

May 24, 2016



Mr. Rian Hooff
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204



Dear Mr. Hooff:

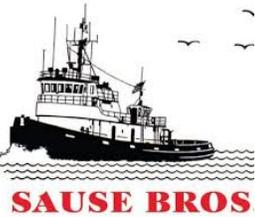
For the last several years, the American Waterways Operators, the Columbia River Steamship Operators' Association, the Oregon Public Ports Association, the Port of Portland, Sause Bros., and Western States Petroleum Association have worked together with DEQ and other stakeholders to provide technical understanding and perspective to the development and refinement of Oregon's ballast rules. Recently, we have worked with you and other stakeholders through the *Task Force on the Shipping Transport of Aquatic Invasive Species* to cooperatively develop a series of consensus goals, including an increase to the vessel arrival ballast management fee, assistance with survey efforts in the coastal zone and freshwater habitats frequented by commercial shipping activities, and adoption of rules related to management of empty ballast tanks.¹ As the report from the Task Force to the legislature notes, there was no Task Force consensus on the appropriateness and practicability for ballast water treatment (BWT) plus ballast water exchange (BWE) prior to discharges into low-salinity waters.



For the last decade, the Maritime Community has been developing BWT technology and standards for implementation into international standards and Federal rules and permits. As demonstrated by regulations promulgated by the EPA, Coast Guard, and international maritime bodies, BWT is the generally preferred method to ensure mortality of aquatic invasive species (AIS). The concern raised by DEQ that the rules attempts to address is that BWE may be more effective than BWT when a ship carrying ballast from a low salinity environment discharges into a freshwater or low-salinity environment. The technical and scientific community is actively researching this issue and the regulatory community, including EPA, is actively in the process of developing effective rules.



Last year, DEQ told the legislature that its proposed rule revisions would be consistent with other West Coast Ports and consistent with the requirements for discharges to the Great Lakes under the EPA's Vessel General Permit (VGP). DEQ's proposed rule revisions, however, institute rules that are not consistent with federal and other west coast rules, and are not limited to discharges to low salinity environments. As discussed below, we recommend that DEQ delay the proposed rulemaking to coincide with upcoming changes to the VGP or modify the revised rule consistent with this letter.



I. DEQ SHOULD POSTPONE RULEMAKING UNTIL THE NEW VGP IS FINALIZED

As you are aware, the Second Circuit, in *NRDC v. EPA*, recently required EPA to justify and rewrite its rules regulating the discharge of ballast water by ships. EPA is anticipated to begin review of the VGP program and permit terms this year, and a revised permit is expected to be issued in 2018. Under these circumstances, DEQ's proposed rule revisions are premature and likely to create confusion. For example, the performance standards proposed by DEQ at OAR 340-143-0050(2)(a) are not likely to be the same as enhanced standards implemented by EPA in

¹ Task Force on the Shipping Transport of Aquatic Invasive Species, 2015 Report to Legislature, p. 29.

response to *NRDC v. EPA*, leaving Oregon (and California) with a standard different from Federal requirements. We recommend that DEQ defer rulemaking until after the renewal of the VGP.

II. DEQ'S PROPOSED RULE REVISIONS WOULD ESTABLISH AN INCONSISTENT REGULATORY FRAMEWORK

A. REQUIRING BWT PLUS BWE IS NOT CONSISTENT WITH REGULATORY REQUIREMENTS FROM OTHER JURISDICTIONS.

DEQ's proposed revisions require ships in Oregon waters to conduct BWT plus BWE before discharging ballast. *Proposed OAR 340-143-0050(2)*. DEQ designed the proposed revisions to the ballast water regulations to address a perceived concern that replacing BWE with BWT (which occurred under the VGP) may result in decreased protection from AIS threats for Oregon's low-salinity environments (see Task Force report). But the proposed rule is flawed. First, the position that BWT is not effective, lacks a quantification of relative risk to Oregon waters. The EPA and the Coast Guard have implemented regulations that support the use of utilizing BWT because it is the best method for killing AIS in ballast tanks. Furthermore, the use of a numeric standard by the federal agencies ensures a level of effectiveness more consistent and reliable than BWE. The idea that BWT plus BWE ensures a level of effectiveness more consistent and reliable than BWE. The idea that BWT plus BWE would have an appreciable effect has not been shown to significantly reduce AIS risk.

Second, the advantage of BWT plus BWE is not established in other regulatory regimes. In communications, meetings, and correspondence with DEQ over the last several years, we have made clear our contention that BWT plus BWE requirements lack a documented risk reduction. EPA is in the midst of studying BWT plus BWE *for low salinity environments* and has stated that "Prior to the issuance of the 2018 VGP, the agencies intend to further examine the efficacy of exchange plus treatment. The requirement for treatment plus exchange will be retained in future VGP's only if the administrative record supports a decision that use of a BWTS alone is not sufficiently protective. Under those circumstances, the requirement for treatment plus exchange can be eliminated." (EPA, Final 2013 Fact Sheet).

Finally, the proposed rule revision to OAR 340-143-0050(2)(a) would require BWT plus BWE prior to ballast discharge in all Oregon waters regardless of salinity. When DEQ presented the BWT plus BWE revision to the legislature last year, it stated that "The proposal is comparable to the approach promulgated by EPA for vessels discharging ballast into the Great Lakes, includes additional exemptions specific to operations on the west coast, and would be contingent upon passage of similar measures in other west coast jurisdictions." (Task Force, p. 30). Yet, the proposal to require BWT plus BWE for all discharges is unique to Oregon. EPA and the Coast Guard have not indicated that BWT plus BWE will remain a solution for the Great Lakes.

B. IF DEQ IS UNWILLING TO DELAY RULEMAKING, IT SHOULD LIMIT APPLICATION OF BWT PLUS BWE TO FRESHWATER AND LOW-SALINITY ENVIRONMENTS.

We believe that DEQ should not institute these rules at this time. We recommend that DEQ postpone this rulemaking until EPA and west coast states provide additional guidance on BWT plus BWE. As an interim measure, DEQ could propose to adopt rules similar to VGP 2.2.3.7, which requires BWT plus BWE where "the vessel has taken on ballast water that has a salinity of less than 18 parts per thousand from a coastal, estuarine, or freshwater ecosystem within the previous month (30 days)." Such a standard would be simpler to implement than the performance standards proposed by DEQ and may provide the added protection for those vessel discharges DEQ deems higher risk. However, this can still be problematic for ships traversing the Columbia River since ballast water regulation will be different on the north and south sides of the state line – which runs down the middle of the Columbia River.

C. PROPOSED RULE REVISIONS SHOULD BE REPEALED AT THE EXPIRATION OF THE VGP.

The proposed revision to OAR 340-143-0050 includes a repeal of section 2 (requiring BWT plus BWE unless an exemption applies) eight years from the effective date of the law. DEQ provides no explanation and no basis for the eight year time frame.

The current VGP expires in 20 months. EPA has begun a review of its ballast water regulations and, in light of the Court's rebuke of current requirements in NRDC v. EPA, the rules are anticipated to change significantly in the next VGP.

A sunset date to the DEQ proposed DEQ rule that correspond with the expiration and renewal of the VGP will ensure that the new VGP does not conflict with requirements under DEQ rules and will allow DEQ to take advantage of the most current information in determining whether to continue BWT plus BWE.

III. CONCLUSION

We appreciate the opportunity to work with DEQ. The revised regulations proposed by DEQ are premature and are likely to initiate a regulatory regime distinct from other neighboring jurisdictions. Such overlapping regulation disincentives ships calling on Oregon ports and all Columbia River ports without justified benefit to the marine environment. We support an approach that will introduce regulatory changes at the time they are needed, to ensure the consistency and efficacy we all desire. We hope to meet in the coming weeks to discuss our concerns and recommendations.

Sincerely,



Charles Costanzo
Vice President - Pacific Region
American Waterways Operators



Mark Landauer
Executive Director
Oregon Public Ports Association



Ross McDonald
Direct Safety, Quality, Environment & Security
Sause Bros.



Kate Mickelson
Executive Director
Columbia River Steamship Operators' Assn.



Fred Myer
Senior Waterways Planner
Port of Portland



Frank Holmes
Director, NW Region
Western States Petroleum Association

Cc: Senator Arnie Roblan
Representative Caddy McKeown
Mr. Pete Shepherd, Interim Director, OR DEQ
Mr. Bruce Giles, Manager, Cleanup and Emergency Response Programs, OR DEQ
Mr. Palmer Mason, Senior Legislative Advisor, OR DEQ