



**The American Waterways Operators**

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Water Docket  
U.S. Environmental Protection Agency  
Mailcode: 2822T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re.: Draft National Pollutant Discharge  
Elimination System (NPDES) General  
Permits for Discharges Incidental to the  
Normal Operation of a Vessel  
(Docket ID No. EPA-HQ-OW-2008-  
0055)

Dear Sir or Madam:

The American Waterways Operators (AWO) is the national trade association for the inland and coastal tugboat, towboat and barge industry. AWO's 350 member companies include the owners and operators of barges and towing vessels operating on the inland and intracoastal waterways; the Atlantic, Pacific, and Gulf coasts; and, the Great Lakes. The towing industry safely and efficiently moves more than 800 million tons of cargo critical to the U.S. economy, such as coal, grain, petroleum products, chemicals, steel, aggregates and containers. Tugboats also provide essential services including shipdocking, tanker escort and bunkering in our nation's ports and harbors.

On behalf of AWO's members, thank you for the opportunity to comment on the draft National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP) for discharges incidental to the normal operation of a vessel. The industry's 4,000 towing vessels and 27,000 barges represent the majority of the commercial vessels that will be affected by the proposed general permit. AWO's members account for 80 percent of the barge tonnage and two-thirds of the towing vessel horsepower in this critical industry segment, and comprise an even greater share when towing vessels under 79 feet are excluded (as they have been, at least for the next two years, by the recent enactment of S. 3298).

AWO is committed to leadership in marine safety and environmental protection. In 1994, AWO became the first transportation trade association to adopt a code of safe practice and environmental stewardship for member companies. Today, compliance with the AWO Responsible Carrier Program (RCP) is a condition of membership in AWO, and all members are required to undergo a third-party audit attesting to their compliance within one year of joining

the association. Re-audits are required every three years. The AWO RCP is just one example of our industry's strong dedication to being part of the solution to our nation's environmental challenges.

AWO is also a member of the Shipping Industry Ballast Water Coalition, a group of maritime trade associations that, together, represent over 90 percent of all vessels calling at U.S. ports, in both the domestic and international trades. The Coalition is committed to working with legislators, regulators and environmental groups to develop environmentally sound and economically practicable solutions to prevent the introduction and spread of invasive species in U.S. waters. In August 2007, AWO submitted detailed comments in response to the agency's solicitation for input on the development of the NPDES permit proposal for vessel discharges. In January 2008, AWO members provided input to EPA's economic analysis of the proposed permit by filling out questionnaires provided by EPA consultant Abt Associates Inc. regarding costs associated with Best Management Practices (BMPs) for vessel discharges.

In 2005, the Coalition joined the federal government in appealing the decision of the U.S. District Court for the Northern District of California in *Northwest Environmental Advocates v. EPA* to the Ninth Circuit Court of Appeals. Although the appeals court issued a ruling on July 23, 2008, affirming the decision of the district court that EPA improperly exempted vessel discharges from the NPDES program in 1973, we continue to believe that the NPDES program is the wrong vehicle for regulating incidental discharges from vessels. The NPDES system was created to manage point source discharges from fixed facilities and is an extremely poor fit for vessels that transit through the waters of numerous states. The diversity of vessels and their discharge streams makes the scientific application of this model to vessel discharges an impossibility. Furthermore, vessel discharges are already regulated by numerous other statutory and regulatory programs, which were developed specifically with the nature of vessel operations in mind. These include the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA), the National Invasive Species Act (NISA), the Oil Pollution Act of 1990, the Act to Prevent Pollution from Ships (APPS) and a multiplicity of Coast Guard regulations implementing these statutes.

In the wake of the appellate court decision (with which we respectfully disagree as a matter of both law and public policy), it is essential that EPA proceed with extreme care to develop a VGP that complies with the statutory requirements governing the NPDES program, has practical application to vessel operations and truly results in enhanced environmental protection. The proposed general permit as drafted requires significant modification on each of these counts. Our comments are aimed at providing practical suggestions to EPA on needed revisions to the proposed VGP (and the process by which it was produced) to meet these criteria and avoid serious negative impacts on a vital segment of the U.S. transportation system.

The first part of our comments addresses general concerns with the proposed permit and the process by which it was developed. The second part discusses specific concerns with respect to the requirements for submission of the Notice of Intent, inspection and recordkeeping, and the effluent limits for listed discharge streams.

General Comments

**First, we strongly urge EPA to petition the district court for an extension of the September 30, 2008, deadline for vacatur of the regulatory exemption for vessel discharges.** EPA simply does not have enough time to perform the in-depth analysis that is required by law prior to promulgation of a final vessel general permit. This is illustrated by the serious ambiguities and errors in the permit (discussed in more detail below). EPA acknowledges this fact, stating that it lacks the type of information that it normally uses to develop a new permitting regime, and that such a lack of information “obviously increases the chance that any permit program that results may not ultimately ensure effective permitting of discharges incidental to the normal operation of a vessel.”<sup>1</sup> Congressional precedent also argues for an extension of the deadline. When the Clean Water Act was passed in 1972, Congress expressly recognized that it would take at least a full two years after its adoption to process and issue permit applications.

An extension is also necessary because the permit does not provide the regulated community with constitutionally adequate notice of the requirements in the permit that provide the basis for the enforcement penalties EPA is allowed to impose.<sup>2</sup> The vague terms used in the BMPs leave vessel operators unable to determine how to comply with the permit. Examples include admonitions to operate in a manner “consistent with good marine practice”<sup>3</sup> and “conduct maintenance and training activities as far from shore as possible.”<sup>4</sup> It is impossible to expect a tugboat captain to know how to comply with these regulations when he or she is working in a dynamic environment that changes by the minute. We understand that EPA’s ability to develop more specific BMPs was constrained by the pendency of the September 30 deadline, but unless EPA seeks and obtains an extension that allows time for a thorough analysis of the effects of vessel discharges and the effectiveness of proposed measures to reduce them, it will be impossible for the agency to develop BMPs that are both non-arbitrary and specific enough to facilitate compliance.

Additionally, more time is necessary in order for the regulated community to prepare to comply with the permit by September 30. The constrained timetable imposed by the district court means that it will not be possible for EPA to finalize the permit far enough in advance of the deadline for vessel owners to take the actions necessary to ensure compliance. EPA simply will not have time to read and analyze public comments on the proposed VGP, make necessary revisions, and issue a final permit more than a few days or, at best, a few weeks before the deadline. Vessel owners will need more time to incorporate the new standards and requirements into their

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<sup>1</sup> May 23, 2007, Declaration of James A. Hanlon, Director of the Office of Wastewater Management, Office of Water, U.S. Environmental Protection Agency.

<sup>2</sup> Under the Fourteenth Amendment to the United States Constitution, a person is protected against a deprivation of his life, liberty, or property without “due process of law.” “Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.” *Satellite Broadcasting Co., Inc. v. Federal Communications Comm’n*, 824 F.2d 1, 3 (D.C. Cir. 1987). “The due process clause thus prevents deference [to the agency’s interpretation of its regulations] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

<sup>3</sup> Vessel General Permit Fact Sheet, page 63.

<sup>4</sup> Vessel General Permit Fact Sheet, page 74.

operations and train their crews. Given the penalties for non-compliance, as well as the prospect of citizen suits, this is a serious matter. Industry must have adequate time to develop effective mechanisms to ensure compliance with the permit.

For the reasons above, and because the universe of vessels and discharges covered by the VGP is extremely diverse in type, operation and location, an evaluation of discharges based on vessel type and size needs to be conducted before the proposed VGP is finalized. **We strongly urge EPA to petition the district court for a three-year extension to develop and establish the program, and to allow the industry adequate time to implement it, before the current regulatory exemption is revoked.** Recent Congressional action underscores Congress's understanding of the need for better analysis to underlie an effective program; the recently passed S. 3298 requires EPA to conduct a two-year study analyzing vessel discharges and their impacts before regulating those from fishing vessels and smaller commercial vessels. The scope of the study is not limited to vessels under 79 feet.

**Second, the draft VGP does not contain the factual basis necessary to comply with Clean Water Act standards for the development of NPDES permits.** EPA is required by law to ensure that the permit requirements are based on articulated facts in the record.<sup>5</sup> However, the permit record lacks a factual basis for concluding that all 28 waste streams identified contain pollutants that must be regulated under the Clean Water Act, mostly because EPA did not have adequate time to study vessel discharges from commercial vessels.

EPA based its identification of the 28 listed discharge streams almost exclusively on "Phase I Uniform National Discharge Standards for Vessels of the Armed Forces" (UNDS), a study that began in the 1990s and is still continuing today. The UNDS study examined about 6,000 vessels, all of which were either Armed Forces vessels (which are specifically exempted from coverage under the proposed permit) or cruise ships in the Alaska trade (which represent only a small and non-representative segment of the universe of vessels that will be regulated under the permit.) The UNDS study does not present any facts that suggest that discharges from those vessels are transferable to any of the other, completely unrelated vessels that will be regulated by the permit. Therefore, the study data used by EPA to arrive at the 28 listed discharges covered by the proposed permit cannot fairly be applied to the larger and more diverse universe of (generally much smaller) vessels, such as tugboats, towboats and barges, that fall under the permit's purview. It is incumbent on EPA to conduct appropriate research regarding discharges from the actual vessels that will be regulated by the VGP so that the regulation is supported by substantial and relevant evidence in the record.

The permit also does not contain the factual basis necessary to validate the general nature of the BMPs, which do not differentiate between different segments of the industry. As recognized by both EPA's *Guidance Manual for Developing Best Management Practices* and *NPDES Permit Writers' Manual*, there are vast differences in industry sectors when it comes to identifying and implementing BMPs. EPA should allow for vessel operator discretion and flexibility when complying with BMPs to account for unique characteristics and discharges from their vessels. For example, the deck washdown from an unmanned hopper barge transporting grain is

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<sup>5</sup> *American Trucking Associations v. EPA*, 175 F.3d 1027, 1054-55 (D.C. Cir. 1999).

markedly different than the washdown from an aircraft carrier or cruise ship, and those differences should be reflected in the BMPs.

Moreover, because there was not enough time for EPA to conduct a thorough analysis, which resulted in standards that were not based on a factual record, the costs that EPA estimated would be imposed on industry are vastly underestimated. In many instances, the Economic Analysis Report states that costs to operators would be “negligible,” when in fact, the vaguely worded BMPs could be interpreted to require operators to put significant time and cost investments into their vessels to comply. (See, for example, the spill rail and drydocking examples discussed in the second part of these comments.) Without better data on the discharges actually produced by the types of vessels subject to the VGP, EPA cannot satisfy the statutory requirements to develop an effective permitting program.

**Third, EPA should expressly provide that discharges covered by other laws or regulations will be deemed to be in compliance with the general permit as long as compliance with such other laws and regulations is achieved.** A number of international and domestic laws and regulations already address many of the vessel discharges addressed in the proposed VGP. These include the International Convention for the Prevention of Pollution from Ships (MARPOL), APPS, NANPCA, NISA, and numerous implementing regulations found in Chapters 33 and 46 of the Code of Federal Regulations. In order to avoid overlap and the imposition of additional, and potentially inconsistent, burdens on the regulated community, EPA should expressly provide that vessel operators are deemed to be in compliance with applicable provisions of the VGP so long as the identified statutes and regulations are complied with. Because EPA has already acknowledged the sufficiency of these standards and requirements,<sup>6</sup> there is no reason why demonstrating compliance with existing regulations could not be sufficient to demonstrate compliance with the permit.

**Fourth, we urge EPA to establish a more workable approach to incorporating state discharge requirements into the permit.** The section 401 certification process is problematic because it will result in the confusing, burdensome and potentially impossible task of vessels having to comply with different requirements as they move between the waters of different states. While we understand that 401 certification is a requirement of the Clean Water Act and is unlikely to be altered, the higher authority of the U.S. Constitution requires that EPA recognize and establish in the permit process limits on the ability of states to impose contradictory standards on vessel discharges regulated under the permit.<sup>7</sup> We urge EPA to require states wishing to impose additional requirements to propose them through the federal rulemaking process (overseen by EPA) in order to ensure that adequate notice is given to the regulated community and the opportunity for comment is allowed. This is especially critical given that vessels are mobile sources that by their nature move in and out of covered jurisdictions on an irregular basis.

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<sup>6</sup> Vessel General Permit Fact Sheet, page 54.

<sup>7</sup> 529 U.S. 89 (2000).

Specific Comments on the Proposed VGP

In addition to the general comments above, we offer the following specific recommendations for changes to the proposed VGP to better reflect the realities of tugboat, towboat and barge operations.

*Notice of Intent (Section 1.5)*

First, we urge EPA to modify the Notice of Intent (NOI) requirements to avoid imposing overly burdensome administrative requirements that do not increase the degree of environmental protection provided by the permitting program, but serve only to add administrative complexity and increase the likelihood of paperwork violations. Specifically, we urge the agency to:

- **Exclude barges from the requirement to submit a Notice of Intent to be covered by the Vessel General Permit.** As EPA acknowledges, 40 CFR 122.28(b)(2)(v) allows that some dischargers may, at the agency's discretion, "be authorized to discharge under a general permit without submitting a notice of intent where the Director finds that a notice of intent would be inappropriate."<sup>8</sup> In making such a determination, the agency must consider such factors as the type, expected nature and volume of the discharge and the potential for toxic and conventional pollutants in the discharges. EPA has used these criteria to exclude self-propelled vessels under 300 gross tons from the NOI requirement, based on the assumption that smaller vessels will produce smaller volumes of discharges and pollutants therein. This tonnage threshold is a poor fit for barges (and especially unmanned barges), the vast majority of which will exceed that measurement but produce smaller volumes of discharges and pollutants than self-propelled vessels.

Barges are also typically operated in ways incompatible with the structure of the NOI and Notice of Termination (NOT) requirements as drafted. For example, a barge may be chartered to multiple operators in a relatively short period of time, following the model of a car rental company. Under this business model, the proposed NOI/NOT submission process is unduly cumbersome and burdensome. We urge EPA to exempt barges from the requirement to submit a Notice of Intent to be covered by the Vessel General Permit. Barge operators would, obviously, still be required to operate in compliance with the requirements of the permit.

- **Exclude self-propelled vessels under 300 gross tons that are currently subject to the NOI requirement because they have the capacity to carry eight cubic meters or more of ballast water, provided they meet certain operational conditions.** Current U.S. Coast Guard policy<sup>9</sup> implementing regulations for ballast water reporting exempts from coverage vessels that employ certain operational procedures to minimize or eliminate the potential for introduction of aquatic nuisance species, such as using only water from commercial or municipal sources for ballast or taking on and discharging

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<sup>8</sup> Vessel General Permit Fact Sheet, page 35.

<sup>9</sup> Navigation and Vessel Inspection Circular (NVIC) 07-04, "Ballast Water Management for the Control of Aquatic Nuisance Species in the Waters of the United States."

ballast water in the same location. EPA should review these Coast Guard-recognized conditions and exempt vessels that meet them from the requirement to submit an NOI.

- **Establish a fleetwide NOI option, allowing vessel owners to submit a single NOI covering the entire listed fleet.** Provisions should be added to make it simple for an owner to add new vessels to the fleetwide NOI, either prospectively or retroactively.
- **Amend the NOI so that coverage of all 28 listed discharges is assumed, unless a vessel owner affirmatively excludes a listed discharge.** Because a vessel may be outfitted with different equipment or enter a different service in the course of the permit's validity period, this will prevent unnecessary paperwork violations of the permit terms. As long as the BMPs in the permit are complied with, the environmental protection objectives of the permit will have been met.

*Inspections, Monitoring, Reporting and Recordkeeping (Section 4)*

The extensive and detailed requirements in this section will have a significant impact on towing vessel crews, whose primary responsibility is and must be the safe navigation and operation of the vessel. These requirements should be streamlined, simplified and clarified in order to lessen the burden on towing vessel crews, which can range from two to 10 individuals. The requirements should also be revised to avoid significant economic impacts on vessel operating companies that we do not believe have been adequately accounted for in EPA's economic analysis of the proposed VGP. To that end, we urge EPA to:

- **Not require drydock examinations where not already required by the Coast Guard or, in the case of classed vessels, a vessel's classification society.** The requirement for an annual visual inspection of the vessel's hull (section 4.1.3.) can be read to require drydockings on a much more frequent basis than currently required. Additionally, the permit recommends drydocking for numerous other maintenance activities associated with the listed vessel discharges, including underwater ship husbandry discharges, controllable pitch propeller hydraulic fluid and chain locker effluent. EPA's economic analysis makes little consideration for the additional cost and time burden this increased drydocking schedule would impose on vessel owners. The cost of drydocking alone (not counting opportunity costs associated with the temporary removal of the vessel from service) ranges from \$1500-\$2500 for an inland tank barge and from \$1850-\$5500 for an inland towing vessel, depending on vessel size. Cleaning a barge (in order to ensure that any necessary hot work can be performed safely) would add an additional \$15,000 or so. We urge EPA to revise the proposed permit to allow such inspections to take place in concert with currently required regulatory or class-mandated drydocking examinations, or, alternatively, no less frequently than every five years for freshwater vessels and every two-and-a-half years for saltwater vessels.
- **Allow vessel owners to use documentation systems established as part of a Safety Management System to satisfy the recordkeeping requirements in the proposed VGP.** As discussed above, all AWO members must comply with the AWO Responsible Carrier Program, a safety management system for tugboat, towboat and barge operators, as a condition of membership in the association. Additionally, vessels subject to the

International Safety of Life at Sea Convention (SOLAS) must comply with the International Safety Management (ISM) code. Both of these Safety Management Systems include extensive requirements for routine inspections, monitoring, reporting, recordkeeping and corrective actions. Vessel owners and operators should be able to use documentation systems established pursuant to a Safety Management System to meet the requirements of sections 4.2. and 4.3. of the proposed VGP. **In addition, EPA should clarify that records may be kept at a shoreside or other easily-accessible alternative location, instead of on the vessel.** This is particularly important for unmanned barges, which may not have a secure, dry area for document storage.

- **Require routine visual inspections no more often than weekly.** The requirement of section 4.1.1. to conduct a detailed visual inspection once per week or once per voyage, whichever is more frequent, is inappropriately burdensome for vessels in harbor service or other short-run operations that may make more than one “voyage” daily. These include harbor tugs, which usually make several trips per day, and vessels on the inland rivers, which often move back and forth frequently between numerous closely-located facilities. We urge EPA to revise these requirements to require visual inspections once per voyage or once per week, whichever is **less** frequent.

*Effluent Limits and Related Requirements (Section 2);  
Vessel Class-Specific Requirements (Section 5)*

We urge EPA to revise or clarify requirements of the proposed permit that are problematic or unclear for tugboat, towboat and barge operators. In particular, we urge the agency to:

- **Not require spill rails for vessels that are not already required to have them by the Coast Guard or, in the case of classed vessels, the vessel’s classification society.** We are unclear as to EPA’s intent in this regard. The permit states clearly on page 49 that “All tank barges must have spill rails...” However, on page 14, the permit states that “When required by their class societies (e.g., oil tankers) or flag Administrations, vessels must be fitted with and use perimeter spill rails...” While EPA’s economic analysis states that the costs of the additional permit requirements for barges, including installing spill rails, were “not analyzed...since the costs are expected to be negligible,” the reality is that requiring spill rails will result in significant new costs to barge owners. One AWO operator of inland tank barges estimates the per-barge cost at approximately \$75,000, including cleaning of the barge, installation of the spill rails and repairing tank linings. This estimate does not include the opportunity cost of time out of service while the barge is in the shipyard.

In addition, we note that while spill rails do offer some degree of environmental protection in the event of an on-deck spill, they also pose safety concerns when flammable or explosive liquids are trapped in a confined area in proximity to potential ignition sources. Given that the Coast Guard is the federal agency charged with regulating vessel safety, we strongly recommend that the Coast Guard, not EPA, be the agency responsible for determining whether spill rails should be required and, if so, promulgating those regulations.

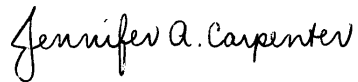
- **Not require Impressed Current Cathodic Protection (ICCP) on tugboats, towboats and barges.** While many larger ships use ICCP in certain areas of the vessel, this technology is not currently used on smaller vessels, such as tugboats or towboats, or on barges because such vessels use an AC power source, while ICCP technology requires a DC power source. This makes the requirement of section 2.2.7. to use ICCP technology “when feasible” problematic because, while it may be technically possible to install ICCP on all vessels, it is not practicable or economically possible on some vessels, including towing vessels and barges.
- **Provide examples of how the requirement to minimize certain discharges while in port will apply to vessels such as harbor tugs, which operate continuously “in port.”** For example, section 2.2.12. requires the discharge from firemain systems to be minimized while in port. However, in order for harbor tug operators to ensure that firemain systems can be operated correctly, they must test the systems and train crewmembers in their use. Similarly, section 2.2.1. requires vessel operators to minimize deck washdowns while in port. These requirements are problematic for harbor tugs that operate continuously “in port” and have no other place to conduct such operations. A harbor tug should not be required to leave its normal operating area solely for the purpose of compliance with the permit requirements.
- **Revise the graywater requirements to acknowledge that graywater storage is problematic for small vessels, such as tugboats and towboats.** Section 2.2.15. requires vessels to minimize the production of graywater in port and while underway, and to store and dispose of it into shoreside facilities if possible. However, given the small size of towing vessel crews, most tugboats and towboats are not equipped with graywater storage capability. It would be extremely difficult to implement regulations that require crewmembers not to use sinks or showers when traveling through, or docked in, certain waterways.
- **Avoid retroactively penalizing vessel operators for non-listed incidental discharges that may occur in the future.** While we are unaware of any other category of discharge incidental to the normal operation of tugboats, towboats and barges that occurs on a regular basis, in significant quantities, and is likely to result in environmental harm, we do not want to see vessel operators face legal jeopardy in the event of a de minimis unlisted discharge. We urge EPA to include language in the Permit Fact Sheet clarifying that the discharges listed in the final permit are the only discharges that EPA has chosen to regulate at this time, and that other de minimis discharges that may occur (and that are not already covered by prohibitions in other laws or regulations) will not be considered a violation of the Clean Water Act. If subsequent analysis reveals a heretofore unrealized significant category of discharge, EPA can amend the permit to include effluent limits and BMPs for such discharges.

Conclusion

In closing, we urge EPA to proceed immediately to request a three-year extension of the vacatur deadline from the district court; to conduct a thorough analysis of vessel discharges and the effectiveness of proposed Best Management Practices; and, to adopt the specific recommendations offered herein for changes to the proposed permit requirements. While the inclusion of these modifications will not change our view that the NPDES program is the wrong vehicle for regulating vessel discharges, this action is critical to reducing unnecessary administrative, economic and operational impacts that the permit will have on the largest segment of the U.S. commercial vessel fleet.

Thank you for the opportunity to provide these comments. We would be pleased to answer any questions or provide further information as EPA sees fit.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer A. Carpenter".

Jennifer A. Carpenter