



Summary Report of Tribal Consultation and Engagement:

Vessel Incidental Discharge National Standards of
Performance

U.S. Environmental Protection Agency

Office of Wetlands, Oceans and Watersheds

Office of Water

I. Background

This consultation report was prepared to support the U.S. Environmental Protection Agency's rulemaking to establish regulations at 40 C.F.R. part 139 for discharges incidental to the normal operation of vessels pursuant to *Clean Water Act* Section 312(p).

In December 2018, President Trump signed into law the *Frank LoBiondo Coast Guard Authorization Act of 2018*, which included the *Vessel Incidental Discharge Act*. Pub. L. No. 115-282, tit. IX (2018) (codified primarily at 33 U.S.C. 1322(p)). Congress passed the VIDA to help streamline the patchwork of federal, state and local requirements for the commercial vessel community. Among other things, the VIDA amends CWA Section 312 by adding a new subsection (p) titled, "Uniform National Standards for Discharges Incidental to Normal Operation of Vessels." Subsection (p) requires the EPA and the United States Coast Guard to develop new regulations for incidental discharges, including ballast water, into waters of the United States and the contiguous zone, from regulated vessels. These new VIDA regulations will apply primarily to discharges incidental to the normal operation of large commercial vessels (greater than 79 feet in length), as well as ballast water from small vessels (less than 79 feet in length) and fishing vessels of all sizes. In most cases, the regulations are to be at least as stringent as existing federal vessel discharge requirements.

The new regulations are to be developed through two separate rulemakings: the EPA is required to develop regulations establishing national standards of performance, and the USCG is required to develop corresponding regulations to implement, monitor compliance and enforce those standards no later than two years thereafter. Once complete, the EPA, the USCG and U.S. states are authorized to enforce those regulations.

This action has Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. Tribes may be primarily interested in this action because commercial vessels may operate in or near Tribal waters.

The EPA consulted with Tribal officials consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*. Consultation was conducted early in the process of developing this regulation to permit them to have meaningful and timely input into its development. This report provides a summary of the consultation and outreach conducted with Tribes during the rulemaking process. It also summarizes comments received in writing and verbally during the Tribal consultation period.

II. Consultation

The EPA sought Tribal comments and consultation from July 11, 2019, to September 11, 2019. On June 18, 2019, a "Notice of Consultation and Coordination" letter was mailed to the leaders of all 573¹ Tribes that were federally recognized at the time, providing background information

¹ In December 2019, the Little Shell Tribe of Chippewa Indians became the 574th federally recognized Tribe.

about the VIDA and the consultation plan, and inviting Tribes to consult on this action. The EPA also notified Tribes of the consultation opportunity via the Tribal Consultation Opportunities Tracking System (<http://tcots.epa.gov>) listserv and emails to the EPA Tribal Environmental Directors listserv. The EPA hosted a National Tribal Teleconference on July 11, 2019, during which the EPA provided an overview of the VIDA, described the interim requirements and the framework of future regulations and identified Tribal provisions associated with VIDA. A total of nine Tribal representatives participated in the teleconference. The EPA also provided an informational presentation on the VIDA during the Region 10 Regional Tribal Operations Committee teleconference on July 18, 2019, as requested the Committee.

During the consultation period, the EPA received two pre-proposal comment letters. The first letter, from the Comanche Nation, confirmed that the VIDA does not interfere with any areas containing prehistoric or historic archaeological materials. The second letter, from the Makah Tribe, requested government-to-government consultation to fully understand the VIDA rulemaking process and the potential for any impacts on the Makah Usual and Accustomed Hunting and Fishing Stations.

More specifically, the Makah Tribe indicated that they sought to specifically understand the implications of the development of ballast water standards under the VIDA on their natural resources and vessels. The EPA hosted a consultation with the Tribe on October 23, 2019, at the EPA Headquarters in Washington, D.C., and provided a brief overview of the VIDA and considerations for the development of ballast water regulations. The representatives of the Tribe and their DC representative expressed specific concerns associated with the possible regulation of refrigerated sea water and ice used for preserving catch as ballast water. The Makah Tribe recommended a full exemption of commercial fishing vessels from ballast water requirements when sea water or ice are added for the purposes of food safety and product quality. The Tribe also noted concerns with invasive species and wanted to ensure that future ballast water regulations are sufficiently stringent to prevent the introduction and spread of such species in Makah waters.

III. Post-Proposal Engagement

On October 26, 2020, the EPA published a Notice of Proposed Rulemaking (85 FR 67818) in the *Federal Register*. Several Tribes requested additional consultation in comments submitted during the public comment period of the proposed rule. The EPA offered additional consultation opportunities and met with Tribal representatives of the Gun Lake Tribe and Chippewa Ottawa Resource Authority to further inform development of the rule.

On October 13, 2021, the EPA met with six representatives from the Gun Lake Tribe to discuss concerns related to ballast water and the petition processes for states to seek enhanced Great Lakes System requirements, no-discharge zones, emergency orders or review of any standard of performance, regulation or policy. Representatives from the USCG also participated. The Tribe communicated concerns associated with certain aspects of the VIDA statute itself, including its reliance on technology-based (rather than water quality-based) standards and the limitation that only Great Lakes state Governors can petition for enhanced Great Lakes System requirements.

More broadly, the Tribe expressed concerns with the removal of state regulations and the risk of invasive species introduction and spread. A meeting summary with additional details is available in the docket.

On November 3, 2021, the EPA met with members of the Chippewa Ottawa Resource Authority, alongside several representatives from the USCG. The members expressed significant concerns associated with invasive species and their effects on the Great Lakes, especially as it relates to treaty fishing rights, and noted that several Great Lakes states have more stringent ballast water regulations than those in the proposed rule. Of particular interest to the participants were the requirements for Lakers, those vessels that operate exclusively in the Great Lakes.

They wanted to discuss the proposed removal of the best management practices for Lakers and how requirements for these vessels would be reconciled with new Canadian regulations.

Finally, the Chippewa Ottawa Resource Authority members inquired about the amount of data reviewed to establish the standards for ballast water management system discharges. A meeting summary with additional details is available in the docket.

Subsequently, on October 18, 2023, the EPA published in the *Federal Register* a Supplemental Notice of Proposed Rulemaking (88 FR 71788) for public comment that presented ballast water management system type-approval data that the EPA received from the USCG since the proposed rule. The supplemental notice also included additional regulatory options that the EPA was considering for discharges from ballast tanks, hulls and associated niche areas and graywater systems. A day prior, on October 17, 2023, the EPA sent an e-mail notification to listservs for Tribal Environmental and Natural Resource Directors, National Tribal Water Council members and other Tribal partners informing them of the public comment opportunity and the availability of upcoming public meetings to introduce the supplemental notice, highlight the additional regulatory options that the EPA was considering for the final rule and provide information on the comment submission process. This information was also shared in the EPA Office of Water's November 2023 edition of the "National Tribal Water Program Updates" E-Newsletter. EPA received one comment on the SNPRM from the 1854 Treat Authority, an inter-tribal natural resource management agency governed by the Bois Forte Band of Chippewa and the Grand Portage Band of Lake Superior Chippewa. The commenter expressed concerns about proposed elements of the rule and the potential impacts of aquatic nuisance species on cultural/natural resources of the region.

The EPA considered all the feedback received from Tribal representatives during the consultation process, as well as the post-proposal meetings and two public comment periods, in the development of the final rule. All materials referenced in this Summary Report are available in the docket, Docket ID No. EPA-HQ-OW-2019-0482.