



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

October 29, 2020

Attn: State Coastal Management Program Managers and Federal Consistency Contacts

Subject: National Consistency Determination for National Performance Standards for Discharges Incidental to the Normal Operation of a Commercial Vessel

PURPOSE

The Coastal Zone Management Act (CZMA) requires federal agency activities, such as rulemakings, that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone be consistent to the maximum extent practicable with the enforceable policies of an approved State management program. The Environmental Protection Agency (EPA) has determined that the development of the proposed rule - National Performance Standards for Discharges Incidental to the Normal Operation of a Commercial Vessel - authorized by the Clean Water Act (CWA) section 312(p), as described below, is a *de minimis* federal activity in which the anticipated effects would be environmentally beneficial. Additionally, the proposed national standards are consistent to the maximum extent practicable with state management programs' enforceable policies outside of the statutorily imposed limitations under CWA section 312 described later in this letter. EPA invites state coastal management program agency views on the EPA determination within 60 days of receipt of this letter.

OVERVIEW

On October 26, 2020, EPA proposed regulations under the CWA, as amended by the Vessel Incidental Discharge Act (VIDA) of 2018, to establish national performance standards for discharges incidental to the normal operation of primarily commercial vessels. By this letter, EPA is providing notification of its determination that the proposed action would have *de minimis* coastal effects that are likely to be environmentally beneficial. The proposed rule would establish general and specific technology-based discharge standards of performance for approximately 82,000 domestic and international non-military, non-recreational vessels operating in the waters of the United States or the waters of the contiguous zone. Discharges from commercial vessels have been regulated under the CWA section 402 National Pollutant Discharge Elimination System permitting regime through the 2013 Vessel General Permit (VGP). The principal effect of the VIDA is to transfer authority for establishing discharge requirements for commercial vessels from the VGP permitting program to the new uniform national regulation-based program under CWA section 312(p). Absent certain narrow exceptions, VIDA requires that the proposed standards be at least as stringent as the general requirements contained in the 2013 VGP.

CWA section 312(p), captioned "uniform national standards for discharges incidental to normal operation of vessels," directs EPA to promulgate performance standards that apply consistently throughout the country to the regulated vessel discharges covered by the proposed VIDA rule. Among Congress' purposes in enacting the VIDA is to provide for uniform, environmentally sound standards and requirements for the management of discharges. The approach does not allow for state-specific distinctions in the development of the technology-based standards.

In 2016, EPA prepared a national consistency determination for the VGP and transmitted its determination to each of the states and territories that administer a NOAA-approved coastal zone management program. In that transmittal, EPA reasoned that the VGP was consistent to the maximum extent practicable with each approved program's enforceable policies based on increased protection to coastal waters made effective through imposition of nationally-applicable discharge controls in lieu of a patchwork of varying state-level controls on those discharges. However, the final VGP incorporated state-specific conditions identified by some of the States.

In contrast to the VGP, it is clear that Congress intended VIDA to result in uniform national standards without state-by-state distinctions. For example, while CWA section 312(p)(4)(C) expressly allows EPA to distinguish between "classes, types, and sizes of vessels" as well as "between new vessels and existing vessels," the statute makes no mention of state-based distinctions in the establishment of the performance standards. Moreover, while the statute requires the VIDA standards to be at least as stringent as the VGP, the statute does not include the VGP's state-specific requirements (from Section 6 of the VGP) as part of the minimum requirements of stringency (see CWA section 312(p)(4)(B)(iii)). Lastly, the statute requires that the proposed standards be established based on the best available technology currently achievable, the best conventional pollutant control technology, or the best practicable control technology currently available. Therefore, based on the national consistency determination prepared for the VGP, EPA now determines that the performance standards in the VIDA rulemaking are consistent to the extent practicable. To the extent the standards would not be fully consistent, the subsequently enacted VIDA statute precludes EPA from full consistency with state-specific enforceable policies.

EPA further determines that the proposed rule is a *de minimis* federal activity because the requirements in the proposed rule are not significantly different than those established under the 2013 VGP. Vessels are already required to meet the requirements of the 2013 VGP, and the proposed changes in the rule from the VGP requirements are not expected to generate significant new or different coastal effects. Any direct or indirect coastal effects resulting from the proposed rule are expected to be environmentally beneficial. The EPA regulation, followed by U.S. Coast Guard implementing regulations, will improve environmental protection by reducing the volume of pollutants entering the waters of the United States and the contiguous zone.

ACTION REQUESTED

EPA requests your review and concurrence with this National Consistency Determination at the earliest possible time, but not later than 60 days from your receipt of this letter. If no response is received during this period, EPA will presume your concurrence. In light of COVID-19 restrictions, responses are requested via email to Kelsey Watts-FitzGerald at watts-fitzgerald.kelsey@epa.gov. Please contact her by phone at 202-566-0232 or by email for any questions regarding this matter.

Sincerely,

Brian Frazer
Division Director
Oceans, Wetlands, and Communities Division