSA"), as amended by the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.*, despite the existence of a savings clause in Title I.¹⁰

Title I of the PWSA authorized the Coast Guard to establish regulations governing vessel traffic or protecting navigation and the marine environment. *Locke*, 529 U.S. at 101. OPA added new provisions to Title I that imposed liability and compensation obligations for violations of the Act, and also added the savings clause. Title II required the Coast Guard to issue regulations addressing design, operation, and personnel requirements of vessels necessary to protect the safety and the marine environment. *Id.*

In holding that most of the Washington regulations were preempted, the Supreme Court first emphasized that "[t]he State of Washington [had] enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established." *Id.* at 99. The ordinary presumption against preemption does not apply, the Court said, with respect to such an area. *Id.* at 108.

Setting the ordinary presumption against preemption aside, the Court then discussed whether Washington's regulations were preempted, principally under the doctrine of "field preemption," by which federal regulation has occupied the field. The Court noted that Title I did not establish a mandatory federal regime of regulation, only a permissive one, and thus reaffirmed an earlier finding that Title I preserves "the historic role of the States to regulate local ports and waters under appropriate circumstances." *Id.* at 108-109. The Court also noted, however, that particularly in the maritime arena—an area historically and predominantly regulated by the federal government—state regulations cannot conflict with federal ones such that following both is physically impossible or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.* at 109. Accordingly, the "relevant inquiry" for preemption is whether the federal agency "has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all," because "even in the context of a regulation related to local waters, a federal official with an overview of all possible ramifications of a particular requirement might be in the best position to balance all the competing interests."

With this standard in mind, the Court examined the Washington vessel requirements to determine whether they were within the state's "residual powers," noting that permissible state rules would be "justified by conditions unique to a particular port or waterway . . . [and would] often be of limited extraterritorial effect, not requiring the tanker to modify its primary conduct outside the specific body of water purported to justify the local rule." *Id.* at 112. Above all, such permissible state laws would "pose a minimal risk of innocent noncompliance, [would] not affect vessel operations outside the jurisdiction, [would] not require adjustment of systematic aspects of

¹⁰ "Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. § 2718.

the vessel, and [would] not impose a substantial burden on the vessel's operation within the local jurisdiction itself." *Id.* In short, the Court recognized that when a federal statute delegated the authority to a federal agency to find a solution to a recognized problem dealing with vessel operations in the nation's waterways, state laws to achieve the same ends must address local and State-specific issues and should not create effects that extend beyond the boundaries of the State's jurisdiction. *Id.*

The Court also analyzed specific Washington state requirements regulating vessel design, operations, and personnel, and held that these were preempted by Title II of the PWSA. Title II, the Court held, created an affirmative scheme of federal regulation of "general tanker design, operation, and seaworthiness" that left "no room for state regulation of these matters." *Id.* at 111. The Court then determined that most of the proposed Washington state requirements ventured into the fields of design, operation, and seaworthiness that were preempted by Title II without regard to any justification posed by unique local circumstances.

Nor does it matter whether the state legislation seeks to achieve or further the same purpose as the federal law. As stated in *Locke*:

The Court observed this principle when Commerce Clause doctrine was beginning to take shape, holding in *Sinnot v. Davenport*, 22 How. 227 (1859), that Alabama could not require vessel owners to provide certain information as a condition of operating in state waters even though federal law also required the owner of the vessel "to furnish, under oath ... all the information required by this State law." *Id.*, at 242. The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation. On this point, Justice Holmes' later observation is relevant: "[W]hen Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604 (1915).

Locke, 529 U.S. at 115.

The United States has adopted the holding in *Locke* in other regulatory programs. For example, in 2003, the Department of Homeland Security promulgated a final rule establishing new requirements for maintaining maritime security, including new vessel security requirements. As part of its preamble to the general rule, DHS included a statement regarding the rule's impact on federalism. 68 Fed. Reg. 60448, 60468 (Oct. 22, 2003).¹¹ In that statement, DHS said that "it would be inconsistent with federalism principles ... to construe the [Maritime Transportation

¹¹ This statement was made pursuant to an Executive Order 13132, which requires consideration of the effect that a regulation has on federalism, including its potential preemptive effect.

Safety Act] as not preempting State regulations that conflict with the regulations in this final rule.” Further—

This is because owners or operators of facilities and vessels—that are subject to the requirements for conducting security assessments, planning to secure their facilities and vessels against threats revealed by those assessments, and complying with the standards, both performance and specific construction, design, equipment, and operating requirements—must have one uniform, national standard that they must meet. *Vessels and shipping companies, particularly, would be confronted with an unreasonable burden if they had to comply with varying requirements as they moved from State to State.* Therefore, we believe that the federalism principles enumerated by the Supreme Court in *U.S. v. Locke* ... regarding field preemption of certain vessel safety, equipment, and operating requirements extends equally to this final rule (Emphasis added.)

DHS went on to note that preemption was particularly appropriate because of “the longstanding history of significant Coast Guard maritime security regulation and control of vessels for security purposes. 68 Fed. Reg. at 60468.

For the same reasons relied on by both the Supreme Court and the United States, state regulation of vessel discharges would be preempted by the proposed rule, and the agency should revise the permit to make it clear.

First, the ordinary presumption against preemption does not apply because, as in *Locke*, maritime transportation is an area with respect to which the “federal interest has been manifest since the beginning of our Republic and is now well established.” *Locke*, 529 U.S. at 99. Moreover, “[v]essels and shipping companies, particularly, would be confronted with an unreasonable burden if they had to comply with varying requirements as they moved from State to State.” 68 Fed. Reg. at 60468.

Second, this new federal program, combined with other ones that overlap with it (as the agency acknowledges in the Notice of Proposed Rulemaking), creates an extensive federal regulatory program regulating vessel discharges – literally from bow to stern. One could hardly imagine a more comprehensive federal regulatory system for ballast water discharges and other normal operation discharges, supporting the notion that the federal government has occupied the field. The program includes the Clean Water Act.

Finally, the Clean Water Act savings clause does not alter the result.¹² The Supreme Court has held that a similar savings clause in OPA did not preclude preemption, saying that the argument “places more weight on the savings clauses than those provisions can bear, either from

¹² Section 510 of the Clean Water Act contains a savings clause providing that: “nothing in this [Act] shall ... preclude or deny the right of any State ... to adopt or enforce ... any standard or limitation respecting discharges of pollutants, or ... any requirement respecting control or abatement of pollution....” 33 U.S.C. § 1370.

textual standpoint or from a consideration of the whole federal regulatory scheme.” *Locke*, 529 U.S. at 105.¹³

Allowing the specter of multiple states imposing differing requirements on vessels that move among and between various state waters would create a formidable burden on commerce and an impossible burden on the industry. Accordingly it is recommended that section 6 of the draft general permit be amended as follows:

Permit conditions applicable to specific states, Indian country, or territories will be addressed in the final permit through the 401 certification process, *subject to the Constitutional doctrine of preemption.*

VIII. THE ECONOMIC ANALYSIS PROVIDED TO JUSTIFY THE COSTS OF THE PROPOSED STANDARDS CONTAINS INCORRECT ASSUMPTIONS, IS NOT BASED ON FACTS, AND MUST BE SUBSTANTIALLY IMPROVED IN ORDER TO COMPLY WITH THE CLEAN WATER ACT AND REGULATORY FLEXIBILITY ACT

By its notice of proposed permit issuance, EPA has committed to operate in accordance with the Regulatory Flexibility Act’s (“RFA’s”) framework and requirements during the issuance of Clean Water Act general permits. *See* 73 Fed. Reg. at 34303. The RFA requires agencies to assess the negative impact of their rules on small businesses. An agency must perform an initial regulatory flexibility analysis (“IRFA”) in its notice of proposed rulemaking, 5 U.S.C. § 603(a), unless the head of the agency certifies that the rule will not “have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). The agency must also perform a final regulatory flexibility analysis (“FRFA”) in its final rule, 5 U.S.C. § 604(a), unless it again makes the requisite certification. 5 U.S.C. § 605(b). The adequacy of the FRFA is subject to APA review, 5 U.S.C. § 611(a)(1) and (2). The agency needn’t present its FRFA in any “particular mode of presentation,” as long as the FRFA “compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product-whatever form it reasonably may take-readily available to the public.” *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 115 (1st Cir. 1997); *National Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp.2d 33, 42 (D.D.C. 2000) (case remanded to the agency for completion of a new FRFA). The requisite components of a FRFA, as set forth in 5 U.S.C. § 604(a), are:

¹³ *Locke*, 529 U.S. at 105. One district court has addressed a similar question, and concluded that state regulation of ballast water discharges has not been preempted. *Fednav v. Chester* 505 F. Supp. 2d 381 (E.D. Mich. 2007). However this decision, by a single federal district judge, is not binding on the United States outside the district. Moreover, that case is distinguishable because the ballast water program was far less pervasive extensive a regulatory regime (covering a single discharge) than the newly proposed vessel discharge permit (it covers 28 discharges). The Coast Guard stated in adopting its NISA regulations that they were not intended to preempt “any State, regional, or local efforts that exceed but do not conflict with the standards” it set forth. 64 Fed. Reg. 26672, 26674 (1999).

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

In its notice, EPA concludes that the VGP is unlikely to result in a significant economic impact on any businesses and in particular, small business. *See* 73 Fed. Reg. at 34303. But as explained above, the *Economic and Benefits Analysis* upon which EPA relies contains serious flaws and is based on scant data and, consequently, does not support EPA's conclusions regarding the impact of the VGP on businesses and small businesses.

IX. CONCLUSION

This is the most comprehensive and complex general permit program the agency has developed in the history of the Clean Water Act. The agency proposes to regulate more than 75,000 sources. It is proposing to require permits for mobile sources, something it has never before done under this law. It will be requiring permits for vessels from all over the world.

We respectfully submit that for the legal and policy reasons explained in these comments, the proposed permit program does not meet the requirements of law, will not provide the benefits intended, and is not cost effective, commercially practicable, and feasible as the law requires. The EPA must take additional time to adequately educate itself regarding the actual nature of the diverse vessels being regulated, the nature of incidental discharges from normal operations of vessels, and which actually contain pollutants, and the wide variety of practices used to address these concerns on vessels. This is the only way that EPA can develop a proper and effective program tailored to the various sectors of the industry that will be regulated, and give the regulated community reasonable notice and time to implement a program once it is established.

The EPA should immediately ask the district court to extend the vacatur date for the exemption, exercise its own discretion to phase in the implementation of this program, or both.

Respectfully submitted,



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APPENDIX

COMMENTS WITH RESPECT TO SPECIFIC SECTIONS OF THE PROPOSED VESSEL GENERAL PERMIT (VGP)

A. General Comments Relating to the Entire VGP

1. Application of requirements to the broad and diverse universe of commercial ship types can not be accomplished in one general permit. Operations aboard vessels vary substantially in a manner which impacts the types of discharges from the vessel as well as their relative volumes.
2. Promulgation of final permit requirements requires some assessment of the compliance costs of the measures being imposed. While in broad terms, the proposal seems to require what is already standard practices, the ambiguity of many terms used herein can read with varying degrees of stringency. In our review of the proposed VGP, our own members that own and operate commercial vessels were unable to ascertain just what was being required by the general terms used in the proposal. The terms and requirements in the proposal are ambiguous to the point that the industry cannot even assess for ourselves the range of compliance costs which could be associated with implementation of a particular requirement although we can safely say that the upper range of these costs would be in the millions of dollars on an industry-wide basis where systems on existing vessels would require redesign, retrofit or replacement in total to control discharges which have not even been shown to have a negative impact on the marine environment. There is also no indication that EPA has attempted to conduct such an analysis as required by law which is a fatal flaw in moving the VGP to final status.
3. Use of the NPDES program which was designed for application to stationary sources with few exceptions is not an appropriate vehicle to use in managing the diverse types and volumes of discharges incidental to the normal operations of vessels.
4. Section 401 certification is likely to result in a myriad of differing requirements from state to state. This patchwork quilt of requirements taken in conjunction with federal requirements under the VGP and already existent federal laws and statues applying to a number of these discharges will create a potential conflict among the various federal and state requirements which would make compliance impossible. Regulations of commercial marine vessels should be accomplished through a single federal program which establishes a consistent and clear set of requirements.
5. Section 401 certification by the states is problematic at best and quite likely an enforcement nightmare for the agency and a compliance nightmare for industry with little real benefit to the marine environment. We understand that Section 401 certification is part of the Clean Water Act. At the same time, the Clean Water Act also authorizes EPA to promulgate superseding federal water quality standards in cases where new or revised State or Tribal standards are not consistent with applicable requirements of the Act or in situations where the EPA Administrator determines that Federal standards are necessary to meet the requirements

of the Act. EPA promulgation of water quality standards requires a rule making process and opportunity for public review and comment.

6. EPA has the discretion to and should modify the Section 401 certification program to require states wishing to impose additional requirements to propose these additional requirements through the EPA and the federal rulemaking process in order to serve adequate notice to the regulated community and allow for comment on these proposals without requiring the regulated community to monitor the rulemaking process in each State and territory. Adequate notice and comment for mobile sources moving in and out of covered jurisdictions on an irregular and infrequent basis requires the creation of such a notice and comment process at the federal level.
7. The VGP as proposed does not recognize mixing zones for covered vessels contrary to EPA practices as applied to other sources covered under the existing NPDES program. Discharges from underway vessels must be managed in a manner which recognizes the different impact those discharges have on the environment.
8. A number of the discharges proposed to be regulated under the VGP are already regulated by other statutes and regulations, including recordkeeping and reporting requirements. In these cases, compliance with these existing requirements should constitute an alternate compliance method to the requirements proposed in the VGP and should be so noted within the body of the VGP.
9. We have concerns with the manner in which potentially legally enforceable permit terms are couched within the body of the permit. Excessive use of the words “may”, “shall”, “should” and “minimize” provide no guidance to the vessel as to the specific acts that would constitute compliance under a given set of circumstances on a given vessel. While the industry is beginning to assimilate Best Management Practices for various vessel types, sizes and voyages, the two months remaining before the vacatur takes effect is insufficient time to provide the level of detail necessary to provide EPA with the information necessary to address the diverse types and volumes of discharges from a wide variety of vessel types.
10. Oceangoing vessels currently have safety and environmental management systems replete with specific operational procedures regarding most if not all tasks and discharges included in the VGP. These systems also include recordkeeping, reporting inspection and corrective action programs which document and identify compliance with the safety and environmental management system requirements, some of which are required by law, and some of which are required by individual company policy. In order to avoid duplication and the need for expenditure of additional human and financial resources, such systems should be expressly recognized as compliant with the broader and more ambiguous terms contained in the VGP. In the few instances where the VGP includes additional requirements, the existing safety management and environmental management programs instituted as part of the vessel’s International Safety Management (ISM) Code should be recognized as compliant where these additional provisions are incorporated into the body of the existing vessel specific plans and procedures. A specific example offered by one vessel owner notes that the 6 most

important significant discharges addressed by the VGP (ballast water, bilge water, graywater, deck washdown/runoff, underwater hull husbandry, anti-fouling coatings) are already addressed in the vessels' safety and environmental management systems including procedures to minimize the impact on the marine environment of these discharges. Specifically the VGP should provide that if a permittee can demonstrate the existence of a program or practice that provides for practices that directly reduce the potential for discharges of pollutants from a particular stream covered by the VGP, that program or practice should be considered a rebuttable presumption of compliance with the BMP for that stream. Moreover, the VGP should provide that no penalty shall be imposed for any violation of a particular BMP unless and until (1) the EPA has first given notice to the permittee that its existing practices are inadequate; (2) agreement is reached or adequate notice is given regarding how those practices should be improved, and (3) a reasonable time to improve them is provided.

11. Due to the wide variety of BMPs across the broad universe of vessel types, it is inexplicable how an adequate cost analysis could have been done. With a wide variation in BMPs as they exist today, so also must there be a wide variety in the associated costs of these BMPs particularly with respect to the wide variations in vessel type, crew size and extremely variable manning costs associated with mariners certified by a number of different nations world-wide.
12. Consideration must be given to modifying application of the proposed VGP to a vessel that spends very little of its time in U.S. waters. Specifically, some type of *de minimis* exception should be created for vessels that rarely trade in U.S. waters. For example, one vessel owner has two vessels that have been operating for 8 years and each has made exactly one port of call in the United States in that time. Another example is provided by a vessel which conducts lightering activities 20 nautical miles offshore and which occasionally enter the 3 nm limit for repairs or bunkering operations (estimated at 6 days total over a 3 year period). In many cases, vessels which infrequently call in the U.S., do not know when or if they will be returning to the U.S. In these three examples, due to the management of their discharges via other legal requirements, their short time within the 3 nm limit and the likely *de minimis* nature for most of the VGP listed discharges, the costs associated with implementing the provisions of the VGP including documentation and recordkeeping, overwhelm what little, if any, environmental benefit that would ensure from their application. BMPs are necessarily practices that cannot be 'turned on' and turned off' when one enters U.S. waters. To require a vessel that enters those waters once a year or less to meet the same requirements as those that are present more regularly fails to consider the necessarily lesser volume of discharges over time that could possibly come from the vessels that are rarely in U.S. waters.
13. It is essential that the EPA recognize the fact that a vessel is a self-contained unit when it is at sea unconnected to a technological and scientific (shore based) infrastructure that stands ready to provide instant advice, scientific analysis and technological support for onboard equipment. While this isolation from a support structure provides the impetus for the employment of professional mariners which can and do maintain and repair equipment and fixed systems with very little external support (especially while the vessel is at sea), there are

some situations where equipment and or analysis needs to be performed by experts that can only be scheduled to call on the ship when it berths at its next port of call. In this respect, we urge EPA to take this into account in outlining the timing of corrective action programs to incorporate the concept that the vessel will execute what is possible while at sea to mitigate a discharge, but may not be able to totally resolve the problem until shore experts board the vessel.

14. Adjustments should be made to the Notice of Intent submittal process to enable filing and coverage under the permit of more than one vessel. In this case, the vessels to be included would be provided by the owner to the EPA within the body of the NOI. Providing this alternative to filing an individual NOI for each vessel would greatly streamline the EPA permitting and coverage process.
15. The VGP uses the terms “non-toxic” and “phosphate free” but does not define these terms within the VGP. This term may have very different meanings in different locations in the world, from which many commercial vessels come. Thus, if a permittee purchases a non-toxic substance while in port in Greece, that must be deemed to meet the ‘non-toxic’ provisions of the VGP. Are vessels owned by the U.S. Department of Transportation/MARAD and vessels owned by the U.S. Navy, covered under the VGP when they are operated and manned by private entities?
16. With regard to various training requirements referenced through the VGP, use of the broad term “crew” is too broad a term, and creates an unnecessary burden on the vessel and shoreside management. For large ocean going vessels the majority of the crew is not involved with any of the decisions on how these discharges are managed. It is therefore recommended that where the term “crew” is used in the training context, it be replaced by “and crew members that actively take part in the management of the discharge.”
17. An exemption for small commercial vessels is needed as is currently included in Part 1.5.1.2; however the language in this section should be modified to be consistent with the language in Part 1.5.1.1 which applies the exemption if the commercial vessel is smaller than 300 gross tons OR does not have the capacity to hold more than 8 cubic meters of ballast water. The connector “and” should be deleted to reflect the fact that existence of either of these criteria trigger the exemption. This appears to be a drafting error.

B. Comments on Specific Effluent Limits and Related Requirements

2.1. Technology-based Effluent Limits and Related Requirements Applicable to all Vessels

- 2.1.1. Material Storage
- 2.1.2. Toxic and Hazardous Materials
- 2.1.3. Fuel Spills/Overflows
- 2.1.4. Discharges of Oil Including Oily Mixtures
- 2.1.5. Compliance with other statutes and regulations

A. We concur fully with the comments provided by the Cruise Lines International Association (CLIA) with respect to section 2.1. We agree that the terms of the VGP should mandate the creation of a materials (non-hazardous and hazardous) management system that minimizes the potential for an inadvertent discharge from what arguably would amount to bad housekeeping practices. The permit requirement should be the creation and implementation of this management program, but not each and every de minimis task might be executed at one time or another in connection with this management program. To draft otherwise, would create a non-compliance event with every minor deviation even if no discharge occurred.

As an example, as currently drafted, identification of an improperly labeled container would trigger the non-compliance reporting process. Instead, if the program requires the proper labeling of containers, identifying a nonlabelled container would not be a violation but rather would be evidence that the program is working and compliance has been achieved.

B. We also concur with the comments provided by CLIA with respect to Section 2.1.3 addressing fuel spills and overflows and most specifically the current text which suggests that use of spill containment devices should be used to **prevent** spills. Booms do not prevent spills. They do contain a spill after it has occurred and may be deployed during certain operations as an additional precautionary measure. However current conditions in major waterways often make pre-deployment of boom impractical at best.

C. Of note here is the diverse operations across the range of vessel types covered under the VGP and the varied BMPs associated with these distinct types of operations. For example, on roll-on/roll-off vessels, the deck watches are responsible for hazardous materials stowage, lashing inspection, refrigerated cargo connect/disconnect and inspection, and other deck “cleanup” tasks to ensure the vessel is secured for sea. Unless there is a loss of containment from an onboard fitting or a container/vehicle the only routine cleanup is usually deck sweeping to ensure a safe working environment for the stevedores as accumulations of dust become airborne during cargo operations. In the case of a tanker, the focus is clearly on deck “cleanup” which includes the inspection and cleaning of drip pans or other containment devices which may contain small quantities of oil from deck machinery and or cargo connections and manifolds. These variations illustrate why further investigation and delineation is necessary before an appropriate VGP can be finalized.

Finally, fuel overflows are not routine or incidental to normal operations of vessels and it is difficult to understand why they are included in the VGP at all. Under existing requirements, these discharges are prohibited and specific requirements are already established in law and regulation to govern the response to and cleanup of deck spills both contained on the vessel and those which constitute releases into the marine environment.

2.2. Technology-based Effluent Limits and Related Requirements for Specific Discharge Categories

2.2.1. Deck Washdown and Runoff

There are some provisions of this section that do not reflect the reality of onboard operations. In particular while it is generally the case that deck washdowns are not conducted in port, the requirement that discharges from deck washdowns be free from floating solids, dispersants or surfactants does not take into account that even after a thorough washdown at sea, some residuals from these materials can and do remain on the deck. While vessel crew can schedule deliberate washdowns while underway, the crew cannot control the weather and any wet weather event will result in deck runoff that may contain a small amount of residual substances from the prior washdown.

To properly address this, additional more detailed information and vessel specific data needs to be collected. At a minimum, however, the proposal must differentiate between the case of deliberate washdown and the case where a discharge occurs as a result of deck runoff from a wet weather event, we recommend that the permit text be changed to require that the vessel implement procedures for deck maintenance, washing and cleanup so as to minimize the discharge of the compounds noted above.

2.2.2. Bilgewater

The Act to Prevent Pollution from Ships (APPS) implements the provisions of MARPOL Annex I which already addresses bilgewater discharges from vessels. The implementing regulations are quite detailed in establishing parameters which regulate these discharges and thus these existing legal requirements should be incorporated by reference into the permit terms. Additional requirements proposed in the VGP should be eliminated, most particularly those prohibiting discharge of treated bilgewater on vessels greater than 400 gross registered tons (GRT) within 1 nautical mile of shore. Deletion of these additional requirements is justified because EPA has not provided any scientific justification which even suggests that these discharges occurring within 1 nm have any adverse environmental impact in the relatively small quantities and low concentrations (less than 15 ppm oil content) at issue, especially when compared to similar discharges from land based facilities already subject to the NPDES program.

In addition, new restrictions on this discharge in the VGP from vessels over 400 GRT within 1 nm as an absolute prohibition does not take into account the situation where a vessel is required to anchor for an extended period of time awaiting a berth. Anchorages are most often within this 1 nm limit and thus, even if the vessel could hold its bilgewater discharges for some period of time during routine transits where they were not required to anchor, extended periods at anchorage would prevent compliance with this additional requirement.

Finally, the provision which prohibits addition of substances that drain to the bilgewater that are not produced in the normal operation of a vessel should be deleted. It is ambiguous and fails to recognize the nature and purpose of the bilge and the discharges from vessel systems that are

collected in the bilge. A number of detergents, emulsifiers and chemicals are used in small concentrations for legitimate onboard cleaning purposes (not for the purpose of removing sheens in discharges) in other vessel systems and residuals will be found in the bilgewater. In addition, flocculants may be utilized in the bilgewater treatment system to increase the efficiency of the oil/water separation process which in turn increases the environmental protection afforded by the system by assuring the lowest oil content possible in the treated bilgewater discharge. While 15 ppm is the cap, vessel operations seek to optimize the performance of the oily water separation system and discharge at the lowest concentration possible which in many cases, is an order of magnitude lower than the legal limit. It is unclear whether these situations would be considered part of the “normal operation of the vessel” under the VGP, but they most certainly are from the vessels perspective taking into account the purpose of the bilge and the various tasks that are necessary for the safe and efficient operation of vessels. If this provision is not deleted as recommended above, it should be clarified to note that the substances and processes described above are in fact, discharges produced in the normal operation of a vessel by adding the following sentence to the second bullet in section 2.2.2 “Routine cleaning and maintenance activities association with vessel equipment and structures are considered to be normal operations of a vessel.”

2.2.3. Discharges of Ballast Water

Discharges of ballast water are already covered by existing federal statutes and implementing regulations. The National Invasive Species Act of 1996 and its implementing regulations found at 33 CFR 151 provide the necessary and justified legal structure by which ballast water discharges should be managed and thus EPA should incorporate by reference these provisions in the VGP.

The VGP provisions relating to ballast water appear to apply to all vessels covered under the permit. It does not recognize the statutorily- created exemption for crude oil tankers engaged in coast wise trade. This exemption applies to vessels carrying unrefined crude oil from one U.S. place to another and includes vessels which carry crude oil from the Alaskan pipeline to refineries in other U.S. states including Hawaii, and vessels conducting lightering operations in U.S. waters which then transport the crude oil to a port within the U.S. This exemption must be maintained and included within the VGP terms since EPA does not have the authority under the NPDES permitting program to override the existing ballast water statutory terms.

Section 2.2.3.3 outlines mandatory ballast water practices which reflect current statutory and regulatory requirements. However, these provisions when injected into the specific terms of a discharge permit provide little guidance to specific vessel types as to what constitutes compliance. It could therefore create much uncertainty and inconsistency in application across the EPA regions. An excellent illustration of this is reflected in the requirement in the VGP to clean ballast tanks “regularly.” In practice, what constitutes ‘regular’ cleaning of ballast tanks varies across vessel types, locations at which the ballast water was taken up where entrained sediment concentrations vary widely, and other environmental conditions outside the control of the vessel. Some vessels under a given set of conditions may only need to clean ballast tanks during their drydock periods, while others, taking up ballast water in highly sedimented water

bodies, may have to do so on much more frequent basis. Essentially, the question boils down to how much sediment is allowable before a determination that the tanks have not been cleaned “regularly”? and whether ‘regularly’ means that it must be done based on passage of time and regardless of the conditions that might exist. Moreover, in reality, the ballast tanks will never be sediment free, so a zero sediment criteria is unrealistic. EPA regions may well view these conditions differently, and there is no telling how a citizen group that has focused on a particular vessel or company might view these requirements, thus creating the potential for massive third party litigation that seeks to manage vessel operations.

Another example of the VGP which fails to reflect actual operations is in the last paragraph in section 2.2.3.3. It provides two examples of what constitutes “minimization of ballast water discharges” (intertank transfers and use of gray water as ballast). Neither of these is operationally feasible for a vast majority of vessels. Intertank transfer presupposes the existence of piping between ballast tanks and assumes that an intertank transfer will not impair the trim and stability of the vessel. Neither of these assumptions are generally the case. Intertank transfer also assumes that all types of vessels have this option. That is simply not the case due to the variable operating and cargo arrangements across the diverse vessel types to be covered by the VGP. For example, a container ship is rarely empty and may have the option of intertank transfer while a crude oil tanker typically spends half of its operational life in a fully laden condition (no ballast) and the other half in a ballast condition (no cargo). The second option, use of graywater as ballast, while possible for a select few number of vessels does not recognize the operational reality that exists on a vast majority of vessels which do not have interconnections between their graywater systems and the ballast water system. Is the EPA requiring that these new interconnections and infrastructure be built on all vessels by October 1?

To correct this problem the agency should define minimization of ballast water discharges in terms of minimization of ballast water taken up which is necessary for the safe operation of the vessel, consistent with the provisions found in existing statutes and regulations.

Section 2.2.3.4 mandates use of shore treatment facilities for ballast water unless an onboard treatment system is installed. While a laudable goal, to the best of our knowledge there is 1 shore treatment facility in the United States (Valdez, Alaska) which although designed for other purposes, can process ballast water from vessels berthed at the facility. Moreover, at this time, to the best of our knowledge, there is no onboard ballast water treatment system approved by the Coast Guard. While this may change in the future, to impose this requirement when no commercially available facilities or treatment systems exist is not consistent with the Clean Water Act.

Section 2.2.3.6 creates new federal requirements for vessels engaged in Pacific Nearshore Voyages. While these provisions generally reflect the programs implemented by California, Oregon and Washington, they were not legally mandated by the 9th Circuit Court of Appeals decision and should be deleted from the federal VGP. No where during the legal action leading up to this point did the federal court or the 9th Circuit deem the current CG requirements as inadequate and the terms of the VGP should reflect this fact by incorporating the existing federal requirements as the sole management program for ballast water discharges. Additional

requirements imposed by select states should not be included. The additional requirements in 2.2.3.6 present a significant cost issue which we do not believe that EPA has addressed. As a specific example, a product tanker engaged in West Coast trade without these requirements to divert outside the 50 nm limit makes its round trip voyage in 6 days. With these requirements, the round trip would take an additional day. At an average charter rate of \$50,000 per day, the cost of compliance to this vessel in just lost time would amount to \$2,600,000 per year. This estimate does not take into account the additional costs associated with fuel to make the diversion or the cost to perform the exchange once the vessel arrives at the exchange location. While charter rates vary widely by vessel type and over time, there is a significant compliance cost attributable to any vessel as a result of these additional requirements. Again, while the future is expected to bring onboard treatment technologies as a viable option, the VGP as proposed does not reflect the current reality that these approved systems are not available.

Sections 2.2.3.7 and 2.2.3.8 contain provisions that would require the sealing of tanks or saltwater flushing of empty tanks. Unlike land based systems, sealing of tanks presumably through some tagging system of valves is not normal practice for valves associated with the vessel cargo and ballast water system. In many cases valves contained in these systems are controlled from remote cargo control rooms and thus are not amenable to physical locking of the valves themselves. A more appropriate provision would require that a management system be in place aboard the vessel to ensure that no discharge can occur from these tanks unless the tank has been flushed with saltwater. This provision would provide flexibility to each vessel as to how the system is secured with due regard to the variations in systems across the diverse vessel types covered by the VGP. In this regard, because tagging is not industry practice, the VGP should make clear that the failure to tag will not create a presumption or be used as evidence that that tank has not been secured.

2.2.4 Anti-Fouling Hull Coatings

It is ironic that this section attempts to limit the ability of vessels to reduce the introduction of invasive species into U.S. waters through the use of effective hull coatings while at the same time 2.2.3 imposes significant new obligations to reduce these species from ballast water discharges. We note that the IMO Convention on the Control of Harmful Anti-fouling Systems (AFS) will enter into effect two weeks prior to the current September 30 vacatur date, and while Congressional ratification processes have yet to be completed, it is expected that the U.S. will become a party to this Convention. It is therefore recommended that the VGP provisions addressing anti-fouling hull coatings incorporate the requirements of this convention into the VGP and deem compliance with the IMO standard to be compliance with the VGP.

We agree that the discharge of TBT should be prohibited consistent with the provisions of the AFS Convention; however we have serious concerns regarding provisions included in the proposed VGP relative to copper-based coatings. We strongly recommend that these provisions be deleted as inconsistent with the AFS Convention. The industry in general removed or in a few cases, sealed TBT coatings long ago - in most cases 5 years before the AFS entry into force date of September 2008. A thorough review of various coating alternatives revealed that copper-

based coatings provided the best anti-foulant protection at a reasonable cost over time with due regard to vessel operations.

We recognize that other coatings (self-polishing as an example) exist and in fact are in use on a number of Armed Forces vessels, but the effectiveness of these coatings depend in many cases on vessel speeds. Armed Forces vessel speeds typically exceed those for commercial vessels and are thus these coatings are not suitable alternatives for a vast majority of vessels which would be covered under the VGP. In many cases, these alternative coatings have been found to be less effective and very susceptible to mechanical damage and abrasion events.

The VGP also proposes that vessels which spend more than 30 days per year in certain waters consider the use of coatings which use rapidly biodegradable biocide or a non-copper alternative. In this respect we have two questions. First, if a anti-fouling coating is to be effective, how can it employ a rapidly biodegradable biocide at the hull surface? While we suspect that this phrase in the VGP is meant to suggest that the biocide be rapidly biodegradable if it separates from the hull, this needs to be clarified.

Second, the VGP requires documentation of how a decision to use copper based anti-foulant paints is reached. What type of documentation is meant here? While this requirement appears in the paragraph discussions certain ports and harbors impaired by copper, does the requirement for documenting the decision to use copper based coatings apply to just those vessels which spend more than 30 days per year in certain ports and harbors or does it apply to the entire universe of vessels covered by the VGP?

2.2.5. Aqueous Film Forming Foam (AFFF)

Our constituents indicated that most vessels conduct training and maintenance discharges outside the 3 nm limit but not that U.S.CG inspection and certification naturally must occur in port. As an example, for U.S. flag tankers, the basic foam quantity requirements are found in 46 CFR 34.20-5. Specific carriage requirements for a particular type of foam and quantity to be carried are determined by the cargoes the vessel is approved to carry and the application rates determined by the foam manufacturer under Underwriters Laboratories oversight. Although subject to some variability, a 90,000 DWT crude tanker has a foam supply of approximately 800 gallons of 3% protein foam. The foam system covers the deck and pumproom. A 40,000 DWT product carrier has a foam supply of approx 1400 gallons of 3% AFFF just for main deck coverage. The requirement is based on its ability to carry polar solvent cargoes which require a foam specifically designed for that application. Foam samples are sent for analysis at least every two years and as long as the sample is within tolerances it is retained onboard. Foam can easily last 25 years or more depending on the type of tank it is stored in and how it is maintained. A 15 second test shot of foam is required twice in five years as per 46 CFR 31.10-18.

One proposed provision does cause concern for our members. This provision prohibits AFFF discharges from vessels that do not transit beyond the 3 nm limit more than once a month unless the discharges are collected and stored for onshore disposal or unless the vessel uses a non-

fluorinated or an alternative foaming agent. We have not had sufficient time to determine the extent of current use of fluorinated versus non-fluorinated foam on vessels which remain within the 3 nm limit. We do have information suggesting that both types are currently in use, and thus vessels staying within the 3 nm limit that use fluorinated foam will find themselves in an irresolvable dilemma. Safety requirements dictate that the system be tested on a regular basis. The proposed VGP would prohibit that test unless the residuals were able to be collected and stored for shore disposal which is not possible during a foam system test.

The solution suggested by EPA would require vessels to replace their fluorinated foam with a non-fluorinated foam or other alternative but this apparent solution is not as easy as it seems. Altering foam types require altering the foam application systems and in many cases requires replacement of the entire system including the foam tank where foam carriage capacity must be sufficient to meet the coverage needs specified by regulation. In some cases, altering the foam type may only require installation of a new application system which calibrates the delivery of foam in a concentration determined by the manufacturer. In either case, the cost associated with replacement of the entire system or at least, the application system will be substantial. Therefore, we recommend that the agency conduct additional investigation into these practices. Alternatively, we recommend deletion of this prohibition for vessels that do not leave the 3 nm limit once per month and replace this text with a provision which permits this discharge providing the foam discharged is limited to that amount necessary to conduct legally required tests.

2.2.6. Boiler/Economizer Blowdown

Boiler/Economizer Blowdown is a routine and necessary operation aboard commercial vessels to assure the continued safe and efficient operation of boilers and economizers. The variation in vessels and operations renders the EPA proposal unrealistic.

No vessel owners which provided input to us on the VGP indicated that there were storage facilities for storing the blowdown in a tank or other existing space. Input we have received also indicates that vessels may have manual blowdown or continuous blowdown systems depending on the size of the boiler and its application. For smaller boilers on motor ships, a vessel may be able to avoid blowdown during a short port stay not exceeding 2 days; however, if the vessel is delayed in port or at anchorage for a longer period, even these smaller systems would need to be able to conduct blowdown operations. For larger boilers such as those found on tankers which are used to drive the cargo pumps, shorter blowdown intervals are necessary.

Due to the wide variations in blowdown requirements, we believe the EPA must gather more detailed data to justify the appropriate BMP. Alternatively, the language which prohibits blowdown for vessels greater than 400 GRT which transit the 3 nm limit at least once a week, should be deleted and replaced with text which requires minimization of blowdown activities in waters covered by this permit in accordance with design and maintenance requirements.

2.2.7. Cathodic Protection

Based on a survey of our members, most large commercial vessels utilize Impressed Current Cathodic Protection (ICCP) as well as sacrificial anodes (electrodes per VGP text) in hard-to-protect areas such as the rudder, stern frame and sea chests. It is also important to note that cathodic protection is used in some internal spaces aboard the vessel such as ballast tanks where they are used as a backup system for the required internal tank coatings and are typically made of zinc or aluminum. Inspection and cleaning or replacement of both types of systems are regularly performed during normal drydocking periods. As a good engineering practice, magnesium is not found on vessel cathodic protection systems with zinc being the predominate element in use.

EPA's recommendation that ICCP should be used in place of sacrificial anodes does not reflect the reality and the needs for adequate cathodic protection across all external hull surfaces. It is critical that sacrificial anodes be permitted in the difficult to protect areas noted above. In view of this necessity, this should be studied much more carefully and facts developed before deciding what BMP should apply. Alternatively, EPA should delete the last paragraph of Section 2.2.7 and substitute text which acknowledges the dual need for ICCP and sacrificial anodes, but calls for minimization of the use of sacrificial anodes where technologically feasible and economically practicable.

It is also noteworthy to recognize that some smaller vessels such as tugs and barges do not have ICCP systems installed and thus use sacrificial anodes as their exclusive method of cathodic protection which should continue to be allowed under the VGP.

2.2.8. Chain Locker Effluent

It is likely that this section generally reflects current practices with respect to the chain locker and anchor/anchor chain washdowns, but we believe additional investigation is necessary to confirm this. Anchors and anchor chain are washed down each time the anchor is weighed while the chain locker is normally cleaned and pumped out while the vessel is in drydock. However, it is generally not technically feasible to clean, rinse and/or pump out the chain locker prior to entering coastal waters. It should be noted that in some cases non-toxic lubricants or coatings are used on the anchor chain to reduce corrosion and such practices should be allowed under the VGP.

2.2.9. Controllable Pitch Propeller Hydraulic Fluid

This section may generally reflect current practices, but additional investigation is necessary to determine this. We believe that unless an emergency arises, maintenance on controllable pitch propellers is done during drydock periods and any residual oil is collected as part of normal shipyard operations. However, the reference to deployment of "oil boom" should be deleted and replaced with text requiring access to appropriate spill response resources should a discharge occur during in water maintenance. This deletion is justified because booming is not practical or

even possible in all situations especially in strong current. Again, if the agency were to take sufficient time to investigate these practices, we believe it would adopt this and other changes.

2.2.11. Elevator Pit Effluent

Most commercial vessels do not have elevators and thus this section would not be applicable to their operation. Input from our members suggest that those vessels which do have elevators collect the effluent in a sump below the shaft and pump it into their oily water waste tank and either transfer to a slop tank for disposal ashore, and/or process through the oily water separation system. Some vessels have incinerators which can process this waste stream as well although they are in a vast minority.

2.2.12. Firemain Systems

At least two routine fireman discharges are not addressed in the VGP as proposed. In many cases, firemain water is used to cool hydraulic deck machinery but the cooling water remains segregated from lubricants and hydraulic fluid. Also, for many vessel types, especially, tank vessels, firemain systems must be charged in port in a ready-to-operate condition should an emergency occur. During this process the fire pump must be in operational mode, and there must be a bleed off of excessive pressure to avoid damage to the pump. This pressure bleeder stream may occur through a cracked valve on deck, routed through the anchor washdown nozzles or, in some cases, may be routed a valve in the engine room. Which of these routes apply to a given ship depend on the way the vessel was designed. Allowing this process to continue under the VGP is essential to the safe operation of the vessel. As currently proposed it is not clear what the status is of the bleeder water which comes from the firemain but either ends up on the deck, exits through the anchor washdown nozzles or enters the engine room? Is it regulated under this section or the sections that addresses deck runoff or other engine room related discharges?

In determining this answer and options for defining BMPs, it is important to note that a substantial volume of water is at issue here which is too voluminous for collection in containment bins. It is also important to note that the water which charges the firemain is water taken up at the dock, so barring any deck debris or other residuals which would already be managed under the deck washdown/runoff BMPs or engine room related discharge BMPs, it represents a discharge of noncontact water taken from and put back into the same water body to which it is being discharged with no change in its condition, thus posing no risk to the marine environment. Obviously if this bleed off is commingled with other discharge streams, the most stringent BMPs and or restrictions would be expected to apply.

This is yet another example of why the agency needs to seek more time from the court to develop this program or needs to give the regulated community additional time to develop appropriately tailored BMPs.

2.2.15. Graywater

A vast majority of non-passenger commercial vessels have no capability to store graywater. The few that have holding capability are limited in the amount of graywater that can be held. While that would not usually be a problem for routine voyages where a vessel encounters no delays, it would not be the case in instances where the vessel was required to anchor for an extended period for reasons which could include awaiting availability of a berth, the need to conduct in water repairs or other delays imposed by port state control authorities.

Without further scientific justification for the need to limit discharges of graywater from non-passenger commercial vessels, the prohibitions in this section should be deleted and language inserted which requires vessels with or without storage capability to minimize graywater discharges to the extent practicable. This approach would give due recognition to the fact that graywater discharges from non-passenger commercial vessels are of relatively small volume due to the small crews on these vessels which generally have less than 30 crew members aboard. It would also give due recognition to the fact that these small volume discharges pale in comparison to similar discharges already permitted from land based sources including stormwater runoff. To the best of our knowledge, few if any vessels have the capability to collect and pump graywater ashore nor do shore reception facilities exist for discharge of graywater ashore.

2.2.17. Non-Oily Machinery Wastewater

It is unclear what is meant to be covered under this section. Generally any machinery wastewater, including cooling water is collected in the bilge system and processed through the oily water separation system. EPA should clarify the nature of the discharge intended to be covered here and confirm that such discharges would be covered under the permit requirements for bilge water.

2.2.18. Refrigeration and Air Condensate Discharge

This section reflects current practices which process non-oily waste water through existing bilge water systems or in some cases, discharge coolant water directly overboard without collection in the bilge where the discharge is known to be oil free.

2.2.19. Rudder Bearing Lubrication Discharge

This section reflects some current practices but does not take into account the manner in which rudder bearings and other hull/water interface bearings operate. These bearings are kept at a positive pressure to prevent the inflow of water and thus discharge small quantities of lubricant occur. The text as proposed should be deleted and replaced with text which requires the seal to be maintained in good operating order so as to minimize the leaking of lubricating oil.

2.2.20. Seawater Cooling Overboard Discharge (including non-contact engine cooling water; hydraulic system cooling water, refrigeration cooling water)

This section does not reflect the operational reality that cooling water is necessary for the safe operation of machinery plants aboard vessels and thus must be continuously discharged whether in port or underway. While shore power may present a future control strategy which may minimize these discharges, it is not a feasible or commercially available alternative now for land-based and ship-based compatibility reasons with few customized exceptions found on the West Coast. Even with shore power options, it is still likely that some equipment aboard the vessel including hydraulic systems would still require cooling water unless dual power systems were installed aboard vessels at a significant cost. In the case of tankers, few would be suitable for shore based power due to the high power levels required for the operation of cargo pumps which are of steam turbine, hydraulic or diesel direct-drive and not amenable to electric drive. While we agree that this discharge should be minimized in port, it is difficult to imagine how these discharges can be further minimized short of re-power and redesign of all power trains currently contained in the engine room. At a minimum additional study is needed to determine how to approach this issue.

2.2.21. Seawater Piping Biofouling Prevention

For most vessels, we believe that cleaning of seawater piping is only done during scheduled drydocking periods since the systems are in use during normal vessel operations. At least for large ocean going vessels, biofouling is minimized through the use of onboard systems which inject low concentrations of biocide into significantly large volumes of water to inhibit biological growth and the selection and use of piping materials that minimize the potential for biofouling and adherence of organisms to internal surfaces within the piping system. It is recommended that the beginning of the first sentence in the third paragraph in this section be modified to read "When a vessel owner/operator removes fouling organisms..." and leave the remaining sentences in this paragraph as proposed.

2.2.22. Small Boat Engine Wet Exhaust

This section is unclear as to whether it is intended to cover lifeboat engines or the auxiliary service vessels which may be carried on some large commercial vessels. First, we suggest addition of appropriate text in this section that explicitly excludes lifeboats from this section. Lifeboats on commercial ships are required by law to be run during lifeboat drills which occur almost without exception while the vessel is underway and outside the 3 nm limit. The exception to this rule are instances where inspection and certification activities are being conducted by Coast Guard personnel and, of course, the situation where the vessel on which the lifeboats are installed does not transit outside the 3 nm limit but are still subject to regular testing. The duration of these tests and the volume of this discharge is such that a de minimis finding for this discharge is appropriate. Indeed the discharges from these engines are far less than that which comes from the thousands of recreational vessels with small engines, that are not required to limit these discharges at all. While maintenance in good working order and well tuned engines per manufacturer specifications is a given existing practice, use of low sulfur or

alternative fuels is not necessarily an option for existing vessels. These vessels are required to carry lifeboats approved under international standards and domestic certification processes. Use of fuels other than those for which the engine is designed could impede the good working order of the engine and impact the performance of legally required lifesaving equipment.

2.2.24. Stern Tube Oily Discharge

Consistent with our comments in Section 2.2.10, routine maintenance on stern tube seals is done during drydock periods and any residual oil is collected as part of normal shipyard operations. Emergency repairs may be conducted in water. However, the reference to use of oil absorbent pads does not reflect the reality that oil absorbent pads are not effective in cleaning up oil contained within a boom and thus should be deleted and replaced with text requiring access to appropriate spill response resources should a discharge occur during in water maintenance.

2.2.25. Underwater Ship Husbandry Discharges

Routine hull cleaning activities are conducted during scheduled shipyard periods for commercial vessels. In some cases, in-water cleaning is necessary for particular classes of vessels that operate in certain environments conducive to biological growth on the hulls. In-water hull cleaning should not be discouraged because it will ensure optimized fuel consumption. Without a cleaning in certain circumstances, fuel efficiency will be reduced along with accompanying increased air emissions associated with this inefficiency and increase the potential for invasive species introductions into U.S. waters.

One troublesome point in this section is found beginning at the second paragraph and follows through to the end of the section. It appears that EPA is intending to regulate the hull cleaning activities of vessels even when they are not within the 3 nm limit covered by the VGP. This can be remedied by clarifying language that stipulates that the permit terms apply only to underwater ship husbandry activities that take place within the 3 nm limit.

In addition, we believe that the requirement that copper based antifoulant paints not result in any visible cloud or plume is an unrealistic and impractical criteria and should be deleted. Some particulates are present in the normal process of underwater hull cleaning and it would be impossible to distinguish between plumes which contain only hull growth and those which contain copper based hull coating residue. Deletion of this provision is also justified in light of the 3 minimization strategies listed in bulleted form in Section 2.2.25 directly above which will serve to minimize the discharge of both fouling organisms and hull coatings.

Notwithstanding these suggestions, this is yet another example of a section of the VGP that is not based on actual data reflective of the regulated community that will be subject to it, and strongly suggests that additional study be conducted.

2.2.27. Graywater Mixed with Sewage from Vessels

Other than as applied to cruise vessels with advanced wastewater systems, we know of no factual basis for including this discharge in the VGP. As stated numerous times above, commingled discharges are subject to the most stringent discharge restrictions and requirements applicable to either component of the co-mingled discharge.

2.2.28. Exhaust Gas Scrubber Washwater Discharge

We urge EPA to incorporate the final provisions of the exhaust gas scrubber effluent guidelines being developed at the International Maritime Organization as the exclusive terms for control of this discharge under the VGP.

2.3. Water Quality Based Effluent Limits

As we noted in our testimony to the House Water Resources Committee on June 12, 2008, shipping is international and the regulation of shipping should be also. In cases where U.S. 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 Clean Water Act 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 discharge standards and/or require different treatment technologies are required, 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.

The Clean Water Act's NPDES system works well for stationary sources, because the state and water body 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.

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.

For these reasons, we believe that EPA should take into account impacts on trade, disparity between ports located on different water bodies which could result in relocation of trade to ports without additional requirements as could be imposed under this section, and the almost certain inability of commercial vessel to meet the potentially endless numbers of additional and potentially conflicting requirements as could be created under this section as well as under the Section 401 certification program. EPA has the authority to limit these concerns as reflected in our comment letter to which this Appendix is attached.

3. Corrective Actions and 4. Inspections, Monitoring, Reporting and Recordkeeping

First, the International Safety Management (ISM) Code includes requirements for implementation of corrective action programs aboard most commercial vessels. These requirements include provisions for inspections, monitoring, reporting, recordkeeping and corrective actions and are already in place on vessels covered by the ISM Code. We recommend incorporation in total of these provisions into this section of the VGP and deletion entirely of the current section as proposed.

Second, the provisions as proposed appear to create a requirement that virtually every task associated with meeting the VGP requirements be reported and where not performed, would trigger a correction action response. As such, the corrective action and reporting criteria are overly broad and too general in nature. A more appropriate approach to establishing corrective action triggers and reporting requirements would be to move the focus away from daily work practices and specific housekeeping task and focus on the management systems that must be in place to achieve the end results. It is far less important to identify an activity which has no nexus to impact overboard discharges than it is to identify those that have impacted an overboard discharge. In this respect, we can support the recommendation made by the Cruise Lines International Association which properly focuses reporting on actual discharges and allows the management systems in place to manage these discharges in a manner compliant with the terms of the VGP.

Third, a vessel is a self-contained unit when it is at sea unconnected to a technological and scientific (shore based) infrastructure that stands ready to provide instant advice, scientific analysis and technological support for onboard equipment. While this isolation from a support structure provides the impetus for the employment of professional mariners which can and do maintain and repair equipment and fixed systems with very little external support (especially while the vessel is at sea), there are some situations where equipment and or analysis needs to be performed by experts that can only be scheduled to call on the ship when it berths at its next port of call. In this respect, we urge EPA to take this into account in outlining the timing of corrective action programs to incorporate the concept that the vessel will execute what is possible while at sea to mitigate a discharge, but may not be able to totally resolve the problem

until shore experts board the vessel. Furthermore, a vessel which requires shore based assistance to fully resolve an operational or mechanical problem should be permitted entry in accordance with existing Coast Guard criteria in order to facilitate final resolution of the problem. This section should expressly provide for cleared entry by Coast Guard officials under these circumstances and also clarify that a vessel inbound in this situation that has corrected the problem to the maximum extent possible by onboard personnel pending final resolution while berthed, will not be cited for a violation of the permit.

Fourth, vessels are already subject to a variety of frequent inspection, monitoring, reporting and recordkeeping requirements. Compliance with these existing requirements should be clearly deemed an alternate compliance mechanism with the provisions proposed in these sections.

Fifth, requiring quarterly samples of discharge streams that are discharged below the waterline is overreaching, unnecessary and inconsistent with current requirements absent any indication that the management system is not operating properly. Fixed discharge control systems should be deemed to be operating properly when the equipment is properly maintained, operated and no visible signs of upset are present. Further, unlike land based sources, sampling of many underwater discharges is virtually impossible by ships' crews due to inaccessibility as would be the case for a number of these discharges including rudder bearings, stern tube seals and others. The provisions for quarterly sampling should be deleted entirely.

Sixth, section 4.2(2) requires the voyage log to include the vessel's next port and country in which it will call. In many cases, this information is not known at the departure port and cannot be logged based on speculation. This requirement for documentation of next port/country of call should be deleted.

Sixth, section 4.2(8) requires documentation of the literally thousands of jobs that occur during routine deck and engine room maintenance, and paint applications. This level of detail is unnecessary since these tasks are not directly related to overboard discharges. Rather section 4.2 in its entirety should incorporate by reference current recordkeeping and reporting requirements as provided for in Coast Guard regulations. The level of detail required there provides ample detail to monitor covered discharges and provides sufficient information for port state control inspectors to assess the management system by which various discharges are managed.

Seventh, the "one time permit report" required by section 4.4.4 appears to be of marginal value from an information standpoint unless detailed explanations are provided under each section. If that is to be required, the form will take far longer than the 30 minutes suggested by EPA. Mirroring the comments of the Cruise Lines International Association, an understanding of industry practices and systems requires constant communications between the industry and EPA. An effective understanding of the industry now and in the future necessitates the need for this continued communication and does not justify the requirement for yet another report that provides little value toward this end.

5. Vessel Class Specific Requirements

The provisions included in section 5.4 (barges) and 5.5 (oil and petroleum tankers) appear to capture what is already current practice. The provisions contained in the educational and training requirements are drafted in a manner that would include all crew members. Use of the broad term “crew” creates an unnecessary burden on the vessel and shoreside management. For large ocean going vessels the majority of the crew is not involved with any of the decisions on how these discharges are managed. It is therefore recommended that where the term “crew” is used in the training context, it be replaced by “crew members that actively take part in the management of the discharge.” EPA should also recognize that training of mariners is covered by the IMO STCW Convention as well as the ISM Code. Compliance with the provisions in these instruments should constitute compliance with the terms of the VGP.