

August 1, 2008

**By Electronic Submission**

Benjamin H. Grumbles  
Assistant Administrator for Water  
c/o Water Docket  
United States Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

**Re: Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel Docket ID Nos. EPA-HQ-OW-2008-0055 and EPA-HQ-OW-2008-0056**

Dear Mr. Grumbles:

The National Marine Manufacturers Association (NMMA) submits the following comments in response to the Environmental Protection Agency's (EPA's) proposed Clean Water Act General Permit for Discharges Associated with Recreational Vessels (RGP) and proposed Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels and Large Recreational Vessels (VGP). These draft permits were proposed for public comment on June 17, 2008. *See* 73 Fed. Reg. 34296 (June 17, 2008).

**About NMMA**

NMMA is the leading national recreational marine trade association, with nearly 1,700 members involved in every aspect of the boating industry. NMMA members manufacture over 80 percent of recreational boats, engines, trailers, accessories and gear used by boaters and anglers in the United States.

As part of its fundamental mission to grow boating participation, NMMA recognizes the need to ensure the environmental health of our waterways. The continued vitality of recreational boating as a popular American past-time relies upon its ability to get people out on the water. Whether our members' customers are fishing, waterskiing, swimming or just cruising, they all not only support, but demand clean water. Boaters, NMMA members, countless boating related businesses and local communities are all affected when access to the water is compromised by either poor water quality or ill-advised regulation. NMMA supports well-considered efforts to develop workable, uniform national standards for boaters that will promote environmental sustainability and protect important marine environments for future generations.

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### **Background Concerning the NPDES Program and the Proposed General Permits**

As noted in previous NMMA comments, the National Pollutant Discharge Elimination System (NPDES) permitting scheme of the federal Clean Water Act was designed primarily to address discharges from stationary industrial and commercial facilities, and was not intended by Congress to apply to recreational vessels. The NPDES scheme and the legal requirements that govern the contents and process for issuing NPDES permits are incompatible with the nature of recreational vessels and their normal and expected use. We recognize and understand that EPA issued proposed NPDES permits for recreational vessels not out of any policy or legal judgment by EPA that this was legally appropriate or advisable, but because EPA was required to do so in light of an order issued by a federal judge in the Northern District of California that will vacate EPA's regulatory exemption at 40 C.F.R. § 122.3(a) as of September 30, 2008. *See, e.g., Northwest Environmental Advocates v. EPA*, \_\_\_ F.3d \_\_\_ (9th Cir. July 23, 2008) (No. 06-17188) (panel decision affirming district court's order). While NMMA continues to disagree with the court's interpretation of the Clean Water Act upon which this order was based, that question is moot with respect to recreational vessels. In the wake of the court's decision, Congress has acted to amend the Clean Water Act to make clear that recreational vessels do not require NPDES permits.

### **The Clean Boating Act of 2008**

On July 22, 2008, both houses of Congress passed S. 2766, the Clean Boating Act of 2008. *See* 154 Cong. Rec. H6749-52, S6981-83 (daily ed. July 22, 2008). The President signed S. 2766 on July 29, 2008, making it effective immediately. Pub. L. No. 110-288; 122 Stat. 2650 (2008).

The Clean Boating Act provides that no permit shall be required under the Clean Water Act by EPA or a state for any discharge incidental to the normal operation of a recreational vessel. *See* Clean Boating Act of 2008, § 2. The Clean Boating Act expressly applies this prohibition of permits for recreational vessels equally to EPA and the states (in the case of a permit program approved under Subsection (b) of Section 402 of the Federal Water Pollution Control Act (22 U.S.C. 1342)). *Id.*

Under the Clean Boating Act, a "recreational vessel" is any vessel "manufactured or used primarily for pleasure" or that is "leased, rented, or chartered to a person for the pleasure of that person." *Id.*, § 3. Excluded from the term is any vessel that is a U.S. Coast Guard "inspected vessel" and either "is engaged in commercial use" or "carries paying passengers." *Id.*

As EPA has already recognized in its draft permits, uninspected (as opposed to inspected) vessels are typically the same as recreational vessels, but have been granted special leave to carry only a very small number of paying or passengers for hire without having to be subject to the extensive regulations for an inspected vessel. It is not uncommon for a boat owner to subsidize the cost of their vessel by periodically taking out passengers for tours or to go fishing, but otherwise use the same vessel for their personal recreational use. In addition, leased vessels, the vessels used in a bare boat charter, or vessels used in a boat livery operation also typically are the same as a recreational vessel, but are leased or rented to an individual for that individual's

pleasure. Congress has included in the scope of the Clean Boating Act all of these recreational and uninspected vessels. In addition, the Clean Boating Act, as the Clean Water Act it amends, applies to foreign vessels when in U.S. waters. Therefore, a foreign flagged vessel in the U.S. that is being operated in the U.S. for the pleasure of the owner would also be covered by the Clean Boating Act provisions.

Instead of subjecting recreational vessels to the ill-suited NPDES program, the Clean Boating Act instructs EPA, working with the Coast Guard, the Secretary of Commerce, and interested states, to conduct a review and only if appropriate determine the incidental discharges from recreational vessels for which it is reasonable and practicable to implement management practices to mitigate adverse impacts on the waters of the United States. Any management practice must take into account the nature of the discharge, any environmental effects of the discharge, vessel safety, and other factors. *See* Clean Boating Act of 2008, § 4. Federal standards of performance suitable for recreational vessels are to be promulgated based on the management standards. *Id.* NMMA looks forward to working with EPA, the U.S. Coast Guard, the Department of Commerce and interested states on the review of recreational vessel incidental discharges.

### **Impact of the Clean Boating Act on the Proposed General Vessel Permits**

As proposed, the RGP and VGP include numerous provisions that are highly problematic from a legal, practical, and boating safety standpoint as applied to recreational vessels. However, due to the enactment of the Clean Boating Act it is inappropriate for EPA to proceed with the proposed general permits as they apply to recreational vessels. NMMA therefore advises EPA to make the following changes to the draft permits.

#### **A. General Permit for Discharges Associated with Recreational Vessels (RGP)**

The proposed RGP applies to “recreational vessels” and “uninspected passenger vessels” under 79 feet in length. RGP at 1, § 1.1. Under the Clean Boating Act, incidental discharges from all recreational vessels will be exempt from the NPDES permit requirement and that category should be removed from the proposed RGP. In addition, “uninspected passenger vessels” identified by EPA as *i.e.*, “sailboats for-hire, charter-fishing vessels engaging in hook-and-line fishing, and personal watercraft for hire” subject to the RGP will also be exempt under the Clean Boating Act. *See* RGP Fact Sheet at 12. Each of these types of vessels is manufactured, used, leased, rented, and/or chartered for pleasure, and therefore is exempt under the Act. Accordingly, all incidental discharges from all of the vessels contemplated for coverage under the RGP will be exempt from the NPDES requirement.<sup>1</sup> For these reasons, NMMA urges

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<sup>1</sup> Moreover, to the extent there could exist a passenger vessel under 79 feet that is not a recreational vessel (or an uninspected passenger vessel), S. 3298 was passed by Congress at the same time the Clean Boating Act was passed and would provide a two-year exemption from the NPDES requirement for incidental discharges from non-recreational vessels under 79 feet in length as well as all fishing vessels, regardless of length. *See* 154 Cong. Rec. H6752-56, S6981-83 (daily ed. July 22, 2008) (signed by President on July 31, 2008).

EPA to withdraw this draft permit and would expect EPA to include language in the Code of Federal Regulations that would reflect the newly enacted exemption for these vessels from the NPDES program (Federal and State).

**B. General Permit for Discharges Associated with Commercial and Large Recreational Vessels (VGP)**

The proposed VGP applies to commercial vessels, and recreational vessels over 79 feet in length. VGP at 1, § 1.2.1. Under the Clean Boating Act, incidental discharges from all recreational vessels (including uninspected passenger vessels) will be exempt from the NPDES permit requirement, regardless of length. Accordingly, the “large” recreational vessels and uninspected passenger vessel categories should be removed from the proposed VGP.

With respect to other non-recreational commercial and inspected passenger vessels, NMMA would note that, under a separate piece of legislation passed by Congress on July 22, and signed by the President on July 31, most incidental discharges from commercial vessels under 79 feet in length, and all fishing vessels regardless of length, will be exempt from the NPDES requirement during a two-year period beginning on July 31, 2008. *See* 154 Cong. Rec. H6752-56, S6981-83 (daily ed. July 22, 2008). This legislation provides EPA with additional time to develop any NPDES permit for these commercial vessels.<sup>2</sup>

NMMA appreciates the opportunity to provide these comments to EPA and welcomes the opportunity to discuss these comments in future detail. Please contact Cindy Squires, NMMA’s Chief Counsel for Public Affairs and Director of Regulatory Affairs at 202-737-9766; [csquires@nmma.org](mailto:csquires@nmma.org) for any additional information or if you have any questions on this material.

Respectfully submitted,



Scott Gudes,  
Vice President Government Relations

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<sup>2</sup> This legislation also requires EPA, in consultation with the Coast Guard, to conduct a study to evaluate the impacts of such incidental discharges, and submit a report to Congress.