



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
WATER

Mr. Paul Eger
Assistant Commissioner
Water Policy
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-4194

Dear Mr. Eger:

I am writing in follow-up to staff level discussions regarding a general permit the Minnesota Pollution Control Agency (MPCA) is developing to address ballast water discharges from vessels operating in the Minnesota waters of Lake Superior. Pursuant to section 510 of the Clean Water Act (CWA), the states, including Minnesota, are free to issue state permits under state law. On Friday, April 11, 2008, a draft ballast water general permit labeled as a "National Pollutant Discharge Elimination System/State Disposal System" permit was posted on the MPCA website for public comment. Currently, the MPCA is not authorized to issue National Pollutant Discharge Elimination System (NPDES) permits for discharges incidental to the normal operation of a vessel, which include ballast water discharges.

As you know, the Environmental Protection Agency (EPA) is currently developing an NPDES permitting framework under the CWA for vessels. This action is in response to a U.S. District Court's vacatur of a 35 year old EPA regulation (40 C.F.R. 122.3(a)) that excludes certain discharges incidental to the normal operation of a vessel from NPDES permitting requirements. *Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI. The court's order in that case, which has national implications, will, unless reversed or modified on appeal to the 9th Circuit Court of Appeals, vacate the exclusion as of September 30, 2008. Upon such vacatur, vessels with discharges that had been excluded from the NPDES program by EPA's regulation would be required to be covered by an NPDES permit by that date or be in violation of the prohibition in CWA § 301 against discharges without a CWA permit. The goal of our NPDES permitting activity is to make environmentally sound NPDES permit coverage available nationwide upon the date of vacatur (should it become effective).

Staff from our offices have been discussing how the MPCA permitting effort relates to EPA's activity to develop an NPDES permitting framework for vessels. EPA is in the process of developing general permits intended to cover discharges incidental to the normal operation of a vessel in waters of the US in all states and territories, regardless of whether a state has otherwise been authorized to implement the NPDES program within its jurisdiction. While pursuant to

CWA section 402(c) EPA typically is required to suspend permit issuance in authorized states, EPA may issue NPDES permits in authorized states for discharges incidental to the normal operation of a vessel, because section 402(c)(1) of the Clean Water Act prohibits EPA from issuing permits in authorized states only for "those discharges subject to [the state's authorized] program." Discharges excluded under 40 CFR 122.3 are not "subject to" authorized state programs. The vessel discharges to be covered by EPA's general permits are discharges excluded from NPDES permitting programs under 40 CFR 122.3. Therefore, the discharges at issue are not considered a part of any currently authorized state NPDES program. See 40 CFR 123.1(i)(2) (where state programs have a greater scope of coverage than "required" under the federal program, that additional coverage is not part of the authorized program) and 40 CFR 123.1(g)(1) (authorized state programs are not required to prohibit point source discharges exempted under 40 C.F.R.122.3).

Because the regulatory exclusion in 40 CFR 122.3(a) has been on the books for 35 years, no State, including Minnesota, has been authorized to issue NPDES permits for the vessel discharges subject to the 40 CFR 122.3(a) exclusion. As a result, until Minnesota (or any other state that would like to acquire permitting authority for such discharges) undertakes the necessary steps to obtain program approval for NPDES permitting of discharges incidental to the normal operation of vessels, the authority to issue NPDES permits for such discharges remains with EPA.¹

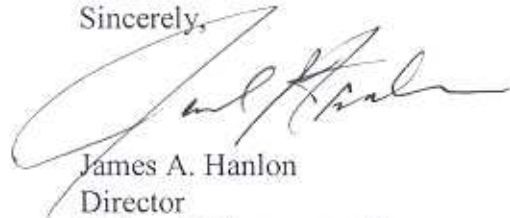
This conclusion only affects the State's ability to issue an NPDES permit for these discharges, and the State remains free to issue other permits under state laws preserved by CWA section 510. Accordingly, Minnesota may issue such state permits as it sees fit under state law. I also wish to emphasize that because NPDES permits for discharges incidental to the normal operation of vessels would be issued by EPA, they would be subject to certification by the State under CWA section 401 with respect to their compliance with State water quality standards and other more stringent requirements of State law.

NPDES states may regulate these discharges under their NPDES program through a revision to their NPDES program. The federal NPDES regulations at 40 C.F.R. 123.62 outline the process for revising a state's NPDES program, which includes the State's submission of a modified program description, Attorney General's statement, Memorandum of Agreement, and any other documents that EPA may need under the circumstances. If the revision is substantial, then public notice and an opportunity to comment are required. The program revision would become effective upon approval by EPA. It appears that MPCA is already taking steps that would contribute to any effort to revise its NPDES program, including a potential revision of the State's regulations to remove its current exclusion for vessel discharges. We would be pleased to work with MPCA on the development of any program revisions, and suggest that you contact Peter Swenson in EPA Region 5 at (312) 886-0236 for further discussion.

¹ During the course of drafting this letter notifying you of EPA's view that Minnesota will not be authorized to issue NPDES permits for the discharges at issue until MPCA obtains approval by EPA, EPA became aware of the order issued to MPCA by the Second Judicial District Court of the State of Minnesota (No. 62-CV-07-2224) requiring MPCA to issue NPDES permits. The order does not affect EPA's opinion put forth in this letter regarding the State's lack of authority to issue NPDES permits.

I hope that this letter clarifies the status of NPDES program requirements with respect to discharges incidental to the normal operation of a vessel. We look forward to working with you on these matters. Should you have any questions, please feel free to call me, or your staff may contact Deborah Nagle at (202) 564-1185.

Sincerely,

A handwritten signature in black ink, appearing to read 'James A. Hanlon', written over the printed name.

James A. Hanlon
Director
Office of Wastewater Management

cc: Jeff Stollenwerk
Peter Swenson