Regulation of Navy Ship Discharges Under the Clean Water Act: Have Too Many Chefs Spoiled the Broth

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REGULATION OF NAVY SHIP DISCHARGES UNDER THE CLEAN WATER ACT: HAVE TOO MANY CHEFS SPOILED THE BROTH?

DANIEL E. O'TOOLE

I. INTRODUCTION

On October 20, 1962, U.S.S. Stickell (DD 888) left her home port of Norfolk, Virginia, under orders to steam south for classified operations. Within forty-eight hours, 180 Navy ships had joined Stickell in the Caribbean to enforce a blockade around Cuba. During the national emergency often called the “October missile crisis,” this naval blockage was the cornerstone of President John F. Kennedy’s successful strategy that convinced Soviet Premier Nikita Kruschev to withdraw the Soviet ballistic missiles from Cuba.¹

On May 19, 1989, the State of Alaska refused permission to U.S.N.S. Sealift Pacific, to unload her cargo of jet fuel destined for Whittier Army Depot.² Alaska’s Department of Environmental Compliance (“ADEC”) cited section 313 of the Clean Water Act,³ as well as state regulations, as authority to prohibit off-loading the jet fuel until the ship obtained a state-approved oil spill contingency plan.⁴

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² On Military Sealift Command vessel designation, see infra note 20 and accompanying text.
³ Letter from Alaska Department of Environmental Compliance to Military Transport Lines, Inc. (MTL is the corporation which manages the transport vessels under contract to MSC) (May 19, 1989) (on file with the Office of Counsel, Military Sealift Command).
What if Sealift Pacific had been tasked to provide fuel for Stickell at a strategic port en route to the Caribbean, such as Port Everglades, Florida; and suppose Florida had refused to allow a transfer of the fuel until the state reviewed and approved the Sealift Pacific’s oil spill contingency plan? Or refused to grant the ship a state water pollution discharge permit? Or otherwise required the ships to comply with state environmental regulations?

Although the courses of these ships were crossed for the purpose of illustration, the critical nature of the confrontation posited between a state and Navy ships may not be mere fiction but could be entirely possible, indeed inevitable, given the current state of environmental laws and the increasingly aggressive posture taken by many states in interpreting and applying those laws to Navy ship discharges.

This article reviews federal and state authority to protect and improve water quality under the Clean Water Act (“CWA”) as applied to Navy ships and the resulting impacts on the Navy’s mission to preserve national security through control of the seas by ships. To place the analysis in a meaningful context, the first section briefly reviews the characteristics that qualify Navy ships as public vessels and, more specifically, warships. The focus then turns to a review of current regulatory authority over ship discharges, including a synopsis of federal statutory and administrative regulations. The issue of whether, or to what

6. The Alaska Statute which ADEC argued was applicable to Sealift Pacific, ALASKA STAT. § 46.04.030 (1991), provides that a person may not transfer oil “to or from a tank vessel” unless an oil discharge contingency plan for the tank vessel “has been approved by the department.” ALASKA STAT. § 46.04.110 (1990) defines “person” to include “government agency.” Other coastal states have similar requirements. See FLA. STAT. ch. 376.071 (1970) (“any vessel operating in state waters with a storage capacity to carry 10,000 gallons or more of pollutants as fuel and cargo shall maintain an adequate written ship-specific discharge prevention and control contingency plan” (emphasis added).
7. The Florida Pollution Control Acts require any person intending to discharge wastes into the waters of the state to make application to the Department of Environmental Resources for an operating permit. FLA. STAT. ch. 403.088(2)(a) (1993).
8. FLA. STAT. ch. 376.07(2)(h)(i) (1993) directs the Department of Environmental Regulation to adopt “such other rules as the exigencies of any condition may require or such as may reasonably be necessary” to carry out the intent of the pollution discharge law. For example, Florida surface water standards prohibit the discharge of more than 5.0 milligrams per liter (mg/l) of oil in discharged bilge water. FLA. ADMIN. CODE ANN. r. 17-302.510(5)(k)(1) (1993). See also infra note 233 and accompanying text.
9. For other examples of state challenges to Navy ship discharges, see infra notes 205-44 and accompanying text.
extent, state regulation of Navy ships may be barred by federal supremacy—the issue over which the Navy and state regulators most often clash—will then be explored, followed by a review of Virginia’s regulatory position and a brief comparison of the approaches taken by several strategic coastal states regarding their authority to regulate Navy ship discharges.

This article observes that the present state of the law represents, at best, a patch-work quilt of legislation which neither protects water quality nor allows the Navy to plan rationally and execute effectively its mission—to the ultimate confusion and frustration of state and federal agencies alike. The obvious solution is, of course, to establish national discharge standards for Navy ships. The eventual reauthorization of the CWA, provides an ideal mechanism for authorizing the development of such standards. This article concludes with a specific recommendation for amending the CWA.

II. NAVY SHIPS: UNIQUE PUBLIC VESSELS

A. Unique Characteristics of Warships

Few would argue that U.S. Navy ships in the active fleet, such as aircraft carriers, destroyers or submarines, are anything but public vessels. However, Navy ships are unique among public vessels due to the Navy’s

11. The CWA’s general definition section does not define “vessel.” 33 U.S.C. § 1362. However, in the Environmental Protection Agency’s implementing regulations for marine sanitation devices, “vessel” is defined as including “every description of watercraft, or other artificial contrivance used, or capable of being used, as a means of transportation on the waters of the United States.” 40 C.F.R. § 140.1(d) (1993). The Department of Commerce General Counsel recently concluded that the use to which a vessel is put is one of two key elements which determine whether a vessel is a “public vessel;” the other being ownership by the government. Letter from Stephen H. Kaplan, General Counsel, Department of Commerce, to Steven S. Honigman, General Counsel, Department of the Navy (Dec. 6, 1993) [hereinafter Kaplan Letter]. The significance of being a public vessel is that a statute might offer deferential treatment or the sovereign may choose to invoke immunity from regulation. See infra note 142 and accompanying text. At common law, “vessel” was defined essentially as in the EPA definition. In its broadest sense, the term is more comprehensive than “ship” and has been held to include a barge having no self-propulsion; Norton v. Warner Co., 321 U.S. 565 (1944); a pile driver scow, George Leary Const. Co. v. Matson, 272 F. 461, 462 (C.C.A. 4 Va. 1921); a new ship once its hull has been launched, The Pinthis, 286 F. 122 (C.C.A.N.J. 1923); and even a
constitutionally derived national security mission. This mission requires that the Navy "be organized, trained and equipped primarily for prompt and sustained combat incident to operations at sea." Presently, the Navy has approximately 469 ships, including auxiliary ships and the Naval Reserve Force. Each ship has a specific tactical significance in the order of battle, much like the playing pieces of a chess game. Though a rook or a bishop may be more valued individually than a pawn for their warfighting capabilities, the winner of the game will be the player who better plans and executes a strategy integrating all of the playing pieces. Each ship within a Navy task force, battlegroup, or other configuration is likewise an integrated component of the larger force. Regardless of a ship’s individual function, be it anti-submarine warfare or provision of combat supplies, each ship is essential to the success of the overall military mission.

hydro-plane moving on the water, Reinhart v. Newport Flying Serv. Corp., 133 N.E. 371 (1921); but not a wharfboat, secured to the shore by cables and used as an office with water, telephone and electric light connections, Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19 (1926); nor a dry dock used for the repair of vessels, even though capable of being floated and towed from place to place, Berton v. Tietjen & Lang Dry Dock Co., 219 F. 763 (D.C. N.J. 1948).

12. U.S. Const. art. I, sec. 8, cl. I: "[t]he Congress shall have the Power To... provide for the common Defense and general Welfare of the United States... to provide and maintain a Navy." Id. at cl. 13; and "to provide for organizing, arming, and calling forth the Militia to execute the laws of the union, suppress insurrections, or repel invasions," Id. at cl. 14, 15.


15. In addition to the active fleet, there are approximately 25 special mission support ships such as research frigates, missile range instrumentation ships, oceanographic research, surveying, salvage and rescue, acoustic research and cable repair ships. The Navy also owns and employs a variety of miscellaneous craft, including but not limited to floating drydocks, 3 barracks ships in use since 1945, an equally aged explosive damage control barge, 75 harbor security boats, 27 riverine warfare craft and various service craft such as aircraft transport lighters, floating cranes, ferryboats and one sail-driven frigate, the U.S.S. Constitution, that first went to sea in 1798 and remains in commission today. See Combat Fleets of the World, supra note 14.
Warships are designed as platforms to carry weapons systems and the personnel required to operate them. They have significantly larger crews than most commercial vessels, and many crew members live on board even when the warship is in port. As a result of the intensive use of space for weapons and personnel, warships have significant weight and space constraints. They must function efficiently and effectively within the rigorous operating constraints of war at sea, so every system must be reliable, able to withstand motion, shock, and vibration, and be compatible with other ship systems. Under some circumstances, particularly in submarines, equipment must also be quiet, leaving no tell-tale acoustic "signature." Warships ply the seas worldwide even during "peacetime" and have neither continuous, nor predictable, access to shore facilities for waste management services. They are deployed at sea for longer periods than is typical for commercial ships which are financially motivated to get from port to port expeditiously. Thus, in describing Navy ships or assigning them to the equivalent of an industrial category for purposes of regulating discharges, the fundamental characteristic of the Navy's active fleet, to which all others are ancillary, is that of being warships.

B. The Military Sealift Command

The Military Sealift Command ("MSC") is another major category of "Navy" ships. The MSC inventory is composed of approximately 120 privately owned ships, built specifically for long term charter to the U.S. Navy. These ships' primary mission is the non-commercial transportation of military cargo by sea for the U.S. Armed Forces. Since the ships are not commissioned vessels, the names of MSC ships are preceded by the

17. 46 U.S.C. § 2101(47) (1982) makes a similar distinction, defining a "vessel of war" as "a vessel (A) belonging to the armed forces of a country; (B) bearing the external marks distinguishing vessels of war of that country; (C) under the command of an officer commissioned by the government of that country . . . ; and (D) staffed by a crew under regular armed forces discipline."
18. MSC was established in 1949 as the Military Sea Transport Service and was reorganized as the MSC in 1970. The MSC is commanded by an active duty U.S. Navy flag officer, presently a Vice Admiral. Combat Fleets of the World, supra note 14, at 874.
19. Id.
designations “United States Navy Ship,” rather than “United States Ship.” They fly the naval ensign of the United States but bear the distinctive markings of the naval auxiliaries—blue and yellow bands encircling their stacks. The crews are primarily civilian, composed of either civil service or contract personnel, although some ships may have active duty naval personnel.

C. The Ready Reserve Force

Finally, the Navy’s Ready Reserve Force (“RRF”) of strategic sealift assets numbers about 108, including fast sealift ships, aviation support and hospital ships, as well as the ready reserve force of tanker-cargo ships, seatrian tankers, gas tankers and crane and troop ships. During Desert Shield and Desert Storm, over sixty of the RRF ships were activated.

D. Summary

The Navy owns and employs hundreds of ships of various ages, employing a wide variety of technologies and possessing various capabilities in order to fulfill its national security mission. However, a number of ships operating under Navy auspices at any given time, such as MSC vessels, might not qualify as “public” vessels for lack of sufficient indicia of Government ownership, despite the fact that a given ship may have been built to Navy specifications and placed under the operational control of the Navy by a long term and exclusive charter.


21. The Coast Guard has argued that an MSC ship is not a “public vessel” of the United States if it carries a Coast Guard certificate and has a civilian crew. The Department of Commerce General Counsel recently rejected such an analysis. Kaplan Letter, supra note 11.

22. The RRF was created in 1976 to compensate for the decline in the U.S. flag merchant marine, formerly relied upon to move men, machines and supplies. The ships are maintained in five, ten and twenty day readiness status. Through fiscal year 1989 (FY89), acquisition and maintenance of the RRF was funded by the Navy which retains ownership of former naval units. As of FY90, the Marine Readiness Administration became responsible for funding; however, acquisition of new ships returned to the Navy in 1991. See generally Combat Fleets of the World, supra note 14, at 905-06.

23. Id.
Furthermore, ships that are most clearly public vessels, the combatants, must meet the prerequisites of applicable statutory or regulatory definitions before qualifying as a vessel or public vessel under a given statute or regulation. The same is true for Navy ships which may not be combatants but are still warships of the active fleet or reserve force. Moreover, to the extent the definitions within the various statutes and regulations were derived without consideration of the paramount military mission and unique characteristics of Navy ships, the ships may be improperly categorized.\(^{24}\)

Casting a further shadow over the imprecision tolerated in categorizing Navy ships are legal storm clouds that foretell of a torrent of controversy, not necessarily over the technological capabilities of various shipboard pollution abatement systems, but over who shall decide which system, if any, is sufficiently protective of the environment to allow a discharge to take place. The Navy? Some other federal agency? Individual states?

III. FEDERAL REGULATORY POSTURE

A. The Clean Water Act\(^{25}\)

The starting point for analysis of regulation of ship discharges to water—or any discharge to water—is the Clean Water Act. Section 301 of the CWA\(^{26}\) makes *any* discharge of a pollutant illegal unless otherwise authorized by the Act.\(^{27}\) The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."\(^{28}\) A "point source" is any "discernible, confined and discrete conveyance, including but not limited to any . . . vessel or other floating craft, from

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24. For example, to the extent a ship is not operated primarily for transportation, such as a hospital ship or a combat stores ship, it might not be a vessel for purposes of qualifying for EPA's vessel discharge exclusion at 40 C.F.R. § 122.3 (1993). For a discussion of qualifying as a "vessel" under this exclusion, see infra notes 70-83 and accompanying text.
25. See supra note 4.
27. The primary mechanism for allowing discharges is the National Pollution Discharge Elimination System ("NPDES"), a permitting program established by CWA § 402, 33 U.S.C. § 1342, see infra notes 55-69 and accompanying text.
which pollutants are or may be discharged." Though section 502 of the CWA does not define "vessels," section 312 describes vessels as "any waterborne craft used or capable of being used for transportation on the water." Navy ships certainly fall within the scope of this broad definition of vessels. As specifically designated point sources, therefore, the plain language of the CWA appears to prohibit Navy ships from "adding" any pollutant to navigable waters. "Pollutants" include several substances which are potentially or routinely discharged from ships, including solid wastes, biological materials, chemical wastes and heat.

Ordinarily, federal sovereign immunity bars application of regulations against federal entities, but section 313 declares each department, agency or instrumentality of the federal government engaged in any activity which may result in the discharge of a pollutant subject to all federal, state, interstate and local requirements, administrative authority, and process respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity. There being no exemption provided for public vessels in the express waiver of sovereign immunity provision, it must be acknowledged that the plain meaning of section 313, construed in conjunction with section 301, prohibits discharges by Navy vessels unless discharges are otherwise in compliance with the CWA.

There are three ways in which Navy ship discharges could be in compliance with the CWA. First, ships underway within the contiguous zone or the ocean are not prohibited by section 301 from discharging pollutants. Second, vessel sewage is specifically exempt from the

29. Id. § 1362(14) (emphasis added).
30. Id. § 1322.
31. Navigable waters are defined as "waters of the U.S." and include not only waters internal to the U.S. but also the territorial sea and the contiguous zone. Id. § 1362(7)-(9).
32. Id. § 1362(6).
33. Id. § 1323(a). See infra notes 136-61 and accompanying text for a discussion of federal sovereign immunity under the CWA.
34. 33 U.S.C. 1362(9).
prohibition of section 301 if discharged under section 312 marine sanitation device provisions. Finally, any discharge pursuant to a National Pollution Discharge Elimination System ("NPDES") permit is an authorized discharge. In addition, discharges of oil are specifically addressed by section 311 as amended by the Oil Pollution Act of 1990.

1. Ocean Discharges

CWA section 501(8) specifically defines the term "territorial seas" as those waters measured from the ordinary low water line and extending seaward three miles. Since the territorial seas are included within the definition of "navigable waters," section 301's prohibition on discharges of any pollutant includes discharges from ships within the three nautical mile territorial seas.

The contiguous zone is defined more loosely as the "entire zone established or to be established by the United States under Article 24 of the Convention of the Territorial Sea and the Contiguous Zone." At the time the CWA was passed, the United States claimed a twelve nautical mile contiguous zone. The prohibited discharge of pollutants under

however, it should be noted that Navy regulations provide specific discharge criteria incorporating the requirements of these and other applicable statutes and regulations. See generally Chief of Naval Operations Instruction 5090.1A, ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, CH. 17 (Oct. 2, 1990) [hereinafter OPNAVINST 5090.1A].

37. Id. § 1342.
38. See supra note 35.
40. Id. § 1362(7).
41. Compare id. § 1311(a) (prohibiting the "discharge of any pollutant") with id. § 1362(12) ("discharge of pollutants" means any addition of any pollutant to "navigable waters") and id. § 1362(7) ("navigable waters" include the territorial seas).
42. 33 U.S.C. § 1362(9); see also 40 C.F.R. § 110.1 (1993).
43. At the time of the CWA's passage, the territorial waters of the U.S. extended seaward three nautical miles (NM) and the contiguous zone out to 12 NM. 37 Fed. Reg. 11,906 (1972). President Reagan's extension of the U.S. territorial seas to 12 NM on December 12, 1988 by Proclamation No. 5928, 3 C.F.R. 547 (1988), raises an interesting question: If the new contiguous zone begins at 12 NM but the CWA limits the territorial sea to three NM, what is the status of the waters between three and 12 NM? Judging by the federally approved state NPDES programs, the proclamation does not appear to have altered the relationship between the contiguous zone and the territorial seas for purposes of environmental regulation.
section 301 also includes the addition of any pollutant to the waters of the contiguous zone—or the ocean from "any point source other than a vessel or other floating craft." Therefore, vessels, including Navy ships, may discharge pollutants consistently with the CWA once beyond three nautical miles—that is, within the contiguous zone or on the high seas.

2. Marine Sanitation Devices

Section 312 provides for the development and promulgation of federal standards of performance for marine sanitation devices ("MSDs"). MSDs are to be "designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters." "Sewage" means human body wastes, although it includes the graywater of commercial vessels on the Great Lakes. Otherwise, graywater is galley, bath, and shower water and is not sewage.

The regulatory scheme anticipated by section 312 is specifically made applicable to public vessels defined as vessels "owned or bareboat chartered and operated by the United States, by a state or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce." Unlike other sections of the CWA, the MSD standards anticipate the unique needs of the armed forces. The standards of performance are promulgated by the Environmental Protection Agency ("EPA") after consulting with the U.S. Coast Guard. The Secretary of Defense is empowered to exempt Department of Defense ("DOD") vessels if compliance is not in the interest of national security.

44. 33 U.S.C. § 1362(12) (emphasis added). The "ocean" is the "portion of the high seas beyond the contiguous zone." Id. § 1362(10).
45. However, discharges beyond three nautical miles are not completely unregulated. Navy regulations include restrictions on discharges of sewage, oily wastes and hazardous wastes as well as restrictions on the dumping of garbage, infectious wastes, plastics and other trash. OPNAVINST 5090.1A, supra note 35.
47. 33 U.S.C. § 1322(d).
48. Id. § 1322(a)(11). Curiously, having defined graywater, § 312 does not again address its discharge. However, it is one of the specifically enumerated discharges exempt from NPDES regulation under 40 C.F.R. § 122.3(a) (1993). See infra note 63 and accompanying text.
50. Id. § 1322(b)(1).
51. Id. § 1322(d).
further provides that the Secretary of Defense shall promulgate and issue regulations regarding the design, construction, installation and operation of marine sanitation devices on vessels owned and operated by DOD. Pursuant to this authority, a DOD Directive issued regulations and made them applicable to Navy ships. Thus, from a federal perspective, ships need only comply with the requirements of the Navy instruction to be in compliance with the CWA regarding the discharge of sewage and graywater.

3. The NPDES Program

Unless pursuant to an NPDES permit, the discharge of a pollutant is illegal. Under section 402 of the CWA, the EPA Administrator, after an opportunity for a public hearing, may issue a permit for the discharge of any pollutant upon condition that the discharge will meet all of the applicable effluent standards. The Administrator may also write conditions into NPDES permits, "including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." EPA’s substantive NPDES permit program regulations are

52. Id. § 1322(d).
54. OPNAVINST 5090.1A, supra note 35, para. 17-5.3.2, sets forth Navy policy on discharges of sewage and graywater. No discharges of sewage, that is “blackwater,” are permitted in U.S. waters out to three nautical miles. Vessels capable of collecting graywater and discharging it with sewage to shore facilities do so while in port. No discharges of black or graywater are permitted into freshwater lakes, reservoirs, or other freshwater impoundments, or into rivers capable of interstate navigation. Both black and graywater may be discharged directly overboard at sea beyond three nautical miles.
56. Id. § 1342(a).
58. 33 U.S.C. § 1342(a)(2). The CWA also anticipates the states taking over the permitting program. In fact, 39 states have EPA approved NPDES permit programs. See H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), reprinted in 1977 U.S.C.C.A.N. 4470: “That section [§ 1342] ... also provides for State programs which function in lieu of the Federal program and does not involve a delegation of Federal authority.” See also United States v. ITT Rayonier, Inc., 627 F.2d 996, 1002 (9th Cir. 1980) (the NPDES state permit program is established under state law and functions in lieu of federal authority).
found at 40 C.F.R. Part 122, including special program requirements,\textsuperscript{59} standard permit conditions,\textsuperscript{60} and regulations dealing with permit modification, revocation, reissuance and termination.\textsuperscript{61}

Despite vessels falling within the definition of point source, and notwithstanding that EPA has the statutory authority to require vessels, including Navy ships, to obtain NPDES permits,\textsuperscript{62} EPA has provided a broad, though incomplete, regulatory exclusion from NPDES permitting requirements for vessel discharges:

The following discharges do not require NPDES permits: (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.\textsuperscript{63}

The legislative history of the CWA indicates the exclusion was based on the administrative impracticality of processing applications for millions of recreational boats.\textsuperscript{64} The Conference Committee reconciling the CWA bills considered a strict and literal construction of the definition of "point source" that would have included discharges from marine engines on recreational vessels and would thus have mandated the permitting of more than six million such vessels. Such permitting would have required an "unreasonable expenditure of administrative effort" and would likewise

\textsuperscript{59} Subpart A includes definitions, exclusions, prohibitions, effect of a permit and continuation of expiring permits. 40 C.F.R. §§ 122.1-.7 (1993).
\textsuperscript{60} Id. §§ 122.41-.50 (1993).
\textsuperscript{61} Id. §§ 122.61-.64 (1993).
\textsuperscript{62} 33 U.S.C. §§ 1323, 1341.
\textsuperscript{63} 40 C.F.R. § 122.3(a) (1993).
\textsuperscript{64} 118 CONG. REC. 16,875-76 (1972).
have been an unreasonable burden on the individual boat owners. The Chairman of the Conference Committee indicated that the Committee "would not expect the Administrator to require permits to be obtained for any discharge from properly functioning marine engines." Additionally, EPA found that most discharges from vessels to inland waters "generally cause little pollution" and exclusion of vessel wastes from permitting requirements would drastically reduce the administrative costs of the NPDES program. So, while there is no statutory authority for creating a vessel discharge exclusion, it has nevertheless been a fixture of the federal CWA implementation program for over twenty years.

Curiously, nothing in either the legislative or administrative history of the exclusion indicates that any consideration of military necessity or the specific missions or functions of Navy ships prompted or fashioned the parameters of the exclusion. The limits of the exclusion have been described most clearly with respect to commercial and industrial shipping, without specific reference to similar functions performed by some Navy ships. Thus, the exclusion applies to Navy ships not by design but by happenstance. Whether a given Navy ship qualifies for the exclusion is often difficult to discern. Nevertheless, to the extent that discharges from Navy ships fall within the discharge exclusion, no NPDES permit is required.

a. Which Vessels Are Exempt?

The original vessel discharge exclusion was explicitly not applicable to discharges when the vessel was "operating in a capacity other than a vessel," e.g., as a storage facility or a cannery. The prerequisite of operating in the capacity of a vessel has since been modified to require that the vessel seeking an exclusion must have a "primary purpose of transportation." EPA commented that the change in language was to clarify that the exclusion of sewage from vessels does not extend to vessels operating as energy, mining, or seafood

65. Id.
67. Id. at 13,528.
68. Id.
70. Id.
71. Id.
processing facilities or to secured vessels used for mineral or oil exploration or development. It is EPA’s position that vessels of these sorts, not used for the primary purpose of transportation, were not intended by Congress to be excluded from NPDES coverage by the mere fact that they are operating in or on water.\(^7\)

The phrase “vessels of these sorts” is a direct reference to the preceding examples of structures used primarily in commercial or industrial processing which operate only secondarily as vessels. Apparently such vessels are not viewed as vessels under the regulations but instead as commercial enterprises at sea which should be subject to the same requirements for controlling discharges as onshore facilities of the same variety discharging into the ocean. EPA reasons that such facilities ought not be exempt from permitting and the required water pollution controls attendant thereto simply by virtue of having moved an operation to sea.\(^7\)

A facility’s “primary purpose” as “transportation” thus determines whether or not a putative vessel qualifies as a vessel for the purpose of applying the NPDES vessel discharge exclusion.

As previously stated, all U.S. Navy ships are essentially warships, regardless of whether an individual ship is a combatant. Navy warships may be described by several salient characteristics, not the least of which is their design and deployment to transport weapons systems and their operators, on or beneath the sea.\(^7\) They are not used for commercial enterprises but are employed primarily for national defense.\(^7\) Under these circumstances, EPA’s “primary purpose as transportation” requirement seems to describe warships. Even when a Navy ship is pierside or moored in an anchorage and not actively engaged in “transporting” its weapons systems, its essential nature and function remains a warship—that is, its “primary purpose” does not change.\(^7\)

A warship does not stop being a warship simply by dropping anchor or securing mooring lines. However, when the unique nature and function of Navy ships is not acknowledged, the rationale of their use primarily for transportation erodes somewhat regarding the vessels that are not combatant warships per se, such as some

\(^{72}\) Id. (emphasis added).


\(^{74}\) See supra note 16 and accompanying text.

\(^{75}\) See supra notes 12-13 and accompanying text.

\(^{76}\) Virginia has adopted the opposite rationale: ships must actually be in transit to qualify for the vessel discharge exclusion. See infra note 175 and accompanying text.
of the special mission support vessels, auxiliaries of the fleet, the MSC and certain RRF ships. This could result in those ships not qualifying for the vessel discharge exclusion.

Submarine tenders function as floating repair facilities for submarines. Although, in terms of military strategy, these ships are an integral component of a naval contingent with a primary mission of transporting services to the deployed submarine, an argument could be made that the primary purpose of such a vessel is industrial in nature with the transportation function being secondary. However, tenders, stores ships and similar vessels do not represent industrial facilities moved to sea for convenience or commercial advantage. The mission of supporting a Navy battle group, or an individual ship for that matter, often cannot be undertaken from a shore facility. Fulfilling such a mission requires mobility and timely rendering of support services at sea even in a “peace time” environment. Thus, where their function as warships is not considered, the transportation of equipment and personnel on water arguably becomes the primary defining characteristic of such noncombatant warships. Nevertheless, a point of contention could arise regarding the primacy of the “industrial nature” over the “transportation purpose” of these ships. To the extent a ship could be viewed as the equivalent of a cannery or a floating storage facility, it would risk losing application of the vessel discharge exclusion.

Maritime Prepositioning Stores ships (“MPS”) are similarly susceptible to losing the exclusion. They are employed to transport supplies to a location in support of the armed forces operating in the area. Once on station, these ships are essentially floating stores. Since the discharge exclusion specifically places vessels used as storage facilities beyond the scope of the exclusion, a substantial question could arise.

77. For a general description of the Navy inventory, see supra notes 14-23 and accompanying text.
78. Tenders are often “forward deployed,”—home-ported in an overseas port. Those stationed in U.S. ports have a routine cycle of operations that includes periods at sea during which they may provide submarine support, but also conduct critical training and meet required sea-going qualifications. Interview with Lt. Michael S. Pinette, United States Navy, Staff, Commander Naval Surface Force, U.S. Atlantic Fleet (Jan. 12, 1994) [hereinafter Pinette Interview] (on file with the William and Mary Environmental Law & Policy Review).
79. See supra note 14 and accompanying text.
regarding the eligibility of the MPS for an exemption from NPDES permitting requirements.\(^8\)

Perhaps the most difficult vessels to qualify for the vessel discharge exclusion may be the Navy’s miscellaneous vessels, such as barracks ships and drydocks. To the extent barracks ships are not used in active transportation but as dockside motels “parked” for extended periods, their primary mission is likely to be viewed as providing quarters for troops, with any transportation function viewed as incidental. Therefore, barracks ships are not likely to be considered “vessels” for purposes of applying the regulatory exclusion to their discharges.

Drydocks rather clearly do not qualify for the vessel discharge exclusion. Although listed on the Naval Vessel Register as a Navy vessel and capable of moving or being moved through the water, a drydock is used to provide secure housing for ship repairs at one site and generally is not used to transport ships, personnel or materials.\(^8\) Indeed, the Navy has conceded that drydocks do not qualify for the vessel discharge exclusion. The Navy does not, however, apply for permits for the vessels in a drydock. Any discharges from the vessel being serviced would be accounted for within any permit for the drydock.\(^8\)

In trying to determine whether a ship is within the discharge exclusion, the most challenging analysis concerns ships of unique character, such as explosive ordnance disposal, salvage and rescue, or cable repair.\(^8\) Clearly these ships must travel by water to render their services, often to ships or submarines in distress. Their mobility by sea is crucial to the success of their mission. Yet, the services they provide are closely akin to an industrial service or process. Once again, their nature as warships aside, these ships risk loss of eligibility for the vessel discharge exclusion because their transportation function may be viewed as secondary to their industrial purpose.

80. Stores ships are not generally forward deployed as are submarine tenders. They have an operational cycle that includes 86-day deployments, after which they return to their home port. During periods of availability they may be tasked with providing support to a battlegroup engaged in training events within or outside territorial waters. Pinette Interview, supra note 78. See also supra note 63 and accompanying text.


83. See supra notes 14-23 and accompanying text.
b. Which Discharges Are Exempt?

Some of the various discharges related to the operation of naval vessels are exempt from regulation under the EPA's vessel discharge exclusion.84 Laundry, shower and galley sink wastes,85 sewage86 and effluent from properly functioning marine engines are all specifically listed within the exclusion and do not require NPDES permitting.87 The exclusion for these discharges, however, appears dependent upon the operation of the vessel as a means of transportation. When operated in a capacity other than as a means of transportation, the exclusion, even for those listed discharges, may be lost. The original phrasing of the regulation made this quite clear: the exclusion “shall not be construed to apply . . . to discharges when the vessel is operating in a capacity other than a vessel . . . .”88 In other words, if the vessel is not used as a vessel, its discharges are not exempt from permitting. The most recent language is less clear, declining to extend the exclusion to other discharges when the vessel is operating in a capacity other than as a means of transportation.89 It is not immediately apparent which discharges might be “other discharges”; however, in light of EPA’s comments in the preamble to the change, it is reasonably clear no substantive change was intended from the original phrasing by the addition of the word “other.”90

If a ship fails to qualify as a vessel because of its employment, the most restrictive interpretation of the exclusion language would dictate that none of its discharges would be exempt from permitting. Assuming a given vessel is sufficiently transportation-oriented to qualify for the

84. See supra note 63 and accompanying text.
85. These three wastes are often called “graywater” as distinguished from “blackwater” sewage. OPNAVINST 5090.1A, supra note 35, para. 17-5.3.
86. Sewage is addressed by the marine sanitation device provisions of CWA § 312, 33 U.S.C. § 1322, supra notes 46-54.
87. See supra note 63 and accompanying text.
89. See supra note 63 and accompanying text.
90. The 1978 preamble stated “that the exclusion of sewage from vessels does not extend to vessels operating as energy, mining, or seafood processing facilities . . . .” 43 Fed. Reg. 37,079 (1978). Presumably, none of the other discharges listed with “sewage” in the first sentence of the regulation would be excluded from regulation under such circumstances either. The new term “other discharges” seems to mean any discharges, without modification, as in the original rulemaking. If that were EPA’s intention, then the original regulation was more clear. 38 Fed. Reg. 13,530 (1973).
discharge exclusion, its laundry, shower and galley sink wastes, sewage and engine effluent are all exempt from NPDES permitting.

Aside from the specifically enumerated discharges, "any other discharge" is also excluded if it is "incidental to the normal operation of a vessel." This language supports a conclusion that those operations of a vessel which are inherent in its nature as a vessel are excluded from permitting. Thus, once a ship is determined to be a vessel for exclusion purposes, any discharges incidental to operating that vessel are exempt from NPDES permitting. But what does "incidental" mean? Two constructions are possible. One is that those discharges related to the purpose for which a given ship was designed are "incidental" to its normal operation and should be excluded from permitting requirements, along with its sewage, graywater and engine effluent. The other construction would exclude only those discharges that relate directly, albeit incidentally, to the ship's normal operation as a mode of transportation. Any non-transportation related discharges would remain subject to permitting.

Consider the following examples that contrast these two constructions. An aircraft carrier's tactical function is to serve as a platform from which airpower can be projected. Crudely stated, it is a floating airport. It cannot function effectively as such unless, in addition to providing its own propulsion, it can supply fuel and maintenance services, among others, to the embarked aircraft. Discharges related to maintenance would be nontransportation-related under the narrower construction of the vessel discharge exclusion and, presumably, would be subject to permitting requirements. However, the more flexible interpretation would exclude such discharges as inherent in the very nature of the vessel and "incidental" to its normal operation, that is—as a warship and, specifically, as an aircraft carrier.

As difficult as the terms "incidental" and "normal operation" are to apply to combatants, they are even more difficult to apply with any degree of accuracy to a ship which is less of a combatant than a submarine or aircraft carrier and which has more of an "industrial" function, such as a tender. Even if such ships do qualify as vessels operated primarily for transportation, a substantial question remains as to the treatment of discharges related to repair services. Performing repairs is this ship's

91. See supra note 63 and accompanying text.
primary mission and that function is essential to the overall success of a naval contingent. To that extent, repair-related discharges would be incidental to its normal operation. However, as with trying to fit such ships within the exclusion’s definition as being used “primarily for transportation,” characterizing discharges as incidental to normal operation is subject to more than a little uncertainty.

Under either construction, certain discharges should be excluded as being essential to a ship’s integrity, habitability and mobility—that is, incidental to its ability to transport. These discharges should include: ablation of the biocide coatings used to retard marine growth on hulls, brine (a by-product of sea water distilled for use as boiler feed and human consumption), boiler cooling water, bilge and ballast water, and even effluent from boiler blowdown.93

Navy ships and their components must be maintained on a regular periodic basis, with the frequency of maintenance depending on the needs of particular systems. Such routine maintenance, required to keep systems in proper working order and to allow maximum longevity of the system, also appears to be embraced within the common meaning of “incidental” to “normal operation.” Routine maintenance is necessary and prudent in order to operate the vessel safely and effectively. If this rationale is accepted, then the interval between maintenance operations on a given system, whether daily, weekly, monthly, quarterly or some other interval based on factors such as frequency of operation, should not alter the relationship of the maintenance as “incidental” to normal operations or affect its eligibility for exemption from the permitting of any associated discharge. By comparison, maintenance that is seldom done over the life of a system and is grossly disruptive of its function, such as a life-extending overhaul or conversion to an updated system, is probably not...

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93. Boiler or steam generator blowdown refers to the flushing out of impurities from the boiler under the pressure of steam. Even though boiler blowdown is sometimes performed as a maintenance function while in port, more typically it occurs at sea. Boiler chemistry periodically exceeds operational parameters while underway. When this occurs, a blowdown must be done wherever the ship finds herself. Proper chemistry must be reestablished or the boiler fails, leaving the ship without propulsion and with only limited electrical capabilities. Performing a blowdown is particularly important for nuclear powered vessels because maintaining correct steam generator chemistry assures the proper functioning and integrity of the primary pressure boundary in the reactor plant. Interview with Richard A. Guida, Deputy Director, Naval Nuclear Propulsion Program, Naval Sea Systems Command, Naval Reactors (Dec. 8, 1993) (on file with the William & Mary Environmental Law & Policy Review).
incidentally related to normal operations. Any resulting effluent discharges would likely be beyond the scope of the regulatory exclusion.

Between the two extremes of routine maintenance and overhaul, there are a number of maintenance-like operations in an uncertain regulatory limbo with little guidance other than the plain meaning of the regulation. An example is cleaning the sewage collection, holding and transfer ("CHT") systems with pressurized air or water, known as "hydroblasting." This process is essential to prevent the CHT system from becoming clogged by a buildup of calcium carbonate which precipitates from the mixing of urine with the seawater used in the system. Hydroblasting is performed on a continuous basis on large ships, such as aircraft carriers. Smaller ships rely on shore installations for hydroblasting service while in port.

A ship would quickly become uninhabitable with a clogged CHT system. Thus, where ships conduct hydroblasting internally on a continuous basis, it could be described as "incidental" to the normal and proper operation of the system and the ship—perhaps even as transportation related, since it is associated with the embarked personnel. However, hydroblasting is a distinct process, external to an otherwise properly operating CHT system. It resembles a repair and is susceptible to controls to regulate resulting discharges. It would appear that the more persuasive characterization, especially for ships receiving hydroblasting as a service in port, would set hydroblasting apart from those discharges typically considered incidental to normal operations.

4. Summary

Section 313 of the CWA clearly grants EPA the statutory authority to impose the requirements of the NPDES on Navy ships; yet that has not occurred, at least not from the federal level, largely due to EPA’s incorporation of a broad, though not all-inclusive, vessel discharge exclusion in the NPDES implementing regulations. While most Navy ships and most ship discharges seem to qualify under the exclusion, the

95. Id.
96. Id.
98. See supra note 63 and accompanying text.
exclusion itself was not designed to address any need of Navy ships. It was simply a concession to the nearly impossible task of permitting millions of recreational vessels. Thus, whether a Navy ship qualifies as a “vessel” depends upon a coincidence: whether a Navy ship falls within parameters not designed with any conscious regard for the mission and functions of warships. Similarly, in too many instances, determinations of which discharges beyond sewage, graywater and engine effluent may be excluded as incidental to the normal operation of the vessel are largely a matter of unguided interpretation.

B. The Oil Pollution Act of 1990

Oil pollution, prevention, removal and liability are addressed in section 311 of the CWA as amended by the Oil Pollution Act of 1990 (“OPA 90”), a stand-alone statute engrafted onto that section. No permit system regulates the discharge of oil and oily wastes. Such discharges are flatly prohibited if discharging would create a visible sheen. More specifically, section 311 declares unlawful any discharge of oil into the navigable waters of the United States, adjoining shorelines, the contiguous zone or the exclusive economic zone in an amount which the President determines by regulation may be harmful. A “harmful quantity” has been administratively determined to be an amount that would cause a film or sheen upon the surface water or would violate “applicable water quality standards.” Oil effluent from a properly functioning marine engine is presumptively not harmful under the implementing regulations, but discharges from bilges certainly could be if they are sufficiently oily as to cause a sheen.

Any person in charge of a vessel that discharges a harmful quantity of oil must notify the appropriate federal agency as soon as that person has knowledge of the discharge. Failure to notify immediately the

99. See supra notes 63-69 and accompanying text.
102. 40 C.F.R. § 110.3-.5 (1993).
106. 40 C.F.R. § 110.7 (1993).
designated agency is a criminal offense punishable by a fine or imprisonment for up to five years or both.\textsuperscript{108} A violator is also subject to administrative penalties,\textsuperscript{109} civil penalties\textsuperscript{110} and liability for removal costs and damages,\textsuperscript{111} as well as liability for damage to natural resources.\textsuperscript{112} Civil penalties may also result if the owner or operator fails to take immediate action to mitigate the effects of a discharge or fails to cooperate with the federal agency coordinating a clean-up response.\textsuperscript{113}

Section 311 of the CWA contains its own definitional subsection.\textsuperscript{114} “Vessels” are defined as “every description of watercraft” used, or capable of being used, as a means of transportation on water “other than a public vessel.”\textsuperscript{115} “[P]ublic vessel” is defined as a vessel “owned or bareboat-chartered and operated by the United States . . . except when such vessel is engaged in commerce.”\textsuperscript{116} “[O]wner or operator” is defined as a “person,” which includes “an individual, firm, corporation, association, and a partnership” but excluding officers, agents or employees of the federal government.\textsuperscript{117}

Based upon the explicit exclusion of public vessels from the definition of “vessel” and the deletion of public officials from the definition of “person,” it may be argued that the provisions of section 311 regarding oil spill reporting, penalties and liability do not apply to public vessels, including U.S. Navy ships and ships owned by or under long-term charter to MSC.\textsuperscript{118} However, section 311 prohibits the discharge of

\begin{itemize}
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id. § 1321(b)(6).
  \item \textsuperscript{110} Id. § 1321(b)(7).
  \item \textsuperscript{111} Id. § 2702(b)(1).
  \item \textsuperscript{112} Id. § 2706(a).
  \item \textsuperscript{113} Id. § 1321(b)(7)(B)-(C).
  \item \textsuperscript{114} Id. § 1321(a).
  \item \textsuperscript{115} Id. §§ 1321(a)(3), 2701 (emphasis added).
  \item \textsuperscript{116} Id. § 1321(a)(4).
  \item \textsuperscript{118} Likewise, the oil pollution liability and compensation provisions of OPA 90 explicitly do “not apply to any discharge . . . from a public vessel.” 33 U.S.C. § 2702(c)(2). “Public vessel” under OPA 90 is defined in the same terms as those in the CWA § 311(a)(4). Id. §§ 1321(a)(4), 2701. See also supra notes 18-21 and
\end{itemize}
harmful quantities of oil or hazardous substances into or upon the navigable waters of the United States without exception as to vessel status. Therefore, public vessels and their "operators" have an affirmative obligation to prevent such discharges even though this obligation appears divorced from the primary enforcement mechanism—civil and criminal penalties.\textsuperscript{119} In addition, operators of public vessels must report any such discharge in accordance with their federal responsibility under the National Contingency Plan ("NCP") which was also promulgated under the authority of section 311.\textsuperscript{120}

Section 311(d) charges the President with preparing the NCP to provide for efficient, coordinated and effective action to minimize damage from oil and hazardous substance discharges.\textsuperscript{121} This responsibility has been delegated to the Administrator of EPA.\textsuperscript{122} The NCP must include an assignment of duties and responsibilities among federal departments and agencies\textsuperscript{123} and establish criteria and procedures to ensure immediate and effective federal identification of, and response to, a discharge or the threat of a discharge.\textsuperscript{124}

The OPA 90 amendments also established the National Response System, which includes criteria for the development and implementation of regional and local oil and hazardous substance removal contingency plans to be developed by area committees of federal, state and local agencies appointed by the President and working under the direction of the Federal On-Scene Coordinator designated in the NCP.\textsuperscript{125} These plans are to describe in detail the area covered by the plan, the responsibilities of an owner or operator and the role of federal, state and local agencies in preventing, mitigating and removing a discharge or the substantial threat of a discharge. The plan must also describe in detail its integration into other contingency plans and the operations of the National Response Unit,
a Coast Guard unit designated by the statute to provide assistance to Federal On-Scene Coordinators.\textsuperscript{126}

In sum, Congress has provided for a federally managed system for preventing, reporting and responding to oil and hazardous discharges through which the designated Federal On-Scene Coordinator, often a Coast Guard District Commander, delineates federal responsibilities. These responsibilities are set forth in the approved area contingency plan which becomes part of the NCP and, as a practical matter, requirements are then promulgated within the Navy by Navy directives.\textsuperscript{127} Responsibilities include notifying the National Response Center of any oil discharge or hazardous substance release of a reportable quantity and serving as on-scene commander to control and clean up a Navy spill.\textsuperscript{128}

One further provision of section 311 merits comment. Tank vessel response plans must be developed by "owners and operators" to address training, equipment and response actions necessary to avert or mitigate a worst case discharge—that is, loss of an entire cargo.\textsuperscript{129} Whether this requirement applies to Navy ships depends on the definition of some key terms. "Owners and operators" of a vessel may be "any person owning, operating or chartering" the vessel.\textsuperscript{130} As previously indicated, neither the United States nor its officers, agents or employees are included in the definition of "person."\textsuperscript{131} However, the definition also does not exclude them.

"Tank vessel" is not directly defined by section 311, but the definition of § 2101 of Title 46 is incorporated by reference: "a vessel that is constructed or adapted to carry, or that carries, oil or hazardous materials in bulk as cargo or cargo residue . . . ."\textsuperscript{132} While some Navy ships might arguably fit this description, the subtitle to which the definition pertains does not apply to public vessels.\textsuperscript{133} Furthermore, the definition of

\begin{itemize}
\item \textsuperscript{126} Id. § 1321(j)(2), (j)(4)(C).
\item \textsuperscript{127} Cf. 40 C.F.R. § 300 (1993); FEDERAL REGION III OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN (June 1, 1991); Commander Naval Base, Norfolk Instruction 6280.1B, AREA OIL AND HAZARDOUS SUBSTANCE POLLUTION CONTINGENCY PLAN (June 1, 1990).
\item \textsuperscript{128} 33 C.F.R. § 153 (1993); 40 C.F.R. §§ 117, 302 (1993) and OPNAVINST 5090.1A, ch. 17, supra note 35.
\item \textsuperscript{129} 33 U.S.C. § 1321(j)(5)(C).
\item \textsuperscript{130} Id. § 1321(a)(6) (emphasis added).
\item \textsuperscript{131} Id. § 1321(a)(7); see also supra note 117 and accompanying text.
\item \textsuperscript{133} Id. § 2109.
\end{itemize}
“vessel” in OPA 90 excludes any public vessel. Nevertheless, even though not required by either the CWA or its OPA 90 amendments, the Navy has long required spill contingency response plans for tank vessels and warships alike.

IV. FEDERAL SOVEREIGN IMMUNITY

Before changing focus from a review of the federal regulatory program to an examination of individual state programs, an analysis of federal sovereign immunity would be a helpful backdrop to subsequent discussion.

Federal sovereign immunity, grounded in the Supremacy Clause of the U.S. Constitution, has historically barred the states from regulating federal activities. Congress can waive federal immunity and has included waivers in a number of environmental statutes, including the CWA. However, “[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is ‘a clear congressional mandate’... that makes this authorization of state regulation ‘clear and unambiguous.” Consistently, the U.S. Supreme Court has narrowly construed congressional waivers of sovereign immunity. Thus, even where there

134. See supra note 115 and accompanying text.
135. OPNAVINST 5090.1A, supra note 35, para. 17-5.7.10. These requirements also apply to government owned ships operated by the MSC, as well as those under both long- and short-term charters to MSC. Id. at para. 17-1.2.
136. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Government activities are “free from regulation by any state,” Hancock v. Train, 426 U.S. 167, 178 (1976) (holding that federal installations are not required to obtain state air pollution emission permits) (citing Mayo v. United States, 319 U.S. 441, 445 (1943); see also EPA v. California, 426 U.S. 200 (1976) (relieving federal installations from obtaining state water pollution discharge permits).
138. Hancock, 426 U.S. at 179.
139. See, e.g., id.
is a waiver of immunity, the applicability of the waiver depends upon the clarity with which Congress drafted its intentions. Only the "unequivocal expression" of a waiver which is "clear and unambiguous" will be sustained by the courts.\footnote{United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1016 (1992); United States Dep’t of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992).} Any ambiguity, any language that could plausibly be interpreted as inconsistent with waiving federal immunity, will be resolved in favor of sovereign immunity.\footnote{Nordic Village, 112 S. Ct. at 1016.} Two recent cases, United States v. Nordic Village, Inc. and United States Department of Energy v. Ohio, served notice that the present Court is firmly committed to that judicial philosophy.

The waiver of federal sovereign immunity in the CWA appears in section 313:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever).\footnote{33 U.S.C. § 1323.} 

Although this section on its face appears to subject federal agencies to all substantive and procedural state water pollution control requirements, the
judicial and administrative construction of the language leave some doubt as to the extent of its application to U.S. Navy ships.143

A. "Requirements" Under Section 313

Section 313 makes federal entities subject to federal, state and local "requirements" with respect to the control and abatement of water pollution. While the term "requirements" is not defined in the statute, the courts have considered what constitutes a requirement for purposes of federal compliance.

Early in the life of the CWA, the U.S. Supreme Court considered whether or not applying for and obtaining a discharge permit from a state with its own NPDES program constituted a requirement. The Court, in EPA v. California, determined that Congress did not waive sovereign immunity to such state regulation.144 Requirements were limited to actual effluent limitations and compliance schedules. They did not include such procedural matters as permitting. Within a year Congress amended section 313 to include the present language specifically subjecting federal entities to permitting requirements and other procedural methods of enforcing substantive provisions.145

Even though procedural requirements, and specifically permitting, have been more clearly brought within the waiver of immunity, the progeny of EPA v. California have not deviated from a narrow construction of "requirements" as "objective, quantifiable standards subject to uniform application."146 In fact, several courts have limited substantive requirements to predetermined effluent standards or limitations.147 State-established standards or limitations are enforceable against federal entities as "requirements" if they are "objective and ascertainable state regulations; e.g., state pollution standards or limitations, compliance schedules,  

emission standards, and control requirements." Therefore, it would appear that, in the absence of a numeric discharge limitation designed to achieve a narrative water quality standard, a narrative standard alone may not be a requirement enforceable against a federal entity because it is not sufficiently precise.

As previously noted, there is no federal requirement to obtain a permit for ship discharges of sewage, graywater, effluent from properly functioning marine engines and other discharges incidental to the normal operation of a vessel. However, although the Navy has apparently relied upon EPA's vessel discharge exclusion to discourage state attempts at regulation, this administrative exclusion is not an expression of reserved sovereign immunity. Indeed, in the preamble to the vessel discharge exclusion, EPA declared that states were free to regulate such discharges even though EPA declined to do so. Nevertheless, though the waiver of sovereign immunity would allow states to require permits for Navy ships, no state has yet done so.

B. Sovereign Immunity and OPA 90

The OPA 90 does not include a waiver of sovereign immunity; rather, state and federal regulatory agencies must justify their jurisdiction, if at all, through sections 311, 313 and 510 of the CWA. As previously discussed, this limits enforcement of OPA 90 provisions against Navy

150. 40 C.F.R. § 122.3(a) (1993), supra note 63.
ships.153 Public vessels are excluded from the OPA 90 definition of "vessels," and section 1002(c) clearly states that none of the provisions of Subchapter I apply to "any discharge... from a public vessel."154 Section 311(m) also insulates Navy ships by explicitly withholding the authority of regulatory agencies to board and inspect public vessels for the purpose of enforcement.155 In other words, OPA 90 appears to require Navy ships to refrain from discharging harmful amounts of oil but public vessels remain immune from liability and enforcement measures.156

C. Executive Exemptions

The CWA contains one section, not yet discussed, but which may potentially prevent clashes between states and federal agencies, specifically the DOD agencies. Following the waiver of federal immunity in section 313, there is language which allows the President to exempt any executive branch effluent source from regulation "if he determines it to be in the paramount interest of the United States to do so."157 Any such exemption may only extend for a period of up to one year.158 Similarly, if he determines it to be in the paramount interest of the United States, the President may issue regulations exempting "any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces."159 Exemptions granted under this authority must be reconsidered every three years.160

The use of an executive exemption for Navy ships, on an effluent-by-effluent basis, would certainly be a cumbersome method of relieving those ships of any state regulations deemed by the President to be contrary to the paramount interests of the country. Although the ability to exempt

153. See supra note 119 and accompanying text.
156. Under the NCP, public vessels also have an affirmative duty to mitigate, report and clean up oil spills. Supra note 125-28 and accompanying text.
158. No such exemption may be granted from the requirements of § 1316 (federal standards of performance for new sources) and § 1317 (toxic pretreatment standards). The President must also report any exemptions to Congress annually and provide the basis therefore. Id. § 1323(a).
159. Id.
160. Id.
“vessels” is broader authority, both forms of executive exemption are couched in terms of an overriding but temporary need for relief from regulation. Neither seems to reflect a congressional intent to invest the President with the latitude to invoke federal supremacy on a broad programmatic basis where Congress may have otherwise waived it. Regardless, given the various classes and ages of Navy ships, multiple exemptions would have to be invoked, reviewed and then re-invoked on a continuous basis. Such a practice is not only impractical, but the long lead time required for research, development and construction, renders a one year, or even a three year, exemption insufficient to provide the stability needed to develop design standards and then to build or retrofit Navy ships.161

V. STATE PRACTICES

There are twenty-four coastal states in the United States, and there are shipyards or port facilities used by Navy ships in all of them.162 Nineteen of these coastal states, including thirteen of the seventeen home port states, have federally approved state NPDES programs.163 Federal approval requires that a state program be at least as stringent as the minimum federal performance standards164 but does not preclude a state from having more stringent standards. Indeed, the CWA specifically provides for no federal preemption of state efforts which exceed federal minimum standards.165

161. Letter from Jacqueline E. Schafer, Assistant Secretary of the Navy (Installations & Environment), to Lajuana Wilcher, Assistant Administrator for Water, EPA (June 2, 1992) (on file with author). Perhaps reflecting the futility of using such time-limited exemptions, the author was unable to find any record that such an exemption has ever been requested.


163. Florida, Louisiana, New Hampshire and Texas do not have federally approved NPDES programs. The State of Washington has an approved program, but it is not yet approved for the regulation of federal facilities. [State Water Laws] Env’t Rep. (BNA) 611:0111 (May 7, 1993).


165. Id. § 1316(c).
As public awareness of environmental matters has grown, the Navy has increasingly encountered attempts by individual states to regulate ship discharges based either on a state's own authority to legislate for the protection of water quality or on the specific CWA authority of its EPA-approved state program. Since there is no requirement that legislation be coordinated even among states with federally approved programs, there are differing standards, interpretations and procedures which states seek to apply to naval vessels. The following examples will serve to illustrate this point.

A. Virginia

The Virginia State Water Control Law prohibits waste discharges or other quality alterations of state waters except as authorized by a Virginia Pollution Discharge Elimination System ("VPDES") permit issued by the State Water Control Board ("SWCB"). The statute directs the SWCB to control the discharge of sewage and other wastes from boats and vessels on all navigable and nonnavigable waters within the state. No regulation may "impose restrictions which are more restrictive than the regulations applicable under federal law," with the exception of adopting necessary protective measures for shellfish grounds.

The SWCB implementing regulations define "pollutant" as any substance, or heat, that causes or contributes to pollution, but not sewage from vessels. Vessel discharges, including "sewage, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharges incidental to the normal operation of a vessel" are listed as discharges which "do not require a permit."

166. Id. §§ 1342(b), 1314(i)(2); 40 C.F.R. §§ 121, 122 (1993).
167. VA. CODE ANN. § 62.1-44.5 (Michie 1950).
168. Id. § 62.1-44.15(5).
169. Now the Water Division of the Virginia Department of Environmental Quality. Effective April 1, 1993, the staff functions of the Air Pollution Control, Waste Management and Water Control Boards were consolidated under the new Department of Environmental Quality, though there was no substantive change in the responsibility of the individual boards. See VA. CODE ANN. § 2.1-1.1 (Supp. 1994); id. §§ 10.1-1183, 1184 (Michie 1950). For ease of reference, this article will refer to the Water Division as SWCB.
172. Id. § 1.6.
regulatory exclusion of vessel discharges from the VPDES program uses language identical to the EPA vessel discharge exclusion.\footnote{See supra note 63 and accompanying text.}

Despite the phrasing of the Virginia vessel discharge exclusion and the statutory admonition to be no more restrictive than the federal regulations, the SWCB determined that all discharges from pierside ships into state waters violate Virginia’s general statutory prohibition against discharge of pollutants.\footnote{Letter from R.N. Burton, Director, Virginia State Water Control Board, to Rear Admiral K.L. Carlson, U.S. Navy, Commander Naval Base, Norfolk, Va. (Oct. 20, 1989) (on file at Commander Naval Base, Norfolk, Va.) [hereinafter 1989 Burton Letter].} The SWCB reasoned that the vessel discharge exclusion only applies to ships in transit and not those in port because ships in port are not being used as a means of transportation.\footnote{Meeting between Virginia State Water Control Board staff and Environmental Programs staff, at Commander Naval Base, Norfolk, Va. (Mar. 4, 1993) (notes on file at Commander Naval Base, Norfolk, Va.). But cf. supra note 76 and accompanying text.}

The impact of this determination is illustrated by the circumstances of the U.S.S. Hayler (DD 997). Hayler was to undergo repairs in a drydock followed by other modifications in a wetberth. All sources of graywater from the rear portions of the ship could be drained from a central point called a “deck riser.” However, all forward sources, including the galley, scullery and a substantial number of berthing spaces, drained to tanks which discharged below the waterline. While in the drydock, fittings could be installed over all discharge points, but once back in the water those graywater sources not serviced by the deck riser would have to be discharged overboard or shut down. The latter action would amount to a loss of the use of all food preparation areas and forty-eight percent of crew berthing areas, effectively making the ship uninhabitable for the crew of 343, many of whom lived on board. Despite the disruption of the ship’s operations and the impact on morale, the commanding officer ordered the crew to move ashore rather than provoke a confrontation with the state by discharging graywater.\footnote{Interview with Commander David S. Shepherd, Judge Advocate General’s Corps, U.S. Navy, Assistant Atlantic Fleet Judge Advocate (Environmental Law) (Apr. 1, 1993) (on file with the William & Mary Environmental Law & Policy Review) [hereinafter Shepherd Interview].}

The SWCB actually cited and threatened the U.S.S. Briscoe (DD 977) with an enforcement action for discharging graywater from galley drains which contained cooking grease.\footnote{Id.} Briscoe is the same class of ship
as *Hayler*, with galley drains discharging below the waterline where they cannot be connected to shore services. At the time of the incident, *Briscoe* was undergoing repairs in a private Virginia shipyard.\(^{178}\)

While these two examples describe ships undergoing repairs, a circumstance which renders them more susceptible to characterization as not being used primarily in transportation, Virginia clearly takes the position that even ships of the active fleet not undergoing repairs are prohibited from discharging sewage or graywater within state-controlled waters.\(^{179}\) The SWCB has indicated that Virginia's current strategy is to regulate such discharges through VPDES permits.\(^{180}\) Recognizing that not all Navy ships are configured to regulate graywater discharges under all circumstances, the SWCB has also suggested that the Navy enter into a compliance agreement whereby the modification of ships not yet configured to collect graywater would be subject to a compliance schedule.\(^{181}\)

In addition to the State Water Control Law, the Virginia Code contains several other provisions relating to water pollution.\(^{182}\) Although the provisions appear intended to prevent the obstruction of waterways, the prescriptive language is broad and includes criminal penalties for placing into state waters any solid waste or substance, noxious or otherwise.\(^{183}\) The SWCB has opined that these sections, and the state's general water quality standards, require that sewage discharges from pierside vessels "be prevented."\(^{184}\) While few would argue that Navy ships should be allowed to dump raw sewage next to the pier, indeed Navy regulations clearly prohibit such a discharge,\(^{185}\) the salient point is that the state has articulated a second basis for asserting authority over vessel discharges that is unrelated to the use of a vessel in transportation. This authority is based

\(^{178}\) *Id.*

\(^{179}\) See 1989 *Burton Letter supra* note 174.


\(^{181}\) *Id.*


\(^{183}\) *Id.* § 62.194.1


\(^{185}\) OPNAVINST 5090.1A, *supra* note 35, ch. 17.
on the state's ability to enforce general water quality standards promulgated pursuant to sections 401 and 510 of the CWA. The possibility that a state could exercise such authority over ship discharges up to three nautical miles from shore has enormous implications for Navy ships required by circumstance or directive to remain at sea but within that distance.

On January 25, 1993, U.S.S. Emory S. Land (AS 39) was transitting the mouth of the Chesapeake Bay when she experienced boiler problems and was forced to anchor. Inclement weather prevented effecting repairs beyond three nautical miles. While at anchor sewage was collected in the ship's holding tanks in accordance with DOD and Navy MSD regulations. However, with a crew of over 1400, sewage retention capacity was limited. When the foul weather prevented dispatching sewage barges to the stricken ship, the sewage had to be discharged on the outgoing tide under the emergency provisions of the MSD regulations. These circumstances were detailed in a spill report filed by the ship as required. Upon learning of the incident, the SWCB notified the Navy that it was considering an enforcement action against the ship.

The Commonwealth of Virginia has two obstacles to overcome in order to rely successfully on water quality standards to regulate Navy ship discharges. First, the Virginia vessel discharge exclusion, being more specific than the general water standards, appears to preempt application of water quality standards to sewage, graywater, engine effluent and other discharges incidental to the operation of Navy ships underway within the territorial seas. Second, Virginia has not promulgated specific effluent limitations based upon water quality standards for the discharge of some wastes. For example, there is no effluent limit for the discharge of oily

187. Id.; OPNAVINST.5090.1A, supra note 35 §§ 17-5.3.2 and 17-5.3.4.
188. No enforcement action was subsequently taken by the state as a result of this incident. Shepherd Interview, supra note 174; interview with C.H. Wallace, Water Division Head, Environmental Programs Department, Commander Naval Base, Norfolk, Va. (Apr. 4, 1993) (on file with the William & Mary Environmental Law & Policy Review).
189. Presumably subject to the further qualification that such ships are used primarily for transportation and not for an industrial use such as a cannery or storage facility. See supra note 72 and accompanying text.
wastes beyond a "no visible sheen" standard.\textsuperscript{190} In the absence of such a predetermined effluent standard, there may be no state "requirement" to which the Navy must adhere under the section 313 waiver of federal sovereign immunity.\textsuperscript{191} Nevertheless, despite the potential gaps in the Commonwealth's regulatory authority, the breadth of the waiver of immunity combined with the expansive definitions of "point source" and "discharge of a pollutant" lends considerable weight to the general premise that Navy ships would be subject to at least some permit requirements should the Commonwealth require them.\textsuperscript{192}

The Commonwealth of Virginia recently amended its oil discharge provisions.\textsuperscript{193} Any discharge of oil which violates water quality standards or permit limits or causes a film or sheen upon state waters is prohibited.\textsuperscript{194} Much like OPA 90, the Virginia statute fixes responsibility for containment and cleanup, assesses liability for cleanup costs and damages, including natural resource damage,\textsuperscript{195} and requires immediate notification of a spill to the SWCB and appropriate federal authorities.\textsuperscript{196} The statute also requires that tank vessels have a state-approved oil discharge contingency plan\textsuperscript{197} and authorizes both civil and criminal penalties for either negligent or knowing and willful violations of the law.\textsuperscript{198}

The definitions within the Virginia statutes are broad enough to include Navy ships. Most of the provisions apply to a person or operator of a facility, vehicle or vessel. An "operator" is defined to include a "person" which may be an individual, corporation or "any governmental unit or agency."\textsuperscript{199} Vessels include every description of watercraft.\textsuperscript{200}

\textsuperscript{190} VA. CODE ANN. § 62.1-44.34:18(A). Where precise effluent limitations are not established, they are to be developed during the permitting process. Office of Water Resource Management, Program Guidance Memo No. 91-010, \textit{The VPDES Permit Manual} § III A.3 (Mar. 18, 1990). Permit effluent limits should be in compliance with Effluent Limitation Guidelines, Water Quality Standards and Best Professional Judgment ("BPJ"). There is no BPJ guidance for oil from vessels, but oil content may be as high as 30 mg/l for oil terminal discharges, while a car wash should not exceed 15 mg/l. \textit{Id.} at Appendix IV 2.b.

\textsuperscript{191} 33 U.S.C. § 1323; \textit{see also supra} note 149 and accompanying text.

\textsuperscript{192} \textit{But cf. supra} notes 27-32 and accompanying text.

\textsuperscript{193} VA. CODE ANN. §§ 62.1-44.34:14 (Supp. 1994).

\textsuperscript{194} \textit{Id.} § 62.1-44.34:18 (Michie 1950).

\textsuperscript{195} \textit{Id.} § 62.1-44.34:18(B).

\textsuperscript{196} \textit{Id.} § 62.1-44.34:19.

\textsuperscript{197} \textit{Id.} § 62.1-44.34:15.

\textsuperscript{198} \textit{Id.} § 62.1-44.34:20.

\textsuperscript{199} \textit{Id.}
Public vessels are not excluded from this definition as they are in the CWA and OPA 90. However, the waiver of federal sovereign immunity in section 313 of the CWA and its relationship to OPA 90 appear to limit enforcement of the state law against Navy ships even though the state definitions would otherwise include them. Perhaps in recognition of this limitation on the Commonwealth’s authority regarding public vessels, the SWCB has historically deferred the enforcement of oil spill regulations against Navy ships to the U.S. Coast Guard. However, the efficacy of this state policy is presently under review by the Virginia Department of Environmental Quality. Should the policy be changed, a confrontation over the extent of Virginia’s authority to regulate Navy ships could easily result.

B. Other State Examples

A number of other states have indicated that Navy compliance with federal regulations may not be sufficient to meet state requirements. A few of the state positions which are more difficult to reconcile with current Navy practice are offered as examples.

1. Texas

Texas does not have a federally approved NPDES program. While awaiting federal NPDES approval, Texas imposes a permit requirement very similar to an NPDES permit. Without a permit issued by the Texas Water Quality Commission (“TWQC”), it is unlawful for any person to discharge pollutants into state waters. “Person” is not defined in the present definitional section to include federal agencies; indeed, it is

200. Id.
201. Id. See supra note 115 and accompanying text.
202. See supra notes 152-56 and accompanying text.
206. Id.
207. Id.
not defined at all. However, the provisions for criminal penalties do list federal agencies and employees as "persons" subject to prosecution for unlawful discharges. Furthermore, any federal officer, agent or employee not complying with a state law is arguably beyond the scope of their federal employment. Such an employee would be vulnerable to criminal sanctions, regardless of any protection sovereign immunity might otherwise provide. There is, therefore, a credible argument that the Texas Water Code ("TWC") prohibition against unpermitted effluent discharges is binding upon, and enforceable against, Navy ships, even if only through individual personnel.

Several RRF Knox class frigates are home-ported at Naval Station Ingleside, Texas. In December of 1992, several of these ships prepared to go "cold iron," that is "turn off" their boilers. The procedure requires these ships to execute a "boiler blowdown," rapidly emptying the boiler of its contents. Under the Virginia and federal regulations, the ships could have argued that blowdown is an incidental operational discharge which is excluded from regulation. This argument was not available in Texas, however, because neither the TWC nor its implementing regulations includes such a provision. Since the ships had no permits, the TWQC made it clear that the ships risked a state enforcement action if they conducted a boiler blowdown in Texas waters. Rather than provoke a confrontation with the TWQC, the Ingleside Naval Station commander intervened. He required the ships to cool slowly their boilers and to drain the effluent to their bilges where it could be collected. He ordered this

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208. Cf., Tex. Water Code Ann. § 26:001, amended by Acts of 1977, Chs. 644, 870; Acts 1981, Ch. 367. The latter section, effective upon delegation of NPDES authority, defines "person" as including a "federal agency, or an agent or employee thereof."
211. For a description of Ready Reserve Force ships, see supra note 22 and accompanying text.
212. Shepherd Interview, supra note 176.
213. See supra note 93 and accompanying text.
214. See supra note 63 and accompanying text.
216. Shepherd Interview, supra note 176.
even though the steam plant was not designed for such a procedure and notwithstanding it may have been harmful to the power plants.\textsuperscript{217}

2. \textit{Florida}

Like Texas, Florida has no federally approved NPDES program but has a statutory scheme that anticipates eventual federal delegation.\textsuperscript{218} The Florida Pollution Control Acts and the Pollutant Discharge Law both prohibit discharging pollutants into state waters unless in conformity with a state permit.\textsuperscript{219} This prohibition as well as the civil and criminal penalties authorized against violators is applicable to “persons,” which is defined as including “any governmental entity.”\textsuperscript{220} The plain meaning of these words is broad enough to include Navy personnel, as well as Navy ships, as government entities.

The Florida Department of Environmental Regulation (“FDER”) is charged with issuing discharge permits and implementing the Florida program consistently with federal regulations.\textsuperscript{221} However, “consistent” clearly does not mean “identical”: there is no vessel discharge exclusion such as appears at 40 C.F.R. § 122.3(a), and the FDER is also explicitly authorized to impose stricter standards than those set by EPA.\textsuperscript{222} Moreover, under Florida’s statutory scheme each county and municipality may establish local pollution control programs, provided they comply with the Pollution Control Acts.\textsuperscript{223}

In November of 1989, Port Everglades, Florida advised Navy authorities that no discharges of any kind were permitted while in that port.\textsuperscript{224} Since the port itself had no pierside reception facilities for shipboard discharges, complying with that directive required U.S. and foreign Navy ships to contract for bilge, sewage and graywater collection

\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Fla. Stat.} ch. 403.061(31) (1990) requires the Florida Department of Natural Resources to adopt rules necessary to obtain EPA approval of an NPDES permitting program in Florida. The Florida Pollution Control Acts also specifically direct the department to apply for NPDES authority by January 1, 1993. \textit{Fla. Stat.} ch. 403.0885 (1990).
\textsuperscript{220} \textit{Id.} ch. 376.031:
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} ch. 403.0601.
\textsuperscript{223} \textit{Id.} ch. 403.182.
\textsuperscript{224} \textit{Id.}
services. Such contracting presumes that the ships are configured in a manner which allows connecting ship outfalls to the contractor’s receptacle, generally either a barge or a truck. However, this is not always possible, and the practical realities of ship configurations have already clashed with Florida’s regulations. In the spring of 1991, U.S.S. Saipan (LHA 2) had to cancel a port call to Port Everglades because no contractor could connect all her discharge points to a collection system.

Foreign naval vessels have an even more difficult time than U.S. ships in complying with a “no discharge” requirement. Many foreign warships do not have collection tanks for sewage and thus no centralized pumping is possible. Their only alternative is to shutdown toilets, showers and sinks and rely on limited pier services such as “porta-potties.” The inconvenience and discomfort to the crews of these ships and the attendant impact on morale, not to mention potential embarrassment to the United States, is easily recognized though difficult to quantify.

Underlying Florida’s permitting requirements are water quality standards and effluent limitations established pursuant to the mandate given the states by CWA sections 301(b) and 306. Florida has established five categories of surface water based on the water’s designated use. Classification of a water body according to a particular designated use does not preclude use of the water for other purposes. However, the use of a waterbody may not result in violation of the quality criteria applicable to its classification. In addition to the criteria specific to each classification, there are also minimum criteria applicable to all surface water regardless of classification. These criteria include narrative as well

225. For example, 963 class destroyers are configured to discharge graywater drains from the forward part of the ship through an underwater outfall. Large ships, such as helicopter landing ships (LHA), have too many overboard discharge points to realistically connect to a contractor’s barge. Shepherd Interview, supra note 176.

226. Shepherd Interview, supra note 176.

227. Shepherd Interview, supra note 176.

228. Shepherd Interview, supra note 176.


230. Surface waters of Florida have been classified according to designated uses as follows: CLASS I, Potable Water Supplies; CLASS II, Shellfish Propagation or Harvesting; CLASS III, Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife; CLASS IV, Agricultural Water Supplies; and CLASS V, Navigation, Utility and Industrial Use. FLA. STAT. ch. 17-302.400 (1990).

as specific numeric limits for certain pollutants. In the absence of a Florida exclusion similar to that of EPA which exempts normal incidental vessel discharges, these numeric criteria appear to be enforceable against Navy ships as state "requirements" under the CWA section 313 waiver of federal immunity.\footnote{232}

Among the numeric criteria the limits on oil and grease best illustrate the potential for confrontation between a state and the Navy. The general criteria for oil and grease which apply in the absence of more specific classification standards prohibit the discharge of water containing more than five milligrams per liter (5.0 mg/l) of oil.\footnote{233} This is an extraordinarily strict standard. By way of comparison, Texas water standards do not contain a numeric limitation but instead prohibit discharging oil which produces a visible film on the surface water.\footnote{234} Virginia likewise relies on a "no visible sheen" narrative standard but also allows up to thirty milligrams per liter (30 mg/l) as a permit limit.\footnote{235}

3. \textit{California}\

The City of San Diego has determined that certain Navy ships, such as repair ships, must obtain NPDES permits because San Diego presumes that these ships are analogous to industrial shore facilities and are not primarily "means of transportation" under the EPA vessel discharge exclusion.\footnote{236} Discharges from such ships are therefore beyond the scope

\footnote{232. Although specific numeric criteria may be enforceable, Florida may not be able to utilize the full range of enforcement mechanisms provided in the state statutes against a federal entity as it otherwise could against a private party. For example coercive or punitive civil penalties may not be available. \textit{Department of Energy v. Ohio}, 112 S. Ct. 1627 (1992), \textit{State of Maine v. Department of Navy}, 973 F.2d 1007 (1992).

233. Only Class V waters permit a higher concentration, allowing up to 10 mg/l. \textit{FLA. ADMIN. CODE ANN.} r. 17-302.510(5)(k), 17-302.580(5) (1990), but only the Fenholloway River in Volusia County is Class V. None of the ports servicing Navy vessels are so classified. \textit{FLA. ADMIN. CODE ANN.} r. 17-302.600 (1990).

234. Whether a discharge of oily water will result in a visible sheen is dependent on a number of factors, but oil in concentrations of between 10 and 15mg/l of water is generally considered the threshold of visibility. Interview with C. H. Wallace, Environmental Programs Department, Water Division, Commander Naval Base, Norfolk, Va. (Oct. 15, 1993) (on file with the \textit{William and Mary Environmental Law & Policy Review}).

235. \textit{See supra} note 190.

236. \textit{Shepherd Interview, supra} note 176.}
of the exclusion and must be permitted. However, the Navy has not yet applied for permits for these or any other Navy ships.\textsuperscript{237}

4. \textit{Hawaii}

In June of 1989, the Hawaii Department of Transportation ("HDOT") advised the Navy that Hawaii Administrative Rules prohibit the discharge of graywater anywhere within three nautical miles.\textsuperscript{238} This interpretation has obvious implications for Navy operations. For example, ARS 50 class vessels conduct ship and aircraft salvage operations, most often within three nautical miles. These ships were designed with reduced-flow toilets and a ten day holding capacity for sewage.\textsuperscript{239} If graywater is added to the sewage, this could cut holding capacity to only one day. Since the typical aircraft recovery operation is four days in duration and debeaching of a ship takes an average of three days, the HDOT position leaves few options, namely shortening on-station time or securing showers and limiting use of sinks. Shortening on-station operational time could conflict with a ship's mission, while the latter options would have substantial health and morale impacts on crews. Given that graywater is specifically exempted from regulation under the EPA vessel discharge exclusion,\textsuperscript{240} the repercussions of enforcing the HDOT position could well force the Navy to challenge the Hawaii position.

5. \textit{New Jersey}

The State of New Jersey has codified a presumption that petroleum contaminated wastes are hazardous wastes\textsuperscript{241} a stricter characterization than that required by federal law but one which is permitted under the provisions of both the Resource Conservation and Recovery Act ("RCRA") and the CWA.\textsuperscript{242} Under this presumption, even Navy ships retrofitted with

\begin{itemize}
\item \textit{Shepherd Interview}, supra note 176.
\item \textit{Shepherd Interview}, supra note 176.
\item S. B. RIGGS, DAVID TAYLOR RESEARCH CENTER, CATALOG OF SHIPBOARD POLLUTION ABATEMENT SYSTEMS (1989).
\item See 40 C.F.R. § 122.3(a) (1993), \textit{supra} note 63 and accompanying text.
\item Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1986). RCRA was the 1976 amendment to the Solid Waste Disposal Act and has become the common name by which the latter is often referred. 33 U.S.C. § 1370.
oil/water separators would be prohibited from discharging bilge water, regardless of the oil content.

6. Washington

Prior to granting state concurrence on the Navy’s home-portal plan for four 963 class destroyers, the State of Washington insisted that the Navy structurally alter the vessels to install a system which would collect graywater in the sewage holding tanks or discharge it to pier facilities. Many Navy ships are undergoing similar retro-fitting as part of the Navy’s ship alteration and modernization program. The state’s insistence on altering the destroyers was generally consistent with Navy planning. However, even though the Navy and the state of Washington were able to reach an accommodation in this case, the specter of states demanding specific structural changes to Navy ships contrary to Navy requirements or demanding a change in the priority of Navy ship alterations must be disconcerting, at best, for naval authorities. At worst it may provoke a controversy of constitutional proportions regarding Congress’ ability to delegate control of the Navy.

VI. CONCLUSION: REVERSE FEDERALISM GONE AWRY

This article began with a brief review of the size and diversity of the Navy fleet. Although numbering over 400 ships, the Navy fleet represents only a small fraction of the total shipping tonnage of the United States. More important than either absolute or relative numbers of vessels, Navy ships have a mission distinct from commercial vessels and must be able to function effectively in a wholly different environment—while waging war at sea. Navy ships must be ready and able to go anywhere, anytime, in order to preserve national security from all threats, foreign or domestic. At the same time the goal of the Clean Water Act must be pursued and achieved. Even though the Navy’s readiness and ability to defend the nation need not conflict with sound environmental stewardship, the statutes and their various implementing

243. Shepherd Interview, supra note 176.
244. Riggs, supra note 239.
245. The combined total of the Navy’s active fleet and MSC ships comprise about 10% of the total number of U.S. flag merchant vessels, which number over 6,300. Jane’s, supra note 14, at 710.
regulations relating to discharges of water are increasingly leading to conflict. One explanation for this is that Congress’ vision of a decentralized enforcement scheme may have been ill-conceived vis a vis the Navy.

The goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”246 In passing the CWA and its subsequent amendments, Congress resolved that the United States should participate, just as private enterprises and citizens must, in achieving this national goal.247 When considering passage of the CWA, however, Congress neglected to consider adequately the complex ramifications such participation would present to the armed forces. Regarding Navy compliance in particular, there is nothing throughout the substantial legislative history of the CWA to reflect Congress’ considered judgment on this front. There is no debate about the status of various classes of Navy ships as public vessels nor of the structural and functional differences between warships and commercial vessels; no reference to the potential national security impacts of requiring compliance by DOD or by Navy ships; no evidence that the actual environmental impact of Navy ship discharges was ever considered; no discussion weighing the economic costs and the environmental impact of various levels of compliance by Navy ships and no mandate that any federal agency engage in such an analysis; and, while considering the delegation of primary enforcement responsibility to the states, no consideration of how a fleet of mobile Navy ships would comply with the inevitably disparate state and local standards.248

Understandably, increasingly aggressive state enforcement efforts generally have not led to increased compliance but have instead resulted in an increasing number of confrontations between the Navy and the states. Some of these confrontations have had no ready method of resolution, including the disconcerting circumstance that no U.S. Navy ship can meet the water discharge standards required to enter all U.S. ports. Other less dramatic but nevertheless problematic circumstances were also noted throughout this article. Environmental requirements vary from state to state, and even from port to port within the same state, leaving

247. Id. § 1323(a).
248. Congress is not alone in bearing responsibility for failing to consider the impacts of requiring Navy compliance. The Carter Administration concurred with the § 313 provisions without comment. COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 852, 1203 (1973).
commanding officers uncertain about their ship's ability to comply and concerned about the liability of their crew if it does not. Some state and local requirements have been incompatible with the standard operating procedures for some ships and their systems. The Navy and the states have been forced to expend increasingly limited financial assets and personnel arranging local “band-aid” solutions which neither produce substantive benefit to the environment nor contribute to the Navy’s long term compliance capability. Some locally negotiated solutions have negatively impacted the habitability of Navy ships, burdening the morale of sailors.

Foreign ships visiting U.S. ports have been even less successful in meeting environmental requirements and in arranging for environmental services satisfactory to certain ports—to the ultimate embarrassment of the United States and potentially to the detriment of our foreign relations. 249

Despite the increasingly obvious difficulties inherent in state and local environmental regulation of Federal agencies, successive Congresses have nevertheless inexorably divested the United States of its sovereign immunity from such regulation. Paradoxically the courts, including the U.S. Supreme Court, have barred enforcement of state regulations against federal agencies often enough that those agencies appear wholly justified in taking a conservative posture when confronted by regulations which appear to complicate or conflict with their primary federal responsibilities. A status quo has thus been established wherein the states are taking Congress’ word at face value by trying to enforce state laws and regulations against federal agencies; the federal agencies, meanwhile, often resist compliance while pondering whether or not the language of a federal statute, if strictly construed by the courts, would clearly and unambiguously impose a legal obligation on them to comply. 250

249. The fact that states perceive themselves as able to impose requirements on foreign warships is curious given that no nation-state’s sovereign has yet waived immunity for purposes of allowing environmental regulation by the several states. An interesting confrontation can easily be envisioned where a state refuses to allow a foreign warship entry into a port after that ship has been granted clearance to enter by the U.S. State Department and, perhaps, even though escorted by a U.S. Navy vessel.

250. There are two additional reasons federal agencies are likely to narrowly construe waivers of immunity. First, if there were no waiver of sovereign immunity and, consequently, no obligation to comply, any expenditure of federal funds for compliance which does not otherwise serve the federal purpose of the agency arguably violates the Anti-Deficiency Act, 31 U.S.C. §§ 1341(a), 1349(a), 1350 (1956). That Act provides for a recoupment action or even criminal penalties against any federal employee who makes unauthorized expenditures of federal funds. Secondly, federal agencies, and DOD
The Navy has rather successfully relied on the courts’ narrow construction of the CWA’s waiver of immunity combined with the vessel discharge exclusion promulgated by EPA to avoid direct state regulation of ships. Despite the fact that the vessel discharge exclusion is not an expression of reserved sovereign immunity nor even preemptive administrative action by EPA, no state has yet required the permitting of a U.S. Navy ship, though individual discharges are being increasingly challenged.

The result of the law’s present development is a complete lack of clear, consistent and achievable requirements for Navy ship discharges. This, in turn, has stymied the Navy’s development of reliable ship design standards which are protective of the environment. Equally lacking are design standards which anticipate the needs of the 21st century Navy, which will drive shipboard technologies forward, integrating warfighting capability and environmental compliance. Development of such design standards is certainly not encouraged by the current CWA scheme of reverse federalism, decentralized state authority over federal agencies, which arguably mandates Navy compliance with individual state water quality standards but does not require any coordination or standardization among the several states.

Having surveyed both the law and the recent effects of its implementation, one may well conclude that neither the Navy nor the federal and state regulatory agencies have been able to fulfill effectively their joint responsibility of protecting and improving water quality. Indeed, it is becoming clear that the CWA and the perpetually changing patch-work quilt of state laws and regulations do not even allow compliance by the Navy in harmony with its primary mission. Congress has simply allowed too many chefs to spoil the broth.

VII. RECOMMENDATION: NATIONAL DISCHARGE STANDARDS

Ensuring Navy compliance with requirements of the CWA does not require a wholesale revamping of the legislation, nor even a reassertion of sovereign immunity and establishment of a wholly federal system of agencies in particular, are highly mission-oriented. The Navy’s primary constitutional and statutory mission of protecting national security, through the use of force, if necessary, is not always easily reconciled with a “second mission” of environmental stewardship. Thus, any ambiguity of mission priorities should be expected to be resolved consistently with the primary mission requirements.
regulation and enforcement. Only two things are necessary. The first acknowledges that the organization, equipping and management of the U.S. Navy cannot be brought into harmony with the requirements of the CWA by resorting to decentralized enforcement of multiple and constantly changing water standards. The second recognizes that there already exists a highly effective command and control structure within the Department of the Navy, the use of which was not properly anticipated by the CWA.  

The best way to ensure Navy ship compliance is to develop a coherent body of effluent standards for application to all Navy ships in all the waters of the U.S. and on the high seas. These standards must then be implemented through the existing command and control structure.

Where a strict command and control structure exists, such as that within the Navy, enforcement of regulations on individual units by a non-Navy agency disrupts the established chain of command. This causes, at best, confusion and delay in compliance while requirements are confirmed by unit commanders with their seniors. It follows that initiating requirements from the state or local level, which must work their way up the chain of command, reflects a failure to understand the purpose and value of the command structure. Even a Navy committed to environmental compliance would find it difficult, if not impossible, to assimilate the existing myriad and changing state and local regulations from the bottom up. However, since the existing military structure was designed to execute the directives of higher authority, it seems that the most efficient means of gaining environmental compliance is to promulgate requirements from the top down, in the form of service directives.  

In other words, effective use of the Navy command and control structure is essential to achieving

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251. The use of the Navy command and control structure to promulgate and enforce clean water compliance does not require allowing a Pentagon fox to guard the environmental hen house. Effective use of the Navy chain of command to achieve compliance at the unit level is an issue distinct from what standards should apply to Navy ships and which agencies, in addition to the Navy, should develop and enforce them.

252. The Navy has promulgated a number of environmental requirements in OPNAVINST 5090.1A, supra note 35. However, this manual obviously cannot incorporate all state and local requirements. Thus, unit commanders are faced with directives from higher Navy authority, which they must follow, as well as other state and local regulations which do not appear in Navy directives and which may or may not be consistent with those directives.
ships' environmental compliance because, as operational units of the Navy, they are most responsive to that structure.\textsuperscript{253}

Use of the Navy's command structure, of course, requires that there be a single body of standards which can be promulgated. This is not a unique concept. The CWA itself already contains a provision for regulating one specific discharge from ships, sewage, through use of a national standard.\textsuperscript{254} Section 312 provides for uniform national standards for marine sanitation devices and their application to, and implementation by, DOD agencies through service directives.\textsuperscript{255} This same regulatory scheme should be expanded to address all shipboard discharges by DOD ships.\textsuperscript{256}

More specifically the CWA should be amended to require EPA, in consultation with the Coast Guard, to develop and apply specific criteria to determine which vessel discharges can practically be controlled and within what parameters.\textsuperscript{257} Once performance standards are developed, DOD, in consultation with EPA and the Coast Guard, should promulgate the regulations necessary to implement the design, construction and use of control technologies to meet the performance standards. Just as under section 312, the states and their political subdivisions could enforce adherence to the federal standards but would not be permitted to adopt or enforce broader or more stringent requirements, as this would obviously defeat the purpose of having federal standards.

\textsuperscript{253} That is not to say that the Navy ought to be left to its own devices in choosing which standards to apply, nor that it should be accountable to no one but itself. \textit{See infra} note 259 and accompanying text.
\textsuperscript{254} \textit{See supra} notes 45-52 and accompanying text.
\textsuperscript{255} \textit{See supra} notes 45-52 and accompanying text.
\textsuperscript{256} The Navy has developed a detailed legislative proposal which, among other changes, substitutes "marine pollution control device" for the term "marine sanitation device" in § 312. Interview with Commander John Quinn, Judge Advocate General's Corps, U.S. Navy, Office of the Chief of Naval Operations (Dec. 15, 1993) (on file with the \textit{William and Mary Environmental Law & Policy Review}). Other public vessels, such as Coast Guard ships, could also be covered by such a legislative proposal. Once control technologies were developed and working, the initiative could be expanded to include commercial vessels.
\textsuperscript{257} Criteria might include such factors as the nature of the discharge, its environmental effects, the practicality of controlling it with existing or developing technology, the costs of such control and the effect incorporating controls would have on vessel capabilities. Consistent with § 312, DOD concurrence with the development and application of these criteria should be required.
There are several benefits in expanding the section 312 regulatory scheme. With a unified body of environmental performance standards, Navy ships could be designed or modified to meet the required standards. Control standards could be phased in at various levels to require not only state-of-the-art technology within a certain period of time but also to drive forward the development of new technologies. National standards could be easily incorporated into compliance directives which could then be promulgated using the existing command structure, setting forth specific and exclusive requirements. Such standards would eliminate the often layered and sometimes inconsistent body of existing regulations. Primary accountability for compliance would be refocused on the chain of command, letting the command and control structure function as it should and eliminating any "bunker mentality" which may presently exist toward outside agency control. Crews could be more easily trained to achieve compliance using national standards. Internal enforcement would be facilitated, and hence be more effective, by having consistent inspection criteria. Finally, should compliance nevertheless lapse, state and local regulatory agencies should retain the ability to enforce the national standards.

The negative aspects of adopting national ship discharge standards are few. Certainly it will be difficult to tailor a single body of standards to reflect the quality needs of any particular water body. However, the states should be active partners with EPA in designing standards that address water quality needs across a wide spectrum of water bodies so that, upon application of specific control technologies, any residual pollution would have no adverse environmental impact. As a further precaution in particularly sensitive areas, the states might also be permitted to designate "no discharge" zones.

Perhaps the most difficult aspect of enacting the recommended amendment may be the politically sensitive nature of reimposing federal preemption of state authority, even in the limited area of Navy ship discharges, after having delegated authority to the states under the decentralized enforcement scheme of the CWA. Yet, Congress may find the states willing to trade away some of the authority they presently have. As this article has shown, state control of Navy ships is often ineffectual or frustrated and is increasingly leading to confrontation rather than compliance. The states stand to gain much more than they would lose by supporting comprehensive national ship discharge standards. Positively stated, the states would be relieved of the burden of implementing their own detailed rules. They could still participate in the national rulemaking
process and would retain the power to enforce the national standards. The states would finally have ship discharge standards applicable to Navy ships that are realistic, achievable and enforceable.

In introducing the Federal Facilities Clean Water Compliance Act of 1993, Congressman Dan Schaefer (R-Colo) complained that federal agencies were not being held accountable. To the contrary, it is not for lack of accountability that federal compliance may lag behind the private sector; it is because the legislation allowing state control of federal agencies, and of the Navy in particular, is fundamentally flawed. Under the circumstances described in this article, expanding the waiver of sovereign immunity to allow states to levy punitive fines against federal agencies, as would Congressman Schaefer’s bill, would only make compliance more expensive, not more achievable.

Congressman Schaefer has argued that “the environment knows no difference” between pollution from a public or a private source. That may be true, but there is a difference between tolerating the discharges incidental to the proper operation of a public vessel and allowing pollution that is exploitation of the environment for private gain. While the environment may not be able to discern the difference, one would hope that Congress can. Recognizing that distinction, Congress should act to reconcile thoughtfully our vital interests in national security and in our environment by authorizing the adoption of national discharge standards for public vessels.

260. Id.
261. Id.