

U.S. Department of  
Homeland Security

United States  
Coast Guard



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17 Nov 17

Amy Jankowiak  
Department of Ecology  
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Bellevue, WA 98008-5452

Dear Ms. Jankowiak:

The Coast Guard appreciates the opportunity to comment on the Washington State Department of Ecology's new proposed rule, Chapter 173-228 WAC – Vessel Sewage No Discharge Zones (NDZ). The Coast Guard supports the protection of Puget Sound from sewage discharges and strives to continue its stewardship of the marine environment in partnership with the state.

I sincerely appreciate the state's consideration of Coast Guard emergency, safety, security, and related contingency operations in the proposed regulation. Not all Coast Guard vessels will have the ability to comply with the proposed requirements during extended search and rescue, and safety, security, and environmental missions without endangering the health, safety, or welfare of the public, the crew, or other personnel aboard. As such, the Coast Guard strongly recommends an exemption be given for public vessels and vessels of the Armed Forces, defined in accordance with the Clean Water Act (CWA) Section 312 (a)(14), which are carrying out missions vital to national security and safety. Additionally, as we specifically noted in our comment to the EPA in December 2016, we commented that more flexibility for exemptions are available under 33 U.S.C. §1322 (f)(4).

The text of the proposed regulation presents four additional areas of concern: (1) the geographic scope of the regulation, (2) the requirements for all vessels to be refitted with a specific type of marine sanitation device, (3) references to certain federal regulations are overbroad, and (4) the delayed and potentially inconsistent enforcement scheme.

First, the geographic scope of the proposed regulation appears broader than the definition of "territorial seas" under 33 U.S.C. § 1362. This could present challenges in consistent enforcement of violations. The NDZ in the chart depicted in the proposed regulation covers areas that extend beyond the waters over which the state has jurisdiction.<sup>1</sup> We note that courts

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<sup>1</sup> 33 U.S.C. § 1322(f)(3) provides that "...if any State determines that the protection and enhancement of the quality of some or all of the *waters within such State* require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such water... (emphasis added)." If Congress had wanted to extend the states' ability to create No Discharge Zones over the contiguous zone, it would have expressly extended that authority in the statute.

have held that insofar as the Clean Water Act delegates certain authorities to the states for the purpose of pollution control, that authority extends only to the waters within such states' jurisdiction.<sup>2</sup> That jurisdiction, according to the Court in *Costle*, extends only to the "territorial seas," which, for the purposes of the Clean Water Act, is defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." Here, it appears that the proposed No Discharge Zone extends beyond three nautical miles in multiple areas.

Second, the proposed regulation in WAC 173-228-040(1) violates the plain language of the Clean Water Act. The proposed regulation requires vessels that currently have a Type I or Type II Marine Sanitation Device (MSD) to install a Type III MSD.<sup>3</sup> Section 312(f)(1) of the Clean Water Act expressly preempts state regulation of the installation of MSDs, other than more stringent statutes or regulations for houseboats, by indicating that "no State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or *installation* or use of any marine sanitation device on any vessel subject to the provisions of this section (emphasis added)." The state's proposed requirement for vessels currently using approved Type I and Type II MSDs to retrofit or install a Type III MSD is a regulation regarding the installation of a MSD in contravention of the statute. While the state may prohibit discharges from Type I and II MSDs in a no discharge zone, the statute is clear that the state may not regulate in the realm of construction and installation of MSDs.

Third, the Coast Guard recommends that WAC 173-228-040(2) be amended to specify that "vessels with marine sanitation devices must secure the devices to prohibit the discharge of sewage per 33 C.F.R. § 159.7(b)" instead of "33 C.F.R. § 159.7," which includes provisions not applicable to this NDZ. Specifically, 33 C.F.R. §159.7(a) generally requires vessels that have installed toilet facilities to have certified Type I, II, or III devices, which contradicts the requirements of WAC 173-228-040(1). Furthermore, 33 C.F.R. §159.7(c) refers to vessels operating on a body of water where the discharge of untreated sewage is prohibited by the Environmental Protection Agency under 40 C.F.R. § 140.3. As such, 33 C.F.R. §159.7(c) only applies to vessels on "freshwater lakes, freshwater reservoirs or other freshwater impoundments whose inlets or outlets are such as to prevent the ingress or egress by vessel traffic subject to this regulation, or in rivers not capable of navigation by interstate vessel traffic."<sup>4</sup> Only 33 C.F.R. §159.7(b) specifically refers to vessels operating on a body of water where discharges are prohibited pursuant to CWA section 312(f)(3), and the Coast Guard recommends referencing this specific cite in the proposed rule.

<sup>2</sup> See *Pac. Legal Found. v. Costle*, 586 F.2d 650, 655-56 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980).

<sup>3</sup> See 173-228-040 (1), *see also* Department of Ecology Preliminary Regulatory Analysis, *Chapter 173-228 WAC Vessel Sewage No Discharge Zones*, 6, Publication no. 17-10-028, October 2017 (providing vessels with installed toilets that do not currently have a Type III MSDs - even if they have Type I or Type II treatment MSDs - would need to install Type III storage for sewage.).

<sup>4</sup> 40 C.F.R. § 140.3(a)(1)



Finally, the state of Washington's plan to provide a five-year delayed implementation for certain vessel types presents enforcement issues as both 33 U.S.C. 1322(f)(3) and 40 C.F.R. § 140.4 appear to prohibit the discharge from all vessels within an NDZ. I am concerned that the proposed rule penalty provision lacks specificity for violations. Additionally, the state agencies may have a different approach to enforcement and penalty provisions than the Coast Guard. We request that the state of Washington work with the Coast Guard to harmonize enforcement issues.

Sincerely,



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