



July 28, 2008

Via email (Maryjean.Fenske@state.mn.us)
and courier

Ms. Mary Jean Fenske
Industrial Division, SP-5
MINNESOTA POLLUTION
CONTROL AGENCY
520 Lafayette Road North
St. Paul, MN 55155-4194
U. S. A.

Dear Ms. Fenske:

**RE: MINNESOTA POLLUTION CONTROL AGENCY, INDUSTRIAL DIVISION,
DRAFT STATE DISPOSAL SYSTEM PERMIT MNG300000 BALLAST
WATER DISCHARGE GENERAL PERMIT (the "Draft SDS Permit")**

We refer you to the Draft SDS Permit on which public comment is being solicited by the MPCA until July 30, 2008.

We take this opportunity firstly to request that our earlier submissions to you of March 12 and April 30, 2008 (together the "Earlier Submissions" and individually, the "March 12 Submission" and the "April 30 Submission"), be included on the Record of comments on the Draft SDS Permit, and secondly to offer Fednav's comments on the particulars of the Draft SDS Permit.

General Comments

We would like to reiterate the position expressed in our Earlier Submissions that our, and we understand the MPCA's, strong preference remains for federal and not state regulation of ballast water discharges from ships trading in the waters of the United States. Given the release on June 16, 2008, by the United States Environmental Protection Agency of its proposed issuance of a NPDES Vessel General Permit (VGP) for Discharges Incidental for Normal Operation of Commercial and Large Recreational Vessels, we would have thought that the MPCA would have concluded that it was



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unnecessary to pursue its proposed SDS Permit. As the United States Court of Appeals for the Ninth Circuit's opinion of July 23, 2008, in *Northwest Environmental Advocates et al. v. US EPA et al.* has, pending any further appeal, removed any uncertainty, absent Congressional action, about the EPA's need to act by October 1, 2008, we respectfully submit that with the EPA's VGP entry into force and effect on October 1, 2008, the MPCA should suspend the need for its discharge permit or at least limit the scope of its SDS Permit to matters not covered in the EPA's VGP.

We question the need for vessels trading to Minnesota State waters to obtain both Minnesota and EPA discharge permits, when both, as concerns the discharge of ballast, appear to impose similar requirements on all ocean-going vessels (when entering the Seaway at Montreal in ballast or as NOBOBs) to adhere to existing and federally enforced U. S. Coast Guard, Transport Canada and St. Lawrence Seaway BWE regulations.

To quote from page 4, Executive Summary of the Great Lakes Ballast Water Working Group's 2007 *Summary of Great Lakes Ballast Water Management* dated May 2008:

"Today, ballast water management requirements in the Great Lakes St. Lawrence Seaway System are the most stringent in the world. There is currently no unmanaged ballast water entering the Great Lakes. Mandatory ballast water regulations that now include saltwater flushing, detailed documentation requirements, increased inspections, and civil penalties provide a tougher enforcement regime to protect the Great Lakes Seaway System. U. S. Coast Guard regulations, Transport Canada's Ballast Water Control and Management Regulations, and the new Seaway ballast water regulation, require all ships destined for Great Lakes ports from beyond the exclusive economic zone (EEZ) to exchange their ballast at sea. If the ships have not complied, they are required to retain the ballast water on board, pump the ballast water ashore, treat the ballast water in an environmentally sound manner, or return to sea to conduct a ballast water exchange."

We also reiterate the position expressed in our Earlier Submissions that if Minnesota proceeds with its Draft SDS Permit, it should actively encourage the other two Great Lakes states (Wisconsin and Ohio) that receive significant discharges of ballast water



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from ocean-going vessels to act (if, in fact, they deem it necessary to act) in a manner consistent with what Minnesota chooses to do; otherwise vessels face the possibility of being required to adhere to inconsistent state permit requirements putting in jeopardy their continued ability to trade in the Great Lakes. Only federally authorised discharge permits enforced by competent federal officials in Canada and the United States, as is now the case, eliminate any possibility of inconsistency among the Great Lakes states.

We refer you to The National Academies Transportation Research Board Special Report 291, headed *Great Lakes Shipping, Trade, and Aquatic Invasive Species*, released July 16, 2008, and, in particular, to the following paragraph on page 71:

"Many in the shipping industry have noted that a complicated patchwork of differing federal, state and provincial, and local ballast water management regulations could well reduce levels of compliance while increasing associated costs. They have emphasized the importance of coordinating efforts to prevent further ballast-mediated AIS introductions."

That said, we nevertheless offer the following comments on the Draft SDS Permit in the expectation that Minnesota, because of the April 21, 2008, decision of District Court Judge Kathleen Gearin or for other reasons, may well decide that it has no choice but to implement a state permit program to regulate the discharge of ballast water in Minnesota State waters.

While we may disagree on the appropriateness of individual states regulating ballast water discharges from vessels, especially ocean-going vessels engaged in international commerce, nobody can fault the process followed and efforts made by the MPCA, its Commissioners and staff, to better understand the complexities of regulating an essential element of a vessel's safe operation. We commend the MPCA for taking the time to witness first hand what is being done to prevent further unintended introductions of AIS, and we were encouraged by the Agency's willingness to listen to the challenges, and verification and approval procedures, facing those developing effective treatment technologies.

All references are to the Draft SDS Permit published on June 29, 2008, and to the Part and Section numbers therein contained.



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Page 1, Permit Required Submittals

Ballast Water Management Plans are, and are required to be, vessel specific. While such plans for each vessel within a class of vessels, as for example, our Oshima and Jiangnan class Seaway size bulk carriers, share much in common with the other vessels within the class, each vessel, nevertheless, maintains and keeps current (for U. S. Coast Guard and Transport Canada inspection) its own BWMP on board. These plans are analysed and approved by the vessel's Classification Society, Transport Canada and the U. S. Coast Guard and are constantly updated.

Recommendation: The BWMP would be made available for inspection on board SDS permitted vessels by MPCA employees or agents but should not, as a matter of course, have to be filed with the MPCA. As the U. S. Coast Guard is content to inspect the BWMP on board the vessel, we see no reason why the MPCA should not be similarly satisfied.

Part 1. Section 1 and Part 2. Section 4

Authorization. Extending the ambit of the Draft SDS Permit to vessels simply "transiting" Minnesota State waters without discharging ballast is, we respectfully submit, beyond the jurisdiction of the State of Minnesota and the intention and scope of the Draft SDS Permit. While it is unlikely that any vessel proceeding, for example, to load cargo in Thunder Bay, Ontario, Canada, would have to transit Minnesota State waters, if per chance it did so transit without discharging ballast in Minnesota State waters, it should not require a permit from Minnesota. Even Michigan's ill conceived ballast water law (Act. No. 33 Public Acts of 2005) only extends to vessels "...engaging in port operations..." in Michigan and not to vessels transiting Michigan State waters. By requiring such a permit, Minnesota likely violates existing treaty obligations between Canada and the United States and in particular the Boundary Waters Treaty of 1909.

Recommendation: The Draft SDS Permit should be limited to vessels discharging ballast water to Minnesota State waters of Lake Superior.



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Part 2. Section 10

Prohibited Discharges. Until deep sea ballast exchange is replaced as the best available technology to effectively treat ballast water, prohibiting a fully ballasted with sea water vessel from discharging its ballast in Minnesota State waters – however rare such an event may be – is unwarranted. To the best of our knowledge and belief no scientific evidence exists that any jeopardy to harbour aquatic ecosystems would result from such a discharge. If the MPCA has scientific evidence to the contrary, it is incumbent on the MPCA to establish that such a discharge would violate Minn. R. 7050.0211 and Minn. R. 7052.0210.

Recommendation: Delete this Section in its entirety until credible scientific evidence justifies such a prohibition.

Part 3. Section 11

Ballast Water and Sediment Management Plan. There should be no inconsistency between what is prescribed in the Draft SDS Permit and currently approved Ballast Water and Sediment Management Plans. As the IMO sets the standard for what is to be included in such Plans, we question why the MPCA deems it necessary to impose different requirements. Sub-division 2 (b) of Section 28 of S.F. 3056 allows for the Commissioner to "...approve a ballast water management plan for a foreign vessel on the basis of a certificate of compliance with the criteria described in paragraph (a)..." Paragraph (f) of Section 11 differs from the IMO standard which prescribes that the vessel must ensure compliance with national and local requirements (which change from time to time) by verifying those requirements with the appropriate local agents and authorities in advance of the vessel's arrival. Having Plans that meet IMO standards, are already approved by the U. S. Coast Guard and Transport Canada and include provision for compliance with local requirements, should satisfy the MPCA.

Recommendation: There should be no inconsistency between the MPCA's requirements and what currently governs the content and verification of Ballast Water and Sediment Management Plans.



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Part 3. Section 13

Ballast Water Treatment Plan. Any ballast water treatment system installed on a vessel in compliance with the IMO's *International Convention for the Control and Management of Ships' Ballast Water and Sediments* and approved by the U. S. Coast Guard (both of which prerequisites apply to all treatment systems on board vessels seeking to trade in the United States without first conducting deep sea ballast exchange), should not be subject to further "... review and approval" by the MPCA. Having adopted the IMO's Biological Performance Standards in Table A, the IMO certification and U. S. Coast Guard approval of the treatment system guarantees that the system meets the requirements of Table A. Advising the MPCA of the particular IMO certified and U. S. Coast Guard approved treatment system to be installed on a vessel at least 180 days prior to its installation should suffice for MPCA's purposes.

Recommendation: Delete the words "for review and approval" in line 2.

Part 3. Section 14

Freshwater Validation. Any ballast water treatment system that has received IMO certification and U. S. Coast Guard approval will only have done so having met the existing stringent IMO testing protocols and the testing protocols and treatment standards soon to be released by the U. S. Coast Guard. Requiring validation under the EPA Environmental Technology Verification Program protocols or at the Great Ships Initiative facility in Superior, Wisconsin, is, in our respectful opinion, inappropriate and unnecessary. If a ballast water treatment technology vendor wishes to avail itself of the GSI facility to test its system in purely fresh water conditions, that is its choice to make. The IMO's certification and U. S. Coast Guard approval of a particular ballast water treatment technology for installation on ocean-going vessels should not, uniquely for Minnesota's purposes, be made conditional on further testing.

Recommendation: Delete Part 3, Section 14 in its entirety.

Part 4. Section 17

Ballast Water Log Book. Throughout the Draft SDS Permit, are references to authorized employees or agents of the MPCA accessing vessels, their log books, etc. We draw your attention to the submission of the Consulate General of Canada to the



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MPCA dated May 5, 2008, and, in particular, to the following reference: "The state does not have the authority to board a vessel. The U. S. Coast Guard has the port control authority." We understand the Canadian Government's position to be that states have not been conferred any vessel control authority similar to the U. S. Coast Guard's Captain of the Port's authority.

Recommendation: The MPCA's access to vessels should be co-ordinated with the U. S. Coast Guard and it must be clarified that the MPCA's authority does not extend to delaying, impeding or otherwise interfering with a vessel's movement while in Minnesota State waters.

Part 4. Section 18 b.

Ballast Water Log Book. It is well understood and accepted that the Master is the owner's representative.

Recommendation: Clarify that the Master of the Vessel's signature suffices.

Part 4. Section 19

Ballast Water Log Book. Section 29 (b) of S. F. 3056 authorises the Commissioner of the Minnesota Pollution Control Agency "to prescribe alternative time periods for record retention for foreign vessels that are consistent with international practices." International practice requires the retention of records for two years, not the three years stipulated in the Draft SDS Permit.

Recommendation: All references in the Draft SDS Permit to retention of records for three years should be replaced by two years, at least for ocean-going vessels.

Part 4. Section 20

Reporting. All non-U.S. and non-Canadian Flag vessels entering the Seaway through the St. Lawrence Seaway's first lock at Montreal, Canada, are required to complete and have verified the *Pre-Entry Information from Foreign Flagged Vessels* form. In this respect, we refer you to our April 30 Submission for reference to the existing U. S. Coast Guard/Seaway/Transport Canada forms that are completed and verified. As most vessels that enter the Seaway do so as NOBOBs (and, therefore,

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are fully laden with cargo), these vessels would, prior to entering Minnesota State waters, normally discharge their cargo at ports in other states or Canadian provinces at which point the discharged cargo would be replaced by Great Lakes ballast.

Recommendation: The existing reports that are prepared and verified on each ocean-going vessel's entry into the Seaway at Montreal will be available for viewing by MPCA employees or agents. Furthermore, each ballasting operation subsequent to entry into the Seaway (indeed every operation) is recorded in the vessel's log book, which will also be available for viewing by MPCA employees or agents. If experience determines that log book entries, because of their technical nature, are not easy to comprehend by MPCA employees or agents, then transferring the information in those entries to forms similar to those prepared and verified on entry into the Seaway will be undertaken.

Part 4. Section 21.

Recommendation: This section, in our respectful opinion, is premature and should be held in abeyance pending the development, certification and approval of ballast water treatment systems and the vessel's Classification Society's yearly verification of the continued proper functioning of such treatment systems. The need for the report contemplated by this Section may be simply addressed by the vessel having all requisite Class certificates on board, for viewing by MPCA employees or agents, verifying the proper functioning of those systems.

PART 5. Note 1

Surface Discharge Limitations and Monitoring Requirements. We acknowledge the MPCA's interest in taking samples from any vessel discharging ballast water into Minnesota State waters to Lake Superior. As previously noted, we will instruct the Masters of our owned vessels to allow MPCA employees or agents to take such samples on the understanding that the costs associated with taking and analysing samples are entirely for the account of the state.

PART 7. Section 55

General Requirement. Confidential Information. Confidential information currently filed with the two Seaway corporations, Transport Canada, and the U. S. Coast Guard





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and proposed to be filed with the MPCA should benefit from like protection at law against disclosure.

Recommendation: All information provided to the MPCA under the Draft SDS Permit should enjoy at least the same level of protection against public disclosure as currently accorded by the Seaway corporations, the U. S. Coast Guard and Transport Canada.

Respectfully submitted,

FEDNAV LIMITED



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Senior Vice-President
and General Counsel

/ot
Encls.

cc: Mr. R. B. Roche, Assistant Attorney General, State of Minnesota
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