

December 4, 2009

VIA ELECTRONIC SUBMISSION

Admiral Thad W. Allen
Commandant of the U.S. Coast Guard
2100 Second Street, SW
Washington, DC 20593

Re: Notice of Proposed Rulemaking, “Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters”, USCG-2001-10486.¹

Dear Admiral Allen:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) is pleased to submit these comments to the U.S. Coast Guard regarding its proposed Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters. Advocacy appreciates the efforts the Coast Guard has made to analyze the impact that the proposed standards will have on small entities and offers these comments to further assist the Coast Guard in developing a regulation that accomplishes the Coast Guard’s objectives while providing regulatory flexibility for the small business affected by the rule.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

Background

On August 28, 2009 the Coast Guard published a proposed rule amending its regulations on ballast water management by establishing standards for the allowable concentration of

¹ 74 Fed. Reg. 44632 (August 28, 2009).

² 5 U.S.C. § 601 et seq.

³ *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (*SBREFA*).

living organisms in ships' ballast water discharged in U.S. waters.⁴ The proposed rule's purpose is to aid Coast Guard's efforts to manage the introduction and spread of non-indigenous and invasive species into U.S. waters. The Coast Guard's current regulations for the management of ballast water discharge require that all vessels equipped with ballast water tanks and bound for ports or places of the United States conduct a mid-ocean ballast water exchange (BWE), retain their ballast water on board, or use another Coast Guard approved ballast water management method (BWM).

In lieu of BWE, the Coast Guard's proposed regulations establish a two-phased ballast water discharge standard (BWDS) for concentration of living organisms that can be discharged in ballast water and establish an approval process for ballast water management systems (BWMS) intended for use on board vessels to meet the proposed discharge standard. Vessels with a 1500-5000 cubic meter ballast capacity constructed before January 1, 2012 must be in compliance with the phase-one standard by their first dry-docking after January 1, 2014. All other vessels must be in compliance with the phase-one standard by their first dry-docking after January 1, 2016. The phase-two standard may or may not be implemented following a practicability review in early 2013, and every three years following. The phase-two standard includes a grandfather clause for vessels that install technology meeting the phase-one standard before January 1, 2016.

Advocacy's Comments

Following the publication of the proposed rule, small businesses within the tug boat, tow boat, and supply barge industries contacted Advocacy to express their concerns regarding the impact of the proposed rule on their industries. These small businesses are concerned that the Coast Guard's economic analysis does not account for a significant number of vessels operated by their businesses. These firms also contend that installing the required BWMS will not be economically feasible for the large number of vessels that discharge relatively small amounts of ballast water. Furthermore, small businesses are especially concerned about the cumulative effect of the proposed regulations should the phase-two standards be implemented without a longer grandfathering period than the five year period proposed. Advocacy submits the following recommendations for the Coast Guard's consideration in light of the concerns expressed by small businesses.

Expand the scope of regulatory flexibility analysis to include more vessels

Pursuant to the RFA, the Coast Guard has prepared and published an Initial Regulatory Flexibility Analysis (IRFA) for this proposed rule. The IRFA concludes that seventy-two percent of small firms affected by the rule would incur an annual cost impact ranging between 10% and 29% of revenue over ten years⁵; however, the regulatory impact analysis prepared for the rule assumes that vessels less than 100 feet in length, as well as tugboats, as well as river vessels, generally do not carry ballast water⁶. Advocacy has spoken with small business representatives in the tugboat, towing and supply vessel

⁴ *Supra* note 1.

⁵ U.S. Coast Guard, *Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters, Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis*, 108; available at www.regulations.gov (Docket ID USCG-2001-10486).

⁶ *Id.* at 37.

industries who assert that many of the vessels listed above do in fact carry ballast water. Additionally, some small business representatives assert that installing BWMS on such small vessels would be cost-prohibitive and would not significantly contribute to the Coast Guard's efforts to manage invasive species. In some cases, it may be the case that the BWMS are more costly than the vessels on which they would be installed.⁷ To fully comply with the RFA, the Coast Guard must expand the scope of its RFA analysis to include the vessels listed above before promulgating a final rule, and then consider further regulatory alternatives in light that analysis.

Consider additional regulatory alternatives to increase flexibility for small businesses

Small businesses have indicated to Advocacy that many of the small vessels engaged in the tugboat, towing and supply vessel industries carry only municipal water in their ballast tanks. Municipal water has not been shown to contribute to the spread of invasive species in U.S. waterways. Given that installing costly ballast water treatment systems on these vessels may not offer significant environmental benefits, Advocacy urges the Coast Guard to craft an exemption for vessels that use only municipal water in their ballast tanks. Such an exemption could provide substantial cost-saving for small businesses without impeding the Coast Guard's efforts to manage invasive species.

Additionally, it has been brought to Advocacy's attention that small towing and supply vessels may contribute to only a fraction of the entire volume of ballast water discharged in U.S. waters. The Coast Guard's regulatory analysis states that average ballast water capacity for vessels affected by the rule ranges between 17,000 cubic meters and 215,000 cubic meters; however, Advocacy has learned that ballast capacity of a typical inland towboat ranges between 70 cubic meters and 140 cubic meters.⁸ Given this information, Advocacy urges the Coast Guard to examine the relative benefits of requiring ballast water management systems for vessels with such low-volume ballast tanks. If the Coast Guard finds that ballast water treatment for these vessels does not provide a significant environmental benefit compared to the current practice of ballast water exchange, or that requiring ballast water treatment systems on such small vessels is not economically practicable, the Coast Guard should consider crafting an exemption for vessels with relatively low-volume ballast tanks.

Include a grandfathering provision with the phase-two standards

The Coast Guard has tentatively proposed to implement its phase-two standard setting the allowable limits for living organisms in ballast water following a practicability review in 2013. The Coast Guard has proposed a five year grandfathering provision for those vessels that comply with the phase-one standard prior to January 1, 2016. Advocacy strongly urges the Coast Guard to retain this grandfathering provision, without the five-year limit. Advocacy urges the Coast Guard to adopt a grandfathering provision that would apply for the life of a typical ballast water treatment system.

⁷ See public comments from The American Waterways Operators, dated December 4, 2009, page 6 (asserting that the cost of an inland barge is, in some cases, approximately half the cost of an average ballast water treatment system).

⁸ *Id.*

As discussed earlier in these comments, and in the Coast Guard's IRFA, installing ballast water treatment systems to comply with the phase-one standards will be extremely costly for small businesses, and not even practicable for certain small operations. Requiring businesses to upgrade their systems within a five-year period would be extremely burdensome for small businesses that will likely still be servicing the debt incurred to purchase the phase-one ballast water treatment systems. Additionally, a five year grandfathering provision could have the perverse effect of incentivizing businesses to refrain from complying with the phase-one standards and wait for implementation of the phase-two standards before installing ballast water treatment systems. At the very least, the Coast Guard should not place a time limit on its grandfathering provision until it is able to assess the potential costs associated with upgrading technology to meet the phase-two standards.

Conclusion

Advocacy appreciates the efforts of the Coast Guard to assess the impact of its proposed ballast water discharge standards and looks forward to assisting the Coast Guard in further developing its analysis to include small tugboats, tow boats and supply vessels. Once the Coast Guard has more thoroughly assessed the economic impact of its proposed standards on these small businesses, Advocacy strongly urges the Coast Guard to examine possible exemptions for vessels that carry only municipal water as well as for vessels with low-volume ballast tanks. Finally, should the Coast Guard implement a final rule including its phase-two ballast water discharge standards, Advocacy strongly urges the Coast Guard to consider including a grandfathering provision that provides adequate flexibility for small businesses. Please do not hesitate to contact me or Jamie Belcore Saloom at (202) 205-6890 or Jamie.Belcore@sba.gov should you have any questions.

Sincerely,

//signed//

Susan M. Walthall

Acting Chief Counsel for Advocacy

//signed//

Jamie Belcore Saloom

Assistant Chief Counsel for Advocacy

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs
Bruce Berkeley, Office of the General Counsel, Department of Homeland Security