

An hourglass-shaped graphic with a globe of the Earth inside. The top bulb is dark blue, and the bottom bulb is light blue. A single drop of blue liquid is falling from the bottom bulb. The globe is centered within the hourglass.

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*Clean Water Act: 110th Congress Legislation on Discharges
from Recreational Boats*

Claudia Copeland, Specialist in Resources and Environmental Policy

January 13, 2009

Abstract. The Environmental Protection Agency (EPA) is required to develop a regulatory response to a 2006 federal court ruling that vacated a long-standing EPA rule. That rule had exempted discharges associated with the normal operation of vessels from permit requirements of the Clean Water Act. Concern that this ruling could require millions of recreational boaters to obtain permits led to the introduction of legislation in the 110th Congress to exempt these and other types of vessels from water quality regulation. This report discusses background to the issue and bills introduced in the 110th Congress in response, two of which were passed by Congress in July 2008 (S. 2766 and S. 3298). The enacted measures exempted recreational vessels from permit requirements (P.L. 110-288) and delayed permit requirements for many other but not all vessels (P.L. 110-299). EPA finalized a permit for the remaining vessels on December 18, 2008.

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Summary

The Environmental Protection Agency (EPA) is required to develop a regulatory response to a 2006 federal court ruling that vacated a long-standing EPA rule. That rule had exempted discharges associated with the normal operation of vessels from permit requirements of the Clean Water Act. Concern that this ruling could require millions of recreational boaters to obtain permits led to the introduction of legislation in the 110th Congress to exempt these and other types of vessels from water quality regulation. This report discusses background to the issue and bills introduced in the 110th Congress in response, two of which were passed by Congress in July 2008 (S. 2766 and S. 3298). The enacted measures exempted recreational vessels from permit requirements (P.L. 110-288) and delayed permit requirements for many other but not all vessels (P.L. 110-299). EPA finalized a permit for the remaining vessels on December 18, 2008.

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Introduction

In the 110th Congress, legislation concerning the applicability of certain environmental regulatory requirements to recreational and other types of boats was introduced. Two bills are titled the Clean Boating Act of 2008 (S. 2766 and H.R. 5949). Legislation titled the Recreational Boating Act of 2007 also was introduced (S. 2067 and H.R. 2550¹). Two other bills were the Vessel Discharge Evaluation and Review Act (S. 2645 and H.R. 5594²). Two measures concerned just with non-recreational boats were S. 3298 and H.R. 6556. As discussed in this report, Congress passed two of these bills, S. 2766 and S. 3298, on July 22, 2008, and President Bush subsequently signed them into law.

These bills were intended to address an issue that has arisen in implementation of the Clean Water Act (CWA). In 2006, a federal court ordered the Environmental Protection Agency (EPA) to revise a CWA regulation that currently exempts discharges from the normal operation of all vessels from the act's permit requirements.³ The bills sought to exempt an estimated 13 million recreational and other vessels from new EPA rules promulgated in response to the court order. A federal appeals court upheld the district court's ruling the day after Congress acted on S. 2766 and S. 3298.⁴

The federal court 2006 order reversed EPA policy in effect since 1973, in a rule that excluded discharges incidental to the normal operation of vessels from CWA permitting requirements. The district court's order revoked the regulatory exemption as of September 30, 2008. The government appealed the court's order, but while waiting for a ruling, on June 17, 2008, EPA proposed two draft CWA permits to respond to the court's mandate. Although the focus of the legal challenge was principally to EPA's permitting exemption for ballast water discharges from vessels,⁵ the court's ruling—and its mandate to rescind the regulatory exemption—also applied fully to other types of vessel discharges that are covered by the exemption, such as graywater and bilge water.⁶ Barring judicial or legislative relief, EPA would have been required to promulgate a CWA permitting program to comply with the court's mandate by September 30. As discussed below, enactment of S. 2766 and S. 3298 relieved recreational boats and many but not all other vessels from these requirements. Further, on August 31, the federal district court approved EPA's

¹ S. 2067 includes several stylistic and formatting differences from H.R. 2550, but the bills are similar enough that they are considered together in this report.

² These bills are not identical, but they are substantially similar and are discussed together in this report.

³ *Northwest Environmental Advocates v. EPA*, No. C 03-05760 SI (N.D.Cal. September 18, 2006).

⁴ *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, No. 03-74795, EPA No. 03-5760, CA 9, July 23, 2008.

⁵ Ballast water is stored in tanks on large ships such as tankers and cruise ships to provide stability. It is essential to the proper functioning of ships (especially cargo ships), because the water that is taken in compensates for changes in the ship's weight as cargo is loaded or unloaded, and as fuel and supplies are consumed. However, ballast water discharges typically contain a variety of biological materials, including plants, animals, viruses, and bacteria. These materials often include non-native, nuisance, exotic species that can cause extensive ecological and economic damage to aquatic ecosystems. For information, see CRS Report RL32344, *Ballast Water Management to Combat Invasive Species*, by Eugene H. Buck.

⁶ Graywater is wastewater from the sinks, showers, galleys, laundry, and cleaning activities aboard a ship. Bilge water is water that collects in the lowest inner part of the ship's hull. It is frequently contaminated with oil and other lubricants from the engine room.

request to delay the court's order until December 19, 2008, and EPA finalized a permit for vessels subject to a permit requirement on December 18.

Background: Clean Water Act Requirements

The Clean Water Act is the principal federal law concerned with pollutant discharges to the nation's surface waters, including rivers and streams, lakes, estuaries, and coastal waters. Section 301(a) of this act provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other sections of the act. The CWA defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft" (33 U.S.C. § 1362(12)). Various courts have held that biological organisms, such as bacteria (e.g., fecal coliform), algae, dead fish, live fish, fish remains, and plant materials are considered pollutants under this definition. A point source is a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft" (33 U.S.C. § 1362(14)). However, discharges of sewage from vessels are expressly excluded from the definition of "pollutant" (33 U.S.C. § 1362(6)(A)), and sewage discharges from vessels are regulated under a separate provision of the act that concerns marine sanitation devices (33 U.S.C. § 1322). The term "discharge incidental to the normal operation of a vessel" is defined in this provision (33 U.S.C. § 1322(a)(12)).

One way a pollutant may be lawfully discharged without violating the section 301 prohibition is to obtain a National Pollutant Discharge Elimination System (NPDES) permit (33 U.S.C. § 1342). Under section 402(a), EPA or a qualified state may "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a)" upon meeting certain conditions required by the act (33 U.S.C. § 1342(a)). Discharging pollutants into waters of the United States without a permit, or in violation of the terms of a permit, can subject a source to the act's enforcement provisions, which include fines and penalties (33 U.S.C. § 1319).

In 1973, EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from NPDES permitting requirements. That rule, at 40 CFR §122.3(a), excludes from permitting "any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel." The exemption applies to vessels of all sizes, whether motorized or not. At the time, EPA stated its belief that "[T]his type of discharge generally causes little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically."⁷

This long-standing EPA regulation was subject to legal challenge in the U.S. District Court for the Northern District of California. In 2005 the court found that Congress had directly expressed its intention that discharges from vessels be regulated under the CWA, and that the regulation at issue contradicted that intention. In September 2006 the court issued a final order that vacated

⁷ U.S. Environmental Protection Agency, "National Pollutant Discharge Elimination System," 38 *Federal Register* 98, May 22, 1973, p. 13528. Although this regulatory exemption from NPDES permitting includes discharges of sewage from vessels, as discussed previously, these discharges are regulated pursuant to CWA Section 312 and regulations at 40 CFR Part 140, which do not use a permitting program. The federal court's order vacating 40 CFR § 122.3(a) did not affect EPA's method of regulating sewage discharges from vessels.

(revoked) the regulatory exclusion in 40 CFR §122.3(a) as of September 30, 2008.⁸ The district court rejected EPA's contention that Congress had previously acquiesced in exempting the "normal operation" of vessels from CWA permitting and disagreed with EPA's argument that the court's two-year deadline creates practical difficulties for the agency and the affected industry. Under the district court's ruling, which was upheld on July 23, 2008, after September 30, discharges of pollutants incidental to the normal operation of a vessel that had formerly been exempted from NPDES permitting are subject to the prohibitions in CWA section 301 against the discharge of a pollutant without a permit. Although EPA appealed the court's decision to the Ninth Circuit Court of Appeals, it also initiated steps seeking public comment on permitting of discharges that are incidental to the normal operation of ships. On June 17, EPA proposed two NPDES permits in response to the court's order (discussed below).⁹ EPA estimated that the universe of vessels potentially affected by the court's order and proposed permits could include over 13 million recreational boats and 98,000 commercial fishing, passenger, cargo and other vessels operating in U.S. waters.

Legislative Proposals and Congressional Response

Several bills in the 110th Congress sought to statutorily exempt vessels from any CWA permitting requirement that EPA might adopt in response to the federal district court's order. They reflected four approaches: (1) modifying a CWA definition to exempt discharges from recreational vessels; (2) modifying the CWA to exempt recreational vessel discharges from permitting and directing EPA to issue performance standards for discharges incidental to the normal operation of vessels; (3) directing the Coast Guard to issue national performance standards for such discharges, but exempting recreational and certain commercial vessels; and (4) temporarily exempting fishing and some commercial vessels from CWA permitting and requiring a study of impacts of vessel discharges.

The first approach was reflected in S. 2067 and H.R. 2550. These bills proposed to amend the definitions provision of the CWA (Section 502, 33 U.S.C. § 1362) to define a "recreational vessel" and to detail the types of discharges from such vessels that would not be defined as pollutants under the act, and therefore would be exempt from permitting. Under these bills, the term "recreational vessel" is defined to mean a vessel that is "manufactured for operation, or operated, primarily for recreational purposes," or that is "leased, rented, or chartered to an individual for recreational purposes."

S. 2766 and H.R. 5949, reflecting the second approach, contained a generally similar provision defining discharges incidental to the normal operation of recreational vessels that would be statutorily exempt from permitting. In defining "recreational vessel," these bills included boats manufactured or used primarily for pleasure, or boats leased, rented, or chartered to a person for the pleasure of that person. These bills proposed to amend the permitting provision of the CWA (Section 402, 33 U.S.C. § 1342), not the definitions provision. Unlike S. 2067 and H.R. 2550, these bills stated that the term "recreational vessel" does not include a vessel that is subject to

⁸ See footnote 3.

⁹ U.S. Environmental Protection Agency, "Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of Vessels," 73 *Federal Register* 117, June 17, 2008, pp. 34296-34349.

Coast Guard inspection and that is “engaged in commercial use” or “carries paying passengers” (e.g., ferries or cruise ships).

S. 2766 and H.R. 5949 (unlike S. 2067 and H.R. 2550) would have added provisions concerning management practices for discharges from recreational vessels. As a result of these provisions, while recreational vessels (as defined in the legislation) would be exempt from permitting requirements, they could become subject to regulations mandating management practices to control discharges.

Section 4 of S. 2766 and H.R. 5949 directs EPA, in consultation with the Coast Guard, the Department of Commerce, and interested states to develop management practices for discharges other than sewage from such vessels. It identifies several factors to be considered by EPA, such as the nature and environmental effects of the discharge, the practicability of using a management practice, applicable federal and state laws and international standards, and cost. After developing management practices, EPA would be required to promulgate federal standards of performance for each. These standards could distinguish among classes, types, and sizes of recreational vessels, and also between new and existing vessels. The standards could allow for waivers “as necessary or appropriate to a particular class, type, age, or size of vessel.” Finally, the Coast Guard would be required to promulgate regulations incorporating the EPA standards of performance. After the effective date of these regulations, a recreational vessel could neither operate nor discharge in violation of the regulations.

A third approach to the issue was reflected in S. 2645 and H.R. 5594, which proposed to exempt recreational and certain other vessels from regulation. Unlike the previously discussed bills, these measures would have given primary responsibility to address vessel discharges to the Coast Guard, not EPA. The legislation did not include amendments to the CWA, but it would in part have amended the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA, 16 U.S.C. § 4701 et seq.). Under NANPCA, the Coast Guard is responsible for developing and implementing a program to prevent the unintentional introduction and dispersal of nuisance aquatic species into U.S. waters from ship ballast water.

S. 2645 and H.R. 5594 would have directed the Coast Guard to study and report on vessel discharges that are incidental to the normal operation of vessels, other than aquatic nuisance species, including types of discharges, the nature and extent of potential effects on human health and the environment, and an analysis of control technologies or best management practices. Based on the study, the Coast Guard was to promulgate and enforce uniform national discharge standards. S. 2645 and H.R. 5594 would have suspended any permit requirement for discharges incidental to the normal operation of vessels promulgated under any other provision of law (i.e., the legislation would supersede any CWA permits issued by EPA). After promulgation of the Coast Guard standards, states would be preempted from establishing separate laws or rules, but states could prohibit such discharges in areas where needed for greater environmental protection.

Under S. 2645 and H.R. 5594, the following discharges incidental to the normal operation of vessels would be exempt from the new Coast Guard rules: discharges from recreational vessels;¹⁰ discharges from commercial vessels less than 79 feet in length; discharges from fishing vessels

¹⁰ S. 2645 would have limited the exemption to recreational vessels less than 79 feet in length; H.R. 5594 had no such limit.

and fish tender vessels (H.R. 5594 only); discharges of aquatic nuisance species in ballast water that is subject to NANPCA; and certain other specified discharges.

A fourth set of proposals was reflected in S. 3298 and H.R. 6556, addressing non-recreational vessels. These identical bills would have provided a two-year moratorium on NPDES requirements for fishing vessels of all sizes (28,875 vessels, according to EPA) and vessels less than 79 feet in length (rather than the full exemption proposed in S. 2645 and H.R. 5594) and would have required EPA to study and report to Congress on impacts of discharges incidental to the operation of vessels (other than sewage and ballast water).

The Senate Environment and Public Works Committee approved S. 2766 on May 21, 2008 (S.Rept. 110-398). The House Transportation and Infrastructure Committee approved H.R. 5949 on May 15, 2008 (H.Rept. 110-765). After the two committees' action on these bills, focusing just on recreational boats, attention turned to impacts of the court's ruling on non-recreational vessels. On June 12, a House Transportation subcommittee held a hearing on vessel discharge issues, including whether commercial as well as recreational boats should be exempted from permit requirements.

On July 22, 2008, the Senate and House passed two of these bills. They passed S. 2766, to exempt recreational boats from CWA permit requirements and require EPA to develop management practices for discharges other than sewage that are incidental to the normal operation of such vessels (signed into law July 29, P.L. 110-288). Congress also passed S. 3298, providing a two-year permit moratorium for fishing vessels and other vessels less than 79 feet in length and requiring EPA to evaluate the impact of discharges other than sewage and ballast water that are incidental to the normal operation of vessels (signed July 31, P.L. 110-299). EPA is to submit a report to Congress with its findings within 15 months of enactment.

EPA's Response: General Permits for Vessels

On June 17, while waiting for the court of appeals or Congress to provide relief from the district court's order, EPA proposed two CWA permits in response to the district court's order.¹¹ A general permit covers multiple facilities within a specific category for a specific period of time (not to exceed five years), after which it expires. Categories covered by general permits have common elements, such as similar types of operations that discharge the same types of wastes. Because of the large number of potential sources of vessels, EPA believed that it made administrative sense to use general permits, rather than individual permits. EPA proposed general permits that would apply in all states; generally, EPA authorizes states to administer the issuance and enforcement of NPDES permits, in lieu of EPA. In this case, however, EPA will be the permitting entity.

The Proposed General Permits

As proposed, one permit (the Recreational General Permit, or RGP) would apply to recreational vessels less than 79 feet in length, an estimated 13 million domestic boats. Discharges incidental to the normal operation covered by the draft permit include toxic (mainly copper from anti-fouling paints and detergents) and conventional pollutants from deck runoff, bilgewater, non-

¹¹ See footnote 9.

contact engine coolant and small boat engine wet exhaust, leachate from anti-foulant hull coatings, and fuel tank overflows. The permit would require recreational boat owners to use several management practices intended to minimize or reduce pollutants of concern, such as use of phosphorus-free soap, minimizing the discharge and transfer of visible organisms that could spread invasive species, and managing on-board trash. EPA estimated that the maximum national compliance cost would be \$88 million, or \$26 per boat per year. Enactment of S. 2766 eliminated the need for this permit.

The second proposed permit (the Vessel General Permit, or VGP) applies to commercial and large recreational vessels. This is a more complex permit than the RGP, because it covers eight large categories of vessels. EPA identified 28 types of waste streams from the normal operation of these vessels (some are not applicable to all vessel types). The permit proposed that most would be controlled by specific best management practices, many of which are already practiced. Some categories, such as cruise ships, would be subject to more detailed requirements. Vessels would be subject to certain monitoring and annual reporting requirements. EPA estimated that 98,645 vessels (including about 7,900 foreign flagged vessels) would be subject to this permit. However, enactment of S. 3298 temporarily relieved nearly 29,000 fishing and large recreational vessels of the need to comply with this permit, but commercial vessels larger than 79 feet (tank and freight ships and barges, and cruise ships) still must comply with the final permit.

The Final Vessel General Permit

On December 18, EPA finalized the VGP for an estimated 69,000 vessels not affected by enactment of S. 2766 or S. 3298.¹² It applies to pollutant discharges incidental to the normal operation from non-recreational vessels that are 79 feet or more in length, and to ballast water discharges from commercial vessels of less than 79 feet and commercial fishing vessels of any length. Geographically, it applies to discharges into waters of the United States in all states and territories, extending to the reach of the three-mile territorial limit. The permit is effective December 19, 2008. However, on the same day, the federal district court granted an EPA motion to delay vacatur of the existing exclusion in 40 CFR § 122.3(a) until February 6, 2009. Thus, the effective date remains December 19, but regulated sources need not comply with terms of the permit until February 6, 2009.

In the final permit, EPA identified 26 types of waste streams from the normal operation of covered vessels (some are not applicable to all vessel types). The types of pollutant discharges subject to the permit include aquatic nuisance species, nutrients, pathogens, oil and grease, metals, and pollutants with toxic effects. As in the proposed permit, most discharges are to be controlled by specific best management practices, many of which are already in use. Some categories, such as cruise ships, would be subject to more detailed requirements for discharges such as graywater and pool and spa water. Monitoring, recordkeeping, and reporting requirements apply.

Procedurally, vessels larger than 79 feet or more than 300 gross tons (50,000 domestic and foreign vessels) are required to submit a Notice of Intent by September 19, 2009, to be covered

¹² U.S. Environmental Protection Agency, "Final National Pollutant Discharge Elimination System (NPDES) General permit for Discharges Incidental to the Normal Operation of a Vessel," 73 *Federal Register* 79473-79481, December 29, 2008. The text of the permit, detailed fact sheet, and economic and environmental benefit analysis documents are available at http://cfpub.epa.gov/npdes/home.cfm?program_id=350.

by the permit. Smaller vessels would be automatically covered. There are no permit fees. Projected compliance costs (including paperwork requirements) range from a low of \$8.9 million to \$23.0 million annually; they vary based on assumptions of vessel populations affected and the number of instances in which incremental costs will be incurred.

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