



United States Environmental Protection Agency
Office of Water
Office of Wastewater Management
Water Permits Division



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FACT SHEET

District Court Decision Vacating the Federal Regulation Excluding Discharges Incidental to Normal Vessel Operations from Clean Water Act Permitting as of September 30, 2008

How did the lawsuit get started and what is it about?

In January 1999, a number of interested parties submitted a rulemaking petition to EPA asking the Agency to repeal its long-standing regulation at 40 C.F.R. 122.3(a) that excludes certain discharges incidental to the normal operation of vessels, including ballast water, from the requirement to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA). The petition seeking repeal expressed concern over discharges of ships' ballast water containing invasive species and other matter. In September 2003, EPA denied the petition. Among its bases for denial, the Agency determined that actions by the federal government under other statutes specific to ballast water were likely to be more effective and efficient in addressing the concerns raised in the petition than reliance on NPDES permits. The denial also noted that the regulation had existed unchallenged since its initial issuance in May 1973, and that Congressional enactment of subsequent statutory schemes and amendments indicated Congress was aware of, and accepted, the regulatory exclusion. Following EPA's denial decision, several groups filed a lawsuit in December 2003 in the U.S. District Court for the Northern District of California (*Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI).

What was the court's ruling?

On March 30, 2005, the District Court ruled that the EPA regulation excluding discharges incidental to the normal operation of a vessel from NPDES permitting exceeded the Agency's authority under the CWA. In subsequent proceedings before the Court, EPA argued that any relief granted by the Court should be limited to ballast water matters alone. However, on September 18, 2006, the Court issued an order vacating (revoking) the regulatory exclusions at 40 C.F.R. 122.3(a) as of September 30, 2008. The Court reasoned that delaying the vacatur by two years would give the Agency time to address the ramifications of the vacatur. Because the Agency respectfully disagrees with the District Court's decision, on November 16, 2006, the United States filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit and that appeal is currently pending.

What types of vessels and discharges might become subject to CWA permitting?

Because the Court's decision is not limited to vessels with ballast water tanks, it appears to implicate an extremely large number of vessels and a range of discharges. Information available from the U.S. Coast Guard indicates that in 2005, vessels equipped with ballast water tanks alone accounted for 8,400 ships reporting over 86,000 port calls. However, there are also 13 million State-registered recreational boats, 81,000 commercial fishing vessels, and 53,000 freight and tank barges operating in U.S. waters. A final rulemaking undertaken specific to the authority of CWA § 312(n) with respect to vessels of the Armed Forces is illustrative as to the potential

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variety of operational discharges. For purposes of CWA § 312(n), that rulemaking identified 39 such discharges in the context of military vessels, and it would appear that besides ballast water, non-military vessels could generate approximately two dozen, or perhaps more, of these kinds of operational discharges (e.g., bilgewater, deck runoff, graywater). See, 40 CFR 1700.4; 1700.5.

Are there any exemptions relevant to vessel discharges unaffected by the Court's ruling?

The Court's ruling would not affect vessel discharge exemptions from permitting that are specifically provided for in the CWA itself. For example, § 502(6)(A) excludes from the Act's definition of "pollutant" sewage from vessels (including graywater in the case of commercial vessels operating on the Great Lakes) and discharges incidental to the normal operation of a vessel of the Armed Forces within the meaning of the CWA § 312. As another example, the CWA provides in § 502(12)(B) that discharges from vessels (i.e., discharges other than those when the vessel is operating in a capacity other than as a means of transportation) do not constitute the "discharge of a pollutant" when such discharges occur beyond the limit of the three mile territorial sea. Because both "a pollutant" and a "discharge of a pollutant" are prerequisites to the requirement to obtain an NPDES permit, these two statutory provisions have the effect of exempting the vessel discharges they address from the requirement to obtain an NPDES permit.

What are the implications of the Court's ruling and what is EPA doing in response?

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, that 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 discharges of pollutants incidental to the normal operation of vessels have been exempt from the NPDES permitting requirement for over 30 years, the Agency lacks practical experience permitting them. These types of discharges pose unique challenges, because vessels are highly mobile and the vessel universe is extremely diverse. In order to address the above ramifications of the Court's ruling, EPA is exploring all available options, including establishment of an appropriate permitting program, and plans to solicit public input as it does so.

For more information:

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Documents related to the rulemaking petition and the Court's ruling are available on-line at:
http://www.epa.gov/owow/invasive_species/ballast_water.html

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