

May 2009

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Déjà Vu All Over Again: Environmentalists Petition for Unprecedented Expansion of Requirements for Vessel Sewage Discharges

An environmental group is petitioning the U.S. Environmental Protection Agency (“EPA”) to completely revamp the regulation of sewage discharges by strengthening and changing treatment requirements and imposing new, expansive recordkeeping requirements for marine sanitation devices (“MSDs”) at a cost for cruise ships that is estimated to approach \$10 million per ship. MSDs used on everything from container ships to car carriers to tug boats to offshore vessels to large private yachts – anything that is over 65 feet in length – could be affected by the proposed changes.

This petition represents only the most recent effort by citizen groups to expand the regulation of vessels under federal environmental laws. This alert describes what this petition seeks, how it will be handled, and what the maritime industry might consider doing to effectively participate in this process.

What Does the Petition Seek?

Based on the premise that the current 30-year-old sewage discharge regulations have not been updated to reflect “dramatic technological advances” in treatment technology in the past 30 years, the petition seeks to have EPA:

1. Issue standards...updating the vessel discharge performance standards ...for Type II Marine Sanitation Devices; and
2. Create strong monitoring, recordkeeping, and reporting requirements...to ensure compliance with vessel discharge performance standards.

As support for its position, Friends of the Earth cites extensively from studies relating to cruise ship discharges. Cruise ships “can produce up to 74,000 gallons of sewage per day (the fleet average is 21,000 gallons of sewage per day, per vessel).”¹ As an example of how sewage contamination threatens pristine environments, the petition notes that “fecal contamination from untreated or inadequately treated sewage is thought to be a major source of harm to coral reefs and dependent species.”²

Why Are These Sought After Changes Important?

The changes being proposed would create a regulatory scheme more like a Clean Water Act permit. Sewage discharges are currently exempt from the Clean Water Act’s National Pollutant Discharge Elimination System permit program because sewage is separately regulated under a different section of the Clean Water Act.

Section 312 of the Clean Water Act mandates that vessels with onboard toilets install an MSD. Any vessel that is greater than 65 feet in length must install a Type II MSD³ that treats waste products prior to any discharge within navigable waters. Prior to installation, Type II MSDs must be certified by the U.S. Coast Guard to treat sewage to have a fecal coliform bacterial count of no greater than 200 milligrams per 100 milliliters and suspended solids no greater than 150 milligrams per liter. Some states have stricter standards for cruise ship discharges in state waters.

However, the petition notes that vessel operators are not required to continually monitor or record compliance with this standard throughout the life cycle of an MSD and that Coast Guard inspections of these discharges are inadequate or non-existent.

The petition asserts that Type II MSDs “routinely” fail to meet current standards, but cites only to a study of cruise ships in Alaska.⁴ It also notes that testing for other priority pollutants not regulated by current standards also detected levels exceeding EPA water quality standards.

The petition asserts that to assure compliance with current federal discharge standards, EPA must expand and strengthen its regulations to provide for adequate monitoring, recordkeeping, and reporting by vessel operators. The petition does not identify what would constitute “adequate” monitoring, recordkeeping, or reporting, but the sampling, recordkeeping, and reporting required of cruise ships in Alaska would likely be considered for application to a broader range of vessels and vessel operations.

The petition stresses the availability of more effective sewage treatment technologies that EPA estimates would cost \$7.09 per passenger to operate and maintain on a large cruise ship with installation costs on a cruise ship between \$2 million and \$10 million per ship. The cost for any other vessel that must install a Type II MSD is not identified.

What Happens Next?

Petitions for rulemaking can be long, drawn out processes. The petition itself must be subject to public comment. EPA then decides whether to accept it and start a new rulemaking or reject it and maintain the status quo. If it accepts the petition, the

EPA then follows a rulemaking process under the Administrative Procedure Act to propose a new rule, again taking public comment, and then decides on a new final rule based on the comments that are made. If it rejects the petition and maintains the status quo, then that decision can be challenged in court. In the most recent example involving the maritime industry, it took nine years for the agency to consider a petition to regulate incidental discharges, be challenged for failing to do so, and then create a new program that regulates these discharges. But with a new Administration in Washington, that time line could change.

Why Should Industry be Concerned with This Now?

This is the second recent effort by citizen groups to increase the stringency of environmental regulation for the maritime industry. The petition process was previously used by environmental groups to eliminate the exemption from Clean Water Act permits for discharges incidental to normal vessel operations. While that petition focused initially on ballast water, when the final new permit was issued, it included regulations governing 26 separate discharges.

First, EPA’s decision to revise the MSD regulation based on this petition will largely be decided by the comments it receives during the public comment period. *See, e.g.*, 70 Fed. Reg. 51,061 (Aug. 29, 2005) (denying petition for rulemaking regarding disposal of lead wheel balancing weights); 65 Fed. Reg. 18,097 (April 6, 2000) (denying petition for rulemaking regarding High Production Volume chemicals under the Toxic Substances Control Act). The petitioners will often provide detailed technical and legal analysis to support their request for rulemaking. *See, e.g.*, Oceana, *Petition for Rulemaking Under the Clean Air Act to Reduce the Emission of Air Pollutants from Marine Shipping Vessels that Contribute to Global Climate Change* (Oct. 3, 2007), available at http://www.oceana.org/fileadmin/oceana/uploads/Climate_Change/Marine_GHG_Petition_FINAL.pdf. *See, e.g.*, *Northwest Env’t Advocates v. EPA*, No. 03-05760 SI (N.D. Cal. filed March 30, 2005). If industry does not participate with meaningful comments, but others do, the agency will be greatly constrained to follow what is provided to the public

record. In this case, the petitioners have provided studies to support their position.

EPA is just starting to regulate the maritime industry. It is incumbent on the industry to make sure it provides the agency with thoughtful, substantive information so that the agency can make informed decisions. If, for example, the industry thinks current regulations are sufficient and that the agency should maintain the status quo, it should provide support for that position. Any decision by the agency to reject a petition for rulemaking can be challenged in court, and the agency must provide a reasoned basis for rejecting the petition and refusing to enter the rulemaking process. *See, e.g., Northwest Env'tl Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (affirming summary judgment and injunctive relief vacating exclusion of incidental vessel

discharges from Clean Water Act); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act required EPA to regulate greenhouse gases). Most importantly, if the agency chooses to reject a petition and the court disagrees, the court can put the agency on a strict timetable to develop a regulation, and often these timetables are unrealistic.

What Can a Vessel Operator Do?

Get involved in the comment process now. The petitioners only gave the agency 180 days to respond to the petition. Specific comments that document why the petition is correct or in error or that posit that any change in regulations should be limited in the type of vessels it affects can sway decision makers.

¹ Petition at 3 citing U.S. Environmental Protection Agency, Cruise Ship Discharge Assessment Report, 2008 at 2-1.

² Petition at 4 citing Mark Dorfman *et al.*, Natural Resources Defense Council, *Testing the Waters: a Guide to Water Quality at Vacation Beaches*, 17th ed. 2007, at 28.

³ Vessels under 65 feet must install Type I MSDs, and vessels that do not want to treat, but rather just hold, any discharge can install Type III MSDs.

⁴ Petition at 6 citing Alaska Cruise Ship Initiative, Alaska Department of Environmental Conservation, Interim Report 13 (Part 2 2001).

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