



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 140

[EPA-R09-OW-2010-0438; FRL-9633-9]

RIN 2009-AA04

Marine Sanitation Devices (MSDs): No Discharge Zone (NDZ) for California State Marine Waters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is establishing a No Discharge Zone (NDZ) for marine waters of the State of California for sewage discharges from: all large passenger vessels of 300 gross tons or greater; and from large oceangoing vessels of 300 gross tons or greater with available holding tank capacity or containing sewage generated while the vessel was outside of the marine waters of the State of California, pursuant to Section 312(f)(4)(A) of the Clean Water Act (CWA), 33 U.S.C. 1322(f)(4)(A). This action is being taken in response to an April 5, 2006, application from the California State Water Resources Control Board requesting establishment of this NDZ. Based on the State's application, EPA has determined that the protection and enhancement of the quality of California's marine waters requires the prohibition of sewage discharges from two classes of large vessels. For the purposes of today's rule, the marine waters of the State of California are defined as the territorial sea measured from the baseline, as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone, and extending seaward a distance of three miles and including all enclosed bays and estuaries subject to tidal influences from the Oregon border to the

Mexican border. State marine waters extend three miles from State islands, including the Farallones and the Northern and Southern Channel Islands.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R09–OW–2010–0438. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Water Division, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. EPA requests that if at all possible, you contact the person listed in the FOR FURTHER INFORMATION CONTACT section to schedule an appointment. The Regional Office’s business hours are Monday through Friday, 8:30 to 5:00, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Amato at (415) 972-3847 or amato.paul@epa.gov.

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I. BACKGROUND

The proposed rule was published in the September 2, 2010, issue of the Federal Register (75 FR 53914). A 60-day comment period followed that ended on November 1, 2010, during which time EPA Region IX received approximately 2,020 comment letters and emails, including 16 distinct letters and approximately 2,000 substantially identical letters. Section III addresses the comments.

Clean Water Act Section 312, 33 U.S.C. 1322, (hereafter referred to as “Section 312”), regulates the discharge of sewage from vessels into the navigable waters. Pollutants most frequently associated with sewage discharges include solids, nutrients, pathogens, petroleum products, heavy metals, pesticides, pharmaceuticals, and other potentially harmful compounds.¹ Sewage discharges can contaminate shellfish beds, pollute drinking water supplies, harm fish and other aquatic wildlife, and cause damage to coral reefs. Direct contact with these pollutants can have serious human health effects, with children, the elderly, and individuals with compromised immune systems being most susceptible. Currently, California marine waters include 120 miles of coast that are listed as impaired for pathogens commonly associated with sewage.

Clean Water Act Section 312(h) prohibits vessels equipped with installed toilet facilities from operating on the navigable waters (which include the three mile territorial seas), unless the vessel is equipped with an operable marine sanitation device (MSD),

¹ The State of California’s “Application for Permission to Prohibit Sewage Discharges from Vessels in California’s Waters Pursuant to Clean Water Act Section 312(f)(4)(A)” at page 33 (Apr. 5, 2006).

certified by the Coast Guard to meet applicable performance standards. 33 U.S.C. 1322(h). The provisions of Section 312 are implemented jointly by EPA and the Coast Guard. EPA sets performance standards for MSDs and is involved in varying degrees in the establishment of NDZs for vessel sewage. 33 U.S.C. 1322(b) and (f). The Coast Guard is responsible for developing regulations governing the design, construction, certification, installation and operation of MSDs, consistent with EPA's performance standards. 33 U.S.C. 1322(b) and (g); see also 33 C.F.R. part 159. The Coast Guard's responsibility includes certifying MSDs for installation on U.S. flagged vessels.

Under some circumstances, vessel sewage discharges treated by an MSD may contain higher concentrations of pollutants than discharges of treated sewage from land-based wastewater treatment plants and may cause or contribute to water quality impairments and impacts to sensitive marine habitats. In 2000, an Alaska Cruise Ship Initiative study sampled 21 cruise ships twice during the cruise season and found that 57 percent of the samples exceeded fecal coliform effluent limits and 78 percent exceeded suspended solids effluent limits for Type II MSDs.² Only one sample met the standards for both. The Coast Guard inspected six of the vessels with high effluent concentrations and found that five were exceeding limits due to improper MSD operation or maintenance, resulting in issuance of civil penalties.³ EPA estimates that large passenger vessels and large oceangoing vessels generate 25.2 million gallons of sewage each year while in California State marine waters a number that is projected to grow. Data was not available to quantify how much of this sewage is currently discharged while vessels are present in

² Exceeding these limits is only a violation if the operator was not discharging through a properly operated and maintained MSD.

³ Alaska Department of Environmental Conservation, "Alaska Cruise Ship Initiative, Part 2 Report" (2001), available at http://dec.alaska.gov/water/cruise_ships/cruiseinitiative.htm

California marine waters; however, as shown in Table 1, EPA used existing data to estimate that the final rule will prohibit the discharge of 22.5 million of the 25.2 million gallons of sewage that large vessels could otherwise legally discharge into California State marine waters each year. Small vessels without holding capacity, which are not regulated by today’s rule, generate an additional 2.8 million gallons of sewage per year that can be legally discharged to California marine waters. A map of California State marine waters and the NDZ can be obtained or viewed at the EPA’s website at <http://www.epa.gov/region9/water/no-discharge/overview.html>, or by calling (415) 972-3847.

Table 1. California Vessel Sewage Contributions and NDZ Prohibitions

Sewage Source	Vessel Sewage Generation in State Waters (gallons/year)	Treated Vessel Sewage Prohibited by this NDZ (gallons/year)
<i>Addressed by this rule</i>		
Large Passenger Vessels	19.2 million	19.2 million
Large Oceangoing Vessels with available holding capacity	3.3 million*	3.3 million
Combined =	22.5 million	22.5 million
<i>Not addressed by this rule</i>		
Large Oceangoing Vessels without holding capacity	2.3 million*	No Change
Large Oceangoing Vessel discharges beyond holding tank capacity	0.4 million	No Change
Small Vessels without holding capacity	2.8 million**	No Change
Combined =	5.5 million	No Change

* The sewage generation per year for large oceangoing vessels in this table (totaling 6 million gallons = 3.3 million + 2.7 million) differs from the 3.4 million gallons per year estimated in the proposed rule because it is derived from more recent data and analysis indicating that the rate of sewage generation is higher than estimated for the proposed rule. The Chamber of Shipping of America (CSA) had conducted a vessel sewage data survey in response to EPA’s July 12, 2010, “Clean Water Act Section 312(b): Notice Seeking Stakeholder Input on Petition and Other Request to Revise the Performance Standards for Marine Sanitation Devices,” 75 FR 39683. This data and its analysis can be found in the docket for this final rule at www.regulations.gov.

**EPA estimate based on State of California small vessel usage data in their January 27, 2009 Application Addendum.

The State of California declared the importance of protecting coastal water from vessel sewage when it enacted the California Clean Coast Act of 2005 (Senate Bill (SB) 771) and related legislation in 2003-2005 to limit pollution from large passenger and large oceangoing vessels. In enacting this legislation, the State found that California's coastal waters warrant the higher level of protection that should be provided through an NDZ. California's highly varied marine environments support high levels of biological diversity and habitat for several dozen species listed as endangered, threatened, or of concern under federal or State law and include designated essential habitat for nearly 100 species of fish along most of California's coast. The unique values associated with California's coastal marine environment have been recognized through the creation of a network of more than 200 protected areas, reserves, sanctuaries, and monuments that together afford special resource protection status to the vast majority of California coastal waters including the four Federally designated National Marine Sanctuaries (Cordell Bank, Gulf of the Farallones, Monterey Bay, and Channel Islands) that combined occupy approximately one-third of the coastline. Waters along the California coastline support important economic, recreational, conservation, research, educational, and aesthetic values, and are becoming increasingly more important for potable water supply as desalinization measures are used to meet demands.

CWA Section 312 generally preempts state regulation of the discharge of sewage from vessels: "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 [MSD] on any vessel subject to the provision of

[CWA Section 312].” 33 U.S.C. 1322(f)(1)(A). Under Section 312(f), however, a state may, in certain circumstances, request that EPA establish an NDZ for vessel sewage or, after required findings are made by EPA, establish such a zone themselves.

There are three types of NDZ designations. First, under Section 312(f)(3) states may designate portions or all of their waters as NDZs if the state determines that the protection and enhancement of the quality of the waters require greater environmental protection than provided by current federal standards. However, no such prohibition applies to discharges until EPA determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters in the NDZ. Second, a state may apply under Section 312(f)(4)(A), as California did here, for an EPA determination that the protection and enhancement of the quality of specified waters within such state requires a prohibition. In contrast to Section 312(f)(3) NDZ designations, Section 312(f)(4) does not require EPA to determine that adequate pump out facilities are reasonably available for all vessels. Upon its determination that the protection and enhancement of the quality of specified waters requires the prohibition, EPA shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into such waters. Lastly, a state may apply under Section 312(f)(4)(B) for EPA to establish, by regulation, a drinking water intake zone which prohibits the discharge of sewage into that zone. 33 U.S.C. 1322(f), 40 C.F.R. 140.4.

The State of California, through the State Water Resources Control Board (State Board), applied to EPA for the establishment of an NDZ covering all California marine waters pursuant to Clean Water Act Section 312(f)(4)(A). As required by the California

Clean Coast Act, the State Board's application requested a prohibition of sewage discharges from large passenger vessels and large oceangoing vessels with "sufficient holding tank capacity" to contain sewage while the vessels are within the marine waters of the State.

With today's rule, the EPA Region IX Administrator grants this application.

II. SUMMARY OF FINAL ACTION

EPA evaluated the State of California's CWA Section 312(f)(4)(A) application for the establishment of an NDZ throughout the marine waters of the State and other relevant information, and issued a notice of proposed rulemaking that would establish the requested NDZ based on the Agency's proposed determination that the protection and enhancement of the quality of these waters required it. EPA carefully considered the public comments on the proposed rule (available in the docket at www.regulations.gov), and concludes that nothing in these comments affects EPA's proposed determination that an NDZ is warranted for these waters. As discussed more fully below, EPA was convinced by some of the comments to make changes to the description of the class of covered large oceangoing vessels subject to the NDZ. The State has indicated that it finds these changes consistent with its NDZ petition.

As discussed more fully in the preamble to the proposed rule, California marine waters support a variety of unique, nationally important and biologically significant environments that contribute to California's recreational, economic, and aesthetic values. EPA estimates that this rule will prohibit the discharge of approximately 22.5 million gallons of treated vessel sewage per year that could otherwise enter California marine waters (EPA is unable to estimate how much of this treated sewage would actually enter

California marine waters in the absence of this rule). This action will protect and enhance water quality, which will benefit human health by reducing the potential for exposure to pollutants from: recreational use of the waters, commercial fishing, shellfish bed operations, and water intakes for desalination plants. Similarly, this action will provide benefits to wildlife and their habitats.

On September 2, 2010, EPA proposed an NDZ covering all California marine waters which would be applicable to large passenger vessels and to large oceangoing vessels with two days or more sewage holding capacity. Based on the comments received for the proposed rule, EPA has changed the description of the class of covered large oceangoing vessels so that it applies to all large oceangoing vessels that have not fully utilized available holding tank capacity or that contain sewage generated outside the NDZ. Revising the definition will provide greater protection and enhancement of the covered waters and make compliance more feasible. The reasons for this change are addressed in more detail in Section III.

EPA is not changing the rule as it applies to passenger vessels, but has addressed a potential ambiguity by modifying the definition of “large oceangoing vessel” to make clear that it excludes any vessel defined as a “large passenger vessel.”

Today’s rule establishes an NDZ for the marine waters of the State of California that applies to two classes of vessels—(1) passenger vessels of 300 gross tons or more having berths or overnight accommodations, and (2) oceangoing vessels of 300 gross tons or more equipped with a holding tank which has not fully used the holding tank's capacity, or which contains more than de minimis amounts of sewage generated while the

vessel was outside of the NDZ.⁴ Vessels within these two classes are completely prohibited from discharging any sewage (whether treated or not) within the NDZ.

EPA expects today's rule will result in large oceangoing vessels with holding tanks maximizing use of their holding tank capacity while in the NDZ. In order to comply with the NDZ, a large oceangoing vessel with a holding tank will, in most cases, choose to empty its holding tank before entering California marine waters. While present in these waters, the vessel must refrain from discharging any sewage so long as it has any holding tank capacity. If the large oceangoing vessel reaches its holding tank capacity due only to sewage generated while in the NDZ, the vessel is no longer within the class of covered vessels and can discharge properly treated sewage in compliance with the NDZ. A vessel can choose to enter the NDZ without first emptying its holding tank, but then it may not discharge any sewage.

EPA recognizes that de minimis amounts of sewage may remain in the holding tank of a vessel that has fully discharged before entering State waters, and therefore has clarified in the rule that such de minimis amounts do not prohibit the vessel from discharging in State waters once its holding tank capacity is fully used. A holding tank is "fully used" when it has been filled to the point that safe and proper operation requires that it be discharged. EPA has also defined the term "holding tank" to make it clear that the rule does not intend for vessels operators to use ballast tanks, or other tanks that have not been specifically designed, constructed, and fitted for holding sewage, to store sewage while vessels are operating in California marine waters.

⁴ A vessel is subject to this rule if it is of 300 gross tons or greater as measured under the International Convention on Tonnage Measurement of Ships, 1969, measurement system in 46 U.S.C. 14302, or the regulatory measurement system of 46 U.S.C. 14502 for vessels not measured under 46 U.S.C. 14302.

This NDZ will not alter the ten existing NDZs in California, all of which were enacted pursuant to CWA Section 312(f)(3). These prior NDZs cover a relatively small portion of California's total marine waters and remain in effect for all vessels (not just large passenger and oceangoing vessels). In addition, certain sewage discharges from vessels are prohibited under National Oceanic and Atmospheric Administration (NOAA) regulations for the four California marine sanctuaries. Nothing in today's rule affects these regulations.

III. RESPONSE TO COMMENTS

In response to the proposed rule, approximately 2,020 comment letters and emails were received including 16 distinct letters and approximately 2,000 substantially identical letters in support of the rule. Comments were provided by regulated entities, trade organizations, government officials, non-governmental organizations, and members of the public. The substantive comments are grouped together and addressed below.

A. Overview

Most of the comment letters expressed support for this rule because it will help protect California's marine biological resources, recreational opportunities, and human health from vessel sewage. Some of these commenters said the rule was necessary: (1) because there is a need for stronger standards to protect coastal resources from vessel sewage; and (2) it will improve California marine waters for commercial fisheries, tourism, aesthetics, science and research. Some supporting commenters further suggested that the rule should be expanded: (1) to include California marine waters out to 12 nautical miles from shore; (2) to include all vessels; (3) to further regulate landside sources of pollution; (4) to improve inspection and testing procedures; (5) to improve

vessel discharge monitoring; and (6) to specify penalties for violators. One supportive commenter expressed concerns with the legal basis for regulating military vessels and one commenter suggested that EPA's economic analysis was incomplete because it did not adequately consider impacts on small businesses.

Commenters opposed to the proposed rule expressed several concerns regarding its legal and scientific basis, which largely fall into these four categories of comments: (1) CWA Section 312(f)(4)(A) does not permit EPA to establish an NDZ applicable to a subset of vessels; (2) the proposed rule does not adequately support an NDZ for all of California marine waters; (3) the connection between vessel sewage and impacts to California waters has not been sufficiently demonstrated; and (4) the two-day holding capacity requirement for oceangoing vessels is arbitrary, inconsistent with CWA Section 312, and less protective than alternative approaches. The comments are addressed in detail below.

B. Public Comments

1. Protection of California's Coastal Resources

Many commenters expressed support for EPA's conclusion that the NDZ is required to protect California's coastal waters from pollutants found in vessel sewage. Approximately 2,000 similar comment letters urged EPA to approve California's application and stated that the NDZ would protect California's fragile ocean and coastal ecosystem from vessel sewage and improve water quality for beaches, fishing, shellfish beds, and human health. Another letter signed by 19 members of California's Congressional Delegation expressed strong support for EPA's proposed rule. Several commenters expressed concerns with anticipated increases in sewage discharges due to

the growing cruise ship industry and the number of large oceangoing vessels in California waters. In addition, commenters said the NDZ was needed to protect the water quality of State and federally protected areas and to address inadequate federal discharge and monitoring requirements of a growing cruise and shipping industry with a documented history of illegal discharges. Economic benefits of improving California's coastal resources were also provided as a reason for creating the NDZ. Some commenters stated that the information in California's application to EPA was sufficient to demonstrate the need for the rule under CWA Section 312.

The EPA agrees with these concerns about impacts to coastal water quality and is finalizing its determination that this NDZ is required to protect and enhance the quality of California marine waters. The information provided by the State and other sources demonstrates that California marine waters are a very important and sensitive resource that has been degraded by the discharge of sewage and would likely experience further degradation without the protections provided by this NDZ. This rule is expected to benefit California's fragile coastal resources by significantly reducing the discharge of pollutants that can occur in vessel sewage. Water quality data for vessel sewage is limited because monitoring is not required; however, EPA considered the 2000 Alaska Cruise Ship Initiative sewage sampling data from 21 cruise ships with Type II MSDs in determining that treated vessel sewage discharges can still contain pollutants in concentrations that exceed current federal Type II MSD effluent limits.⁵ Type II MSDs also do not remove nutrients and the biochemical oxygen demand loading which contribute to water quality degradation. Based on this information, and the likelihood that

⁵ As noted previously, such discharges may or may not be a regulatory violation, depending on whether or not they result from improper operation or maintenance of the device.

vessel traffic will continue to grow, EPA and the State of California have determined that even vessel sewage treated by an MSD that complies with CWA Section 312 standards may be a significant source of pollutants that have negative impacts on California's coastal resources.

2. Expansion of the Rule

Some of the commenters recommended expanding the rule to increase protection of California's coastal resources. One commenter recommended that EPA expand the distance of the proposed NDZ from three to twelve nautical miles from shore because winds and currents constantly move the sewage and even three miles from shore is too close to protect coastal resources. The commenter noted that some other federal laws, such as the National Marine Sanctuaries Act, the Marine Plastic Pollution Research and Control Act of 1987, and the Ocean Dumping Act, address pollution within the 12-mile contiguous zone.

EPA recognizes that an NDZ does not impose a physical barrier to the movement of pollutants and understands the potential benefits of such an expansion, but the commenter's proposal would extend the NDZ beyond the limit of the CWA territorial seas, into the CWA contiguous zone, an area in which CWA Section 312 does not apply. See, e.g., CWA Section 312(b) (directing EPA to develop federal standards of performance for MSDs discharging into "navigable waters") and CWA Sections 502(7) and (8) (defining "navigable waters" as including the "territorial seas" which extend "seaward a distance of three miles"). Any request for action under the authorities cited by the commenter – even if potentially available – is outside the scope of today's action on California's application for an NDZ applicable to its waters, pursuant to CWA Section

312. EPA also notes that the U.S. Coast Guard, which is charged with enforcing this NDZ under CWA Section 312(k), measures the CWA's jurisdictional boundaries in ocean waters by using nautical miles. See, e.g., 33 U.S.C. part 2.

A commenter who supports establishment of an NDZ stated that the rule should be expanded to apply to all vessels, instead of just the classes of vessels requested by California's legislation. EPA recognizes that prohibiting all vessels from discharging treated sewage in California marine waters may have broader benefits for water quality; however, the commenter did not provide information for the record demonstrating that such an expansion is required for the protection and enhancement of the quality of the specified waters. The State specifically requested, and provided information in support of, an NDZ limited to large passenger vessels and large cargo vessels with adequate holding capacity. EPA approached the State Board about expanding the application to include all vessels, but the State Board determined this would be contrary to the Legislature's instructions to limit the scope of the prohibition to the two specified classes of vessels. The State Board provided further support for the distinction between large and small vessels in an October 13, 2006, supplement to its CWA Section 312(f)(4)(A) application. The supplement cites a number of efforts directed at smaller vessels, including construction of pump-out facilities, educational outreach, and establishment of small NDZs under CWA Section 312(f)(3) in key harbor areas. The supplement also summarizes data from marina surveys of small vessels which showed that 80 percent of the estimated 841,000 recreational vessels in California marine waters lack Type I or II MSDs, which means that they are already prohibited from discharging to marine waters by the CWA. EPA reviewed this material and determined that the State's approach was

reasonable because it would control discharges from two significant classes of vessels which, together, generate most of the sewage that could be legally discharged into State waters, whereas neither the State, nor any commenters, submitted evidence showing that it would be necessary to prohibit all discharges from the remaining classes of vessels to provide for the protection and enhancement of the quality of the State's waters.

One commenter asked EPA to consider regulating landside wastewater sources as well, including municipal discharge and wastewater treatment facilities, because they are a larger source of pollutants. EPA agrees that landside discharges are a more significant contributor to pollutants in coastal waters, but these discharges are outside the scope of today's rulemaking. Today's rule establishes an NDZ under CWA Section 312, which is limited to vessel sewage discharges only. Landside point-source discharges of pollutants are regulated through the National Pollution Discharge Elimination System (NPDES) under CWA Section 402, and nonpoint sources of pollution are regulated under CWA Section 319.

A commenter also suggested improved inspections, sampling, monitoring, penalties and passenger fees as ways to improve the rule. Specifically, the commenter noted that the United States Coast Guard (Coast Guard) should have authority to conduct unannounced inspections of regulated vessels in light of several previously confirmed vessel sewage discharge violations. These activities are beyond the scope of today's Section 312(f)(4)(A) rulemaking. We note that the Coast Guard has existing authority to inspect vessels and assess penalties under CWA Sections 312 (j) - (l), as well as its general law enforcement authorities. 33 U.S.C. 1322 (j)-(l); see also 14 U.S.C. 89.

3. Scope and Applicability of CWA Section 312(f)(4)(A)

Several commenters stated that CWA Section 312(f)(4)(A) requires a complete prohibition of discharges from *all* vessels upon the Administrator's determination that specified state waters require protection. These commenters stated that Section 312(f)(4) and 40 C.F.R. 140.4(b) do not permit application of an NDZ to select vessel classes and that EPA must act on the State's application by either imposing an NDZ applicable to all vessels, or by not establishing an NDZ at all. One commenter further stated that it is implicit in Section 312(f)(4)(A) that NDZs are intended only for areas where sewage discharges are sufficiently impacting the marine ecosystem so as to justify banning them entirely.

As noted in the Notice of Proposed Rulemaking, this is the first time an NDZ has been proposed for specific categories of vessels. EPA is issuing the rule, applicable to two classes of large vessels, based on: (1) the scope of the State's NDZ application; (2) the evidence supporting a discharge ban with this defined scope; (3) lack of information demonstrating that an expansion is required, and (4) EPA's interpretation that Section 312(f)(4)(A) authorizes EPA to promulgate an NDZ for specific classes of vessels where appropriate.

The final rule is consistent with the State of California's application for an NDZ limited to all passenger vessels over 300 gross tons, and oceangoing vessels over 300 gross tons with sufficient holding tank capacity. The State legislature specifically directed the State Board to submit an application to EPA requesting an NDZ for only these two classes of vessels. As discussed above, EPA made its determination regarding the requested NDZ based on the record before it, which included information on sewage generation and the potential for sewage discharges to State waters from the subject

classes of vessels and from other classes of vessels. The two subject classes of vessels are responsible for most of the sewage generated by vessels in California marine waters, an estimated 22.5 million gallons of 28 million total gallons generated and potentially discharged each year. The information obtained by EPA did not show that extension of the rule to all vessels was required to protect and enhance the quality of the State's waters. The commenters also did not provide information which shows that it is necessary to include these other classes of vessels within the scope of the rule to protect and enhance the quality of these waters.

Extending the rule to all vessels would also be unduly burdensome on the community of marine vessel owners and operators. By applying this rule to the two classes of large vessels, the vast majority of sewage discharges will be abated in these sensitive waters. As discussed previously, much of the vessel-generated sewage that is not covered by this rule is already required to be pumped out in harbor pump-out stations, or discharged outside the 3-mile limit of State marine waters, because most recreational and small commercial vessels lack a Type I or Type II MSD to treat their sewage. The remaining vessels without holding tanks (which are required by CWA Section 312 to treat their sewage with approved MSDs), account for a comparatively small portion of the total sewage generated in the State's marine waters.

EPA considered the different structure and wording of the NDZ provisions to conclude that Section (f)(4)(A) allows for an NDZ limited to specific classes of vessels, where appropriate. EPA believes that the contrast between the language in the NDZ provisions in Sections 312(f)(4)(A) and 312(f)(3) strongly suggest that Congress did not intend to foreclose the Agency from imposing an NDZ on a subset of vessels under the

former where appropriate: Section 312(f)(4)(A) allows EPA to completely prohibit the discharge of any sewage from “a vessel,” whereas Section 312(f)(3) provides for the complete prohibition of discharge of any sewage from “all vessels.” If Congress had meant that all vessels must be subject to an NDZ under Section 312(f)(4)(A), it would have used the term “all” as it did in Section 312(f)(3). In addition, Congress’ desire to authorize NDZ protection for special waters where necessary could be significantly frustrated if the Agency were to adopt the commenters’ reading. After all, if EPA were to read the CWA to foreclose California’s application, the State would be forced to choose between seeking a complete discharge ban that includes some vessels, which as a group do not contribute greatly to the sewage discharge problem yet might have difficulty complying, or taking no action to protect water quality from any vessel discharges. In view of the textual differences between Sections 312(f)(3) and 312(f)(4)(A), as well as the policy considerations underlying Congress’ enactment of those provisions, EPA reads Section 312(f)(4)(A) as permitting a state to seek an NDZ that is limited to specific classes of vessels.⁶

Two commenters expressed concern that this rule could lead to the patchwork application of NDZ’s between states or other jurisdiction based on vessel classes. The commenters believe that an NDZ that does not ban discharges from all vessels could lead to a lack of uniformity which would make the efficient operation of commercial vessels

⁶ Commenters who disagreed with this conclusion relied primarily on Congress’ use of the terms “completely” and “any” in describing the scope of NDZs permitted under Section 312(f)(4)(A). See 33 U.S.C. 1322(f)(4)(A) (providing that, upon making the required finding, the Administrator shall “*completely* prohibit the discharge from a vessel of *any* sewage (whether treated or not) into such waters”) (emphasis added). While Congress’ use of the terms “completely” and “any” by itself, might be conducive to a reading that the NDZ must apply to all vessels, this language refers to “a vessel.” These terms could simply have been used by Congress to indicate that the prohibition on discharge is absolute with respect to whatever vessel or class of vessels it applies to, rather than permitting a standard which allows covered vessels to discharge sewage that meets a specified treatment standard.

in U.S. waters very difficult. They stated that Congress created the NDZ program to address local water quality issues that deserved additional protections but that Congress also recognized a critical need for consistency across state lines. “Uniformity and predictability of legal requirements was precisely the goal when Congress enacted CWA Section 312(f)(1) which preempts the states from creating such inconsistent legal requirements particularly with regard to the application of Section 312(f)(4) which does not require a determination of adequate shore reception facilities.”

As the comments indicate, Section 312(f) reflects a balance between the federal interest in uniform regulation of marine commerce and a state’s interests in protection and enhancement of the quality of specified waters. EPA has previously approved ten NDZs in California, and NOAA has established prohibitions on the discharge of sewage from large vessels in waters within the boundaries of the four National Marine Sanctuaries along the California coast. Already, the discharge requirements for vessels operating along the California coast are not uniform. Today’s rule will create a more uniform, well-defined boundary three miles from the California coast demarcating the NDZ for the covered classes of vessels.

One of these commenters further stated that establishing an NDZ for vessel classes sets a “dangerous precedent” because Section 312(f)(4)(A) does not require EPA to find that adequate pump-out facilities are reasonably available for all vessels, as is the case for state applications under Section 312(f)(3).

EPA does not expect that today’s action will lead to the establishment of unjustified NDZs in the future. As noted, Section 312(f)(4)(A) does not require EPA to find that adequate pump-out facilities are available, but, unlike Section 312(f)(3), it

requires EPA to determine whether a proposed NDZ is required for the protection and enhancement of the quality of specified waters. If a state is unable to demonstrate that the waters specified in a proposed NDZ warrant that protection, or that the necessary protection can be provided by an NDZ, the state will not obtain a discharge prohibition under Section 312 (f)(4)(A). Under Section 312 (f)(3), only the state needs to determine whether the waters require protection, and EPA decides whether adequate pump-out facilities are reasonably available.

Some commenters also suggested that the State should have sought EPA approval under CWA Section 312(f)(3), instead of 312(f)(4)(A). Section 312(f)(3) authorizes states to, “completely prohibit the discharge from all vessels of any sewage” in some or all of their waters, provided that EPA determines that adequate sewage handling facilities are reasonably available to “all vessels” operating in the affected waters.

EPA does not decide which of these statutory provisions a state should use to apply for an NDZ. Having decided to apply under Section 312(f)(4)(A), the State of California was required to meet the criteria of this provision, and EPA is required to determine whether or not they have done so. With this final rule, we find that they have.

4. Classes of Vessels

Some commenters stated that there is no factual basis for distinguishing between large cargo vessels and smaller vessels with similar crew and passenger numbers because there would be no difference in the impacts of their sewage discharges on water quality. Some commenters also noted that the proposed rule had estimated that recreational vessels without holding tanks, as a class, have the potential to discharge more than twice the amount of sewage as covered cargo vessels.

EPA recognizes that the size of a vessel is not always determinative of the amount of sewage it will generate or its potential to pollute State waters. We expect that some vessels below the 300 gross tonnage threshold sometimes carry a similar number of crew and passengers as some of the covered large oceangoing vessels. However, as discussed above, California's application addressed vessels over 300 gross tons, and the revised data show that smaller vessels without holding tanks, as a group, are a less significant source of sewage discharges within the NDZ than large oceangoing vessels (see Table 1). EPA believes that the State's approach to defining the vessel classes by tonnage is practical and understandable. Alternatives, such as defining vessel classes by crew and passenger numbers, would be more difficult to implement and enforce.

Several commenters stated that EPA did not explain the legal basis for applying the NDZ to select classes of vessels. Some of these commenters also stated that EPA should renotice the rule for comment after explaining the legal justification for applying Section 312(f)(4)(A) to limited classes of vessels.

EPA is only required to reference the legal authority for the proposed rule. 5 U.S.C. 553(b)(2). The Notice of Proposed Rulemaking not only specified the legal basis for the proposed rule (CWA Section 312(f)(4)(A) and 40 C.F.R. 140.4), it explained EPA's rationale for proposing, for the first time, to limit the NDZ to certain vessel classes, and specifically invited the public to comment on this approach. The commenters' detailed analyses of the issue shows that the commenters had a sufficient understanding of the legal issues to question EPA's application of Section 312(f)(4)(A) to specific classes of vessels and offer specific arguments against the proposed approach. In

this final rule preamble, EPA has, in response to these comments, explained its legal rationale for today's action.

5. Large Oceangoing Vessel Sewage Holding Capacity

Some commenters suggested that the two-day holding capacity requirement for oceangoing vessels in the proposed rule was arbitrary and impractical because it had no environmental impact-based justification and would cause large oceangoing vessels to have to make extra trips beyond State waters to discharge sewage. Commenters also noted that the requirement could incentivize holding tank removal or reduction to avoid regulation, resulting in an increase in unregulated vessels and vessel discharges. One commenter suggested that there should be an exception for vessels that had installed improved treatment systems rather than large holding tanks. A couple of commenters suggested that there was a greater impact from the sewage discharges of vessels not covered by the two-day holding capacity requirement.

Most of the commenters who opposed the two-day holding capacity requirement recommended revising the rule to more closely reflect California's legislation, which defines the covered class of large oceangoing vessels as those with "a holding tank of sufficient capacity" to contain sewage while in the marine waters of the State. These commenters proposed changing the rule to require *all* vessels, to the extent they are coming from waters in which discharge is permitted, to arrive with sewage holding tanks that have been discharged to the greatest extent operationally practicable. In addition, under the commenters' suggested approach, all such vessels would be prohibited from discharging sewage within State waters to the extent that they have the capability to hold such sewage in a holding tank. These commenters stated that this approach would

provide greater environmental benefit by regulating all vessels with holding tanks and result in a greater reduction in the amount of effluent discharged. In addition to written comments, representatives of the shipping industry met with EPA to discuss this approach during and after the proposed rule comment period.⁷ These representatives stated that this approach would increase compliance and be easier to enforce since the Coast Guard could check the discharge logs at the same time and in the same manner as it investigated compliance with other shipping industry regulations.

Based on the information provided by the commenters and EPA's own evaluation of the sewage generation data, we agree that the proposed two-day holding tank definition may be impractical in some circumstances (e.g. causing some vessels to make additional trips from ports to discharge outside the NDZ and complicating port operations), might create an incentive for some vessel operators to remove existing holding capacity to avoid coverage by the rule, and, as discussed more fully below, would be less protective of coastal water quality than a rule that covers all large oceangoing vessels having any amount of holding capacity. As described in Section II, today's rule replaces the proposed two-day holding tank capacity definition with a vessel class definition which provides that only those large oceangoing vessels equipped with holding tanks which have fully utilized the capacity of those holding tanks while present in State waters may discharge any treated sewage. The Agency believes this approach better implements California's request in its application for an NDZ that applies to large oceangoing vessels equipped with "a holding tank of sufficient capacity." Consistent with the State's application, the final rule remains limited to large vessels.

⁷ Records of meetings between EPA and shipping industry representatives can be found in the docket for this rule at www.regulations.gov.

Since the Notice of Proposed Rulemaking, EPA has acquired detailed 2010 large vessel data from the Coast Guard and the Chamber of Shipping of America (CSA), available in the docket for this rule. Data from the Coast Guard include port arrival and departure dates and times, and vessel identification, characteristics, country of origin, owners and operators for all vessels calling on California ports in 2010. EPA used the Coast Guard data to better estimate port call frequency and durations for large vessels, as this information was more current and complete than the 2006 State Lands Trust Vessel Survey Data that EPA relied on for the proposed rule. The CSA vessel sewage data was compiled in response to EPA's *Clean Water Act Section 312(b): Notice Seeking Stakeholder Input on Petition and Other Request to Revise the Performance Standards for Marine Sanitation Devices*, 75 FR 39683, July 12, 2010, and includes vessel, crew, sewage generation and holding capacity information for over 600 oceangoing vessels, of which 588 were 300 gross tons or greater. EPA was able to use this data to better estimate sewage generation rates and holding capacities for large oceangoing vessels because the holding capacity information is more detailed and reliable and includes the number of days of holding capacity and daily sewage generation rates for each vessel. EPA used the new data to compare the volumes of treated vessel sewage that would be prohibited from discharge into State marine waters under the proposed rule and this final rule.

Without direct data for vessel sewage discharges in State waters, EPA used the 2006 State Lands data and 2010 Coast Guard and CSA data, to estimate the volumes of sewage generated by the different classes of vessels while present in California waters. An analysis of the Coast Guard and CSA data indicate that the median daily sewage generation rate per person for large oceangoing vessels is 16 gallons, which is almost

twice as much as the estimate for large passenger vessels.⁸ CSA sewage volume data ranged significantly and is attributed to crew size variation and likely to systems that process both sewage and graywater; regardless, this remains the best available data for large oceangoing vessels. The 2006 State Lands data continues to be the best source of information for large passenger vessels, therefore, EPA's estimated sewage generation rate for these vessels remains 8.4 gallons per person, per day as was used in the proposed rule. EPA used these sewage generation estimates, data on the number and length of vessel port calls, and the range of vessel sewage tank holding capacities, to compare the scope of coverage of today's rule against the scope of coverage for the proposed rule. The Coast Guard and CSA data, and EPA's analysis and analytical methods are included in the docket for this rule. EPA's analysis determined that today's rule would regulate 62 percent of large oceangoing vessels, or approximately twelve percent more than the two-day holding capacity criteria of the proposed rule, because all large oceangoing vessels with holding tank capacity, including those with less than two days, would now fall under the rule. Based on CSA data, approximately 50 percent of vessels reporting had less than two days holding capacity. This increase would prohibit approximately nine percent more treated sewage, or over 780,000 gallons, from being discharged into California marine waters, as compared to the two-day holding capacity requirement in the proposed rule.⁹

⁸ For the proposed rule, EPA did not have data on cargo ship sewage generation rates, so the Agency used passenger ship data from the December 29, 2008 *Cruise Ship Discharge Assessment Report* to estimate the sewage generation rate for large non-passenger oceangoing vessels at 8.4 gallons per person, per day. The Coast Guard and CSA is more reliable because it includes specific sewage generation data for large oceangoing vessels.

⁹ The older data used in developing the proposed rule would also show that the final rule prohibits more sewage discharges, and is therefore more protective of water quality, but the extent of the difference would be less because EPA's original estimate of daily sewage generation was lower.

Today's rule also addresses the point raised by some commenters that the proposed two-day holding capacity rule would have excluded more large oceangoing vessels from the NDZ than it covered. As described above, today's rule will apply to approximately 62 percent of the large oceangoing vessels calling on California ports (those with holding tanks), instead of only 50 percent with two-day capacity using the originally proposed two-day holding capacity criteria. As a result today's rule will prohibit the discharge of approximately 3.3 million gallons of sewage per year, compared to the estimated 2.7 million gallons of sewage that may continue to be discharged by vessels with no holding capacity or vessels that exceed the maximum holding capacity of their tanks. (See Table 1.)

Since this approach is consistent with the State's application for an NDZ, more protective of California marine waters, more operationally feasible, and more likely to lead to better compliance, EPA has eliminated the proposed two-day holding tank capacity criteria and associated definitions, and restructured the rule to require that all large oceangoing vessels with holding tanks fully utilize their holding tank capacity while in State marine waters. EPA has presented this approach to the State, and the State agrees that the final rule is an appropriate approach to implementing "sufficient holding tank capacity."

Today's final rule does not adopt the commenters' specific proposed language, but it has substantially the same effect on large oceangoing vessels. Most covered vessel operators are expected to choose to enter State waters with empty holding tanks to be certain that they will fall outside the class of vessels subject to the NDZ if they fully use their holding capacity. In some instances, where a vessel with substantial holding

capacity will be in State waters for a short time, this may not be necessary. However, any large oceangoing vessel which might reach its holding capacity while in State marine waters is expected to choose to empty its tanks before entering State marine waters. In addition, EPA did not incorporate the commenters' proposed language requiring holding tanks to be "discharged to the greatest extent operationally practicable" because this is addressed by the "more than de minimis amounts of sewage" provision in the final rule.

The rule also does not distinguish between large passenger vessels with certified MSDs and those with advanced waste treatment systems, as one commenter proposed, because Section 312(f)(4)(A) expressly prohibits distinctions between vessel discharges based on the level of treatment (the regulation must "completely prohibit the discharge from a vessel of any sewage (whether treated or not) into such water").

5. Applying a No Discharge Zone for all California Marine Waters

Many commenters suggested that there is an insufficient nexus between vessel sewage and the entirety of California marine waters to designate an NDZ for all of the State's coastal waters. Some commenters suggested that there is insufficient data to support an NDZ at all. Three commenters stated that a prohibition under CWA Section 312(f)(4)(A) and 40 C.F.R. 140.4(b) requires science-based evidence that vessel sewage discharges are impacting specific waters in the proposed NDZ and that the State and EPA had not provided sufficient evidence of the impacts. One stated that the determination of the proper area to be included in an NDZ requires a quantitative and qualitative consideration of the relationship between the discharge for which the regulation is being considered and the water quality characteristics (both baseline levels and water quality standards) of the "specified" waters covered by the State's application. Some commenters

stated that under 40 C.F.R. 140.4(b), an NDZ could only be established where a prohibition on vessel discharges is needed to attain applicable water quality standards for the specific waters to be protected. Commenters suggested that impacts to water quality could not be measured without knowing the volume and spatial and temporal distribution of the discharges, or without ranking the contribution of the vessel discharges in relation to other sources of marine pollution. A commenter also stated that the diversity of California marine waters and the differing levels of impacts from oceangoing vessels to the waters make “lumping” them together into one NDZ illogical.

Pursuant to CWA Section 312(f)(4)(A), EPA evaluated the waters that the State specified for NDZ coverage. At the outset, it is important to note that the statutory standard for when EPA must impose an NDZ under CWA 312(f)(4)(A) is where the Administrator determines “that *the protection and enhancement of the quality of specified waters* within such state requires such a prohibition.” Contrary to what was suggested by commenters, nothing in the statute requires a demonstration focused on specific state water quality standards.¹⁰

Based on the information contained in the record for today’s rule, EPA finds that the NDZ requested in the State’s application is required for all of California’s marine waters. This information demonstrates that significant portions of California marine waters are biologically important and sensitive, that large vessel sewage discharges are a significant source of marine pollution which is distributed widely throughout State waters, and that these discharges contribute to the degradation of the State waters. From

¹⁰ EPA recognizes that its CWA section 312(f)(4)(A) regulations include a reference to state water quality standards, in the context of addressing a decision by the Administrator to expand or reduce the scope of a State’s requested NDZ, but that is not an issue in this designation. In any event, this reference predates amendments to CWA 312(f)(4)(A) which eliminated any need for EPA to determine whether an NDZ was necessary to protect applicable water quality standards, to the language in the statute today.

the Mexican border to the Oregon border, California marine waters include 889 recreational areas, 200 aquatic sanctuaries, over 100 state marine protected areas, including 34 locations designated as State Water Quality Protection Areas for unique biological values and or fragility, four National Marine Sanctuaries, other national and state parks, commercial and recreational fisheries, shellfish growing areas and essential fish habitat. These waters support important economic, recreational, conservation, research, educational, and aesthetic values, and are becoming increasingly important for potable water supply as desalinization measures are being proposed and used to meet drinking water demands. California has also listed 120 miles of its coastal waters as impaired for pathogens commonly associated with sewage.¹¹

Specially designated areas found throughout California's coastal waters are part of a larger connected oceanographic unit that is essential habitat for a wide range of important marine species. The entire length of California's coastal waters is influenced by the California Current system, an eastern boundary current that forms the eastern portion of the North Pacific subtropical gyre. While this broad current moves southward off the continental shelf, seasonal coastal upwelling (driven primarily by coastal winds), as well as countercurrents and eddies (smaller scale cyclonic flows), contribute to mixing of continental shelf water with offshore ocean waters. The population dynamics, genetic structure, and biogeography of many coastal marine species are highly influenced by and dependent on this oceanographic connectivity. These waters provide important migration routes, feeding grounds, and breeding sites for many marine mammal species, including blue whales, gray whales, dolphins, porpoises, California sea lions, fur seals, and

¹¹ These pathogens originate from both land-based and water-based sources.

Northern elephant seals, as well as migratory and resident sea bird species, including petrels, cormorants, albatross, terns, shearwaters, pelicans, and auklets.

Because most of California's coastal waters are recognized as possessing special significance, the degree of connectivity and mixing throughout these coastal waters requires that the NDZ extend to all of California's marine waters. As some commenters noted, discharged sewage moves easily through coastal waters and can impair water quality in protected areas even if it is released outside those areas. By establishing the NDZ for all of California marine waters, instead of select areas of special concern, today's rule will provide the required protection of water quality. In addition, it will be easier for vessel operators to understand the scope of the designation and be able to comply with the rule.

In light of the extensive array of important marine resources located throughout California's coastal waters, their connection to the California Current system, and the presence of the two covered classes of large vessels in many parts of these waters having the potential to discharge 22.5 million gallons of sewage per year, EPA does not believe that Section 312(f)(4)(A) requires it to divide the proposed NDZ into individual segments and conduct site-specific evaluations of these segments to determine the extent to which vessel sewage discharges are impacting each. None of the commenters identified specific segments of the NDZ that they proposed to exclude from designation.¹² The information provided in the State's application, the proposed rule and supporting comments demonstrate that an NDZ encompassing all California marine waters is required to protect and enhance the quality of California marine waters which warrant

¹² As noted previously, these commenters stated that EPA should deny the State's request for establishment of an NDZ for *all* California marine waters.

special protection under CWA Section 312(f)(4)(A) because of their unique qualities and diverse resources.

7. Other General Comments

One commenter, while in support of the vessel sewage prohibition, expressed concerns with the legal basis for regulating military vessels under the rule stating that Section 553(a)(1) of the Administrative Procedure Act prohibits an agency from regulating military matters. Section 553(a)(1) exempts rulemakings involving military functions from having to comply with the Administrative Procedure Act's notice and comment procedures, but does not exempt military functions from all federal regulations. Pursuant to Section 312(d) of the CWA, certain military vessels are covered by today's rulemaking according to the second applicability provision, i.e., any military vessel that is a "large oceangoing vessel equipped with a holding tank which has not fully used the holding tank's capacity, or which contains more than de minimis amounts of sewage generated while the vessel was outside of the marine waters of the State of California." Under CWA section 312(d), however, the Secretary of Defense has exercised the authority to exempt specific vessels or classes of vessels from compliance in the interest of national security. The Secretary of Defense promulgated Department of Defense (DoD) 4715.06-R1 "Regulations on Vessels Owned or Operated by the Department of Defense" (January 2005), at p.8, sections C.1.3.1.1 through C.1.3.1.4, which explain the circumstances under which DoD has exempted its vessels from the sewage discharge requirements of Section 312, including for example, circumstances in which compliance would excessively and unreasonably detract from the vessel's military characteristics, effectiveness, or safety, and not be in the interest of national security. This DoD

regulation states that commanding officers and/or vessel masters of exempted vessels are nonetheless required to limit sewage discharges into U.S. navigable waters, territorial seas, and NDZ's to the maximum extent practicable without endangering the health, safety, or welfare of the crew or other personnel aboard.

The commenter also stated that the economic analysis for the rule required under the Regulatory Flexibility Act was incomplete because it did not consider “potentially devastating” impacts to small shore-side businesses in the event regulated large passenger vessels spent fewer days at ports while transiting beyond the NDZ to discharge. The Regulatory Flexibility Act only requires agencies to consider economic impacts on small entities to which the rule will apply. *See, e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001), 5 U.S.C. 603(b)(3). This rule will not apply to "small shore-side businesses" and thus EPA was not required to consider the potential indirect impacts of the rule on those businesses. Nevertheless, EPA does not anticipate the rule will result in cruise ships spending fewer days at California ports than they would otherwise. The comment letter from Cruise Lines International Association, which represents 26 cruise lines, stated that their members have implemented the California legislative restrictions that formed the basis for the rule since the State legislation was enacted.

Another commenter suggested that federal regulation of sewage discharges from vessels preempts state regulation. Section 312(f)(1)(A) of the CWA specifies 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;

however, the other subsections of 312(f) specifically authorize states to apply to EPA for establishment of NDZs.

IV. Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998 (63 FR 31885), regarding plain language, this preamble and the Final Rule are written using plain language.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and 13563 (76 FR 3821, Jan. 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action (docket number EPA-R09-OW-2010-0438).

EPA prepared an analysis of the potential costs associated with this action to determine whether the final rule would have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy or a sector of the economy. Vessels that are equipped with MSDs and that navigate throughout California waters are already subject to the EPA MSD Standard at 40 C.F.R. part 140 and the Coast Guard MSD Regulations at 33 C.F.R. part 159. These standards prohibit the overboard discharge of untreated vessel sewage in state waters and require that vessels with installed toilets be equipped with Coast Guard certified MSDs which either retain sewage or treat sewage to the applicable standards. See, 40 C.F.R. 140.3; 33 C.F.R. 159.7. There

are three types of MSDs, but only Type II and Type III MSDs are used by the vessels affected by this rule.

Vessels subject to this final rule include all large passenger vessels of 300 gross tons or more and oceangoing vessels of 300 gross tons or more equipped with sewage holding tanks. The proposed rule relied on 2008 data for large passenger vessel calls to estimate that up to 40 percent of the large passenger vessels may need to retrofit their holding tanks, at an estimated cost of \$200,000 per vessel, to ensure they had adequate holding capacity while operating in State waters. The total estimated one-time capital cost for the existing fleet of large passenger vessels calling on California ports was estimated to be \$3.8 million. To estimate operation and maintenance costs, EPA assumed that most of the cost would be labor to operate and occasionally inspect new or retrofitted tanks. Conservatively assuming each ship would budget one hour per week for tank operation and maintenance at approximately \$50 per hour, we estimated approximately \$2,600 per year, per ship, or approximately \$50,000 per year for operation and maintenances costs.

Approximately 62 percent of the large oceangoing vessels have sewage holding tanks and, therefore, are subject to this final rule. For the proposed rule, EPA evaluated the potential costs of voluntarily retrofitting holding tanks on some vessels to increase capacity or, alternatively, making extra trips beyond State marine waters to discharge sewage. However, the final rule does not require owners to retrofit any large oceangoing vessels or make extra trips to discharge outside of the NDZ to discharge sewage, and therefore we do not anticipate that it will impose additional costs on these vessel operators.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 C.F.R. 1320.3(b). Since today's rule would not establish or modify any information and record keeping requirements, it is not subject to the requirements of the Paperwork Reduction Act.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 C.F.R. 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the final rule on small entities, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. The small entities subject to the requirements of this final rule

fall under Deep Sea Freight Transportation (NAICS Code 483111) and Deep Sea Passenger Transportation (NAICS 483112) classifications.¹³ The U.S. Small Business Administration size standard for these businesses is 500 or fewer employees. To determine the size of companies that own large passenger and large oceangoing vessels that call at California ports, the EPA reviewed owner profiles for all large passenger vessels and several oceangoing vessels that responded to the State's 2006 vessel survey. Based on this review, it was determined that no large passenger and oceangoing vessels that call at California ports are owned by companies that employ 500 or fewer people.

D. Unfunded Mandates Reform Act

This final rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year, as demonstrated above in section A, Executive Order 12866: Regulatory Planning and Review.

Because the final rule contains no regulatory requirements that might significantly or uniquely affect small governments, it is also not subject to the requirements of Section 203 of the Act. Small governments are subject to the same requirements as other entities whose duties result from this final rule and they have the same ability as other entities to retain and pump out treated sewage or discharge outside of the designated zones.

E. Executive Order 13132: Federalism

This action does not have Federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of

¹³ U.S. Small Business Administration Table of Small Business Size Standards, North American Industry Classification System (NAICS), www.sba.gov/size.

government, as specified in Executive Order 13132. Section 312(f) of the CWA generally preempts state regulation of sewage discharges in state waters. An NDZ allows the state to seek protection of its state waters that it would otherwise be preempted from providing on its own. The State of California is requesting that EPA take action to designate all State marine waters as an NDZ under CWA Section 312(f)(4)(A), and EPA's action in this final rule is responsive to this request. Therefore, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have any known tribal implications, as specified in Executive Order 13175 (65 FR 67249, Nov. 9, 2000). The only expected impact on tribal rights or responsibilities is the improvement of ocean water quality. EPA has notified all California tribes with coastal reservations of this action and received no comments.

G. Executive Order 13045: Protection of Children from Environmental Health Risks & Safety Risks

The order applies to economically significant rules under E.O. 12866 that concern an environmental health or safety risk that EPA has reason to believe may disproportionately affect children. This action is not subject to EO 13045 (62 FR 19885, Apr. 23, 1997) because it is not economically significant as defined in EO 12866.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The final rule will further regulate and reduce pollutants from sewage in California marine waters thus reducing the risk of exposure to all populations, including those covered under this Executive order.

K. Congressional Review Act,

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective [INSERT DATE 30 DAYS FROM PUBLICATION].

Lists of Subjects in 40 CFR Part 140

Environmental protection, Sewage disposal, Vessels.

Dated: February 9, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

For the reasons stated in the preamble, EPA amends 40 CFR part 140 as follows:

PART 140 – [AMENDED]

1. The authority citation for part 140 continues to read as follows:

Authority: 33 U.S.C. 1322.

2. Section 140.4 is amended by adding paragraph (b)(2) to read as follows:

§140.4 Complete prohibition.

* * * * *

(b) * * *

(2)(i) For the marine waters of the State of California, the following vessels are completely prohibited from discharging any sewage (whether treated or not):

(A) A large passenger vessel;

(B) A large oceangoing vessel equipped with a holding tank which has not fully used the holding tank's capacity, or which contains more than de minimis amounts

of sewage generated while the vessel was outside of the marine waters of the State of California.

(ii) For purposes of paragraph (b)(2) of this section:

(A) “Marine waters of the State of California” means the territorial sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles, and all enclosed bays and estuaries subject to tidal influences from the Oregon border (41.999325 North Latitude, 124.212110 West Longitude, decimal degrees, NAD 1983) to the Mexican border (32.471231 North Latitude, 117.137814 West Longitude, decimal degrees, NAD 1983). A map illustrating these waters can be obtained from EPA or viewed at <http://www.epa.gov/region9/water/no-discharge/overview.html>.

(B) A “large passenger vessel” means a passenger vessel, as defined in section 2101(22) of title 46, United States Code, of 300 gross tons or more, as measured under the International Convention on Tonnage Measurement of Ships, 1969, measurement system in 46 U.S.C. 14302, or the regulatory measurement system of 46 U.S.C. 14502 for vessels not measured under 46 U.S.C. 14302, that has berths or overnight accommodations for passengers.

(C) A “large oceangoing vessel” means a private, commercial, government, or

military vessel of 300 gross tons or more, as measured under the International Convention on Tonnage Measurement of Ships, 1969, measurement system in 46 U.S.C. 14302, or the regulatory measurement system of 46 U.S.C. 14502 for vessels not measured under 46 U.S.C.14302, that is not a large passenger vessel.

(D) A “holding tank” means a tank specifically designed, constructed, and fitted for the retention of treated or untreated sewage, that has been designated and approved by the ship’s flag Administration on the ship’s stability plan; a designated ballast tank is not a holding tank for this purpose.

* * * * *

**[FR Doc. 2012-4469 Filed 02/24/2012 at 8:45 am; Publication Date:
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