

Vessel Incidental Discharge Act

Uniform National Standards and Requirements. The Vessel Incidental Discharge Act would require the Secretary of the department in which the Coast Guard is operating, in consultation with the Administrator of the EPA, to establish and implement uniform national standards and requirements governing ballast water discharges and other discharges incidental to the normal operation of vessels. Currently these discharges are regulated by a growing patchwork of federal and state laws and regulations. The new uniform standards and requirements would be established and supersede the current jumble of federal and state requirements in phases, and would be based upon the best available technology economically achievable. Enforcement responsibilities would be vested in the Secretary. States also would be permitted to enforce the Act's uniform standards and requirements.

Phase One Requirements. Effective on the date of enactment, the bill would establish the ballast water treatment standard and requirements set forth by the Coast Guard in its final rule, Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (77 Fed. Reg. 17254 (March 23, 2012)), as the uniform national standard and requirements governing ballast water discharges by vessels. If the Secretary determined a more stringent State ballast water treatment standard to be feasible under a petitioning process specified in the Act, the more stringent State standard would be adopted as the uniform national standard. Within two years of the date of enactment, the Secretary, in consultation with the Administrator, would be required to issue a final rule governing the incidental discharges other than ballast water that are covered by the Act.

Phase Two Requirements. Not later than January 1, 2022, the Secretary, in consultation with the Administrator, would be required to issue a final rule revising the ballast water treatment standard so that it is 100 times more stringent than the initial ballast water treatment standard. Issuance of the revised standard could only occur, however, after a feasibility review to ensure it is, among other things, reliably and safely achievable, detectable, and commercially available. The revised performance standard requirements generally would apply to a vessel beginning on the date of its first drydocking on or after January 1, 2022, but not later than December 31, 2024. The Act would provide the Secretary with a reasonable degree of flexibility to tailor the revised standard and related implementation deadlines based on the results of the feasibility review, commercial availability of treatment technology, and other factors.

Subsequent Decennial Reviews. The Act would require the Secretary, in consultation with the Administrator, to complete a review ten years after the issuance of the revised ballast water treatment standard described above, and every ten years thereafter, to determine whether further revision of the ballast water performance standard would result in a scientifically demonstrable and substantial reduction in the risk of the introduction or establishment of aquatic nuisance species. The Secretary and Administrator would also be permitted to include in these decennial reviews the best management practices prescribed for discharges other than ballast water under the Act. The Secretary would be required to revise one or more of these best management practices if doing so would substantially reduce the impacts of a given type of incidental discharge on navigable waters.

Treatment Technology Certification. The Act would establish a process for the Secretary, in consultation with the Administrator, to certify ballast water treatment technology to meet treatment standards under the Act. It would require the Administrator, in consultation with the Secretary, to issue requirements within 180 days of enactment for land-based and shipboard testing protocols to certify treatment technologies and laboratories to evaluate such technologies. After these protocols are in place, no manufacturer would be permitted to sell a treatment technology for a vessel unless it is

properly certified. A vessel would be allowed to continue using an installed treatment system, notwithstanding a revision of the ballast water treatment standard occurring after the system is ordered or installed, until the expiration of the system's service life, so long as it is properly used.

Exemptions. The Act would exempt from its requirements incidental discharges by vessels less than 79 feet in length engaged in commercial service, fishing vessels, and recreational vessels, as well as discharges that occur for research, safety, or similar purposes. It would also exempt from its requirements ballast water discharges by vessels that operate exclusively in a geographically limited area and in other limited instances. The Act would exclude from its scope vessels of the U.S. Armed Forces, which currently are not subject to vessel incidental discharge requirements.

Alternative Compliance and Judicial Review. The Act would permit the Secretary, in consultation with the Administrator, to establish alternative compliance measures governing ballast water management for vessels that have minimal ballast water capacity, are about to go out of service, or use ballast water exchange as their management method. It would require the Administrator, in consultation with the Secretary, to set standards for ballast water exchange facilities. The Act would also enable an interested person to petition the D.C. Circuit Court of Appeals for judicial review of any final rule promulgated under the Act.

Effect on State Authority. The Act would provide generally that no State or political subdivision thereof may adopt or enforce another statute or regulation with respect to a discharge incidental to the normal operation of a vessel after the date of enactment the Act. Notwithstanding this general prohibition, a State or political subdivision thereof would be permitted to enforce a statute or regulation that specifies a more stringent ballast water performance standard and is in effect on the date of enactment if the Secretary, after consultation with the Administrator and other appropriate federal officials, made a determination that: (1) compliance with any performance standard specified in the statute or regulation can in fact be achieved and detected; (2) the technology and systems necessary to comply with the statute or regulation are commercially available; and (3) the statute or regulation is consistent with obligations under relevant international treaties or agreements to which the United States is a party. In the event the Secretary makes such a determination, the Secretary is then required to adopt the state's more stringent ballast water performance standard in lieu of the standard in the Coast Guard final rule, as part of the initial, national uniform requirements.

Background

In 1973, when the EPA first implemented the National Pollutant Discharge Elimination System (NPDES) pursuant to section 402 of the Clean Water Act, the Agency categorically exempted vessels from the prohibitions and permitting requirements of NPDES. This exemption remained in place until 2005, when the 9th Circuit Court of Appeals upheld a federal district court ruling that the EPA's 32-year-old regulatory exemption was beyond the Agency's scope of authority under the Clean Water Act. As a result the Coast Guard, which also regulates ballast water under the National Aquatic Nuisance Prevention and Control Act of 1990, and the EPA are now both regulating ballast water under separate, sometimes inconsistent federal statutes and implementing regulations. Additionally, for the first time commercial vessel owner/operators are now required to have an EPA permit simply to operate their vessels. On top of this inefficient federal regime, subjecting vessels to NPDES has opened the door for the States to establish their own varying standards and requirements for vessel incidental discharges. This complicated, inefficient, and confusing patchwork of federal and state requirements will only continue to grow until one set of environmentally sound standards is put in place.