

## CLEAN BOATING ACT OF 2008

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JULY 22, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. OBERSTAR, from the Committee on Transportation and Infrastructure, submitted the following

### R E P O R T

[To accompany H.R. 5949]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 5949) to amend the Federal Water Pollution Control Act to address certain discharges incidental to the normal operation of a recreational vessel, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

#### PURPOSE OF THE LEGISLATION

H.R. 5949, the “Clean Boating Act of 2008”, amends the Federal Water Pollution Control Act (“Clean Water Act”) to provide a limited exemption from the National Pollutant Discharge Elimination System (“NPDES”) permitting requirements for discharges incidental to the normal operation of a recreational vessel, and establish a management program to address any discharges from a recreational vessel excluded from the permitting requirements of the Act.

#### BACKGROUND AND NEED FOR LEGISLATION

Section 301(a) of the Clean Water Act (“Act”) provides that “the discharge of any pollutant by any person shall be unlawful” unless the discharge is in compliance with a permit issued under the Act. Section 502 of the Act defines “discharge of a pollutant” as “(A) any addition of any pollutant to navigable waters from any point source, (B) any 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.” A “point source” is defined as a “discernible,

confined and discrete conveyance” and includes a “vessel or other floating craft.” The term “pollutant” includes, among other things, “sewage, garbage . . . biological materials . . . and industrial, municipal, and agricultural waste discharged into water.”

Section 402(a) of the Act authorizes the Environmental Protection Agency (“EPA”) to “issue a permit for the discharge of any pollutant, or combination of pollutants” upon certain conditions required by the Act. Section 402 permits are commonly called National Pollutant Discharge Elimination System permits, or NPDES permits. NPDES permits can be either individual permits or less-burdensome general permits when the discharge of pollutants will cause only minimal adverse environmental effects to the environment when discharged separately and will have only minimal cumulative adverse effect on the environment.

In 1973, EPA promulgated a regulation that excluded “discharges incidental to the normal operation of vessels” from NPDES permitting (38 Fed. Reg. 13528, May 22, 1973). After Congress reauthorized and amended the Clean Water Act in 1977, EPA conducted an additional round of public comment on the regulation (43 Fed. Reg. 37078, August 21, 1978). In 1979, EPA promulgated the final revision that established the regulation in its current form (44 Fed. Reg. 32854, June 7, 1979). That regulation identifies several types of vessel discharges as being subject to NPDES permitting (such as trash, garbage, or other discharges related to energy production, mining, or seafood production), but specifically excludes discharges incidental to the normal operation of a vessel.

Under EPA regulations, found at 40 CFR 122.3(a), the following discharges did 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.

In March, 2005, the U.S. District Court for the Northern District of California ruled that the Clean Water Act exemption for “discharges incidental to the normal operation of a vessel” exceeded EPA’s authority under the Act.

This decision, *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 2005 WL 756614 (N.D. Cal. Mar. 30, 2005), was primarily focused on the authority of the Clean Water Act to regulate discharges of ballast water from vessels. The Court concluded that, because of the potential impact that invasive species pose to receiving waters, the underlying goals of the Clean Water Act to restore and protect the chemical, physical, and biological integrity of the nation’s waters, and the fact that Congress had “‘directly spoken’ in the [Clean Water Act] and specifically requires NPDES permits for vessels discharging pollutants in the na-

tion's waters," EPA acted in excess of its authority in "exempting an entire category of discharges" from the NPDES permit program.

On September 18, 2006, the U.S. District Court for the Northern District of California issued an order vacating (revoking) the regulatory exclusions for "discharges incidental to the normal operation of a vessel" found at 40 CFR 122.3(a) as of September 30, 2008. On November 16, 2006, the United States filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit. Oral arguments before the Ninth Circuit Court of Appeals occurred in August 2007, and the decision in this case is currently pending.

According to EPA, a consequence of the *Northwest Environmental Advocates* decision is that all discharges of pollutants from vessels, other than those that are specifically otherwise addressed by the Clean Water Act (i.e., discharges of sewage, oil and hazardous substances, and discharges incidental to the normal operation of a vessel of the Armed Forces under section 312 of the Act), could potentially be required to have a NPDES permit. These NPDES permits could be either individual permits or general permits, and would include discharges of pollutants from all non-military vessels, including approximately 13 million recreational vessels throughout the United States.

The Committee believes that the discharge of pollutants from recreational vessels is likely to pose a minimal adverse impact on water quality and the environment, even on a cumulative basis. Accordingly, the Committee believes that it is appropriate to retain the limited exclusion from the NPDES requirements of the Clean Water Act for discharges incidental to the normal operation of a recreational vessel. However, to further minimize any potential adverse impact to water quality and the environment, the Committee strongly believes that the Administrator must further examine the potential adverse impacts of discharges incidental to the normal operation of a recreational vessel, and develop (and have implemented by the Secretary of the Department in which the United States Coast Guard is operating) appropriate management practices to mitigate potential adverse impacts on the waters of the United States.

H.R. 5949, the "Clean Boating Act of 2008", provides that the NPDES permit requirements of section 402 of the Clean Water Act shall not apply to recreational vessels. A "recreational vessel" is defined as any vessel that is manufactured or used primarily for pleasure, or is leased, rented, or chartered to a person for the pleasure of that person, and excludes any vessel that is subject to inspection by the United States Coast Guard and that is engaged in commercial use or carries paying passengers.

The Clean Boating Act of 2008 also requires the Administrator to: (1) develop management practices for recreational vessels to mitigate the adverse impacts on waters of the United States of discharges incidental to normal recreational vessel operation (excluding sewage) in any case in which the Administrator determines that the use of those practices is reasonable and practicable; and (2) promulgate Federal standards of performance (which may distinguish among vessel types, classes, and sizes, as well as new and existing vessels) for each discharge for which such a management practice is developed.

In addition, the Clean Boating Act of 2008 directs the Secretary of the Department in which the United States Coast Guard is operating to promulgate regulations governing the design, construction, installation, and use of management practices for recreational vessels as necessary to meet such standards of performance.

Finally, the Clean Boating Act of 2008 prohibits operation of a recreational vessel in or discharges from a recreational vessel into waters of the United States or waters of the contiguous zone, other than in compliance with such standards.

#### SUMMARY OF LEGISLATION

##### *Section 1. Short title*

This section designates the title of the bill as the “Clean Boating Act of 2008.”

##### *Section 2. Discharges incidental to the normal operation of recreational vessels*

This section amends section 402 of the Clean Water Act to add a new subsection (r) to provide that no National Pollutant Discharge Elimination System permit shall be required by the Administrator (or by a State, in the case of an approved permit program under subsection 402(b)), for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

##### *Section 3. Definition*

This section defines the term “recreational vessel” to mean any vessel that is (1) manufactured or used primarily for pleasure; or (2) leased, rented, or chartered to a person for the pleasure of that person. It excludes from the definition of the term “recreational vessel” any vessel that is subject to inspection by the United States Coast Guard and that is (1) engaged in commercial use, or (2) carries paying passengers.

##### *Section 4. Management practices for recreational vessels*

This section amends section 312 of the Clean Water Act to add a new subsection (o), which would apply to any discharge, other than a discharge of sewage, from a recreational vessel that is incidental to the normal operation of the recreational vessel; and exempt from NPDES permit requirements of the Act by operation of section 402(r) of the Clean Water Act (established by section 2 of the Clean Boating Act of 2008).

New paragraph 312(o)(2) requires the Administrator, in consultation with the Secretary of the department in which the United States Coast Guard is operating, the Secretary of Commerce, and interested States, to determine the discharges incidental to the normal operation of a recreational vessel for which it is reasonable and practicable to develop management practices that mitigate potential adverse impacts on the waters of the United States. Such determinations must be promulgated in accordance with the Administrative Procedure Act (5 U.S.C. Sec. 553). In making his determinations, the Administrator is required to consider: (1) the nature of

the discharge; (2) the environmental effects of the discharge; (3) the practicability of using a management practice; (4) the effect that the use of a management practice would have on the operation, operational capability, or safety of the vessel; (5) applicable Federal and State law; (6) applicable international standards; and (7) the economic costs of the use of the management practice.

Initial determinations under new paragraph 312(o)(2) must be made not later than one year after the date of enactment. Every five years thereafter, the Administrator is required to review the determinations and, if necessary, revise the determinations based on any new information available to the Administrator.

New subparagraph 312(o)(2)(B) requires the Administrator to develop management practices for recreational vessels in any case in which the Administrator determines that the use of those practices is reasonable and practicable.

New paragraph 312(o)(3) requires the Administrator, in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Commerce, other interested Federal agencies, and interested States, to promulgate Federal standards of performance for each management practice developed under new paragraph 312(o)(2). Performance standards must be promulgated in accordance with the Administrative Procedure Act (5 U.S.C. Sec. 553).

In promulgating performance standards, the Administrator is authorized to take into account the classes, types and sizes of vessels, and whether the vessels are new or existing, but must take into consideration the factors described in new subparagraph 312(o)(2)(B). The Clean Boating Act of 2008 provides the Administrator with authority to waive the applicability of the standards as necessary or appropriate to a particular class, type, age, or size of vessel.

The standards of performance for a management practice are required to be promulgated not later than one year after the date of a determination that the management practice is reasonable and practicable. Every five years thereafter, the Administrator is required to review the standards and, if necessary, revise the standards based on any new information available to the Administrator.

New paragraph 312(o)(4) requires the Secretary of the department in which the United States Coast Guard is operating to promulgate regulations governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet the standards of performance promulgated. Such regulations are required to be promulgated as soon as practicable after the Administrator completes his rulemaking on performance standards, but not later than one year after the date on which the Administrator promulgates such standards.

New subsection 312(o)(5) states that this new subsection would not affect the application of section 311 of the Clean Water Act to discharges incidental to the normal operation of a recreational vessel.

New subsection 312(o)(6) provides that, after the effective date of the regulations promulgated by the Secretary of the department in which the United States Coast Guard is operating, the owner or operator of a recreational vessel is prohibited from operating in, or making any discharge incidental to the normal operation of the

vessel into, the waters of the United States or the waters of the contiguous zone, if the owner or operator of the vessel is not using any applicable management practice meeting standards established under new subsection 312(o).

#### LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

On May 1, 2008, Representative Steven LaTourette introduced H.R. 5949, the “Clean Boating Act of 2008”.

On May 15, 2008, the Committee on Transportation and Infrastructure met in open session, and ordered H.R. 5949 reported favorably to the House by voice vote with a quorum present.

#### RECORD VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. There were no recorded votes taken in connection with consideration of H.R. 5949 or ordering the bill reported. A motion to order H.R. 5949 reported favorably to the House was agreed to by voice vote with a quorum present.

#### COMMITTEE OVERSIGHT AND FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in this report.

#### COST OF LEGISLATION

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

#### COMPLIANCE WITH HOUSE RULE XIII

1. With respect to the requirement of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, and clause 308(a) of the Congressional Budget Act of 1974, the Committee references the report of the Congressional Budget Office included in the report.

2. With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to provide a limited exemption from the National Pollutant Discharge Elimination System permitting requirements of the Clean Water Act for discharges incidental to the normal operation of a recreational vessel, and to establish a management program to address any discharges from a recreational vessel excluded from the permitting requirements of the Act.

3. With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the

Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 5949 from the Director of the Congressional Budget Office.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, June 3, 2008.*

Hon. JAMES L. OBERSTAR,  
*Chairman, Committee on Transportation and Infrastructure,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5949, the Clean Boating Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

ROBERT A. SUNSHINE  
(For Peter R. Orszag, Director).

Enclosure.

*H.R. 5949—Clean Boating Act of 2008*

H.R. 5949 would direct the Environmental Protection Agency (EPA) to investigate discharges of pollution from recreational boats to determine what types should be regulated and to promulgate standards of performance for managing those discharges. The U.S. Coast Guard (USCG) would be responsible for enforcing the standards developed by EPA.

CBO estimates that implementing H.R. 5949 would have no significant effect on the federal budget because EPA is already required to regulate discharges from recreational boats that it deems should be regulated, and either that agency or the USCG must enforce such regulations. The two agencies are currently carrying out those responsibilities. Enacting the legislation would not affect revenues or direct spending.

The bill contains no intergovernmental or private-sector mandates and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Deborah Reis. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH HOUSE RULE XXI

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5949, the “Clean Boating Act of 2008”, does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI of the Rules of the House of Representatives.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, committee reports on a bill or joint resolution of a public character shall include a statement citing the specific powers granted to the Congress in the Constitution to enact the measure. The Committee on Transportation and Infrastructure

finds that Congress has the authority to enact this measure pursuant to its powers granted under article I, section 8 of the Constitution.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

#### PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 5949 does not preempt any state, local, or tribal law.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

#### APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

### FEDERAL WATER POLLUTION CONTROL ACT

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#### TITLE III—STANDARDS AND ENFORCEMENT

\* \* \* \* \*

##### MARINE SANITATION DEVICES

SEC. 312. (a) \* \* \*

\* \* \* \* \*

(o) *MANAGEMENT PRACTICES FOR RECREATIONAL VESSELS.*—

(1) *APPLICABILITY.*—*This subsection applies to any discharge, other than a discharge of sewage, from a recreational vessel that is—*

(A) *incidental to the normal operation of the vessel; and*

(B) *exempt from permitting requirements under section 402(r).*

(2) *DETERMINATION OF DISCHARGES SUBJECT TO MANAGEMENT PRACTICES.*—



## (A) DETERMINATION.—

(i) *IN GENERAL.*—The Administrator, in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Commerce, and interested States, shall determine the discharges incidental to the normal operation of a recreational vessel for which it is reasonable and practicable to develop management practices to mitigate adverse impacts on the waters of the United States.

(ii) *PROMULGATION.*—The Administrator shall promulgate the determinations under clause (i) in accordance with section 553 of title 5, United States Code.

(iii) *MANAGEMENT PRACTICES.*—The Administrator shall develop management practices for recreational vessels in any case in which the Administrator determines that the use of those practices is reasonable and practicable.

## (B) CONSIDERATIONS.—In making a determination under subparagraph (A), the Administrator shall consider—

- (i) the nature of the discharge;
- (ii) the environmental effects of the discharge;
- (iii) the practicability of using a management practice;
- (iv) the effect that the use of a management practice would have on the operation, operational capability, or safety of the vessel;
- (v) applicable Federal and State law;
- (vi) applicable international standards; and
- (vii) the economic costs of the use of the management practice.

## (C) TIMING.—The Administrator shall—

- (i) make the initial determinations under subparagraph (A) not later than 1 year after the date of enactment of this subsection; and
- (ii) every 5 years thereafter—
  - (I) review the determinations; and
  - (II) if necessary, revise the determinations based on any new information available to the Administrator.

## (3) PERFORMANCE STANDARDS FOR MANAGEMENT PRACTICES.—

(A) *IN GENERAL.*—For each discharge for which a management practice is developed under paragraph (2), the Administrator, in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Commerce, other interested Federal agencies, and interested States, shall promulgate, in accordance with section 553 of title 5, United States Code, Federal standards of performance for each management practice required with respect to the discharge.

(B) *CONSIDERATIONS.*—In promulgating standards under this paragraph, the Administrator shall take into account the considerations described in paragraph (2)(B).

(C) *CLASSES, TYPES, AND SIZES OF VESSELS.*—The standards promulgated under this paragraph may—

(i) distinguish among classes, types, and sizes of vessels;

(ii) distinguish between new and existing vessels; and

(iii) provide for a waiver of the applicability of the standards as necessary or appropriate to a particular class, type, age, or size of vessel.

(D) TIMING.—The Administrator shall—

(i) promulgate standards of performance for a management practice under subparagraph (A) not later than 1 year after the date of a determination under paragraph (2) that the management practice is reasonable and practicable; and

(ii) every 5 years thereafter—

(I) review the standards; and

(II) if necessary, revise the standards, in accordance with subparagraph (B) and based on any new information available to the Administrator.

(4) REGULATIONS FOR THE USE OF MANAGEMENT PRACTICES.—

(A) IN GENERAL.—The Secretary of the department in which the Coast Guard is operating shall promulgate such regulations governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet the standards of performance promulgated under paragraph (3).

(B) REGULATIONS.—

(i) IN GENERAL.—The Secretary shall promulgate the regulations under this paragraph as soon as practicable after the Administrator promulgates standards with respect to the practice under paragraph (3), but not later than 1 year after the date on which the Administrator promulgates the standards.

(ii) EFFECTIVE DATE.—The regulations promulgated by the Secretary under this paragraph shall be effective upon promulgation unless another effective date is specified in the regulations.

(iii) CONSIDERATION OF TIME.—In determining the effective date of a regulation promulgated under this paragraph, the Secretary shall consider the period of time necessary to communicate the existence of the regulation to persons affected by the regulation.

(5) EFFECT OF OTHER LAWS.—This subsection shall not affect the application of section 311 to discharges incidental to the normal operation of a recreational vessel.

(6) PROHIBITION RELATING TO RECREATIONAL VESSELS.—After the effective date of the regulations promulgated by the Secretary of the department in which the Coast Guard is operating under paragraph (4), the owner or operator of a recreational vessel shall neither operate in nor discharge any discharge incidental to the normal operation of the vessel into, the waters of the United States or the waters of the contiguous zone, if the owner or operator of the vessel is not using any applicable management practice meeting standards established under this subsection.

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## TITLE IV—PERMITS AND LICENSES

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## NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a) \* \* \*

\* \* \* \* \*

(r) *DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF RECREATIONAL VESSELS.*—No permit shall be required under this Act by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

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## TITLE V—GENERAL PROVISIONS

\* \* \* \* \*

## GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided, when used in this Act:

(1) \* \* \*

\* \* \* \* \*

(25) *RECREATIONAL VESSEL.*—

(A) *IN GENERAL.*—The term “recreational vessel” means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) *EXCLUSION.*—The term “recreational vessel” does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

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