

# EPA RELEASES NEW TOOL TO ANALYZE COSTS OF COMPLYING WITH A STATE-PROPOSED NO DISCHARGE ZONE, BUT IT CARVES OUT CAPITAL COSTS FROM THE ANALYSIS

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## **U.S. Maritime Alert**

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The U.S. Environmental Protection Agency (EPA) recently announced a new policy that it intends to use in considering costs imposed by No Discharge Zones (NDZs) under § 312(f)(3) of the Clean Water Act (CWA). Calling this policy the “No-Discharge Zone Cost Analysis Tool” (Tool), EPA has stated that it will employ the Tool in one form or another in future EPA determinations regarding NDZs. However, EPA's Tool expressly excludes all capital costs related to retrofitting vessels so that they may be able to store and pump out sewage to comply with NDZ restrictions, a potentially significant source of industry costs associated with NDZ compliance.

## **BACKGROUND**

Under the CWA, since 1976, most commercial vessels have treated onboard sewage with approved marine sanitation devices (MSDs) so that when discharged it did not create environmental risk to the receiving waters.<sup>1</sup> The CWA, however, allows states to designate certain locations as NDZs, contingent on EPA approval.<sup>2</sup> These NDZs prohibit even treated sewage from discharge and instead require that vessels store sewage on board and arrange for pump out and treatment on shore, requiring vessels to remove MSDs and replace them with storage units.<sup>3</sup> The CWA also allows EPA to designate NDZ areas directly, upon application by a state.<sup>4</sup> To date, states have designated at least 70 NDZs.<sup>5</sup> When a state wishes to designate a NDZ, EPA is required to determine that “adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available.”<sup>6</sup> Serious questions have arisen in some circumstances as to whether sufficient onshore facilities exist, particularly where those onshore treatment facilities are already overtaxed, and whether the sometimes high cost of retrofitting a vessel to be able to access such facilities and remain operational is reasonable.

In July 2016, the state of Washington petitioned EPA to designate the entirety of Puget Sound as a NDZ,<sup>7</sup> the largest single NDZ ever proposed. On 19 January 2017, EPA, when deciding if onshore treatment facilities were reasonably accessible, determined that it was not required to consider any costs incurred by vessel operators to comply with the NDZ, including costs to retrofit their vessels so that they could store sewage and access onshore pump-out, treatment, and disposal facilities.<sup>8</sup> On 30 November 2020, the U.S. District Court for the District of Columbia determined that EPA was required to consider the costs of compliance when evaluating NDZ petitions filed by states under § 312(f)(3) of the CWA.<sup>9</sup> It remanded the record for the Puget Sound NDZ to EPA to consider this and other issues.<sup>10</sup>

On remand, EPA introduced the Tool that it will use to evaluate whether onshore facilities for the removal and treatment of vessel sewage are “reasonably available.” The agency determined that it need only consider actual operating costs when determining if onshore facilities were reasonably available but that it did not need to consider the capital costs needed for vessels to hold sewage and access pump-out facilities at all. Applying the Tool, EPA reaffirmed its determination approving the largest-ever NDZ, located in the Puget Sound.<sup>11</sup> While EPA said it might modify the Tool depending on the proposed NDZ,<sup>12</sup> there was nothing in the announcement that hinted at how or why capital costs might be relevant to one NDZ but not to another.

While litigation continues regarding the validity of this determination,<sup>13</sup> EPA apparently plans to move forward and use the Tool for future NDZs.

## **NDZ COST ANALYSIS TOOL**

The Tool claims to assess existing pump-out capacity and the potential cost impact of designating a NDZ by (a) assessing the ability of existing pump-out facilities to meet demand, focusing on sewage-generating, non-oceangoing commercial vessels and comparing the pump-out capacity within the entire NDZ to total estimated vessel demand; and (b) performing a cost-impact analysis to assess changes in vessel operating costs. In analyzing potential costs, EPA divided vessel classes into two types: Type A included tugboats, commercial fishing boats, excursion boats, and ferries; Type B included large cruise ships, ferries with overnight accommodations, cargo ships, great-lake freighters, offshore vessels, public unclassified vessels, military vessels, and recreational vessels. Importantly, EPA's Tool does not consider any capital expenditures or up-front costs that vessels may incur in order to comply with a NDZ. EPA has expressly taken the position that it does not need to consider such costs, claiming that the adequacy and availability of pump-out facilities do not influence such costs.<sup>14</sup> This approach allows the agency to disregard significant costs associated with retrofitting vessels, including a tank that can hold wastewater in between access to onshore facilities and the time spent out of service during retrofit.<sup>15</sup>

Although the Tool as included in the announcement is specific to the Puget Sound NDZ, EPA noted that the Tool may be “modified to reflect the unique characteristics of an individual water body,”<sup>16</sup> suggesting that EPA intends to use the Tool in one form or another to evaluate future NDZ determinations. The agency did not explain how capital costs might be more or less important to one water body versus another, nor has EPA taken any public comment on the Tool or promulgated it as any sort of rule under the Administrative Procedure Act.

## **IMPLICATIONS**

More states are seeking to establish NDZs under § 312(f)(3) of the CWA. In each case, EPA must determine if there are reasonably available onshore facilities for the safe and sanitary removal and treatment of the sewage from these vessels. As these NDZs are created, they will render the onboard equipment used to treat vessels outmoded. There are significant costs associated with removing this equipment and replacing it with storage units capable of holding sewage in order to access sometimes limited onshore facilities. Moreover, the process, which often requires multiple agency inspections and approvals, is complex and time consuming, particularly for small businesses. Due to the potential impact on vessel owners and operators and other affected stakeholders, impacted businesses and individuals should consider providing comments to EPA regarding the costs and other logistical challenges associated with complying with a proposed NDZ in any notice-and-comment period

associated with a proposed NDZ. The Tool EPA developed provides some insight into how EPA may consider such information and could provide a starting point for the type of data to be included in comments.

K&L Gates' Maritime and Public Policy practice groups are at the ready to assist clients with generating and submitting such comments, and K&L Gates litigators are able to assist commenters in later challenges to such agency decisions.

## FOOTNOTES

<sup>1</sup> 33 U.S.C. § 1322(h)(4).

<sup>2</sup> *Id.* § 1322(f)(3).

<sup>3</sup> [U.S. Env't Prot. Agency, Vessel Sewage No-Discharge Zones](#) (last visited Mar. 26, 2021).

<sup>4</sup> 33 U.S.C. § 1322(f)(4).

<sup>5</sup> [U.S. Env't Prot. Agency, No-Discharge Zones \(NDZs\) by State](#) (last visited Mar. 26, 2021).

<sup>6</sup> 33 U.S.C. § 1322(f)(3).

<sup>7</sup> AMY JANKOWIAK, WATER QUALITY PROGRAM, WASH. STATE DEP'T OF ECOLOGY, [FINAL PETITION TO DESIGNATE THE WATERS OF PUGET SOUND AS A NO DISCHARGE ZONE](#) (July 2016).

<sup>8</sup> U.S. Env't Prot. Agency, [Puget Sound No-Discharge Zone Response to Comments](#) (last visited Mar. 26, 2021).

<sup>9</sup> *Am. Waterways Operators v. Wheeler*, No. 18-CV-02933 (APM), 2020 WL 7024195, at \*10 (D.D.C. Nov. 30, 2020). American Waterways Operators is represented by K&L Gates LLP in this litigation.

<sup>10</sup> *Id.* at \*23.

<sup>11</sup> [Letter from Michelle L. Pirzadeh](#), Acting Regional Administrator, U.S. Env't Prot. Agency, Region 10 (Feb. 23, 2021).

<sup>12</sup> U.S. Env't Prot. Agency, [EPA Consideration of Issues upon Remand in American Waterways Operators v. Wheeler](#), No. 18-cv-2933 (D.D.C.) at \*4 (Feb. 26, 2021).

<sup>13</sup> Plaintiffs in this matter are still litigating the legality of EPA's determination on remand, including its decision to exclude capital and other retrofitting costs from its analysis.

<sup>14</sup> U.S. Env't Prot. Agency, [EPA Consideration of Issues upon Remand in American Waterways Operators v. Wheeler](#), No. 18-cv-2933 (D.D.C.) at \*5 (Feb. 26, 2021).

<sup>15</sup> In response to requests for comments on EPA's original determination, interested parties submitted extensive comments illustrating that the average cost of retrofitting commercial vessels fell between US\$161,500 to US\$750,000, depending on vessel type. See U.S. Env't Prot. Agency, [Puget Sound No-Discharge Zone Response to Comments](#) (last visited Mar. 26, 2021).

<sup>16</sup> U.S. Env't Prot. Agency, [EPA Consideration of Issues upon Remand in American Waterways Operators v. Wheeler](#), No. 18-cv-2933 (D.D.C.) at \*4 (Feb. 26, 2021).

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