

ENCLOSURE 3

San Francisco Bay Conservation and Development Commission Consistency Determination on the Vessel General Permit



Making San Francisco Bay Better

December 12, 2008

United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

ATTENTION: Douglas E. Eberhardt, Chief, NPDES Permit Office

SUBJECT: Consistency Determination No. CN 7-08

Dear Mr. Eberhardt:

On September 2, 2008, the United States Environmental Protection Agency (EPA) submitted a proposed National Pollution Discharge Elimination System (NPDES) Vessel General Permit (VGP) and requested that the Commission concur that the proposed permit is consistent with its Amended Coastal Zone Management Program for San Francisco Bay. The Commission concurs with the determination of the EPA that the Vessel General Permit to regulate discharges incidental to the normal operation of commercial vessels 79 feet or greater in length, except non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels in San Francisco Bay is consistent with the Commission's Amended Management Program for San Francisco Bay, if the permit is modified to be consistent with certain conditions contained in the attached determination. BCDC retains the right to reopen, revise or revoke this consistency determination if the terms and conditions of the Final VGP are modified substantially.

The Commission's conditional consistency determination is attached. If you should have any questions regarding the attached Agreement or need any further assistance, please contact Tim Eichenberg of my staff at 415/352-3655 or time@bcdc.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "WILL TRAVIS", written over a white rectangular area.

WILL TRAVIS
Executive Director

WT/TE/ra

Enc.



Making San Francisco Bay Better

**AGREEMENT WITH CONDITIONS FOR CONSISTENCY
DETERMINATION NO. CN 7-08**

December 12, 2008

United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

ATTENTION: Douglas E. Eberhardt, Chief, NPDES Permit Office

Dear Mr. Eberhardt:

I. Agreement

A. The San Francisco Bay Conservation and Development Commission agrees with the determination of the United States Environmental Protection Agency (EPA) that the following project is consistent with the Commission's Amended Coastal Zone Management Program for San Francisco Bay:

- Location:** In the Bay, at various locations in the nine Bay Area Counties
- Description:** Issuance of an EPA Vessel General Permit (VGP) under the National Pollution Discharge Elimination System (NPDES) permit program pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. §1342, to regulate discharges incidental to the normal operation of commercial vessels 79 feet or greater in length, except non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels (73 Fed. Reg. 34296-34304, July 17, 2008).

B. This agreement is given based on the information submitted by the U.S. EPA in its letter dated September 2, 2008 on the proposed VGP, subject to conditions contained herein that must be incorporated into the final VGP for the permit to be consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program for San Francisco Bay, and State water quality laws. BCDC retains the right to reopen, revise or revoke this consistency determination if the terms and conditions of the final VGP are modified substantially.

II. Findings and Conditions

A. **Legal Authority and Project Background.** On September 2, 2008, BCDC Executive Director Will Travis received a determination from the U.S. EPA Region IX that its proposed Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels, issued under the National Pollution Discharge Elimination System permit program is consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program (CZMP) under section 307(c)(1) of the Coastal Zone Management Act (CZMA). EPA requested BCDC to review and, if necessary, issue conditions to concur with EPA's consistency determination. The Commission, pursuant to the CZMA is required to review federal projects within San Francisco Bay, and agree or disagree with the federal agency's determination that the project is consistent with the Commission's Amended CZMP for San Francisco Bay. This letter constitutes such review and comment.

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Generally, the VGP increases protection of coastal waters by subjecting certain vessel discharges (28 in all), currently not subject to regulation under the NPDES permit program, to enforceable permit limits. However, discharges from certain vessels under the VGP would be inconsistent with California laws regulating ballast water, graywater and other discharges. Therefore the Executive Director is concurring with EPA's consistency determination administratively subject to the condition that the final VGP is modified to be consistent with the State's CZMP and State law water quality laws.

The VGP is issued pursuant to EPA's NPDES permit program under section 402 of the Clean Water Act, 33 USC § 1342. The VGP is a federal activity that is subject to the Commission's federal consistency authority under CZMA section 307(c)(1). The CZMA requires consistency determinations from state coastal management agencies for federal agency activities that are national or regional in scope under 15 CFR §§ 930.31(d) and 930.36(e). The CZMA authorizes BCDC to review EPA's VGP to determine if it is consistent with the enforceable policies of California's Coastal Zone Management Program to the maximum extent practicable, and issue conditions if necessary. The EPA must incorporate any conditions issued by BCDC into the general permit. The enforceable policies of California's CZMP include the standards and policies of the McAteer-Petris Act, the San Francisco Bay Plan and BCDC regulations.

Section 301(a) of the CWA prohibits the discharge of pollutants into the waters of the United States, including the 3-mile territorial sea, without a NPDES permit. Discharges incidental to the normal operation of vessels were excluded from the NPDES permitting program by regulations issued by the EPA in 1973 under 40 CFR §122.3(a). This regulatory exclusion was struck down by a U.S. District Court in 2005 (*Northwest Environmental Advocates, et al. v. EPA*, 2005 WL 756614 (N.D. Cal)), and the decision was affirmed on appeal by the 9th Circuit in 2008. The Court gave EPA until September 30, 2008 to vacate the regulatory exclusion. The date was subsequently extended to December 19, 2008. The court found that EPA regulations excluding discharges incidental to the normal operation of a vessel from the NPDES permit program violated the CWA requirement for NPDES permits for the "discharge of any pollutant into navigable waters from any point source," including "a vessel or other floating craft" under 33 USC §§ 1362(12)(A) and 1362(14). The EPA must issue a permit by December 19, 2008 for 28 types/ categories of discharges incidental to the normal operation of vessels or those vessels will be in violation of the CWA. Any conditions issued by BCDC must be incorporated into the VGP by the EPA before December 19, 2008, because of the court-imposed deadline.

In July 2008, the Clean Boating Act of 2008 was signed into law (P.L. No 110-288) exempting recreational vessels from NPDES permit requirements; instead it authorized the Coast Guard to issue regulations implementing EPA best management practices for recreational vessels. Congress also imposed a 2-year moratorium on NPDES permits for vessels of less than 79 feet and non-ballast water discharges from commercial fishing vessels (P.L. No. 110-299). Therefore, recreational vessels, non-ballast water discharges from fishing vessels, and vessels less than 79 feet in length are excluded from the proposed VGP at this time.

EPA has determined that the issuance of the VGP is consistent to the maximum extent practicable with the enforceable policies of California's approved CZMP for a number of reasons. Vessel discharges under the VGP are currently not subject to NPDES permit requirements. Therefore, EPA states that, "upon final issuance, the permit will provide increased protection to coastal waters by imposing enforceable NPDES permit limits on those discharges. In addition, the permit establishes technology-based effluent limitations based upon CWA section 304(b)(2), ensures that vessel discharges will be in compliance with applicable

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State water quality standards under section 303, and establishes requirements for ... monitoring and inspections. In addition, ... under CWA section 401 ... the State of California has been asked to certify that the permit will comply with State water quality standards and other appropriate requirements of State law, and the final permit, when issued, will incorporate applicable requirements or conditions required by that certification."

The VGP would incorporate the Coast Guard mandatory ballast water management and exchange standards and add some additional requirements for ballast water management. It would provide technology-based effluent limits, mostly in the form of Best Management Practices (BMPs), for 28 types of discharges including ballast water, deck runoff, bilgewater, hull leachate, underwater husbandry, and cathodic protection. The effluent limits are intended to control a variety of materials discharged incidental to the normal operation of vessels classified into 7 major groups: Aquatic Nuisance Species (ANS or invasive species), conventional pollutants (BOD, oil and grease, pH, TSS), metals, nutrients (nitrogen and phosphorus), pathogens (E. Coli and fecal coliform), and other toxic and non-conventional pollutants with toxic effects (including phthalates, phenol, tetrachloroethylene, chlorine residuals, and chlorides). The permit also establishes additional technology-based requirements for certain discharges from 8 specific classes of vessels, including cruise ships, research vessels, and large ferries, and water quality-based effluent limits for impaired waters. Certain discharge types would be limited or prohibited in nearshore waters and waters protected for conservation purposes such as national marine sanctuaries and national parks. The VGP would also establish specific corrective actions, inspections and monitoring requirements as well as recordkeeping and reporting requirements. The VGP would require a submission of a Notice of Intent (NOI) for vessels greater or equal to 300 gross tons or with a ballast water capacity of at least 8 cubic meters. EPA estimates that this requirement would affect 44,363 domestic and 7,834 foreign flagged vessels. All other vessels covered by the VGP would not have to submit an NOI. In all, the EPA estimates that approximately 91,000 U.S. flagged vessels and 7,000 foreign flagged vessels may be eligible for coverage under this permit. Discharges not authorized under the VGP include discharges from vessels not operating as a means of transportation (such as seafood processing facilities, casinos, or oil and gas exploration facilities), sewage discharges, used or spent oil, garbage or trash, photo processing wastes, effluent from dry cleaning operations, medical wastes, and discharges of noxious liquid substance residues. As noted earlier, the VGP does not apply to commercial vessels less than 79 feet, non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels.

The VGP comes before BCDC under its federal consistency authority pursuant to section 307(c)(1) of the CZMA. Section 307(c)(1) requires "each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." The VGP affects the land and water uses and natural resources of the Bay, primarily the Bay's wildlife and water quality, and therefore must be reviewed under the Commission's federal consistency authority.

California's CZMP for San Francisco Bay addresses water quality under section 66605(d) of the McAteer-Petris Act. Section 66605(d) requires that activities in the Bay "must minimize harmful effects," including "the reduction or impairment of the volume surface area or circulation of water, water quality, fertility of marshes or fish or wildlife resources, or other conditions impacting the environment." The Bay Plan requires that "Bay water pollution should be prevented to the greatest extent feasible," and that "water quality in all parts of the Bay should be maintained at a level that will support and promote the beneficial uses of the Bay as

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identified in the San Francisco Bay Regional Water Quality Control Board's Water Quality Control Plan, San Francisco Bay Basin, and should be protected from all harmful or potentially harmful pollutants." The Bay Plan calls upon BCDC to utilize the policies, recommendations, decisions, advice and authority of the State Water Resources Control Board as the basis for carrying out the Commission's water quality responsibilities. In addition, section 307(f) of the CZMA provides that the State's water quality requirements under the CWA "shall be incorporated in any program developed pursuant to this title [CZMA] and shall be the water pollution control ... requirements applicable to such program."

BCDC has consulted with the State Water Resources Control Board regarding the VGP and compliance with state water quality requirements. The State Board has not yet issued a Water Quality Certification that the VGP meets state water quality standards under section 401 of the CWA. While the VGP generally increases the protection of Bay water quality and resources by imposing NPDES requirements on discharges that were not previously subject to regulation, it also allows some discharges to exceed state requirements that could harm Bay water quality and resources. Therefore, the Commission is issuing this consistency determination with conditions to ensure compliance with CZMP water quality policies and state water quality requirements.

B. Conditions for Consistency Concurrence. BCDC has reviewed the proposed VGP and determined that the following conditions minimize harmful effects, prevent pollution to the greatest extent feasible, reduce the impairment of water quality and other resources of the Bay, promote beneficial uses of the Bay, protect the Bay from harmful pollutants, and are consistent with State and regional Water Board policies and requirements under the CWA. Therefore, the Commission finds that with the following conditions, the proposed VGP is consistent with the enforceable policies of the San Francisco Bay segment of the California Coastal Zone Management Program to the maximum extent practicable.

- 1. Treated Bilgewater and Hazardous Wastes:** The VGP prohibits vessels greater than 400 gross tons from discharging untreated bilgewater in all waters. However, treated bilgewater containing up to 15 ppm of oil may be discharged within 1 mile of shore in the Bay if necessary to maintain the safety and stability of the ship. Treated bilgewater also may be discharged more than 1 mile from shore so long as the vessel is underway and sailing at least 6 knots. The VGP therefore allows vessels greater than 400 gross tons to discharge treated bilgewater while underway in certain areas in the South, Central and North Bay, and the Suisun Bay that are more than 1 mile from shore. The oil discharged in treated bilgewater could adversely affect these and other areas of the Bay contrary to Public Resources Code § 72400, which prohibits the discharge of oily bilgewater, hazardous waste, other waste, and sewage sludge from oceangoing ships of 300 gross tons or more within the marine waters of the State, including coastal waters.

Condition: To comply with State law and the policies of the California CZMP, the VGP should be modified to prohibit the discharge of treated bilgewater and hazardous wastes as defined in Public Resources Code §72410(e) and (l) from large vessels of 300 gross tons or more within San Francisco Bay except in emergencies or to maintain the safety and stability of the ship.

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2. **Ballast Water:** The VGP would allow large commercial vessels in the Bay to discharge ballast water in the Bay subject to certain limitations, including at-sea ballast water exchange. Ballast water is a major vector for the introduction of Aquatic Nuisance Species (ANS or invasive species) in San Francisco Bay. It is estimated that 1 new ANS is introduced into the Bay every 14 weeks causing severe environmental and economic harm. According to the State Lands Commission, ballast water exchange should be considered only an interim ballast water management tool because of inefficiencies, ineffectiveness and operational limitations. For this reason, California enacted the Coastal Ecosystems Protection Act of 2006 with stringent performance standards to remove invasive species from ballast water. The Act, under Public Resources Code §71205.3, establishes a schedule that requires all ballast water discharges in State waters to have zero detectable levels of all organism size classes by the year 2020.

Condition: To comply with State law and the water quality policies of the California CZMP, the schedule for implementing State ballast water performance standards contained in the Coastal Ecosystem Protection Act under Public Resources Code § 71205.3 should be incorporated into the VGP for San Francisco Bay.

3. **Graywater:** The VGP would require all vessels to "minimize" graywater discharges while in port in the Bay. Vessels larger than 400 gross tons may discharge graywater more than 1 mile from shore while underway. Graywater from cruise ships are required to meet certain effluent standards within 1 mile of shore, and cruise ships may discharge untreated graywater beyond 1 mile while underway and sailing at least 6 knots. The VGP therefore allows the discharge of graywater, and graywater mixed with sewage, within ports and certain areas in the South, Central and North Bay, and the Suisun Bay that are more than 1 mile from shore. Graywater may contain pollutants that adversely impact Bay resources and water quality contrary to the policies of the California CZMP and the Coastal Ecosystems Protection Act of 2006. Pursuant to Public Resources Code § 72423, the Act requires oceangoing ships with sufficient holding tank capacity and capability for transfer to either hold on board or transfer sewage and graywater to a pumpout facility if available, and prohibits the discharge of sewage or graywater within the marine waters of the State. It also requires such discharges to be reported to the State Office of Emergency Services under Public Resources Code § 72421.

Condition: To comply with State law and the California CZMP, the VGP should be modified to prohibit the discharge of graywater in San Francisco Bay from all oceangoing ships as defined in Public Resources Code § 72410(j) that have sufficient holding tank capacity and capability for transfer to either hold on board or transfer graywater to a pumpout facility, and to require such discharges to be reported to the State Office of Emergency Services.

C. Listing with the Commission. Pursuant to Regulation Section 10620, the VGP was listed with the Commission on November 21, 2008.

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Executed in San Francisco, California, on behalf of the San Francisco Bay Conservation and
Development Commission on the date first above written.



WILL TRAVIS

Executive Director

San Francisco Bay Conservation and
Development Commission

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cc: San Francisco Bay Regional Water Quality Control Board,
Attn: Certification Section
Environmental Protection Agency, Attn: Eugene Bromley