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**TESTIMONY OF
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BEFORE THE
WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE OF
THE HOUSE TRANSPORTATION AND INFRASTRUCTURE
COMMITTEE**

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Introduction

Good morning Chairwoman Johnson and Members of the Subcommittee. I am James A. Hanlon, the Director of the Office of Wastewater Management in the Office of Water at the U.S. Environmental Protection Agency (EPA). Thank you for the opportunity to discuss discharges that are incidental to the normal operation of vessels and the Clean Water Act's National Pollutant Discharge Elimination system (NPDES) program. My testimony will provide updates on our current NPDES permitting activities with respect to commercial vessel discharges. I will begin by first providing a brief overview of EPA's long-standing NPDES exclusion for discharges that are incidental to the normal operation of vessels and the litigation that challenges the validity of that exclusion.

NPDES Permit Exclusion and Related Litigation

Less than one year after the CWA was enacted, EPA promulgated a regulation excluding discharges incidental to the normal operation of vessels from the NPDES permitting program. First promulgated on May 22, 1973, that regulatory exclusion has undergone only minor changes over the past 35 years, and is currently codified at 40 C.F.R. 122.3(a) as follows:

“The following discharges do not require NPDES permits:

(a) 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. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other

discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.”

In January 1999, a number of interested parties submitted a rulemaking petition to EPA expressing concern over discharges of ships’ ballast water containing invasive species and other matter and requested that EPA repeal the exclusion. Following EPA’s denial of the petition, in December 2003, several of the groups filed a lawsuit in the U.S. District Court for the Northern District of California seeking revocation of the exclusion (*Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI). Despite our arguments defending the validity of the exclusion and requesting that any relief be limited to ballast water alone, in September 2006, the Court issued an order vacating the regulatory exclusion as of September 30, 2008. Because that order was not limited to just ballast water discharges, it potentially implicates a wide variety of other discharges incidental to the normal operations of vessels, not only for the thousands of larger ocean-going ships with ballast tanks, but also, commercial vessels, barges, recreational vessels, and any other vessels (other than vessels of the Armed Forces) with discharges incidental to their normal operations into waters of the United States.

Section 301(a) of the CWA generally prohibits the “discharge of a pollutant” without an NPDES permit. If the District Court’s order remains unchanged, the regulatory exclusion allowing for the discharge of pollutants incidental to the normal operation of a vessel without an NPDES permit will be vacated by the Court on September 30, 2008. This means that, as of that date, the regulatory exclusion will no longer exempt such discharges from the prohibition in CWA section 301(a). The CWA authorizes civil and criminal penalties for violations of the prohibition against the discharge of a pollutant without a permit, and also allows for citizen suits against violators.

Because we respectfully disagree with the District Court's decision, the Government, on November 16, 2006, filed a notice of appeal with the U.S. Circuit Court of Appeals for the Ninth Circuit. Oral argument was heard by the Court on August 14, 2007, and at the time this testimony was prepared, a decision on the appeal is pending. Because it was not prudent to simply await the outcome of that appeal, subsequent to the lower court's decision, EPA began developing NPDES general permits to comply, based on available information and within the limited time available prior to the Court's September 30, 2008, vacatur of the existing NPDES exclusion. Our goal is to establish final NPDES general permits prior to vacatur of the existing exclusion (barring success on appeal or Congressional action). Given the complexity of this task, the limited available information, the procedural steps we must follow, and the sheer number of vessels and discharges implicated, this is an extremely ambitious goal.

I also wish to make clear that denial of the rulemaking petition and our appeal of the lower Court's decision does not reflect a dismissal of the significant impacts of aquatic invasive species. Rather, we believe the NPDES program does not currently provide an appropriate framework for managing ballast water and other discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port to port, state to state, and country to country. As a general matter, we believe that discharges from such highly mobile sources would be more effectively and efficiently managed through the development of national, environmentally sound, uniform discharge standards.

Discharges Incidental to the Normal Operation of Commercial Vessels

The number of commercial vessels subject to NPDES permitting as a result of the Court's decision is extensive. Our most recent analysis of existing information indicates that approximately 91,000 domestically-flagged vessels would be affected by the commercial vessel permit. We also estimate approximately 8,000 foreign-flagged vessels will also be subject to the

requirements of the commercial vessel permit. With respect to recreational vessels, we estimate 18 million such vessels are implicated.

A wide variety of discharge types are involved, such as deck runoff from routine deck cleaning, bilgewater from properly-functioning oily water separators, and ballast water. While developing NPDES permits for these discharges by the Court's September 30, 2008, date for vacatur of the existing NPDES exclusion, we did not have a sufficient amount of time to independently investigate vessel operations and resulting discharge impacts as extensively as we might have wished. Instead, we have relied on the most accurate and up-to-date information available, including articles from the scientific and technical literature, information on vessel discharges solicited from the public in our June 21, 2007, Federal Register notice, information from the CWA § 312(n) uniform national discharge standards (UNDS) program for vessels of the Armed Forces, information from other expert federal agencies, such as the Coast Guard and Maritime Administration, and documents associated with meetings of the International Maritime Organization's Marine Environment Protection Committee.

Based on such information, we have identified a universe of 28 discharges incidental to normal operation of commercial vessels as listed in Table 1 below. I wish to note that depending upon the class and operational characteristics of a given commercial vessel, the presence or absence of some of these discharges will vary, and further wish to note that some of these discharges are not limited to just commercial vessels, but also will be associated with recreational vessels. Additional summaries of these discharges will be available in the fact sheet and administrative record for the upcoming draft NPDES permits, and summary descriptions and characterizations of most of these discharges presently can be found on the Office of Water website for the UNDS program at: www.epa.gov/owow/oceans/regulatory/unds.

TABLE 1
Discharges Incidental to Normal Operation of Commercial Vessels¹

Deck Washdown and Runoff	Graywater
Bilgewater	Motor Gasoline & Compensating Discharge
Ballast Water	Non-Oily Machinery Wastewater
Leachate from Anti-fouling Hull Coatings	Refrigeration and Air Condensate Discharge
Aqueous Film Forming Foam	Rudder Bearing Lubrication Discharge
Boiler/Economizer Blowdown	Seawater Cooling Overboard Discharge
Cathodic Protection	Seawater Piping Biofouling Prevention
Chain Locker Effluent	Small Boat Engine Wet Exhaust
Controllable Pitch Propeller Hydraulic Fluid	Stern tube oily Discharge
Distillation and Reverse Osmosis Brine	Sonar Dome Discharge
Elevator Pit Effluent	Underwater Ship Husbandry
Firemain Systems	Weldeck Discharges
Freshwater Layup	Graywater Mixed with Sewage from Vessels
Gas Turbine Water Wash	Exhaust Gas Scrubber Washwater Discharge

We received only limited environmental impact data in response to our June 21, 2007, Federal Register notice and have taken that information into account, along with other available information sources, in permit development. Some of the constituents that would be present in these discharges are already subject to regulation under other federal laws (e.g., aquatic nuisance species in ballast water (National Aquatic Nuisance Prevention and Control Act (NANPCA)); oil in bilgewater (CWA § 311; Act to Prevent Pollution from Ships)) and thus are better documented than others as being known to potentially cause adverse environmental impacts.

NPDES Permitting Activities

As mentioned above, in order to assist in the development of NPDES permits, the Agency issued a Federal Register notice on June 21, 2007, seeking information from the public on matters related to vessels and their discharge characteristics as well as potential technologies or practices for discharge control. Approximately 1,600 responses were received by the end of the comment period on August 6, 2007, with the majority of these being from

¹ Note that this list of discharges does not include sewage from vessels within the meaning of CWA section 312 (including graywater from commercial vessels in the Great Lakes), as those discharges are subject to regulation though national, uniform, enforceable standards under CWA §§ 312(a) -- (m), and by virtue of CWA § 502(6)(a) are excluded from NPDES permitting.

individuals concerned about the potential impacts of a permitting regime on recreational and fishing vessels.

We expect issuance of the draft permits for public comment within the next few days. Taking into account the volume of vessels implicated and other relevant factors, we have determined that these permits should take the form of general, rather than individual, NPDES permits. In accordance with the CWA, these permits will be limited to a five-year term from their date of final issuance and therefore, like all NPDES permits, will be subject to periodic reissuance thereafter.

Recognizing the differences in discharge and operational characteristics between commercial and recreational vessels, we have determined that issuance of two general permits, one focusing on most recreational vessels, and the other on commercial vessels and large (over 79-foot) recreational vessels to be appropriate. In both cases, as required by the CWA, the permits will contain effluent limitations based on the Act's technology-based requirements as well as water quality-based limitations. In the case of the recreational vessel permit, we have focused on those discharges with the most potential for impacts (e.g., oily water discharges and transport and spread of aquatic nuisance species), with emphasis on the use of good boating practices to control those discharges. For the commercial vessel permit, we necessarily deal with a broader array of discharges and have included more detailed control measures. The fact sheets for these permits will provide more details and will be available after the draft permits are issued for public comment.

Because the discharges to be covered by these general permits are limited to those vessel discharges that were excluded from NPDES permitting programs under 40 CFR 122.3(a), these general permits initially will be issued by EPA and cover those discharges subject to that exclusion in all states and territories, regardless of whether a state has been authorized to implement other aspects of

the NPDES program within its jurisdiction. The discharges at issue are not considered a part of any currently authorized state NPDES program, and as a result, until states that would like to acquire NPDES permitting authority for such discharges take the necessary steps to obtain program approval for NPDES permitting of discharges incidental to the normal operation of vessels, the authority to issue NPDES permits for such discharges remains with EPA. In light of a number of articles in newspapers and the trade press suggesting there will be fees or that vessel operators will need to “buy” permits, I would like to take this opportunity to clarify that there presently are no issuance or processing fees associated with EPA-issued NPDES permits.

I also wish to emphasize that the above discussion only relates to the states’ present ability to issue a NPDES permit for these discharges. States of course remain free to issue other permits under state laws as preserved by CWA section 510, and, once they receive approval from EPA, can issue NPDES permits for discharges incidental to the normal operation of vessels in lieu of EPA.

Although the initial round of NPDES permits for discharges incidental to the normal operation of vessels would be issued by EPA, this would not assure uniformity across the country. This is because federally-issued NPDES permits are subject to certification by the state under CWA section 401 with respect to compliance with state water quality standards and other appropriate requirements of state law. For this reason, although these permits initially are being issued by EPA, the states, through exercise of their 401 certification rights, can impose additional conditions as may be required by state law and also may deny certification (which would prevent issuance of the permits with respect to those waters of the U.S. within the state’s jurisdiction).

Administration Views on Legislation

The Administration urges consideration of twofold Congressional action with respect to discharges that are incidental to the normal operation of commercial vessels as follows:

- 1) Under Coast Guard leadership and in appropriate consultation with EPA, we strongly support the enactment of legislation to strengthen NANPCA to better prevent the introduction of aquatic nuisance species via ballast water and other vessel-related pathways.

- 2) We also strongly support enacting legislation to provide for the appropriate development of national enforceable uniform standards for other discharges that are incidental to the normal operation of commercial vessels in lieu of the use of NPDES permits.

To further these objectives, and to provide Congress with technical assistance on Title V of H.R. 2830 and on S. 2766, on behalf of the Administration, on April 1, 2008, EPA and the Department of Homeland Security submitted letters commenting on those bills, including an attachment with recommended legislative text specifically focused on both of these points. I hope you will give those recommendations your careful consideration as you pursue these important issues and would be pleased to provide you with more details about their contents or draft assistance, should you so request.

While I defer to the Department of Homeland Security for more details on the Administration's preferred legislative text with respect to ballast water and other vessel sources of aquatic nuisance species (ANS), I do wish to note as a general matter the Administration's long-standing and strong support for enactment of appropriate legislation to better ensure the establishment of environmentally-sound, uniform, federal ballast water discharge standards and requirements under NANPCA, using the basic structure and framework of the February 2004 International Maritime Organization's (IMO) Ballast Water Convention.

Although the ballast water discharge standards contained in that Convention are not as stringent as those sought by the U.S. during negotiations, at U.S. insistence, the treaty preserves the ability of Parties to set more protective standards to better safeguard their waters against invasions. Furthermore, because the structure and basic approach of the Convention in many respects reflect successful accomplishment of the United States' negotiating goals, we generally believe its overall framework is a useful model to follow when considering domestic legislation.

In addition, we strongly support an approach which provides for the phasing-in of a ballast water performance standard that is 100 times more stringent than that currently contained in the IMO Convention for the two larger categories of organisms. Although both of these key concepts are contained in Title V of H.R. 2830 and S 2766, the Administration's recommended legislative text builds on and refines many of the existing provisions in those bills to provide more effective, efficient, and practicable implementation.

With respect to other discharges that are incidental to the normal operation of commercial vessels, we also strongly believe that the Administration's alternative legislative text provides the best way forward to establish an appropriate and effective regulatory program to manage discharges, other than ANS, incidental to the normal operation of vessels in lieu of NPDES permitting. The alternative text was patterned after the basic approach Congress has chosen in the past for other vessel discharges under section 312 of the CWA and developed after extensive and thorough inter-agency coordination.

Unlike H.R. 5949 (and its Senate counterpart S 2766), which only include those discharges incidental to the normal operation of recreational vessels, the Administration proposal more comprehensively manages discharges incidental to the normal operation of all vessels. In particular, in lieu of using NPDES permits,

it provides for the evaluation, development, and implementation of environmentally-sound, nationally-uniform and enforceable best management practices, based on the “best available technology” factors of the CWA. It would exclude recreational vessels less than 79 feet in length from this new program, as well as from NPDES permitting, while still leaving the states free to regulate those vessels should they deem appropriate. We believe this approach is preferable to that currently contained in H.R 5949 as it provides for the development of national, uniform, enforceable controls focusing on discharges from commercial and very large recreational vessels, which are more likely to be of concern due to their discharge constituents and volume. To assist you in considering this matter, a copy of EPA’s May 21, 2008, letter to the Senate Committee on Environment and Public Works containing such recommended legislative text and commenting on S. 2766 (which is identical to HR 5949), is attached to this testimony.

Conclusion

In closing, Chairwoman Johnson, I would like to thank you and the Subcommittee for inviting me to participate in this hearing. The Administration looks forward to working with you and all of our partners to continue making progress on these important issues. I would be happy to answer any questions you may have.