

Status of the Ballast Water Discharge Standard Rulemaking

The Department of Homeland Security, through the U.S. Coast Guard, is authorized by Congress to develop a national regulatory program to prevent the introduction and spread of aquatic nonindigenous species (NIS) into U.S. waters via ballast water discharges from vessels. By direction of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA) and the National Invasive Species Act of 1996 (NISA), the Coast Guard has promulgated several regulations and continues to develop future regulations to address this issue.

Current Regulations and Policies

Following the invasion of the Great Lakes by zebra mussels, NANPCA was enacted and authorized the Coast Guard to develop regulations for a mandatory ballast water management (BWM) program for the Great Lakes and Hudson River. We established these regulations in 1993 and 1994, respectively. These regulations appear in Title 33, Part 151, Subpart C of the Code of Federal Regulations (CFR). Subsequent high profile invasions around the U.S., prompted Congress to reauthorize and amend NANPCA with NISA. Under NISA, national voluntary BWM guidelines for vessels entering all other U.S. regions after operating outside the U.S. Exclusive Economic Zone were promulgated by the Coast Guard in 1999. NISA required the Coast Guard to assess compliance with the voluntary guidelines with the stipulation to convert them into a mandatory BWM program if the Coast Guard determined that the voluntary guidelines were inadequate. In 2002, the Coast Guard submitted a report to Congress stating that compliance with the guidelines was too low to determine its adequacy, and therefore the Coast Guard intended to develop regulations to address these issues.

In 2004, the Coast Guard established regulations for penalty provisions for vessels bound for U.S. ports who fail to comply with the Great Lakes BWM Program and/or that fail to submit their ballast water reporting forms. These regulations also expanded the BWM reporting and recordkeeping requirements. Later in 2004, regulations were promulgated converting the national voluntary guidelines into a national mandatory BWM program. These regulations appear in CFR, Title 33, Part 151, Subpart D.

A large number of vessels calling on the Great Lakes declare No Ballast Onboard (NOBOBs). However, these vessels may contain residual ballast water and/or sediments and have the potential to carry NIS. As these vessels transit the Great Lakes, they off-load their cargo and take on Great Lakes water as ballast water. Once NOBOB vessels take on new cargo, and discharge the mixed (residual and Great Lakes) ballast water, the potential exists for the introduction of NIS into the Great Lakes. In 2005, the Coast Guard established a policy of voluntary best management practices (including saltwater flushing) for NOBOB vessels. In the spring of 2008, the U.S. and Canadian Seaway agencies enacted regulations that require saltwater flushing of all ballast tanks containing residual amounts of ballast water to a salinity level of 30 parts per thousand.

Rulemaking in Progress-Ballast Water Discharge Standard

In addition to the current regulations and policies, the Coast Guard is engaged in a rulemaking that would set a performance standard for the quality of ballast water discharged in U.S. waters. This rulemaking is being carried out under NANPCA and NISA, which authorize the Coast Guard to

approve alternative ballast water management systems (BWMS) that are found to be at least as effective as mid-ocean ballast water exchange (BWE) in preventing NIS introductions.

As the effectiveness of ballast water exchange varies from vessel to vessel, the Coast Guard believes that setting a performance standard would be the most effective way for approving BWMS that are environmentally protective and scientifically sound. Ultimately, the approval of BWMS would require procedures similar to those in CFR, Title 46, Subchapter Q, to ensure that the BWMS works not only in the laboratory but under shipboard conditions. These would include: pre-approval requirements, application requirements, land-based/shipboard testing requirements, design and construction requirements, electrical requirements, engineering requirements, and piping requirements. As a necessary first step in approving BWMS, the Coast Guard has proposed defining a ballast water discharge (BWD) standard that would enable us to assess a BWMS's ability to be environmentally protective. We did this via an advanced notice of proposed rulemaking (ANPRM), published March 4, 2002, in which we began our rulemaking process by asking for comments to help define a ballast water treatment goal and standard. The rulemaking is entitled "Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters," and documents and public comments relating to the rulemaking can be found at <http://dms.dot.gov> under docket number USCG-2001-10486.

Since September 2003, we have been conducting essential environmental impact analyses to support this rulemaking, as required by the National Environmental Policy Act, the Endangered Species Act, and various other environmental statutes. We have held public workshops across the nation to engage interested stakeholders in discussing the environmental impacts the Coast Guard must consider. The Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service are assisting us as cooperating agencies. In addition to considering a "no action" alternative that would avoid using a BWD standard to evaluate BWMS, the environmental analysis will also assess the impact of establishing a stringent "virtual sterilization" standard that would require the elimination of all living organisms larger than 0.1 micron. Also, we are considering adoption of some less stringent standard that would establish maximum acceptable discharge concentrations for various types of potential NIS. An example of this type of standard we are evaluating is set forth in the International Maritime Organization's "Convention for the Control and Management of Ships' Ballast Water and Sediments" which was adopted in 2004. The results of these analyses will be published in a Draft Programmatic Environmental Impact Statement (DPEIS), which the Coast Guard is developing in conjunction with the NPRM.

The ballast water rulemaking is currently under review at the Office of Management and Budget (OMB). Assuming there aren't any major issues with the rule, according to their guidelines OMB must clear on significant rulemakings within 90 days of the May 15, 2009 submission.

Not only must the Coast Guard conduct environmental analyses for implementing a BWD standard, we must also conduct economic analyses. Under Executive Order 12866, any federal agency engaged in a significant rulemaking action must conduct an assessment of potential costs and benefits, including an explanation of how the rulemaking is consistent with the statutory mandate and Presidential policies. This assessment is called a Regulatory Impact Analysis (RIA). The RIA, along with a Federalism analysis, generally would also explain how the rulemaking avoids undue interference with the functions of state, local, and tribal governments.