EPA'S COURT-MANDATED REGULATION OF BALLAST WATER:

WHAT DOES IT MEAN FOR THE STATES?

A NATIONAL SEA GRANT LAW CENTER DISCUSSION PAPER

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Introduction

In March 2005, a federal district court in California ruled that the EPA must regulate ballast water under the Clean Water Act (CWA). On September 18, 2006 Judge Illston of the U.S. District Court for the Northern District of California granted Northwest Environmental Advocates' motion for permanent injunctive relief and remanded the case to the EPA setting a two-year deadline for EPA action. The challenged regulation, 40 C.F.R. § 122.3(a), will be set aside as of September 30, 2008. EPA filed an appeal to the Ninth Circuit Court of Appeals on November 16, 2006. Oral arguments were held on August 14, 2007.

Despite its appeal of the district court decision, EPA issued a notice of intent on June 21, 2007 to develop a NPDES permit program for the discharge of pollutants incidental to the normal operation of vessels. Embracing an expansive interpretation of Judge Illston's ruling, EPA's program would not be limited to ballast water, but would also include bilge water, deck runoff, and gray water. The comment period closed on August 6, 2007.

Although the court's decision and EPA's rulemaking notice have received fairly wide press coverage, one issue that has not gotten a lot of attention in the popular press is the potential impact of the EPA's court-mandated regulatory program on individual states. States (with a few exceptions), not the EPA, are responsible for the day-to-day implementation and enforcement of the CWA. While some states, like Michigan and California, may embrace this opportunity to regulate ballast water, others may not have the resources or political will to properly undertake additional permitting responsibilities.

At the request of Minnesota Sea Grant, the Minnesota Office of Pollution Control, and the American Great Lakes Ports Association, the National Sea Grant Law Center drafted this discussion paper to facilitate conversations about what might be in store for the states. Much of the policy information contained in this paper originated elsewhere, primarily from a 2001 draft report issued by EPA on the agency's regulatory options for ballast water discharges. Our goal is to provide the necessary background legal knowledge, all too often assumed in agency and legal publications, thereby improving the ability of all concerned parties to participate in the policy-making process.

How Did We Get Here?

The Clean Water Act (CWA) prohibits the discharge of pollutants from a point source into the navigable waters of the U.S. without a National Pollutant Discharge Elimination System (NPDES) permit. Biological materials and organisms, such as bacteria, algae, dead fish, and plant materials, are considered pollutants. Although

vessels are considered point sources, the EPA has by regulation exempted from the NPDES permit requirements discharges "incidental to the normal operation of a vessel."[1] The discharge of ballast water falls within this exemption, which was promulgated by the agency in 1973.[2]

In January 1999, a number of environmental groups petitioned the EPA to repeal § 122.3(a) claiming it conflicts with the CWA, which does not contain a blanket exemption for incidental discharges from vessels. The CWA does exclude incidental discharges from vessels made in the contiguous zone (defined as the area three to twelve miles from shore) and the ocean (defined as any area of the high seas beyond the contiguous zone).[3] Discharges in other waters, however, are not excluded by the statutory language.

Additionally, the CWA excludes from the definition of pollutant "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces."[4] Although these discharges are exempt from the NPDES requirements, Congress instructed the EPA to regulate these discharges through other programs. Sewage discharges are managed through federally established standards of performance for marine sanitation devices[5] and Uniform Discharge Standards have been established for incidental discharges from Armed Forces vessels which include the use of marine pollution control devices.[6] The existence of these alternate regulatory programs and their legislative history tends to undermine the agency's position that incidental discharges from other vessels are exempt from any regulation pursuant to the CWA.

Despite the strong legal arguments of the environmental petitioners, the EPA denied their petition in September 2003, citing policy considerations and Congress's apparent preference that the Coast Guard regulate routine, operational discharges, as evidenced by Non-Indigenous Aquatic Nuisance Prevention and Control Act (NANPCA) and the Act to Prevent Pollution from Ships.[7] EPA did not aggressively challenge the petitioners' reading of the CWA, choosing instead to mount arguments based on the reasonableness of the agency's interpretations.

EPA noted in its response that states are not preempted by the CWA from acting to regulate discharges incidental to the normal operation of a vessel. As discussed below, states may operate a NPDES program with a greater scope of coverage than that

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[1] 40 C.F.R. § 122.3(a).
[2] 38 Fed. Reg. 13,530 (May 22, 1973).
[3] 33 U.S.C. § 1362(12)(B).
[4] *Id.* § 1362(6).
[5] *Id.* § 1322(b).
[6] 40 C.F.R § 1700.4.
[7] EPA, Decision on Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a) (2003).

required by the federal regulations.[8] States are not precluded by the CWA from adopting or enforcing "any standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution" as long as those standards are no less stringent than the federal standards.[9] "A NPDES-authorized State that identifies the discharge of invasive species in ballast water as a significant concern in its waters may act to address those discharges through its NPDES program."[10]

Unhappy with EPA's response, Northwest Environmental Advocates and a number of environmental groups filed a lawsuit in federal court challenging EPA's decision not to repeal § 122.3. The groups relied on the same legal arguments first set out in the 1999 petition. Because biological materials are included in the CWA definition of "pollutant" and vessels are "point sources," EPA must regulate ballast water discharges through the NPDES program. Judge Susan Illston of the U.S. District Court for the Northern District Court of California agreed. In *Northwest Environmental Advocates v. EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. March 30, 2005), Judge Illston ordered the EPA to repeal § 122.3, finding that ballast water discharges constitute a "discharge" of "pollutants" (because ballast water can contain biological materials) into the navigable waters of the U.S. from a "point source." Judge Illston held that "given the clear language of the CWA, the statute requires that discharges from non-military vessels into the nation's lakes, rivers, and harbors occur only under the regulation of an NPDES permit."[11]

The court found that although other federal laws, primarily NANPCA as amended by the National Invasive Species Act of 1996 (NISA), directed the Coast Guard, not the EPA, to oversee the development of regulatory requirements for ballast water, NISA was not intended to limit the CWA with respect to ballast water discharges. 16 U.S.C. § 4711(b)(2)(C) clearly states that "the regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the [CWA]." The court also pointed out that NISA only addresses Aquatic Invasive Species (AIS) and not the other types of ballast water pollutants, such as sediment, rust, etc. and is therefore not comprehensive.[12]

The EPA also raised the issue of preemption by the Act to Prevent Pollution from Ships (APPS), which implements U.S. obligations under the International Convention for the Prevention of Pollution from Ships (MARPOL). The court rejected this argument as well, finding that although Congress delegated responsibility for implementing

[8] 40 C.F.R. § 123.1(i)(2).
[9] 33 U.S.C. § 1370.
[10] EPA, Decision on Petition for Rulemaking at 9.
[11] *Northwest Environmental Advocates v. EPA*, 2005 U.S. Dist. LEXIS 5373 at *29 (N.D. Cal. March 30, 2005).
[12] *Id.* at *35.

MARPOL to the Coast Guard, the APPS contains a savings clause that states "remedies and requirements of this chapter supplement and neither amend nor repeal any other provisions of law, except as expressly provided in this chapter."[13] Therefore EPA's authority under the CWA to regulate pollutants from vessels was preserved. The court concluded its opinion by ordering the EPA to repeal 40 C.F.R. § 122.3(a).

On September 18, 2006 Judge Illston granted Northwest Environmental Advocates' motion for permanent injunctive relief and remanded the case to the EPA.[14] After refusing to limit the scope of her order to ballast water discharges only, Judge Illston set a two-year deadline for EPA action. The challenged regulation, 40 C.F.R. § 122.3(a), will be set aside as of September 30, 2008. Judge Illston dismissed the shipping industry's concerns regarding the impact of the ruling on global shipping as "dramatically overstated," finding they were based on the assumption that ballast water discharges would be absolutely and immediately prohibited. Judge Illston recognized that a two-year time frame is "ambitious," but concluded that it would not impose an undue burden on the EPA because the agency is intimately familiar with the ballast water problem and the Coast Guard already requires several measures the EPA could adopt.

The court's September 2008 deadline is fast approaching. As mentioned above, the EPA has taken preliminary steps towards a regulatory program for ballast water discharges. This announcement stirred even more controversy than Judge Illston's opinion, due in part to the EPA's statement that approximately 143,000 commercial vessels and potentially more than 13 million state-registered recreational boats could be affected by this rulemaking.

Any prediction regarding the outcome of this rulemaking is pure speculation at this point. Further action on the rulemaking would be unnecessary if EPA wins its appeal, although such a scenario is uncertain given the environmental record of the Ninth Circuit Court of Appeals. Congress could also take action. For example, H.R. 2550, currently pending in the U.S. House of Representatives, would exempt recreational boats from certain CWA requirements in an attempt to lessen the impact of any court-ordered regulations on the recreational boating community. Although the specific outcome is unknowable at this point, it is important that all concerned parties understand how the EPA could regulate ballast water and other vessel discharges under the Clean Water Act and the impact of an expanded NPDES program on individual states.

Regulatory Options

[13] 33 U.S.C. § 1907(f).

[14] *Northwest Environmental Advocates v. EPA*, No. C 03-05760, Order Granting Plaintiffs' Motion for Permanent Injunctive Relief (N.D. Cal. Sept. 18, 2006).

EPA has several regulatory options available under the CWA to regulate incidental discharges. The agency could establish a general permit for vessel discharges. EPA could choose to provide effluent guidelines which the states would implement on a case-by-case basis through permits. Finally, EPA could work with the Coast Guard to develop vessel discharge provisions.

Effluent Limitations

As mentioned above, the NPDES permit program regulates discharges of pollutants from point sources to waters of the United States. NPDES permits generally impose numeric effluent limits based on technology-based treatment or control standards. In cases where technology-based controls alone are insufficient to achieve water quality standards in the receiving waterbody, water quality-based effluent limits may also be imposed. Permits may also require the use of Best Management Practices (BMPs).

In most cases, the NPDES program is implemented by authorized states, not the EPA. Authorized states must meet minimum federal standards, but are not required to implement identical programs. State standards and permit conditions may be more stringent than the federal government standards. It should be noted here that the vessel exclusion is not a required element for state NPDES programs.[15] States are therefore not prevented from using their state NPDES programs to regulate ballast water discharges from vessels. While a coordinated national approach is preferable to a patchwork of state regulation, nothing in the CWA prevents state action in this area.

NPDES coverage can be provided through individual or general permits. With individual permits, a point source applies for and receives its own unique permit designed for its specific discharge and situation. A general permit, on the other hand, covers a large number of similar point sources through a single permit document. Here EPA would identify the permit conditions that would apply to incidental discharges from vessels and issue a general permit that would cover any discharger meeting the established criteria.

Once the general permit is issued, any dischargers that thinks they meet the general permit criteria can submit a Notice of Intent (or other appropriate notification) to the permitting authority (state or EPA) requesting coverage and promising to comply with the conditions in the permit. The permitting authority has the discretion to grant coverage under the general permit or require the facility to apply for an individual permit.

[15] 40 C.F.R. §123.25.

In its 2001 draft discussion paper, the EPA noted that any extension of NPDES permit coverage to ballast water discharges would most likely be coupled with the development of a general permit.[16] A general permit, as opposed to individual permits, would provide for national uniformity and increase predictability for regulated sources. It would also reduce the administrative burden in authorized states.

Regulatory changes will not happen overnight. It generally takes at least two years to develop and issue a new rule due to a variety of administrative requirements including environmental reviews and public notice and comment. In addition, states have one to two years to revise their programs to reflect changes to the federal regulations.[17]

It may turn out, however, that the biggest disadvantage with the NPDES program is the lack of effective technologies to control or prevent invasive species introductions. Although NPDES permits impose numeric treatment levels, permits rarely mandate specific treatment technology, leaving such decisions to the facilities. Using the NPDES program to regulate vessel discharges, especially ballast water discharges, could result in the imposition of permit requirements that cannot be met with current technology. For instance, the only failsafe method of preventing the introduction of invasive species via ballast water is to prohibit the discharge of ballast water. This, of course, is not always possible due to vessel operational requirements and safety concerns. The next best option, ballast water exchange, is not 100 percent effective and would be difficult to monitor for compliance with permit conditions.

Effluent Guideline

A general permit is not the EPA's only option with respect to NPDES implementation. The EPA could decide to develop an effluent guideline applicable to all NPDES permits for vessel discharges. Effluent guidelines impose a national level of treatment that must be met by all permittees, regardless of whether the permit is issued by an authorized state or the EPA. While states are of course free to develop more stringent standards, in practice most states follow the EPA guidelines. Effluent guidelines currently exist for a number of industry sectors including aquaculture, landfills, industrial laundries, and oil and gas extraction.

The development of an effluent guideline for incidental discharges from vessels could be quite complex given the variety of vessels and discharges that could fall within the scope of this regulatory program. When establishing an effluent limitation, EPA must determine the best available technology economically achievable (BAT). It would be almost impossible to develop effluent limits that could be technically achieved by all

[16] EPA, Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options, Draft Report for Public Comment (September 2001) available at http://www.epa.gov/owow/invasive_species/ballast_water.html .
[17] 40 C.F.R. §123.63(e).

vessels, which would force EPA to develop limits for subcategories of vessels, vastly increasing the cost and time involved. From a state perspective, the effluent guidelines option would probably be the least burdensome since the states would have clear guidance on how they should write the permits.

Section 402 of the CWA

The best option available to the EPA under a revised NPDES program may be to utilize Section 402(g) of the CWA. Section 402(g) provides that

> Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.[18]

Section 402(g) applies to both EPA and state NPDES programs and could provide a mechanism for the imposition of uniform standards. Of course, the feasibility of this option depends on the ability of the Coast Guard to establish the necessary standards. Given that the current litigation and controversy were driven in part by the lack of Coast Guard standards, this option may be limited. However, if the Coast Guard could establish standards, § 402(g) would provides the means to harmonize the NPDES and NISA requirements.

Enforcement

The Clean Water Act provides EPA and authorized states with a wide range of enforcement options. The Act may be enforced administratively, by orders and fines assessed within the agency. The Act may also be enforced through civil penalties and injunctions obtained in court or through criminal fines and imprisonment. Citizen suits, which will be discussed separately below, are also available to enforce most CWA requirements.

Due to the "cooperative federalism" structure of the Clean Water Act, both the states and the EPA can enforce permit conditions. Once the EPA has delegated NPDES authority, the enforcement of the program becomes primarily the responsibility of the state. Although the EPA ceases to issue the permits in authorized states, the EPA has the authority to conduct enforcement actions in such states and can proceed directly against violators. The Coast Guard is also authorized to enforce state permits because

[18] 33 U.S.C. § 1342(g).

violations of state permits are considered violations of federal law. In addition, all NPDES-permitted facilities are subject to inspection by the EPA and the states.

What if a facility owner refuses entry?

On the federal level, EPA's policy is to obtain consent for an inspection even if there is statutory authority to enter a regulated facility.[19] If entry is denied, the inspector records all relevant information concerning the denial and contacts the Regional Enforcement Attorney. If the facility owner continues to refuse consent after speaking with the Attorney, an administrative warrant will be sought from the United States Attorney's office in the district where the facility is located. While administrative warrants are preferred for regulatory violations such as noncompliance with permit conditions, a criminal warrant may also be sought to obtain evidence for a criminal prosecution. If inspections are routine and they are based on a neutral inspection plan, courts generally issue the warrants.[20]

It is not advisable for a permitted entity to refuse access to inspectors or to disregard an administrative order. While administrative orders under the CWA are not self-enforcing, EPA uses such orders to obtain compliance and warn violators that enforcement is forthcoming. If a facility owner forces EPA to go to court, the court-imposed fines and penalties may be much higher. Not much can be gained by wasting the regulators' time and raising their ire.

Michigan

The Michigan Department of Environmental Quality (MDEQ) and the Department of Natural Resources (MDNR) are responsible for enforcement of the state's environmental laws. Their enforcement authority is drawn from the Natural Resources and Environmental Protection Act (NREPA). MDEQ has primary responsibility for processing and issuing a variety of environmental permits, including surface water discharge (NPDES) permits.

Under state law, the MDEQ has the authority to "enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters of the state" and may request the assistance of other state institution and officers.[21] MDEQ employees may enforce the state water protection laws and make criminal complaints against violators.[22] The

[19] Reitze, Jr., A. W. and C. S. Holmes. "Inspections under the Clean Air Act." 1 Envtl. Law. 29 (1994).
[20] *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).
[21] Mich. Code § 324.3105.
[22] Mich. Law & Practice, Waters and Water Courses § 74.

MDEQ may also request that the Attorney General commence a civil action to obtain relief for a violation of the law, administrative order, or permit condition.[23]

Citizen Suits

Citizen enforcement of environmental statutes has become a staple of environmental regulation. The first citizen suit provision appeared in the Clean Air Act and provides that "any person" might commence an enforcement action against the violator of "any emission standard or limitation," subject to specified conditions.[24] Today, almost every piece of significant environmental legislation provides for some type of citizen enforcement.

"Environmental citizens suit provisions may be broken down into two main categories: (1) suits against regulated entities to enforce compliance with environmental regulations ('citizens enforcement actions'), and (2) suits against governmental agencies to require implementation of a congressionally mandated regulatory scheme (so-called 'mandatory duty cases')."[25] In citizen enforcement actions, citizens seek enforcement against facilities operating without the proper permits or in violation of a properly issued permit. Citizen suit provisions usually provide for injunctive relief to stop the illegal activity and civil penalties. Over the years, environmental groups have used these types of lawsuits to not only enforce permit provisions, but to establish the regulatory boundaries of federal programs.

In addition to enforcement actions, most environmental citizen suit provisions also provide for citizen actions "to require the EPA administrator or other responsible agency officials to carry out their responsibilities to implement the acts."[26] The CWA provides for both types. Under the CWA, any citizen may commence a civil action on his own behalf against

> (1) Any person alleged to be in violation of an effluent standard or limitation or an order issued by the Administrator or a State with respect to such a standard or limitation or
>
> (2) The Administrator where there is alleged a failure of the Administrator to perform any non-discretionary act or duty.[27]

States that fail to properly implement the provision of the CWA and EPA's regulations are exposed to litigation under the citizen suit provisions of federal laws and state and

[23] *Id*.
[24] 42 U.S.C. § 7604.
[25] Environmental Law Practice Guide § 12A.02.
[26] *Id*.
[27] 33 U.S.C. § 1365.

federal administrative procedures acts. Most recently, an environmental groups filed suit against the Minnesota Pollution Control Agency for not taking sufficient action (according to the plaintiffs) to prevent the introduction of Viral Hemorrhagic Septicemia (VHS) into Lake Superior and other Minnesota waters.[28] The complaint alleges that the PCA's failure to require NPDES permits for ballast water discharges violates the Minnesota Environmental Rights Act and is arbitrary and capricious agency action in violation of the Minnesota Administrative Procedure Act.

Conclusion

While it is too early to tell what the final outcome of the Northwest Environmental Advocates' ballast water litigation will be, it is important to consider the potential impacts of the various regulatory options. State environmental agencies with responsibility for NPDES permitting and environmental enforcement should evaluate their capacity to assume the additional workload that will come with any change to the existing regulatory structure. Even if the EPA is able to limit the scope of the new program to ballast water (as opposed to all incidental discharges), state agencies may have to process many more permits applications than they currently handled. Some agencies will need to familiarize themselves with the nuances of ship inspections and enforcement. Gaps in permitting and enforcement authority need to be identified and filled.

Although the comment period for EPA's notice of intent to develop a NPDES program for vessel discharges closed on August 6, 2007, there will be other opportunities for states and interested parties to participate as the rulemaking moves forward. Having these discussions will bring attention to advantages and disadvantages of the various options, improve the comment process, and should result in more narrowly tailored and enforceable rules.

[28] The Minnesota Center for Environmental Advocacy's complaint is available at http://www.mncenter.org/minnesota_center_for_envi/files/summons_and_complaint.pdf .