

COASTAL STATES ORGANIZATION



50 F Street NW - Suite 570 - Washington DC 20001
(202) 800-0580 - coastalstates.org

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Via Regulations.gov Portal

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: Supplemental Notice of Proposed Rulemaking, Vessel Incidental Discharge National Standards of Performance (Docket No. EPA-HQ-OW-2019-0482)

The Coastal States Organization (CSO) respectfully submits these comments to the Environmental Protection Agency (EPA) in response to the Supplemental Notice of Proposed Rulemaking, “Vessel Incidental Discharge National Standards of Performance.”¹ Since 1970, CSO has served as the collective voice for the nation’s coastal states, commonwealths, and territories on policy issues relating to coastal, Great Lakes, and ocean management. CSO’s governor-appointed delegates – leaders of the thirty-six state and territory coastal management programs – partner with coastal communities, the federal government, tribal governments, and the regulated community for the effective management, beneficial use, protection, and development of the coastal zone through the federal-state partnership established under the federal Coastal Zone Management Act (CZMA).²

The present comments address continued concerns from coastal states regarding the process by which EPA has developed national discharge standards under the Vessel Incidental Discharge Act of 2018 (VIDA).³ EPA’s engagement with coastal states following its initial proposed rule has not addressed substantive and procedural concerns raised by states regarding EPA’s compliance with CZMA federal consistency obligations and the adequacy of the proposed standards’ protections for coastal and marine resources.⁴ The present comments supplement previous CSO comments provided in response to the initial 2020 proposed rule and are made in addition to and in support of comments submitted by individual states and territories.

The VIDA amended the Clean Water Act (CWA) to mandate that EPA set technology-based standards in consultation with interested states for discharges incidental to normal operations from primarily non-military and non-recreational vessels. The statute directs EPA to adopt standards that are at least as restrictive as those under EPA’s 2013 National Pollutant Discharge Elimination System Vessel General

¹ 88 Fed. Reg. 71,788 (Oct. 18, 2023).

² 16 U.S.C. § 1451 *et seq.*

³ 33 U.S.C. § 1332(p).

⁴ Under the CZMA, federal agencies are obligated to work with coastal states to ensure that federal agency activities, including rulemakings, with reasonably foreseeable effects on coastal uses and resources are consistent to the maximum extent practicable with the enforceable policies of federally-approved state coastal management programs. 16 U.S.C. § 1456(c)(1)(A). The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of the affected state unless full consistency is prohibited by existing law applicable to the federal agency. 15 C.F.R. § 930.32(a)(1).

Permit.⁵ Following finalization of EPA’s rulemaking, the VIDA requires the U.S. Coast Guard (USCG) to develop corresponding implementation, compliance, and enforcement regulations.⁶

EPA issued an initial proposed rule on Oct. 18, 2020, setting out national standards.⁷ On Nov. 4, 2020, EPA transmitted a National Consistency Determination (NCD) to coastal programs, declaring that the proposed national standards are consistent to the maximum extent practicable with enforceable policies of coastal programs under the CZMA and that “[t]o the extent the standards would not be fully consistent, the subsequently enacted VIDA statute precludes EPA from full consistency with state-specific enforceable policies.”⁸ The NCD does not provide analysis of specific national standards, reasonably foreseeable coastal effects, or enforceable policies.

In response to the NCD, coastal states completed CZMA federal consistency review of the proposed rule and individually issued concurrences,⁹ conditional concurrences,¹⁰ or objections.¹¹ To CSO’s awareness, EPA has not yet responded to any state’s CZMA decision.

On Oct. 18, 2023, EPA issued a supplemental notice modifying provisions in the initial proposed rule pertaining to equipment standards for new Lakers, controls on hull cleaning activities, and greywater systems, while offering additional information on provisions pertaining to ballast water uptake best management practices (BMPs). The supplemental notice implicates issues raised by multiple states’ decisions, including the preclusive effect of regulation of hull cleaning activities, but does not directly address specific CZMA objections raised by states or substantially fulfill proposed conditions, including with regard to ballast water uptake BMPs and Laker equipment standards. EPA has not issued a supplemental consistency determination or otherwise engaged in coordination under the CZMA regarding the supplemental notice.

More effective coordination with state coastal programs is necessary to ensure that national standards established under the VIDA meet both EPA’s and coastal states’ shared priorities for the protection of ocean and coastal waters and species, and that EPA meets its coordination and cooperation obligations under the CZMA.

The VIDA directs EPA to work in consultation with states to set national standards that are uniform, enforceable, and, broadly, at least as protective as under the pre-VIDA regime. National standards set

⁵ 33 U.S.C. § 1332(p)(4)(B)(iii).

⁶ 33 U.S.C. § 1332(p)(5).

⁷ 85 Fed. Reg. 67,818 (Oct. 26, 2020).

⁸ Letter from Brian Frazer, Division Director, Oceans, Wetlands, and Communities Division, EPA. “National Consistency Determination for National Performance Standards for Discharges Incidental to the Normal Operation of a Commercial Vessel.”

⁹ For states which did not issue a decision, concurrence is presumed. 15 C.F.R. § 930.41.

¹⁰ A conditional concurrence set out conditions that, if included in an agency’s final decision, would allow the state to concur with the proposal, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the state, and an identification of the specific enforceable policies. 15 C.F.R. § 930.4(a). If the conditions are not met in the agency’s final decision, then the agency must treat the conditional concurrence as an objection. 15 C.F.R. § 930.4(b).

¹¹ An objection sets out how the proposal will be inconsistent with specific enforceable policies of the state, and may include alternative measures which, if adopted by the agency, would ensure consistency to the maximum extent practicable. 15 C.F.R. § 930.43(a). A federal agency shall not proceed over a state’s objection unless the agency concludes that the proposal is either fully consistent or consistent to the maximum extent practicable, and clearly describes in writing the legal impediments to full consistency. 15 C.F.R. § 930.43(d).

out in both the proposed rule and the supplemental notice would instead bypass existing state protections for coastal waters, communities, and sensitive ecosystems while setting less protective federal standards. The CZMA requires EPA to coordinate with states to ensure that decisions affecting coastal waters are consistent with states' policies protecting those waters. The proposed rule, supplemental notice, and NCD instead disregard enforceable policies applicable to EPA's decision making.

Before issuing a final rule, EPA should reengage directly with coastal programs to identify improvements to national standards which would make them consistent with state enforceable policies while meeting EPA's statutory obligations. Where states have higher protections for certain waters than in other parts of the nation, EPA should work with states to develop national standards that are equivalently protective, not use the VIDA's mandate for uniformity to pursue lowest-common-denominator standards that would erode existing protections.

EPA should conduct a more detailed analysis of state enforceable policies than originally provided in the NCD. EPA should provide an analysis of both the "common denominator" of affected policies as well as "sections that would apply to individual states to address coastal effects and enforceable policies unique to particular states."¹² State conditional concurrences and objections issued in early 2021 identify specific enforceable policies implicated by the proposed rule, although EPA's analysis should also address changes under the supplemental notice as needed.

EPA should specifically identify how proposed standards are either fully consistent or consistent to the maximum extent practicable with coastal states' enforceable policies.¹³ For those standards which EPA concludes are consistent to the maximum extent practicable, EPA should clearly describe, using specific citations, the statutory provisions, legislative history, or other legal authority which limits its discretion to be fully consistent.¹⁴

When EPA issues a final rule, EPA should explicitly notify states of its decision on whether to proceed over any remaining objections, including conditional concurrences with which the final rule is not consistent, addressing objections and conditions individually as needed.¹⁵ The notification should incorporate the required clear descriptions of any legal impediments to full consistency providing the basis for meeting the "consistent to the maximum extent practicable" standard.¹⁶

In providing a legal basis for meeting the "consistent to the maximum extent practicable" standard, EPA should not rely on the VIDA preemption provision at CWA section 312(p)(9)(A)(i).¹⁷ This provision, which becomes effective only upon finalization of USCG enforcement regulations, does not provide a viable basis for excluding states from the development of national standards at the outset, including by

¹² 15 C.F.R. § 930.36(e).

¹³ 15 C.F.R. § 930.32(a).

¹⁴ *Id.*

¹⁵ 15 C.F.R. § 930.43(d).

¹⁶ 15 C.F.R. § 930.43(d)(1).

¹⁷ "... [E]ffective beginning on the date on which the requirements promulgated by the [USCG] ... with respect to every discharge incidental to the normal operation of a vessel that is subject to regulation under this subsection are final, effective, and enforceable, no State, political subdivision of a State, or interstate agency may adopt or enforce any law, regulation, or other requirement of the State, political subdivision, or interstate agency with respect to any such discharge." 33 U.S.C. § 1322(p)(9)(A)(i).

working with EPA to ensure that the new standards are consistent with existing, generally applicable state protections.¹⁸

Likewise, EPA should not rely on an argument that the rulemaking is an environmentally beneficial activity without addressing those national standards that are less protective than under the pre-VIDA regime, including protections established at the state level.

In sum, CSO encourages EPA to engage more openly and collaboratively with states to identify national standards which achieve effective, environmentally sound protections for ocean and coastal waters. Please reach out for further information to John Ryan-Henry (jryan-henry@coastalstates.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Derek Brockbank". The signature is fluid and cursive, with a long horizontal stroke at the end.

Derek Brockbank
Executive Director

¹⁸ See 33 U.S.C. § 1322(p)(9)(A)(vi) (“Nothing in this subsection preempts any State law, public initiative, referendum, regulation, requirement, or other State action, except as expressly provided in this subsection.”)