

United States Coast Guard
Docket Management Facility (M-30)
U.S. Department of Transportation
West Building, Ground Floor, Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590-0001

Re: Docket Number USCG-2004-19621, Dry Cargo Residue Discharges in the Great Lakes; Preparation of Environmental Impact Statement

March 27, 2009

Dear U.S. Coast Guard:

Alliance for the Great Lakes, Great Lakes United, Lake Ontario Waterkeeper, and the National Wildlife Federation, in consultation with the Conservation Law Center, Inc., respectfully submit these comments in response to the Dry Cargo Residue Discharges in the Great Lakes; Preparation of Environmental Impact Statement (“second EIS”) (73 Federal Register 79496) As we noted in our comments of July 22, 2008 on the draft first environmental impact statement (EIS) and notice of proposed rulemaking and September 22, 2008 on the Final EIS (“first EIS”) (which are considered to be incorporated by reference into these comments)¹, a shared priority of our four groups is to ensure that commercial navigation practices in the Great Lakes and St. Lawrence River do not have a deleterious impact on the basin freshwater ecosystem and dependant communities and economies.

1) DRY CARGO RESIDUE DISCHARGES INTO THE GREAT LAKES ARE PROHIBITED BY FEDERAL AND INTERNATIONAL LAW

We continue to oppose the U.S. Coast Guard’s (USCG) rulemaking codifying the practice of discharging dry cargo residues (DCR) into the Great Lakes, St. Lawrence River, and all inland navigable waterways.

We have previously stated that the law upon which the USGC relies for the dry cargo rulemaking does not require the USCG to allow dry cargo dumping, and therefore the USCG is able to both give effect to MARPOL and the Coast Guard and Maritime Transportation Act of 2004. The USCG relies on the “notwithstanding any other law” language for its authority to allow dry cargo dumping. However, that phrase is not always taken literally by courts and does not always require all otherwise applicable laws be ignored.² Additionally, relying on that phrase ignores the standard for abrogating or

¹ Alliance for the Great Lakes et al., Public Submission USCG-2004-19621-0114, Draft Environmental Impact Statement; U.S. Coast Guard Rulemaking for Dry Cargo Residue Discharges in the Great Lakes, USCG-2004-19621, July 22, 2008; Alliance for the Great Lakes et al., Public Submission USCG-2004-19621-0122, U.S. Coast Guard Rulemaking for Dry Cargo Residue Discharges in the Great Lakes, USCG-2004-19621, September 22, 2008.

² See, e.g., Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996); D.C. Federation of Civic Associations v. United States, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030.

modifying a treaty by a later statute: (1) Congress must clearly state their intent to step away from the international agreement; and (2) the statute and the treaty must be irreconcilable.³

We restate our belief that ending dry cargo dumping in the Great Lakes is the only alternative that is consistent with federal and international law.⁴

2) IF THE RULEMAKING PROCEEDS, WE SUPPORT THE ZERO-DISCHARGE ALTERNATIVE

If the USCG continues with the DCR rulemaking, we support the Zero-Discharge Alternative.⁵ The Zero-Discharge Alternative is consistent, in effect, with federal and international law, and protects the Great Lakes and St. Lawrence River from the deleterious impacts of dry cargo dumping.

3) IMPROVEMENTS ARE NEEDED IF ANOTHER ALTERNATIVE IS SELECTED

If the USCG continues with the DCR rulemaking and does not select the Zero-Discharge Alternative, we encourage the development and adoption of a rule that establishes a process to reach the goal of eliminating dry cargo dumping. Such a rule would contain achievable improvements to current practices such as specified control measures, discharge limits on quantity and type of DCR, additional restrictions on discharge locations, a firm commitment to continual improvement, and benchmarks to monitor progress. The USGC should include in its rule a triennial review to reevaluate technology, research, improvements available to industry and ports, and the need for new no-discharge zones. USCG should also include in its final rule the parts of the first EIS that strengthened environmental protections: (1) banning DCR discharges within the boundaries of four protected areas; (2) restricting DCR discharges within Green Bay and the Western Basin of Lake Erie; and (3) banning DCR discharges within three miles of the shore of five land-based protected areas.⁶

4) WE SUPPORT AN EXPANDED SCOPE OF THE SECOND EIS

We support including in the second EIS additional study of sediment physical structure, socioeconomic resources, protected and sensitive areas and their designation, the benthic community, and invasive species, as proposed.⁷ We request that the following also be included in the second EIS:

- evaluate a ban on cargo dumping anywhere within areas designated as a no discharge zone under Section 312 of the Clean Water Act;

³ See Alliance for the Great Lakes et al., Public Submission USCG-2004-19621-0114 at 4-5.

⁴ See Alliance for the Great Lakes et al., Public Submission USCG-2004-19621-0139.1 at 1.

⁵ 73 Fed. Reg. 79498 (December 29, 2008).

⁶ U.S. Coast Guard, Final Environmental Impact Statement: U.S. Coast Guard Rulemaking for Dry Cargo Residue Discharges in the Great Lakes, USCG-224-19621, August 2008, pp. 1-5 – 1-6.

⁷ 73 Fed. Reg. 79498 (December 29, 2008).

- evaluate the option of requiring new technologies and ban dry cargo dumping entirely for all new commercial vessel operations while phasing out dry cargo dumping by existing vessels through continual reductions in dumping;
- conduct a detailed study of environmental benefits from and costs of mandatory discharge control measures for vessels and ports; and
- additional study of the toxicity of dry cargo residue.

Please feel free to contact any of the undersigned if you have questions or need any clarification.

Sincerely,

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The Alliance for the Great Lakes is an organization that has existed in one form or another since 1970. The Alliance works to conserve and restore the world's largest freshwater resource through policy, education and local efforts aimed at preserving the Great Lakes region as a national treasure. It also works with the region's residents, enhancing their understanding of how they can help, too. The mission of the Alliance is one of conservancy and restoration of the world's largest fresh water resource and the preservation of clean water for generations to come.

The Conservation Law Center is a non-profit organization established as a Midwest-based advocate for natural resource conservation. The Clinic serves its clients using all of the tools and approaches that law firms use, but it accepts as clients only those whose issues involve advocacy for natural resources and who are non-profit or governmental organizations.

Great Lakes United is an international coalition of groups and individuals in the United States, Canada, First Nations and tribes dedicated to the protection and restoration of the Great Lakes-St. Lawrence River basin. A priority of the coalition is to ensure that commercial navigation practices in the Great Lakes and St. Lawrence River do not have a deleterious impact on the basin freshwater ecosystem and dependant communities and economies.

Lake Ontario Waterkeeper fulfills its mission by educating the public about Lake Ontario and the Great Lakes Basin and by conducting research and public education activities on behalf of the watershed. Our goal is to restore and protect Lake Ontario's natural resources, as well as contribute to its aesthetic, social recreational and economic values. We are a licensed member of the New York-based Waterkeeper Alliance, led by Robert F. Kennedy Jr.

National Wildlife Federation inspires Americans to protect wildlife for our children's future. We work with over 4 million members, partners, and supporters to actively educate, inspire, and promote achievable solutions to everyday Americans in communities from coast-to-coast.