

February 5, 2013

The Honorable Cass Sunstein  
Administrator, Office of Information and Regulatory Affairs  
Office of Management and Budget  
Eisenhower Executive Office Building  
1650 Pennsylvania Ave, NW  
Washington, D.C. 20503

Re: RIN 2040-ZA13: Development of a National Pollutant Discharge Elimination System (NPDES) Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels

Dear Administrator Sunstein:

For reasons that are unique to the legislative and litigation history of the issue, the Executive Branch has two different agencies – the U.S. Coast Guard and the Environmental Protection Agency – charged by law with regulating the discharge of ballast water from ships calling in U.S. ports. It is essential that the regulations of these two agencies be consistent. We have scheduled a meeting with your staff on February 22 to discuss this issue.

In short, the issues of concern have been known and identified for some time. The Coast Guard's final regulations were issued under its statute last March after being reviewed and approved by OMB. Prior to that final rule's approval and publication, the EPA issued a draft vessel general permit under its statute. The EPA's final vessel general permit is now before OMB for review prior to its becoming final.

There are a few important issues where that draft EPA permit varies from the Coast Guard's final regulation in a way that is important to the regulated industry. Our objective is simply to ensure that the EPA final regulatory approach, which the agency plans to publish in March 2013, is fully consistent with the Coast Guard's final rule that has already been approved and published, and which is understood by ship owners, ballast water treatment technology vendors and testing facilities, and shipyards in the United States and around the world to be decided U.S. policy.

These issues are discussed in more detail in the attached Appendix, which we enclose in advance of our meeting for your information and reference. We look forward to our meeting on February 22<sup>nd</sup>.

Sincerely,

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Mr. Ken Kopocis, EPA Office of Water  
Mr. Jeffrey Lantz, USCG Director of Commercial Regulations and Standards  
CDR Ryan Allain, USCG Office of Environmental Standards

Enclosure

## Appendix

### Discussion of Ballast Water Treatment Provisions in the Draft 2013 EPA Vessel General Permit That Need to Align With the Coast Guard Final Rule

#### Background

The above named maritime industry organizations requested a meeting with OMB to request OMB's assistance to ensure that the final ballast water treatment provisions in the EPA's draft 2013 Vessel General Permit (VGP), which is currently under OMB review, are made consistent with the ballast water treatment provisions contained in the U.S. Coast Guard's final ballast water rule, which was published on March 23, 2012 and became effective June 21, 2012. This meeting is scheduled to occur at 2:00 PM on February 22, 2013.

One of our concerns with the draft 2013 VGP is that the permit's ballast water treatment implementation schedule for newly built ships ("newbuilds") does not align with the newbuild implementation schedule and the mandatory technology type-approval process established by the Coast Guard final rule.

The first aspect of the problem with the draft 2013 VGP's treatment of newbuilds is that the VGP defines a newbuild as any vessel for which construction begins on or after January 1, 2012, whereas the Coast Guard's date for the classification of a newbuild is almost two years later – December 1, 2013. Under the Coast Guard final rule, vessels classified as newbuilds must be equipped with treatment technology upon delivery. For the draft VGP, newbuilds must comply upon delivery on or after the effective date of the permit, which will be December 19, 2013<sup>1</sup>.

The misalignment in the two newbuild trigger dates is exacerbated by a second aspect of the problem. The Coast Guard final rule appropriately requires that only those ballast water treatment technologies that have been type approved by the Coast Guard may be used to comply with the Coast Guard's numeric discharge standards, which are the same numeric standards proposed for EPA's Vessel General Permit. Under current estimates, such type-approved technologies may not be available until approximately mid-2014. This means that a newbuild delivered shortly after the December 19, 2013 effective date of the 2013 VGP would not be able to use Coast Guard approved treatment technology as a means of complying with the VGP ballast water discharge requirements.

The use of Coast Guard type approved treatment technology is the only reliable means for vessels discharging ballast water to meet the federal treatment standard contained in the

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<sup>1</sup> The World Shipping Council raised this issue in its comments filed with the EPA on February 21, 2012 and Council staff has met with Office of Water staff to discuss the issue. The Council also raised the issue in its testimony before the Coast Guard and Maritime Transportation Subcommittee of the House Transportation and Infrastructure Committee on April 26, 2012. At that hearing, Mr. James Hanlon, Director of Wastewater Management for EPA, acknowledged this problem in the draft VGP and stated that EPA intended to align its final VGP with the Coast Guard's rule. EPA repeated its intention to address the issue in its June 12, 2012 letter to Chairman LoBiondo responding to written follow-up questions from the hearing.

draft 2013 VGP and Coast Guard final rule. That is the case because there is a growing, justifiable recognition that treatment systems that have been type approved by other countries may not consistently meet the International Maritime Organization (IMO) standard that the EPA and the Coast Guard have adopted. It is because of that lack of confidence in technology type approvals issued by other countries that the Coast Guard rule requires the use of equipment that has been type approved by the Coast Guard.

It would make no sense from either an environmental or an economic perspective for the next VGP to require installation of ballast water treatment technology that has not been type approved by the Coast Guard. If a vessel seeking to comply with the EPA VGP installed technology that had not been approved by the Coast Guard, that vessel could very well have to replace that treatment technology with a Coast Guard approved technology very shortly after the original treatment system installation, at a cost in the millions of dollars. In addition to the cost and commercial disruption that such a scenario would cause, there is no reason to think that use of a treatment system that had not been approved by the Coast Guard would reduce the risk of invasive species introduction any more effectively than the current requirement that all ballast water be exchanged in the open ocean before any near-shore discharge, a control mechanism that has proven effective.

Because Coast Guard type-approved technologies may not be available by the time some newbuilds must comply with the Coast Guard final rule (i.e. upon delivery for vessels constructed on or after 1 December 2013), the Coast Guard in its final rule has established a process through which vessels may comply with that rule by filing an extension request on the grounds that Coast Guard type-approved technology is not available.<sup>2</sup> The Coast Guard has also confirmed that vessels may receive an extension irrespective of whether the Coast Guard has accepted some foreign type-approved technologies into its “Alternate Management System” (AMS) program, which is designed to avoid penalizing vessels already equipped with foreign type-approved technologies by allowing them to use their installed systems to comply with the Coast Guard final rule for no more than five years beyond the vessel’s compliance date. Any systems recognized under the AMS designation by definition will not have met the criteria for full Coast Guard type approval.

Vessel owners and operators have the same goal as the federal government – to make sure that the multi-million dollar ballast water treatment systems installed on vessels that will be calling the U.S. consistently meet the applicable treatment standards. That goal and its accompanying environmental protection benefits require installation of tested and Coast Guard type-approved systems.

Another of our concerns with the draft 2013 VGP is the discrepancy between the proposed applicability of its ballast water treatment requirements and the applicability of the requirements promulgated by the Coast Guard. In its final rule, the Coast Guard limited its expansion of its ballast water discharge standards in response to public comments expressing uncertainty about the feasibility, cost-effectiveness and environmental benefit of installing

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<sup>2</sup> The Coast Guard explains its extension request process in its ballast water final rule frequently asked questions, which may be found at: <http://www.uscg.mil/hq/cg5/cg522/cg5224/docs/BWDS.Aug.17.2012Revision.pdf>

ballast water treatment systems on non-seagoing vessels, writing that additional analysis and research was necessary. As a result, its requirements apply only to seagoing vessels that operate outside the U.S. exclusive economic zone, or that travel within the exclusive economic zone and meet a certain size threshold that makes them similar to vessels operating internationally. However, in its draft 2013 VGP EPA proposed to apply its ballast water discharge limits to all vessels covered by the permit, including non-seagoing vessels. While there are some exemptions and exceptions in the draft 2013 VGP, as well as approved ballast water management methods in addition to the use of a ballast water treatment system, there is still a significant number of vessels that are not subject to Coast Guard requirements and that could not meet the requirements of the EPA's proposed permit without incurring significant costs and operational challenges. It would be premature for the EPA to expand the applicability of these requirements before the questions of practicability and cost-effectiveness identified by the Coast Guard, which have also been raised in comments to EPA on its draft permit, are answered.

We recognize that the draft 2013 VGP was issued by EPA many months prior to the Administration's promulgation of the Coast Guard's final rule, which was published after extensive inter-agency review and collaboration and OMB approval. We therefore expect that the final 2013 VGP will correct the above-discussed misalignments between the draft VGP and the Coast Guard rule.

### **Recommendations**

In order to resolve these inconsistencies between the Coast Guard final rule and the draft 2013 VGP, we respectfully recommend that the final 2013 VGP incorporate the following changes that will provide newbuilds with a reasonable and orderly path to comply with the federal ballast water treatment standard:

- 1) Align the newbuild implementation schedule in the 2013 VGP with the schedule in the Coast Guard final rule, so that newbuilds constructed on or after 1 December 2013 must comply with the ballast water treatment requirements upon vessel delivery;
- 2) Include in the 2013 VGP ballast water treatment requirements an extension provision that grants a vessel that has obtained an extension to the implementation schedule from the U.S. Coast Guard an identical extension to the VGP ballast water implementation schedule; and
- 3) Align the applicability of the ballast water discharge limits of the 2013 VGP with the applicability of the Coast Guard final rule by adding those vessel types to which the Coast Guard's ballast water discharge standards do not apply to the list of vessels not required to meet the VGP's ballast water treatment standards, listed in Part 2.2.3.5.3 of the proposed permit.

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