



OCTOBER 25, 2023

EPA Issues Supplemental Notice of Proposed Ruling to Implement the Vessel Incidental Discharge Act—Finally!

The U.S. Environmental Protection Agency (“EPA”) published a Supplemental Notice of Proposed Rulemaking (“SNPR”) on October 18, 2023, modifying its initial proposed rule from three years ago on performance standards for vessel incidental discharges. [2023-22879.pdf \(govinfo.gov\)](#) The SNPR addressed only three limited areas—ballast water, hulls and associated niche areas, and graywater—and did not make any sweeping changes to the prior proposal of October 26, 2020. [2020-22385.pdf \(govinfo.gov\)](#)

BACKGROUND

In December 2018, the Vessel Incidental Discharge Act (“VIDA”) was signed into law, which amended the Clean Water Act (“CWA”) and was intended to replace the EPA’s 2013 Vessel General Permit (“VGP”) to bring uniformity, consistency, and certainty to the regulation of incidental discharges from U.S. and foreign-flag vessels. VIDA required EPA to finalize uniform performance standards for each type of incidental discharge by December 2020, a deadline that is nearly three years past, and requires the United States Coast Guard (“USCG”) to implement EPA’s final standards within two years thereafter.

In October 2020, EPA published a proposed rule titled Vessel Incidental Discharge National Standards of Performance to implement VIDA, but the proposal languished with the change from the Trump Administration to the Biden Administration. EPA’s delay in finalizing its performance standards prompted the Center for Biological Diversity and Friends of the Earth to file a

lawsuit in February 2023 to force EPA to finalize its performance standards. *Center for Biological Diversity, et al., v. Regan, et al.*, No. 3:23-cv-535 (N.D. Cal. 2023). The premise of the environmental groups’ complaint was that EPA’s inaction harmed aquatic ecosystems, with the principal allegations focused on ballast water discharges. The parties thereafter negotiated a Consent Decree that requires EPA to finalize its performance standards by September 23, 2024. To keep EPA accountable, EPA is also required to provide updates to the court every three months on the status of the rulemaking.

SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

The SNPR addressed limited topics. Only three key areas are discussed: ballast water, hulls and associated niche areas, and graywater. These are the only topics on which EPA seeks comment—EPA is not requesting comments on anything not included in the SNPR. Within these topics, EPA is seeking comments on six decisions and proposals.

1. Decision not to propose a more stringent ballast water discharge standard.

The majority of the SNPR addressed ballast water and provided support for EPA's decision to maintain alignment with the International Maritime Organization ("IMO") and USCG ballast water discharge standards. The SNPR details EPA's review of the IMO and USCG type-approval processes for ballast water management systems ("BWMS"), including three ultraviolet systems that were the topic of a 2015 federal court case addressing ballast water. *Nat. Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 808 F.3d 566 (2nd Cir. 2015). EPA also explained why it determined a "no detectable organisms" standard was impractical based on the challenges of collecting and analyzing ballast water at levels lower than the proposed standard.

The SNPR further detailed the extensive efforts the EPA and USCG took to ensure EPA had reviewed as much available ballast water data as possible. The USCG prepared data for all type-approved BWMSs as of the date of the proposed rule in a manner that excluded all identifying information on the maker and system. The SNPR then described the method by which EPA analyzed the data provided. Ultimately, EPA concluded that the data failed to demonstrate that a more stringent discharge standard should be considered "best available technology or BAT," particularly considering the recognized need to have multiple BWMS options to suit different vessels and circumstances. BAT represents the best available technology that is economically achievable for controlling discharges.

2. Proposal to require ballast water management plans to address uptake practices.

EPA's initial proposal removed the ballast water best management practices ("BMPs") that were included in the 2013 VGP and that are also a current USCG regulatory requirement, *e.g.*, minimizing or avoiding uptake of ballast water in areas known to have infestations or populations of harmful organisms, areas near sewage outfalls, areas near dredging operations, and in the darkness, among other areas, because EPA determined that the best management practices were not practical to implement. The SNPR noted conflicting comments were received on whether removal of the best practices

was appropriate, with some commenters arguing that the best management practices were foundational and encouraged minimization of environmental impact from ballast water discharges. In response, EPA is considering requiring vessels' ballast water management plans to address ballast water uptake planning to minimize uptake of organisms and pathogens similar to the prior BMPs, which would allow vessels to incorporate local knowledge and tailor plans to vessel operations, while also avoid prescribing vague requirements that are difficult for vessels to implement and the government to enforce.

3. Proposal to require an equipment standard for new vessels that will operate exclusively on the Great Lakes.

The 2020 proposed regulations had exempted vessels operating exclusively on the Great Lakes, known as Lakers, regardless of build date, from the numeric ballast water discharge standard based on the unique challenges these vessels face in treating ballast water, such as low salinity and high turbidity, icing, and suspended matter. This was an expansion of the exemption in the 2013 VGP, which required Lakers constructed after January 1, 2009, to meet the numeric ballast water discharge standard. EPA noted that this decision was one of the most commented on aspects of the initial proposed rule.

Based on the comments received, the SNPR stated that EPA is considering setting a ballast water discharge *equipment* standard for Lakers, but not a numeric discharge standard, for vessels built after the effective date of the USCG rulemaking. This option was considered in drafting the initial proposed regulations, along with other alternative treatment methods, but ultimately not included because EPA found insufficient data on whether the alternative methods would reduce discharge of organisms to a known effectiveness level. EPA stated that, after further deliberation, it is reconsidering the equipment standard because it "would potentially result in reduced discharges of organisms, even if the numeric discharge standard cannot be met." The SNPR details EPA's analysis of an equipment standard and EPA's position that such a standard would be an incremental step towards a longer-term goal of advancing better technology and treatment of ballast water discharges on the Great Lakes.

The proposal would require “New Lakers” to install and operate a USCG type-approved BWMS, while acknowledging the BWMS cannot meet the numeric discharge standard. EPA proposes to define a “New Laker” as “a bulk carrier vessel that operates exclusively on the Great Lakes and that is constructed after the effective date of USCG regulations promulgated pursuant to CWA section 312(p)(5)(A)(i).” EPA made clear that it is not considering an equipment standard for existing Lakers.

4. Proposals on defining new terms or eliminating vague terms related to biofouling.

EPA’s original proposal included requirements to reduce biofouling organisms, principally from hulls and niche areas, by requiring biofouling management plans and implementing cleaning protocols. The SNPR discussed a number of issues that arose in comments related to biofouling and the proposed requirements to develop a biofouling management plan and follow in-water equipment and system cleaning protocols. EPA is considering a host of new definitions for inclusion in the biofouling discharge standards, including: “passive discharge of biofouling,” “active discharge of biofouling,” “anti-fouling coating,” “anti-fouling system,” “microfouling,” and “macrofouling.”

EPA is also considering how it should define and distinguish between some of the proposed definitions in the standards, if at all. EPA explained that it views passive discharges of biofouling as an incidental discharge, but is considering whether it should differentiate between passive and active discharges of biofouling in the standards. EPA is also considering use of the terms macrofouling and microfouling to replace references to the U.S. Navy’s Fouling Rating scale, which many commenters believed an inappropriate scale for assessing risk.

EPA is also considering eliminating use of some terms in the proposed rule that were vague and difficult to interpret, such as “frequent,” “gentle,” “minimal,” “local in origin,” and “plume or cloud of paint.”

5. Proposal to prohibit in-water cleaning without the capture of macrofouling and exclude discharges from in-water cleaning and capture systems from the regulations.

In the proposed rule, EPA had not differentiated between in-water cleaning without capture and use of in-water cleaning and capture systems. Based on a number of comments, EPA is considering setting standards that prohibit discharges from in-water cleaning of macrofouling without capture and setting a discharge standard for in-water cleaning of microfouling. EPA is also considering adding biofouling management requirements to minimize macrofouling, such as mandating cleaning of microfouling and minimizing damage to anti-fouling coatings.

Additionally, EPA is considering treating discharges from in-water cleaning and capture systems differently from other biofouling discharges and not regulating them as discharges incidental to the operation of a vessel. EPA noted that these systems pull captured debris to the surface, where it is pumped to a barge or directly to shore for treatment and disposal, akin to ballast water discharges to a reception facility, which EPA does not regulate under VIDA.

6. Proposal to limit graywater standard applicability to new vessels of 400 GT or above that have a maximum capacity of 15 or more persons and provide overnight accommodations to those persons.

EPA initially proposed that graywater discharged from certain vessels, including all new vessels over 400 gross tons (“GT”), be prohibited unless they meet numeric discharge standards for certain parameters. The SNPR noted that multiple comments were received requesting that EPA consider exempting vessels that carry only a small number of persons from the graywater discharge standards proposed for vessels of 400 GT or more based on the fact that they generate less graywater. EPA acknowledged that vessels that carry fewer persons, regardless of vessel tonnage, would produce a lower volume of

graywater discharges. Accordingly, EPA is considering limiting applicability of the graywater discharge standards to new vessels of 400 GT or more that have a maximum capacity of 15 or more persons and provide overnight accommodations to those persons.

PUBLIC INPUT

EPA will hold two virtual public meetings addressing the SNPR on November 8 at 4:00 p.m. EST and November 16 at 9:00 a.m. EST. The same presentation will be given at both meetings. Please click [here](#) to register.

Comments on the topics discussed in the SNPR can be submitted to EPA until December 18, 2023.

Vessel owners and operators are encouraged to review the SNPR and comment on the areas that may impact their operations.

CONCLUSION—FULL VIDA IMPLEMENTATION

Full implementation of VIDA and the EPA's performance standards is still a ways off. Once EPA's performance standards are finalized, targeted for September 2024, the USCG will have two years to develop and finalize regulations addressing implementation and enforcement of EPA's standards. Until full implementation of the USCG regulations, likely not until late 2026 at the earliest, the 2013 VGP will remain in effect. In light of EPA's aggressive enforcement of the 2013 VGP in recent years, it is critical for vessel owners and operators to closely review VGP compliance for the vessels in their fleet and implement strict oversight and quality control, including audits, to ensure VGP requirements are complied with, crew are trained, and any deficiencies are promptly corrected.

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