

The Vessel Incidental Discharge Act

On Tuesday, December 4, 2018, the President signed into law S. 140, the “Frank LoBiondo Coast Guard Authorization Act of 2018,” which, among other things, makes changes to the law relating to the regulation of vessel incidental discharge and ballast water. These changes are set out in Title IX of the Act, which is entitled the “Vessel Incidental Discharge Act of 2018” (the Act). The important features of the Act are summarized below, and discussed in more depth in Appendices A and B.

The Structure of VIDA

VIDA (Title IX of the Frank LoBiondo Coast Guard Authorization Act of 2018) is structured as follows:

Section 901, entitled “Short Title,” merely states that Title IX may be cited as the “Vessel Incidental Discharge Act of 2018.”

Section 902, entitled “Purposes; Findings,” sets out the purposes of Title IX, as well as Congressional findings that motivated the changes.

The rest of the Act, extending from pages 133 to 173 of S.140, is set out in section 903, entitled “Standards for Discharges Incidental to Normal Operation of Vessels.” Section 903 is subdivided as follows:

- (a) Uniform National Standards
- (b) Regulations for Use of Marine Pollution Control Devices
- (c) Enforcement Authority
- (d) Logbook Requirements
- (e) Quagga Mussel
- (f) Coastal Aquatic Invasive Species Mitigation Grant Program and Mitigation Fund
- (g) Great Lakes and Lake Champlain Invasive Species Program
- (h) Technical and Conforming Amendments

VIDA’s substantive provisions

The substantive provisions of VIDA are set out in section 903, Standards for Discharges Incidental to the Normal Operation of Vessels. Those substantive provisions are as set out below.

903(a) – Uniform National Standards for Discharges Incidental to the Normal Operation of Vessels

Section 903(a)(1) amends section 312 of the Federal Water Pollution Control Act (33 U.S.C. 1322) to add a new subsection (p), entitled “Uniform National Standards for Discharges Incidental to Normal Operation of Vessels. That new subsection (p)¹:

(1) Requires the EPA, within 2 years, to promulgate Federal standards of performance for marine pollution control devices for each type of discharge incidental to the normal operation of a vessel that is subject to regulation (those discharges are set out in 2(A) and (B) of new subsection (p)). The performance standards must be reviewed at a minimum every five years.

(2) Requires the Coast Guard to issue regulations within 2 years of the EPA’s promulgation of uniform federal standards for the enforcement of those standards.

(3) Provides that the EPA Vessel General Permit, plus Coast Guard regulations promulgated pursuant to section 1101 of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4711), including the regulations contained in subparts C and D of part 151 of title 33, Code of Federal Regulations, and subpart 162.060 of part 162 of title 46, Code of Federal Regulations, shall remain in force and effect until the Coast Guard issues its final regulations for the enforcement of the EPA standards. Once those regulations are final, effective, and enforceable, the VGP and the Coast Guard discharge regulations will be repealed.

(4) Permits the EPA to require, by order, the use of emergency best management practices for any region or category of vessels when necessary to reduce the reasonably foreseeable risk of introduction or establishment of an aquatic nuisance species, or to mitigate the adverse effects of a discharge that contributes to a violation of applicable water quality standards.

(5) Establishes special rules relating to the discharge of ballast water. Those include:²

(a) Describing the ballast water exchange or saltwater flush requirement for certain vessels with empty ballast tanks bound for a port or place of destination subject to the jurisdiction of the United States (requirements and exclusions are spelled out in the new 33 U.S.C. 1322(p)(6)(B)).

(b) Establishing what constitutes “compliance with a standard of performance for a marine pollution control device that is a ballast water management system.”

(c) Requiring the Coast Guard to evaluate the possibility of type-approving ballast water management systems that merely render target organisms nonviable, instead of killing them.

(d) Requiring the Coast Guard to establish a framework for Federal and intergovernmental response to aquatic nuisance species risks from discharges from vessels subject to ballast water and incidental discharge compliance requirements, including the introduction, spread, and establishment of aquatic nuisance species populations.

¹ For a detailed analysis of the new 33 U.S.C. s1322 subsection (p) relating generally to the incidental discharge of waste through the normal operation of vessels, please see Appendix A.

² For a detailed analysis of the new 33 U.S.C. s1322 subsection (p) particular to the discharge of ballast water, please see Appendix B.

(6) Makes it unlawful to violate the VGP and existing Coast Guard rules while they remain in effect; to discharge any discharge incidental to the normal operation of the vessel into waters of the United States or waters of the contiguous zone in violation of the Coast Guard regulations implementing the EPA's uniform federal standards to be developed; and, subject to exceptions, to operate in waters of the United States or waters of the contiguous zone if the vessel is not equipped with a required marine pollution control device that complies with the requirements established under subsection (p). Each day of a continuing violation constitutes a separate offense, a vessel operated in violation of these standards is liable in rem for any civil penalty assessed for the violation, and vessel clearance may be withheld or revoked for any violations.

(7) Repeals the sVGP effective immediately, thus exempting discharges incidental to the normal operation, except for ballast water, from small vessels (i.e., less than 79 feet in length) and commercial fishing vessels of all sizes from National Pollutant Discharge Elimination System (NPDES) permit coverage under the Clean Water Act.

(8) Specifies minimum additional incidental discharge requirements for the Great Lakes and Pacific Region (as that term is defined in the Act).

(9) Permits states, subject to some limitations, to create no-discharge zones in areas where discharges would otherwise be permitted under the to-be-created EPA standards.

903(d) - Logbook requirement for certain U.S. vessels

46 USC 11301(a) requires vessels of the United States, unless on a voyage from a port in the United States to a port in Canada, to carry an official logbook if the vessel is—

(1) on a voyage from a port in the United States to a foreign port; or

(2) of at least 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title and is on a voyage between a port of the United States on the Atlantic Ocean and on the Pacific Ocean.

Section 903(d) of the Act amends 46 USC 11301(b) to require the following additional mandatory entry in official logbooks:

(13) when a vessel fails to carry out ballast water management requirements as applicable and pursuant to regulations promulgated by the Secretary, including when the vessel fails to carry out ballast water management requirements due to an allowed safety exemption, a statement regarding the failure to comply and the circumstances under which the failure occurred, made immediately after the failure, when practicable to do so.³

903(e) - Addition of species to prohibited importation or shipment list

Section 903(e) of the Act adds “quagga mussel of the species *Dreissena rostriformis* or *Dreissena bugensis*” to the list of species whose importation into or shipment between the United States, any

³ Compliance with this logging requirement may excuse, or at least ameliorate, a violation for operating in waters of the United States or waters of the contiguous zone without a required and compliant marine pollution control device, as discussed in (6) under the 903(a) analysis, *supra*.

territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, is prohibited by 18 U.S. C. 42(a)(1). Any member of a listed species, or the eggs or offspring therefrom, are required to be promptly exported or destroyed at the expense of the importer or consignee. In addition, anyone violating this law is liable to be fined as provided in Title 18, U.S. Code, or imprisoned not more than six months, or both. 18 U.S.C. 42(b).

903(f) - Establishment of Coastal Aquatic Invasive Species Mitigation Grant Program

Section 903(f) directs the Secretary of the Department of Commerce, together with the National Fish and Wildlife Foundation established by section 2(a) of the National Fish and Wildlife Foundation Establishment Act (16 U.S.C. 3701(a)), to establish a program to be known as the “Coastal Aquatic Invasive Species Mitigation Grant Program”, under which the Secretary and the Foundation shall award grants to eligible entities in accordance with the provisions in section 903(f)(2) of the Act.

903(f)(3) – Establishment of Coastal Aquatic Invasive Species Mitigation Fund

Section 903(f)(3) establishes in the Treasury of the United States a trust fund, to be known as the “Coastal Aquatic Invasive Species Mitigation Fund”, consisting of such amounts as are appropriated or credited to the Fund in accordance with this paragraph or section 9602 of the Internal Revenue Code of 1986.

903(g) - Establishment of Great Lakes and Lake Champlain Invasive Species Program

Section 903(g) of the Act requires the EPA Administrator to establish within the Great Lakes National Program Office a program, to be known as the “Great Lakes and Lake Champlain Invasive Species Program”, which, among other things, is charged with:

- (a) monitoring for the introduction and spread of aquatic nuisance species into or within the Great Lakes and Lake Champlain Systems;
- (b) detecting newly introduced aquatic nuisance species prior to the establishment of the aquatic nuisance species in the Great Lakes and Lake Champlain Systems;
- (c) informing and assisting with management and response actions to prevent or stop the establishment or spread of an aquatic nuisance species.

Appendix A – General Changes to Discharges Incident to the Normal Operation of Vessels

Section 903(a) amends section 312 of the Federal Water Pollution Control Act (33 U.S.C. 1322, “Marine Sanitation Devices”) to add at the end a new subsection (p), entitled Uniform National Standards for Discharges Incidental to Normal Operation of Vessels. All of the matters discussed below are in the new subsection (p).

The first significant component of section 903(a) relates to the incidental discharge of pollutants from vessels, which is currently regulated by the EPA by means of the Vessel General Permit.⁴ Section 903(a)(4)(A)(i) of the Act (which will be codified at 33 U.S.C. 1322(p)(4)(A)(i))⁵ requires the Administrator of the Environmental Protection Agency (hereinafter EPA), within two years of the Act’s enactment, to promulgate federal standards of performance for marine pollution control devices for each type of discharge incidental to the normal operation of a vessel that is subject to regulation under this subsection. Such discharges include (subject to exceptions)⁶ the following:

- (a) any discharge incidental to the normal operation of a vessel; and
- (b) any discharge incidental to the normal operation of a vessel (such as most graywater) that is commingled with sewage, subject to the conditions that—
 - (1) nothing in subsection (p) prevents a state from regulating sewage discharges; and
 - (2) any such commingled discharge shall comply with all applicable requirements of—
 - (aa) subsection (p); and

⁴ The VGP and its variants (e.g. small vessel general permit, or sVGP) are the EPA’s means of effecting the National Pollutant Discharge Elimination System (NPDES) system under the Clean Water Act.

⁵ All citations will be to the statute as amended, not to the Act.

⁶ Per 33 U.S.C. 1322(p)(2)(B), subsection (p) does not apply to any discharge incidental to the normal operation of a vessel—

(i) from—

(I) a vessel of the Armed Forces subject to 33 U.S.C. 1322 subsection (n);

(II) a recreational vessel subject to 33 U.S.C. 1322 subsection (o);

(III) a small vessel or fishing vessel, except that this subsection shall apply to any discharge of ballast water from a small vessel or fishing vessel; or

(IV) a floating craft that is permanently moored to a pier, including a ‘floating’ casino, hotel, restaurant, or bar;

(ii) of ballast water from a vessel—

(I) that continuously takes on and discharges ballast water in a flow-through system, if the EPA Administrator determines that system cannot materially contribute to the spread or introduction of an aquatic nuisance species into waters of the United States;

(II) in the National Defense Reserve Fleet that is scheduled for disposal, if the vessel does not have an operable ballast water management system;

(III) that discharges ballast water consisting solely of water taken onboard from a public or commercial source that, at the time the water is taken onboard, meets the applicable requirements or permit requirements of the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(IV) that carries all permanent ballast water in sealed tanks that are not subject to discharge; or

(V) that only discharges ballast water into a reception facility; or

(iii) that results from, or contains material derived from, an activity other than the normal operation of the vessel, such as material resulting from an industrial or manufacturing process onboard the vessel.

(bb) any law applicable to discharges of sewage.⁷

These standards of performance are to be determined in concurrence with the Secretary of the department in which the Coast Guard (hereinafter Coast Guard) is operating, and in consultation with interested governors. Until the date these performance standards are final, effective, and enforceable,⁸ the current VGP, plus any regulations promulgated by the Coast Guard pursuant to section 1101 of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4711) (as in effect on the day before the date of enactment of subsection (p)), including the regulations contained in subparts C and D of part 151 of title 33, Code of Federal Regulations, and subpart 162.060 of part 162 of title 46, Code of Federal Regulations (as in effect on the day before that date of enactment), shall remain in force and effect.⁹ Once final, effective, and enforceable standards of performance as required in subsection (p) are promulgated, the VGP and the described Coast Guard regulations will no longer have any force or effect.

The net effect of the Act with respect to discharges incidental to the normal operation of a vessel is that for vessels subject to the VGP, the existing EPA and Coast Guard regimes will remain in place, as is, until the EPA establishes new or revised performance standards, and promulgates regulations putting those standards into effect.¹⁰ In contrast, Congress chose to exempt discharges incidental to the normal operation, except for ballast water, from small vessels (i.e. those less than 79 feet in length), and commercial fishing vessels of all sizes, from NPDES permit coverage. As a result, the sVGP is repealed effective immediately,¹¹ and permit coverage for any vessel covered under the sVGP is terminated without any further action being required by operators of affected vessels. Any violation of the VGP or of Coast Guard regulations issued under the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (as previously discussed) remains unlawful, with each day of a continuing violation constituting a separate offense, a vessel being operated in violation of these rules being liable *in rem* for any civil penalty assessed for the violation, and the possibility of vessel clearance required under section 60105 of title 46, United States Code, being withheld or revoked if the owner or operator of the vessel is in violation of these rules.¹²

⁷ 33 U.S.C. 1322(p)(2)(A).

⁸ This is the date on which regulations implementing any new or revised standard of performance promulgated by the EPA are issued, which is to be two years or less after the promulgation of such new or revised standards. 33 U.S.C. 1322(p)(5)(A). In addition, 33 U.S.C. 1322(p)(5)(B) and (C) require the Coast Guard to promulgate such regulations governing the design, construction, testing, approval, installation, and use of marine pollution control devices as are necessary to ensure compliance with the new or revised standards of performance, and to promulgate regulations, including requirements for vessel owners and operators with respect to inspections, monitoring, reporting, sampling, and recordkeeping, to ensure, monitor, and enforce compliance with the standards of performance promulgated by the EPA, as well as Coast Guard regulations relating to marine pollution control devices.

⁹ The current VGP is scheduled to expire on December 18, 2018; however, under this law, the VGP will remain in effect, as is, until the new regime as established by the Act takes effect.

¹⁰ See 33 U.S.C. 1322(p)(9)(B)

¹¹ 33 U.S.C. 1322(p)(9)(c).

¹² 33 U.S.C. 1322(p)(8).

Appendix B – Changes in Section 903 of the Act Specific to Normal and Incidental Discharges of Ballast Water

The other significant component of section 903(a) relates to the incidental discharge of a specialized “class” of pollutants, that being ballast water. These ballast water rules, set out in 33 U.S.C. 1322(p)(6), are in addition to, not in place of, the general incidental discharge rules discussed in Appendix A. With respect to a vessel with empty ballast tanks, the owner or operator of a vessel with empty ballast tanks bound for a port or place of destination subject to the jurisdiction of the United States shall, prior to arriving at that port or place of destination, conduct a ballast water exchange or saltwater flush—

- (1) not less than 200 nautical miles from any shore for a voyage originating outside the United States or Canadian exclusive economic zone; or
- (2) not less than 50 nautical miles from any shore for a voyage originating within the United States or Canadian exclusive economic zone.¹³

However, this exchange or flush is not required if:

- (1) the unpumpable residual waters and sediments of an empty ballast tank were subject to treatment, in compliance with applicable requirements, through a type-approved ballast water management system approved by the Coast Guard;
- (2) if the unpumpable residual waters and sediments of an empty ballast tank were sourced within—
 - (a) the same port or place of destination; or
 - (b) contiguous portions of a single Captain of the Port Zone;
- (3) if the exchange or flush would compromise the safety of the vessel or is otherwise prohibited by any Federal, Canadian, or international law (including regulations) pertaining to vessel safety;
- (4) if design limitations of the vessel prevent such an exchange or flush; or
- (5) if the vessel is operating exclusively within the internal waters of the United States or Canada.¹⁴

Beyond the empty ballast tank exchange or flush requirements, the law also addresses installed ballast water management systems. In general, subject to limitations,¹⁵ a vessel shall be deemed to be in compliance with a standard of performance for a marine pollution control device that is a ballast water management system if the ballast water management system—

- (1) is maintained in proper working condition, as determined by the Coast Guard;
- (2) is maintained and used in accordance with manufacturer specifications;

¹³ 33 U.S.C. 1322(p)(6)(B).

¹⁴ 33 USC 1322(p)(6)(B)(ii).

¹⁵ The presumptive compliance rules do not apply with respect to a vessel or ballast water management system the Coast Guard determines has exceeded its service life, upon the completion of a major conversion (as defined in section 2101 of title 46, United States Code) of the vessel, or upon a determination by the Coast Guard that there are other type-approved systems for the vessel or category of vessels, with respect to the use of which the environmental, health, and economic benefits would exceed the costs. 33 U.S.C. 1322(p)(6)(C)(ii).

(3) continues to meet the ballast water discharge standard applicable to the vessel at the time of installation, as determined by the Coast Guard; and

(4) has in effect a valid type-approval certificate issued by the Coast Guard.¹⁶

The net effect on these provisions of the Act is that vessels still need to install and operate Coast Guard type-approved BWMS in compliance with applicable manufacturers' and regulatory requirements.

One aspect of the Act that may lead to a future change to U.S. ballast water management laws and regulations of import to vessel operators is the Act's mandate that the Coast Guard, in coordination with the EPA, to publish a draft policy letter within 180 days that, based on the best available science, describes type-approval testing methods and protocols for ballast water management systems that:

(1) render organisms in ballast water nonviable; and

(2) may be used in addition to the methods established under subpart 162.060 of title 46, Code of Federal Regulations (or successor regulations)—

(a) to measure the concentration of organisms in ballast water that are capable of reproduction;

(b) to certify the performance of each ballast water management system under this subsection; and

(c) to certify laboratories to evaluate applicable treatment technologies.

Within 1 year from the Act's enactment, the Coast Guard is directed to publish a final policy letter describing type approval testing methods, if any, for ballast water management systems (BWMS) that render organisms in ballast water nonviable. This evaluation process for possible type-approval of ballast water management systems that render organisms nonviable, as opposed to killing them, is an interesting development, as it was the U.S.'s insistence that BWMS must kill organisms in ballast waters instead of merely rendering them nonviable, that was a principal factor in the U.S. declining to adopt the International Maritime Organization's Ballast Water Management Convention.¹⁷ It should be noted, however, that all the Coast Guard is charged with doing at this point is to develop a policy letter evaluating the feasibility of BWMS that (only) render organisms in ballast water nonviable; the applicable U.S standards at this time still require such organisms to be rendered not-live (or not-living), as that term is applied in 33 CFR 151.1511.

¹⁶ 33 U.S.C. 1322(p)(6)(C)(i).

¹⁷ International Convention for the Control and Management of Ships' Ballast Water and Sediments, which entered into force on September 8, 2017.