

December 15, 2023

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW, Washington, DC 20460

**RE: Vessel Incidental Discharge National Standards of Performance,
Docket #: EPA-HQ-OW-2019-0482**

Dear Environmental Protection Agency,

On behalf of the undersigned organizations, we respectfully submit comments in response to the Environmental Protection Agency's (EPA) Vessel Incidental Discharge National Standards of Performance proposed supplemental rule. We previously submitted comments on the proposed rule on November 20, 2020 and our earlier comments are incorporated by reference.

Our comments today are limited to the most recently proposed supplemental regulatory options that EPA is considering, as well as comments on the rationale that EPA has put forward regarding its supplemental regulatory options and continuance of proposals from its 2020 proposed rule.

Our organizations represent environmental, conservation, hunting and fishing interests, all sharing a priority of ensuring that invasive species do not continue to be introduced into or spread throughout the Great Lakes and St. Lawrence River, which we believe would have an adverse impact on their ecosystems, dependent communities and economies.

We strongly encourage the EPA to address the following concerns our collective organizations have that are aimed at issuing a final rule that will provide greater protection against the introduction and spread of invasive species throughout the Great Lakes and all across our nation's waters than the status quo. We believe the final rule should:

- 1) Regulate all vessels, including Lakers, as instructed under the Vessel Incidental Discharge Act of 2018, thus resulting in further limiting the introduction and spread of invasive species into U.S. waters; and**
- 2) Retain best management practices for the discharge of ballast water into U.S. waters to ensure that the final standard is as protective as it can be.**

Following are more specific comments on the rationale offered by EPA on its proposal to not regulate existing Lakers, as well as on the supplemental regulatory options that EPA is considering.

The Vessel Incidental Discharge Act of 2018 requires regulation of all Lakers

The Vessel Incidental Discharge Act of 2018 (VIDA) directs the Environmental Protection Agency (EPA) to issue rules establishing national standards of performance for discharges, such as ballast water, that are incidental to vessel operations. The purpose of the rule is to protect the natural environment and the surrounding communities and economies from the introduction of aquatic invasive species or harmful pathogens that might be released or transported from vessels.

To date, aquatic invasive species have caused substantial environmental and economic harm to the Great Lakes and waters all across the country and pose a significant and continuing risk. One of the primary modes of transport of aquatic invasive species throughout the Great Lakes is through the discharge of ballast water. Therefore, it is imperative that the final rule that EPA issues to regulate incidental vessel discharges apply to all classes of vessel transport that may be regulated throughout the Great Lakes and St. Lawrence River.

VIDA was written to pre-empt state water quality standards. These proposed new rules exempting Lakers puts ports like Duluth-Superior at risk while at the same time taking away any local capacity to enforce standards the state considered necessary. Congress has given EPA the exclusive task of regulating incidental vessel discharges, including ballast water, and as such EPA has a duty to ensure that the national standards it sets protect all the waters of the United States, including the Great Lakes and St. Lawrence River, despite any specific challenges that may be encountered by the distinguishing characteristics of these waters.

The proposed supplemental draft rule, like the initial draft proposed in 2020, is inconsistent with the requirements of VIDA, the technology-forcing mandate set forth in the Clean Water Act (CWA), and the Second Circuit's holding in NRDC v. EPA, 808 F. 3d 556 (2d Cir. 2015). In that case the court held that the EPA's decision to issue a Vessel General Permit (VGP) in 2013 - with the same requirements as set forth in EPA's current proposed rule - was arbitrary and capricious and in violation of the CWA.

The requirements of VIDA dictate that the agency require the implementation of the best available technology that is economically achievable. The purpose of this is to force action so that treatment technologies are implemented without limitation and keep pace with needs. The supplemental proposed rule's continuing exclusion of existing Lakers from any requirement to implement ballast water management systems, as well as the proposed deletion of requirements for ships built in 2009 or later (which are currently required by permit to install ballast water management systems) is inconsistent with the statutory requirements of VIDA, which does not exempt Lakers from regulation and mandates that any national standards that are established be at least as stringent as the current operating permit (see 33 U.S.C. 1322(p)(4)(B)(ii) noting that the final rule be no less stringent than the permit).

Given that ballast water discharges from Lakers account for over ninety-five percent of ballast water volumes transferred in the Great Lakes, the exclusion of existing Lakers from any requirement to treat ballast water is problematic and contrary to law. By continuing to exempt existing Lakers from such requirements, the agency is creating a continuing risk to the environment and economy of the Great Lakes posed by the unregulated transfer of ballast water which could result in the introduction and transfer of harmful aquatic invasive species. Furthermore, by not requiring that Lakers implement ballast water management, and by exempting Lakers that have been constructed since 2009 or later, the agency is creating a regulatory system that is worse than the status quo since Lakers constructed since 2009 are required, pursuant to the existing permit, to implement ballast water management systems.

Excluding Lakers from regulation is contrary to law, arbitrary and capricious and an abuse of discretion

EPA provides several reasons why the agency is not requiring Lakers to implement ballast water management systems. These reasons include: (1) anticipated retrofit costs; (2) the ongoing research program of the Great Lakes and Lake Champlain Invasive Species Program; and (3) VIDA's "period of use" provision which EPA purports would prevent the agency from requiring vessels to upgrade any ballast water management system that is installed now if more stringent requirements are imposed in the future. For the reasons that follow we find EPA's rationale arbitrary and capricious and an abuse of discretion in interpreting the agency's statutory duties under VIDA to establish national standards of performance for vessel discharges.

First, with respect to anticipated retrofit costs, EPA cites to just one study, prepared for the Lake Carriers Association (an industry trade group) in 2017 that estimated the cost to retrofit the existing Laker fleet at \$639 million. With this one estimate, and without any further consideration or analysis or evidence cited in the proposed or supplemental rule, EPA determines that the best available technology is not economically achievable.

The agency does not provide any analysis of this industry-provided estimate. It is unknown if the industry produced study made assumptions that inflated costs. The agency does not provide any information that would allow third parties to consider whether this estimate is accurate or whether the retrofit costs could be reasonably borne by any vessel. Given that Canada cited costs of \$280 million for compliance with its requirements for the implementation of ballast water management systems and the Canadian fleet is comparable in size to the American Lakers, we question EPA's reliance on this industry produced study and the \$639 million cost to retrofit the Laker fleet.

Furthermore, there is no discussion or analysis as to whether the cost of implementing a ballast water management system is one that can be reasonably borne by the industry. Laker operating costs and revenues are not included and there is no analysis, as there was for the proposed New Laker subcategory, to know the retrofit costs on an individual ship basis. It may be possible, for example, for the implementation of ballast water management systems to be implemented on a class of ships more easily than others, or spread over a period of years, which would lessen the financial burden and facilitate the implementation of ballast water management in existing ships. EPA does not present any other alternatives to consider other than only regulating "New Lakers" that have not yet been designed and built. However, it is possible that other alternatives, such as looking at specific classes of ships, or extending the time period for implementation of ballast water treatment systems, could affect the cost. In short, we believe that EPA has not made the case as to why the retrofit costs for the existing Laker fleet is not economically achievable.

Second, reliance upon the Great Lakes and Lake Champlain Invasive Species Research Program is misplaced in that research on shipboard and land-based ballast water management systems for use by vessels solely operating on the Great Lakes is only one of several purposes for which this research program was established. As such, it is unrealistic for the agency to avoid setting a regulatory requirement now for the existing Laker fleet in anticipation that the research program will discover a superior method of ballast water management in the future. The Great Lakes and Lake Champlain Invasive Species Research Program was established in recognition of the significant negative environmental effects caused by invasive aquatic species and requires significantly more focus on rapidly developing ballast water treatment system alternatives for Lakers.

Lastly, EPA states that VIDA's "legacy clause" weighs against establishing an equipment standard for Lakers. The rationale being that if an equipment standard were required now that standard would remain in effect for the life of that system without an ability to modify or improve upon the standard if a more stringent requirements were adopted in the future. We believe that the agency's reliance upon the legacy clause is misplaced.

First, the legacy or "period of use" provision in VIDA does not prevent the EPA from regulating existing Lakers. Most importantly, the exception to the legacy clause only applies for the Coast Guard Secretary when EPA has already made a determination of what the national standard should be. Because there is no standard, the Coast Guard Secretary has not determined which technologies would be type-approved, so it likely cannot implement this exception to the legacy clause. This means that the legacy clause is only applicable when the EPA has set a standard. Thus, it is within EPA's power to set a standard, upon which the Coast Guard Secretary can rest their decision to mandate new technologies for an existing fleet.

EPA's supplemental regulatory options do not result in reasonable progress

EPA is considering two supplemental regulatory options for ballast water management: (1) requiring identification of ballast water uptake practices; and (2) creation of a new regulatory subcategory for "New Lakers" with imposition of an equipment standard for ballast water management. We believe that these supplemental regulatory options to the proposed rule issued in 2020 are modest and will not result in reasonable progress to address the risk posed by the untreated transfer of ballast water within the Great Lakes.

With respect to requiring vessel operators to address and identify their uptake practices as part of ballast water management plans, we note that this is a continuation of a requirement contained in the 2013 vessel general permit and as such provides no greater protection to Great Lakes resources than currently provided and with the proposed deletion of best management practices that are now required actually provides less. Generally, this reporting requirement would describe the specific vessel practices that are being utilized by the vessel operator to minimize or avoid the uptake of harmful organisms and pathogens and prevent or reduce their spread throughout the Great Lakes.

While we appreciate that such a reporting requirement may induce vessel operators to be more aware of the specific circumstances in which vessels are operating, as we have noted the proposed deletion of best management practices creates a situation where vessel operators have no guidance on situations to avoid. As such, this increases the likelihood that vessel operators will undertake ballast water uptakes in situations that should be avoided and places the entire responsibility upon the vessel operator to understand each and every operational situation that they may encounter that could be problematic as it relates to ballast water transfers.

Furthermore, EPA's proposed rationale for eliminating best management practices is that the situations where best management practices are employed is beyond the control of the vessel operator. However, in the Great Lakes the vessels operate within a limited number of ports and either know or can be informed of local situations easily to ensure a better uptake. For these reasons we believe that retaining best management practices would be more protective of environmental resources and we again encourage EPA to retain them.

With respect to establishing a new regulatory subcategory for "New Lakers" (those constructed after the effective date of the yet-to-be-issued Coast Guard VIDA implementing regulations) and the proposal to impose an equipment standard on them, we appreciate EPA's willingness to require an equipment standard for Lakers and support this requirement. This will result in some level of binational consistency with Canadian requirements. However, we believe that EPA overstates the progress that will be made in addressing the harm posed by untreated ballast water transfers by only regulating New Lakers. New Lakers are rarely built. EPA's own economic analysis indicates that in the last 20 years that six new Lakers were constructed and three older Lakers were converted or retrofitted. For purposes of analyzing its proposal, EPA assumes that approximately 7.5 New Lakers will be built in the next 25 years. At this rate, it would take more than a century for enough New Lakers to be built so as to replace the existing fleet. This is an incredibly long time and in no way can be seen as reasonable progress with respect to eliminating the threat posed by the unregulated transfer of ballast water.

Given the infrequency of new construction and the lifespan of the existing fleet, we do not believe that imposing an equipment standard only on New Lakers will have a significant effect in reducing the spread of harmful aquatic invasive species and the benefits will be modest. Furthermore, by imposing the equipment standard only on New Lakers, EPA is creating a disincentive to the construction of New Lakers and an incentive to maintain older existing vessels which EPA proposes to be exempt from regulation.

Boundary Waters Treaty of 1909 and Great Lakes Water Quality Agreement

Consistent with the Boundary Waters Treaty of 1909, EPA must ensure through this rule that pollution from US ships does not pollute the boundary waters and harm people or property in Canada. The US also has obligations under the Great Lakes Water Quality Agreement of 2012. Pursuant to Annex Five: Discharges From Vessels, the Agreement requires measures to protect the quality of the Great Lakes, take into account International Maritime Organization standards and guidance issued under their auspices, use best-available science, and prohibit and make penalties for discharge from vessels that are harmful to the quality of the Great Lakes. Further, under Annex Six: Aquatic Invasive Species, the Agreement requires "a binational strategy to prevent the introduction of Aquatic Invasive Species (AIS) to control or reduce the spread of existing AIS, and to eradicate, where feasible, existing AIS within the Great Lakes Basin Ecosystem." Requiring all Lakers to install ballast water management systems would be most consistent with these international treaty obligations and would also promote binational regulatory consistency with Canada which requires ballast water treatment for ships stopping in Canadian ports.

Conclusion

Given that the agency is proposing to relax current requirements for ships constructed in 2009 or later, require no standards and no ballast water treatment system for existing Lakers, delete current requirements for best management practices, and propose that ballast water management systems be required for New Lakers built after the Coast Guard issues its regulations, we believe that the agency is sacrificing reasonable progress now in favor of an illusion that it will make progress in the future.

We believe that the agency's choice to do nothing is a missed opportunity to improve the environmental performance of the existing Laker fleet to address the harm of ballast water transfers of invasive aquatic species. This choice is not only contrary to VIDA's statutory mandate to establish a national performance standard for vessels transiting the Great Lakes and St. Lawrence River, but is also arbitrary and capricious.

EPA has provided no evidence or information or analysis to demonstrate why the costs to retrofit the existing Laker fleet is not economically achievable. And EPA has not provided sufficient information to justify deleting current best management practices other than a sweeping statement that such practices are unenforceable.

Overall, the proposed rule and the supplemental leave the Great Lakes in a situation where they are worse off than currently under the general permit. This is not tenable and we again encourage the agency to require that all vessels that are eligible be required to implement ballast water management so as to protect the resources of the Great Lakes and St. Lawrence River from the harmful introduction and spread of invasive aquatic species. We urge the EPA to accept our recommendations to establish a much stronger federal program than that originally proposed. Please do not hesitate to contact Marc Smith from National Wildlife Federation (msmith@nwf.org) or Don Jodrey from Alliance for the Great Lakes (djodrey@greatlakes.org) if you have any questions or need clarification of our position.

Sincerely,

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