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July 16, 2010

Commandant (CG-5231)
United States Coast Guard
2100 2nd Street SW, Stop 7126
Washington, DC 20593-7126
Attn: Mr. Greg Kirkbride

Re: F-2010-0254(DA)
United States Coast Guard (Coast Guard) - proposed rule establishing ballast water discharge standards for living organisms, mandated under the National Invasive Species Act of 1996 (Pub. L. 104-332).
**Objection to Consistency Determination**

Dear Mr. Kirkbride:

The Department of State (DOS) has completed its review of the consistency determination for the U.S. Coast Guard's proposed "Standards for Living Organisms in Ship's Ballast Water Discharged into U.S. Waters" (Proposed Regulation). Pursuant to 15 CFR § 930.43, DOS objects to the consistency determination on the basis that the Coast Guard's proposal is not consistent to the "maximum extent practicable" with the enforceable policies of the New York Coastal Management Program (NY CMP).

**Subject of the review**

In its Federal Register notice of August 28, 2009, the Coast Guard proposed amending its regulations on ballast water management by establishing standards for the allowable concentration of living organisms in ships' ballast water discharged in U.S. waters and for the use of approved engineering equipment for ballast water management systems. The new regulations are intended to aid in controlling the introduction and spread of Aquatic Invasive Species (AIS) species from ships discharging ballast water in U.S. waters.

DOS recognizes that AIS have become increasingly prevalent in New York's coastal and inland waters. Among the Coast Guard's proposed regulatory changes are updates to 33 CFR Part 151, Subpart C, which established mandatory ballast water management procedures for vessels entering the Great Lakes and Hudson River. DOS is pleased that the Coast Guard has proposed the implementation of numerical limits on the discharge of the deleterious organisms and agrees that a comprehensive national standard for their discharge is necessary. Currently, the Coast Guard regulations (33 CFR Part 151) require all

vessels equipped with ballast water tanks and bound for ports or places of the United States to conduct a mid-ocean ballast water exchange, retain their ballast water onboard, or use an alternative environmentally sound ballast water management method approved by the Coast Guard. The Coast Guard's Proposed Regulation which would phase in numerical standards for ballast water discharges represent an improvement over the current regulatory regimen. While deserving of recognition, however, the Proposed Regulation would contravene state coastal policies because they are not adequately protective of New York's coastal waters.

In September 2009, DOS was notified of the USCG Proposed Rule and Notice, at which time, DOS reviewed the BWDS Draft Programmatic Environmental Impact Statement (DPEIS). DOS then submitted comments on the proposed rule and DPEIS on December 4, 2009, notifying the USCG of the New York State requirements for ballast water discharges within New York waters. DOS received the Coast Guard's consistency determination submittal on March 26, 2010, and the State's 60-day review period began on that date. On April 30, 2010, DOS requested a 15-day extension of the review period and requested additional information necessary for DOS to continue its review. On May 21, 2010, DOS received a confirmation from the Coast Guard of the 15-day extension of the review period, and was informed that the additional information requested to continue the review of the proposed regulatory action would be provided. The requested additional information was received on June 8, 2010 and an additional 30-day extension to the review period was granted by the Coast Guard. On July 9, 2010, an additional 7-day extension was granted.

The Proposed Regulation includes a phase-in schedule for complying with the Phase 1 and Phase 2 nationwide ballast water discharge standard regulations (BWDS) that is based on each vessel's ballast capacity and build date. During the phase-in period for the Phase 1 standard (which corresponds to the International Maritime Organization (IMO) standard), ballast water exchange (BWE) would remain as a ballast water management (BWM) option for vessels not yet required to meet the BWDS. At the end of the Phase 1 phase-in schedule, the option of using BWE would be eliminated. From that point forward, all vessels would be required to manage their ballast water through a Coast Guard approved ballast water management system (BWMS) and meet either the proposed Phase 1 or Phase 2 IMO discharge standard, as applicable, or retain their ballast water onboard. Ships conducting BWMS would be required to discharge less than 10 viable organisms per cubic meter greater than or equal to 50 micrometers in minimum dimension, and less than 10 viable organisms per milliliter less than 50 micrometers in minimum dimension and greater than or equal to 10 micrometers in minimum dimension. The Coast Guard proposed Phase 2 standard would be 1,000 times (1000 x) more stringent than the proposed Phase 1 standard and corresponding IMO standard. However, in the Proposed Regulations it appears that the 1000 x IMO standard could be required as early as 2016, or as late as 2025. In some cases, vessels may not be required to meet this discharge standard at all.

New York issued a currently effective U.S. Environmental Protection Agency (US EPA) Clean Water Act (CWA) 401 certification to the Vessel General Permit (VGP) (copy enclosed) that contains discharge standards more stringent than the Phase 1 and Phase 2 standards set forth in the Proposed Regulation. The US EPAVGP contains specific enforceable conditions for New York State waters and requires the implementation of a 100 x IMO standard by no later than January 1, 2012, and a 1000 x IMO standard in newly constructed vessels on or after January 1, 2013. The standards and time frames for implementation as set forth in the Proposed Regulation are thus less stringent than New York's US EPA VGP conditions.

**Applicable Policies**:

The Proposed Regulation's ballast water discharge standards are inconsistent with coastal policies 18 and 30. The Coast Guard does attempt to reserve the State's authority to implement more stringent water quality standards by acknowledging in its Proposed Regulation that "[n]othing in today's proposal is intended to affect in any way action EPA may take in the future with respect to regulation of ballast water discharges in the vessel general permit under its Clean Water Act authorities."[1] Further, Proposed Regulation § 151.2025(e) sets forth that "[t]his subpart does not affect or supersede any requirement or prohibition pertaining to the discharge of ballast water into the waters of the United States under the Federal Water Pollution Control Act [Clean Water Act] (33 U.S.C. 1251 to 1376)." New York acknowledges that the Proposed Regulation attempts to accommodate US EPA authority under the CWA, as well as pre-existing state law regarding water quality standards for controlling invasive species. However, the Proposed Regulation does not protect New York's coastal waters from the introduction of invasive species originating in ballast water discharged into adjacent state waters pursuant to the less stringent Coast Guard regulation.

Importantly, since New Jersey has concurred with the Proposed Regulation, its close proximity to New York waters could mean an inflow of ballast water into New York's coastal waters that does not meet New York's US EPA VGP conditions. Connecticut has provided the Coast Guard with a conditioned concurrence for the Proposed Regulations stating that it would be pertinent for New York's US EPA VGP standards to be applied in Long Island Sound. However, if the Proposed Regulation was to be adopted using the current less stringent standards for vessels originating outside of Connecticut's waters, this would result in differing water quality standards being applied within Long Island Sound.[2] The differing standards will continuously compromise New York State's ability to implement more stringent, legally enforceable water quality standards as set forth in the US EPA VGP.

Policy 18: *To safeguard the vital economic, social and environmental interests of the State and of its citizens, proposed major actions in the coastal area must give full consideration to those interests, and to the safeguards which the State has established to protect valuable coastal resource areas*

Numerical standards for this type of discharge currently exist for waters under the jurisdiction of New York State in the form of the CWA 401 certification to the US EPA, which requires that by not later than January 1, 2012, each vessel covered under the US EPA VGP that operates in New York waters, shall have a ballast water treatment system that meets a discharge standard approximately equivalent to 100 x IMO. Each vessel constructed on or after January 1, 2013 that is covered under the US EPA VGP and operates in New York waters, shall have a ballast water treatment system that meets a discharge standard approximately 1000 x IMO. The Coast Guard proposed BWDS does not meet the current standards for this type of discharge in New York waters and is therefore inconsistent with this policy.

Policy 30: *Municipal, industrial, and commercial discharge of pollutants, including but not limited to, toxic and hazardous substances, into coastal waters will conform to State and national water quality standards.*

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[1] 74 Fed. Reg. 44634 (August 28, 2009); see also 16 U.S.C. § 4725.

[2] See United States Environmental Protection Agency, National Pollutant Discharge Elimination Permit, Vessel General Permit for discharges incidental to the normal operation of vessels (VGP) "Less stringent conditions than those set forth in this certification letter are not sufficient to prevent the impairment of New York's waters for their best usage such as fish, shellfish, and wildlife propagation and survival . . ." p. 93.

The introduction of invasive species into the ecosystems of New York occurs primarily as a result of the discharge of ballast water from commercial vessels. New York shares several waterbodies and innumerable ecosystems with other States. The need for the regulation of these discharges across the nation has been recognized by New York State for many decades, and a ballast water discharge standard for vessels operating in State waters, as provided above, has been incorporated into the federal permit for vessels eligible under the US EPA's VGP in order to ensure that New York's water quality standards will be met.

The Coast Guard's Proposed Regulation Phase 1 standard, corresponding to the IMO standard, has been reviewed in comparison to New York's certification and documents cited therein. As stated in New York's conditions in the US EPA VGP, "the standards adopted by IMO would only be a marginal improvement on current management practices of ballast water exchange for the largest organisms (>50 μm) and may be similar to unmanaged ballast water for the smaller organisms (<50 μm)." Specifically, IMO's Study Group on Ballast Water and Other Ship Vectors (SGBOSV) found in 2003 that the median concentration of the largest organisms (>50 μm, generally equivalent to zooplankton) in unmanaged ballast water was 0.4 per liter or 400 per cubic meter, and they recommended a discharge standard three orders of magnitude lower, i.e., 0.4 per cubic meter. The standard ultimately adopted by IMO for organisms of this size was 10 per cubic meter, which falls between the concentration in unmanaged ballast water and the IMO's SGBOSV recommendation. This IMO standard has thus been characterized as only "a marginal improvement on current management practices of ballast water exchange." Furthermore, IMO's Study Group on Ballast Water and Other Ship Vectors found that the median concentration of the smaller organisms (<50 μm, generally equivalent to phytoplankton) in unmanaged ballast water was 13,300 per liter or 13.3 per milliliter. The SGBOSV recommended a discharge standard three orders of magnitude lower, i.e., 0.0133 per milliliter, but the standard ultimately adopted by IMO for organisms of this size was 10 per milliliter, which is essentially the same as the concentration of 13.3 per milliliter in unmanaged ballast water. Given this evidence that the IMO standard and the corresponding Phase 1 standard proposed by the Coast Guard are not adequately protective, the Coast Guard's proposed regulatory action would not ensure that New York State water quality standards are met.

The implementation deadlines for the Coast Guard's proposed Phase 1 and Phase 2 standards are unduly prolonged. Shorter deadlines are needed to stem the introduction of invasive species into the ecosystems of New York. Moreover, the resulting patchwork of water quality standards for adjacent states with shared water bodies would compromise a state's ability to implement more stringent water quality standards as there would be a constant inflow of water governed by the Coast Guard lesser water quality standards flowing into the higher standard state, thus undermining the original intention of Proposed Regulation § 150.2025(e). Although the Proposed Regulation reserves New York State's authority to implement its US EPA VGP conditions on vessels entering its state waters, the Proposed Regulation is unable to prohibit the flow of water from adjacent states with lesser water quality standards into New York's waters. The Coast Guard's recognition that states have the authority through a cooperative effort with the US EPA VGP as set forth in § 151.2025(e) is compromised by the very fluid dynamics of the ecosystems the Coast Guard seeks to protect.

While the need for a consistent national ballast water discharge standard exists, the standard needs to be comprehensive and consistent with the coastal programs of the States. Several States have provided conditions for the CWA 401 certification to the US EPA VGP, which must be complied with for any proposed regulatory action. The adoption of the most stringent of those State conditions would allow for consistency throughout the coastal States, and provide for the best protection of our shared waters. The Coast Guard's proposed BWDS does not meet the most stringent standard currently in place for ballast

water discharges, nor does it meet the current ballast water discharge standards required in New York waters, and is therefore inconsistent with this policy.

**Conclusion**:

Given the foregoing, the proposed regulatory action does not meet the current ballast water discharge standards for vessels operating in New York waters, nor is it protective of the State water quality standards that form the basis of the current ballast water discharge standards for such vessels. As such, the Proposed Regulation does not protect New York State waters and is therefore inconsistent with coastal policies 18 and 30.

**Alternatives to the Current Proposed Regulation**:

Pursuant to 15 C.F.R. § 930.43(a)(3), the Department of State may identify alternatives, if they exist, which, if adopted, would allow an activity to proceed in a manner that is consistent to the maximum extent practicable with the enforceable policies of the NY CMP. An alternative identified would be for the Coast Guard to adopt more stringent ballast water management requirements and numeric limits, namely, those set forth in New York's Clean Water Act Section 401 certification of the US EPA VGP, to be the nationwide standard.

Specifically, under the identified alternative, the Coast Guard would adopt the following ballast water management requirements, numeric limits and implementation dates set forth in New York's Section 401 certification, subject to the exceptions and qualifications listed therein:

1) Each vessel shall have a ballast water treatment system that meets the following standards on or after January 1, 2012, subject to the exceptions listed in New York's Section 401 certification.
    a. *Standard for organisms 50 or more micrometers in minimum dimension*: Any ballast water discharged shall contain less than 1 living organism per 10 cubic meters.
    b. *Standard for organisms less than 50 micrometers in minimum dimension and more than 10 micrometers in minimum dimension*: Any ballast water discharged shall contain less than 1 living organism per 10 milliliters.
    c. *Standards for indicator microbes*:
        i. Any ballast water discharged shall contain less than 1 colony-forming unit of toxicogenic *Vibrio cholera* (serotypes O1 and O139) per 100 milliliters or less than 1 colony-forming unit of that microbe per gram of wet weight of zoological samples;
        ii. Any ballast water discharged shall contain less than 126 colony-forming units of *escherichia coli* per 100 milliliters; and
        iii. Any ballast water discharged shall contain less than 33 colony-forming units of intestinal enterococci per 100 milliliters.

2) Each vessel constructed on or after January 1, 2013 shall have a ballast water treatment system that meets the following standards, subject to the exceptions listed in New York's Section 401 certification.
    a. *Standard for organisms 50 or more micrometers in minimum dimension*: Any ballast water discharged shall contain no detectable living organisms.

b. *Standard for organisms less than 50 micrometers in minimum dimension and more than 10 micrometers in minimum dimension*: Any ballast water discharged shall contain less than 0.01 living organism per milliliter.
c. *Standards for indicator microbes*:
    i. Any ballast water discharged shall contain less than 1 colony-forming unit of toxicogenic *Vibrio cholera* (serotypes O1 and O139) per 100 milliliters or less than 1 colony-forming unit of that microbe per gram of wet weight of zoological samples;
    ii. Any ballast water discharged shall contain less than 126 colony-forming units of *escherichia coli* per 100 milliliters; and
    iii. Any ballast water discharged shall contain less than 33 colony-forming units of intestinal enterococci per 100 milliliters.
d. *Standard for bacteria*: Any ballast water discharged shall contain less than 1,000 bacteria per 100 milliliters.
e. *Standard for viruses*: Any ballast water discharged shall contain less than 10,000 viruses per 100 milliliters.

Pursuant to 15 C.F.R. § 930.43 and §930.112, you may attempt to resolve these issues with DOS, or request Secretarial Mediation from the U.S. Department of Commerce. Given that the mediation process may be lengthy, if you would like to continue discussions with this office while pursuing mediation, please call Mr. Jeffrey Zappieri at (518) 473-2476.

The U.S. Department of Commerce is being notified of this decision by copy of this letter.

Sincerely,

Sally F. Ball
Assistant Secretary of State

Cc: Coast Guard – M.L. Blair
OCRM – John King

Attachment: New York's Clean Water Act Section 401 certification of the US EPA VGP