designee determines necessary to adjudicate a specific claim.

(3) *ECHO provider exclusion or suspension.* A provider of ECHO services or items may be excluded or suspended for a pattern of discrimination on the basis of disability. Such exclusion or suspension shall be accomplished according to the provisions of § 199.9.

* * * * *

■ 7. Section 199.7 is amended by revising paragraphs (a)(2) and (b)(2)(xii) to read as follows:

§ 199.7 Claims submission, review, and payment.

(a) * * *

(2) *Claim required.* No benefit may be extended under the Basic Program or Extended Care Health Option (ECHO) Program without submission of an appropriate, complete and properly executed claim form.

* * * * *

(b) * * *

(2) * * *

(xii) *Other authorized providers.* For items from other authorized providers (such as medical supplies), an explanation as to the medical need must be attached to the appropriate claim form. For purchases of durable equipment and durable medical equipment under the ECHO, it is necessary also to attach a copy of the preauthorization.

* * * * *

■ 8. Section 199.8 is amended by revising paragraphs (d)(4) and (d)(5) to read as follows:

§ 199.8 Double coverage.

* * * * *

(d) * * *

(4) *Extended Care Health Option (ECHO).* For those services or supplies that require use of public facilities, an ECHO eligible beneficiary (or sponsor or guardian acting on behalf of the beneficiary) does not have the option of waiving the full use of public facilities which are determined by the Director, TRICARE Management Activity or designee to be available and adequate to meet a disability related need for which an ECHO benefit was requested. Benefits eligible for payment under a state plan for medical assistance under Title XIX of the Social Security Act (Medicaid) are never considered to be available in the adjudication of ECHO benefits.

(5) *Primary payer.* The requirements of paragraph (d)(4) of this section notwithstanding, TRICARE is primary payer for services and items that are provided in accordance with the Individualized Family Service Plan as required by Part C of the Individuals with Disabilities Education Act and that are medically or psychologically necessary and otherwise allowable under the TRICARE Basic Program or the Extended Care Health Option.

* * * * *

■ 9. Section 199.20 is amended by revising paragraph (p)(2)(i) to read as follows:

§ 199.20 Continued Health Care Benefits Program (CHCBP).

* * * * *

(p) * * *

(2) * * *

(i) The Extended Care Health Option (ECHO) under § 199.5.

* * * * *

■ 10. Appendix A to part 199 is amended by adding the term ''ECHO'' and removing the term ''PFPWD'' to read as follows:

Appendix A to Part 199—Acronyms

* * * * *

ECHO—Extended Care Health Option

* * * * *

Dated: July 20, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–16932 Filed 7–27–04; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 151

[USCG–2003–14273]

RIN 1625–AA52

Mandatory Ballast Water Management Program for U.S. Waters

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is requiring mandatory ballast water management practices for all vessels equipped with ballast water tanks bound for ports or places within the U.S. or entering U.S. waters. This rule will increase the Coast Guard's ability to protect U.S. waters against the unintentional introduction of nonindigenous species via ballast water discharges, which have had significant impacts on the nation's marine and freshwater resources, biological diversity, and coastal infrastructure. It will also comply with the requirements of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and the National Invasive Species Act of 1996. The Great Lakes ballast water management program remains unchanged.

DATES: This final rule is effective September 27, 2004.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2003–14273 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Mr. Bivan R. Patnaik, Project Manager, Environmental Standards Division, Coast Guard, telephone 202–267–1744, e-mail: *bpatnaik@comdt.uscg.mil.* If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Legislative and Regulatory History

The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA) [Pub. L. 101–646], enacted by Congress on November 29, 1990, established the Coast Guard's regulatory jurisdiction over ballast water management (BWM). To fulfill the directives of NANPCA, the Coast Guard published a final rule on April 8, 1993, titled ''Ballast Water Management for Vessels Entering the Great Lakes'' in the **Federal Register** (58 FR 18330). This rule established mandatory BWM procedures for vessels entering the Great Lakes in 33 CFR part 151, subpart C.

A subsequent final rule titled ''Ballast Water Management for Vessels Entering the Hudson River'' was published on December 30, 1994, in the **Federal Register** (59 FR 67632). This final rule amended 33 CFR part 151 to extend the BWM requirements into portions of the Hudson River.

The National Invasive Species Act (NISA) [Pub. L. 104–332] enacted by Congress on October 26, 1996, reauthorized and amended NANPCA. NISA reemphasized the significant role of ships' ballast water in the introduction and spread of nonindigenous species (NIS). NISA authorized the Coast Guard to develop a voluntary national BWM program and mandated the submission of reporting forms without penalty provisions. On

May 17, 1999, the Coast Guard published an interim rule on this voluntary program titled, ''Implementation of the National Invasive Species Act of 1996 (NISA)'' (64 FR 26672) and finalized the rule on November 21, 2001 (66 FR 5838).

NISA also instructed the Secretary of the Department in which the Coast Guard is operating (the Coast Guard was operating under the Department of Transportation when NISA was enacted) to submit a Report to Congress evaluating the effectiveness of the voluntary BWM program. Congress anticipated that the Secretary might determine that either compliance with the voluntary guidelines was inadequate, or the rate of reporting was too low to allow for a valid assessment of compliance. In either case, Congress stipulated the development of additional regulations to make the voluntary guidelines a mandatory BWM program. The Secretary's Report to Congress, signed June 3, 2002, concluded that compliance with the voluntary guidelines, found in 33 CFR part 151, subpart D, was insufficient to allow for an accurate assessment of the voluntary BWM regime. Accordingly, the Secretary stated his intention to make the voluntary BWM guidelines mandatory. A copy of this Report to Congress can be found in the public docket (USCG–2002–13147) at *http://dms.dot.gov.*

On June 14, 2004 (69 FR 32864), we published a final rule titled ''Penalties for Non-submission of Ballast Water Management Reports'' that implemented penalties for failure to comply with the mandatory requirements found in 33 CFR part 151 and widened the applicability of the reporting and recordkeeping requirements to all vessels bound for ports or places within the U.S., with minor exceptions.

On July 30, 2003, we published a notice of proposed rulemaking titled ''Mandatory Ballast Water Management Program for U.S. Waters'' in the **Federal Register** (68 FR 44691). We received 38 letters commenting on the proposed rule. No public meeting was held on this rulemaking.

Background and Purpose

As directed by NISA and as stated in the Secretary of Transportation's Report to Congress in June 2002, the Coast Guard has determined that the voluntary BWM program is inadequate because sufficient compliance has not occurred. Therefore, as of the effective date of this rule, the Coast Guard has converted the voluntary BWM program into a mandatory program. This rule will increase the Coast Guard's ability to protect against introductions of NIS via ballast water discharges.

On March 1, 2003, the Coast Guard became a component of the Department of Homeland Security. As a result, the Secretary of the Department of Homeland Security assumed all duties once bestowed on the Secretary of the Department of Transportation with respect to this rule. The Secretary of Homeland Security concurs with the Coast Guard's rule regarding the mandatory BWM program.

This final rule revises 33 CFR part 151, subpart D, by requiring a mandatory BWM program for all vessels equipped with ballast water tanks bound for ports or places within the U.S. and/or entering U.S. waters. The mandatory BWM requirements for vessels entering the Great Lakes and Hudson River from outside the U.S. Exclusive Economic Zone (EEZ) remain unchanged.

The mandatory program requires all vessels equipped with ballast water tanks entering U.S. waters after operating beyond the EEZ to employ at least one of the following BWM practices:

(a) Prior to discharging ballast water in U.S. waters, perform complete ballast water exchange in an area no less than 200 nautical miles (nm) from any shore.

(b) Retain ballast water onboard the vessel.

(c) Prior to the vessel entering U.S. waters, use an alternative environmentally sound method of BWM that has been approved by the Coast Guard.

Although the national mandatory BWM program provides vessels with the option of using one of three BWM practices, ballast water exchange is likely to be the most used practice because—

- Some vessels engaged in trade are unlikely to hold their ballast water after arriving in U.S. waters from outside the EEZ, as this would mean they would not be able to conduct cargo operations;
- Alternative environmentally sound methods of BWM are still being developed and will likely be of limited availability in the near future; and

Therefore, under this rule, the BWM practice of conducting mid-ocean ballast water exchange prior to discharging ballast water in U.S. waters will be the practice used by the majority of vessels at this time.

Mid-ocean ballast water exchange is currently the most practicable method to help prevent the introductions of NIS into U.S. waters. Water in the open ocean contains certain physical, chemical, and biological conditions (such as high salinity). Organisms contained in ballast water that is exchanged in mid-ocean will not, or are unlikely to survive in an open ocean system. Likewise organisms that are contained in ballast water after a mid-ocean exchange is conducted will not, or are unlikely to survive if introduced into a freshwater or coastal system.

As mid-ocean ballast water exchange will be the most likely used BWM practice at this time, there are those vessels with voyage and/or safety concerns that will not be able to conduct ballast water exchange. Voyage and/or safety concerns may include security concerns since these issues have increased significantly due to recent events. NISA requires us to take into consideration different operating conditions in developing the mandatory BWM program. Therefore, a vessel that cannot practicably meet the requirements of paragraph (a) above due to a voyage that does not take it into waters at least 200 nm from any shore for a sufficient length of time or due to safety concerns will retain its ballast onboard. The vessel will not be prohibited from discharging the minimum amount of its ballast water necessary to maintain the safety of the vessel in areas other than the Great Lakes and the Hudson River. However, the vessel must discharge only the amount of ballast water operationally necessary for safety concerns. An entry must be made in the ballast water records supporting the reasons that the vessel could not comply with the regulatory requirements. Ballast water records must be made available to the local Captain of the Port (COTP) upon request.

This final rule also revises the criteria for a mid-ocean exchange by removing the constraints of exchanging ballast water in waters at a depth of 2,000 meters. Currently, there is no international consensus on a water-depth criterion for ballast water exchange. For example, Australian legislation has a depth requirement of 200 meters, and Israel's ballast water exchange requirement has no depth restriction, while the International Maritime Organization (IMO) Convention for the Control and Management of Ship's Ballast Water and Sediments, recently adopted on February 9, 2004, has a criterion of 200 meters. As there is no international consensus to mid-ocean ballast water exchange criteria, at this time, we believe defining mid-ocean ballast water exchange as taking place at least 200 nm from shore allows more vessels to conduct exchange and simplifies enforceability.

The Coast Guard recognizes that there are two currently feasible methods of conducting an exchange:

- An empty/refill exchange. The tank (or pair of tanks) is pumped down to the point where the pumps lose suction, and then the tank is pumped back up to the original level.
- A flow-through exchange. Mid-ocean water is pumped into a full tank while the existing coastal or fresh water is pumped or pushed out through another opening. As defined by the Coast Guard, a volume of water equal to three times the ballast tank capacity must be pumped for a flow-through exchange.

Failure to employ at least one of the BWM practices outlined above will result in a penalty, unless the vessel is exempt due to safety or voyage constraints or specifically exempted from the regulation.

Each vessel subject to this rule (33 CFR part 151 subpart D) will be required to develop and maintain a BWM plan. The plan shall be specific to each vessel and shall fulfill two purposes: (1) Show that there is a BWM strategy for the vessel; and (2) allow any master, or other ship's officer as appropriate, serving on that vessel to understand and follow the BWM strategy for the vessel. The IMO has issued guidelines on the content of BWM plans in IMO Resolution A.868(20) Annex 1, Chapter 7. Any plan meeting these IMO guidelines will meet the regulatory requirement laid out in § 151.2035(a)(7). This Resolution is available on the IMO's Global Ballast Water Management Programme Web site [*http://globallast.imo.org*]. For your reference, we have also placed a copy of the IMO guidelines in the docket for this rule at the location listed above under **ADDRESSES.** Failure to maintain a BWM plan onboard the vessel or to make the required ballast water reporting forms available will result in penalties.

Discussion of Comments and Changes

We received 38 letters on the proposed rulemaking for BWM. Most letters contained more than one comment. These included general comments as well as specific comments. We address the general comments first and then the specific comments.

General Comments

We received 16 comments in general support of the rule. One of these commenters supported the requirement that vessels must maintain BWM plans and that they should be modeled after IMO guidelines. One commenter supported the provisions of the rule that would not require vessels to deviate from their voyages or delay their voyages in order to conduct ballast water exchange.

One commenter stated that effective BWM and reporting are critical to maintaining the ecological and economic well being of coastal Alaska.

Three commenters stated that the U.S. mandatory BWM program should be consistent with IMO guidelines and supported our removal of the depth requirement for conducting ballast water exchange. One commenter stated that the Coast Guard did not adequately explain why ballast water exchange is acceptable in waters less than 2,000 meters deep.

We agree with the commenters. We have developed the BWM program to be as consistent with IMO guidelines as practicable. For example, and as recognized by the commenters, under the voluntary BWM program, we requested that ballast water exchange take place in an area 200 nm from shore and at a depth of 2,000 meters. To be consistent with IMO guidelines, we modified the mandatory program to require that ballast water exchange take place 200 nm from shore, without regard to water depth. We believe this harmonization will help vessel operators that must follow both IMO guidelines and U.S. requirements. As stated in the proposed rulemaking (68 FR 44691), there is not consensus on water depth criterion for ballast water exchange. Because there is no scientific consensus on a specific water depth that is suitable for exchange, and for the reasons stated above, we aligned our requirements with IMO guidelines.

One commenter stated that there should be no vessels exempt from the mandatory BWM program.

We disagree with the commenter. NISA authorizes specific exemptions for crude oil tankers engaged in coastwise trade and Department of Defense and Coast Guard vessels. Therefore, we do not currently have the authority to include these vessels in the applicability for the final rule.

One commenter requested that the Coast Guard host a public meeting on the Programmatic Environmental Assessment (PEA).

The Coast Guard does not intend to hold a public meeting for the PEA. We believe that the comment period provided ample opportunity for the public to suggest other alternatives to the one examined in the PEA.

Two commenters stated that there should be a publicly accessible database for nationwide ballast water discharges.

National ballast water discharge data is publicly available and can be found at the Web site for the National Ballast Information Clearinghouse at *http://invasions.si.edu/NBIC/ballast.html.*

One commenter asked if vessels discharging ballast water should be regulated under the Environmental Protection Agency's (EPA) National Pollution Discharge Elimination System (NPDES) Program.

This comment was the subject of a petition submitted to EPA on January 13, 1999. EPA responded to this petition on September 9, 2003 to comply with a court order (68 FR 53165). The Coast Guard opined, during the legal proceedings, that regulation of vessels discharging ballast water should remain under the authority of the Coast Guard. EPA, for the reasons set out in its September 9, 2003, petition denial, does not regulate vessels discharging ballast water under the NPDES program.

One commenter asked if the Coast Guard would identify ''high-risk vessels'' and if we would encourage their owners to install ballast water treatment systems. This commenter also asked if the Coast Guard has funding to conduct research onboard vessels.

The Coast Guard does not have the ability to identify ''high-risk vessels'' with respect to NIS, nor have we defined this term in our regulations. Further, the Coast Guard does not have funding to conduct research onboard vessels; however, we have developed a Shipboard Technology Evaluation Program (STEP) that encourages owners to install and test various technologies for ballast water treatment. This program was established in January 2004, through a Navigation and Inspection Circular (NVIC 01–04) and announced in a Notice of Availability published in the **Federal Register** on January 7, 2004 (69 FR 1082).

One commenter asked how the Coast Guard, in conjunction with EPA and the States, will develop education and outreach programs for BWM.

We intend to develop guidance regarding BWM procedures and recommended practices. This guidance will take into account coordination with EPA and other Federal and State agencies. Additionally, class societies and IMO have published guidance on best practices and procedures for BWM that is specific to ship type.

One commenter stated there has been a misunderstanding among mariners on what constitutes a ''full exchange.''

As defined in § 151.2025, there are two methods of exchange, either ''flow through'' or ''empty/refill.'' Both exchange methods, as defined in this section, describe what constitutes a full exchange. A ''full exchange'' using the ''flow through'' method means that three full tank volumes of water have

been exchanged. A ''full exchange'' using the ''empty/refill'' method means that the ballast tanks are pumped down to the point where the pumps lose suction, and the tank is then refilled to the original level.

One commenter suggested we revise § 151.2030 to remove the distinction between U.S. waters and the Great Lakes. Another commenter stated that the national BWM program should be the same as the program on the Great Lakes.

We agree with these comments; however, the intent of this rule is simply to convert the voluntary national guidelines for BWM to a mandatory, national program. We intend to merge the Great Lakes program and the national program into a single program in a future rulemaking.

One commenter stated that § 151.2037 is not enforceable and is inconsistent with § 151.2035(b) and recommended removing the term ''voyage concerns.''

We disagree with this comment. If a vessel cannot comply with § 151.2035(b) because of ''voyage concerns,'' that vessel is responsible for documenting this action. If there is no documentation, the Coast Guard will assess a monetary penalty for failing to comply with § 151.2037.

One commenter stated that a minimum ballast water transfer quantity or capacity should be established and that BWM or reporting should not be required for volumes below these amounts.

We disagree with the commenter. As directed by NISA, we are required to analyze BWM operations for vessels, regardless of a vessel's ballast capacity or volume of ballast water carried on any particular voyage. Therefore, we are not establishing a minimum quantity or capacity requirement.

One commenter requested clarification on what is expected of vessels in innocent passage in terms of compliance with the rule.

As stated in § 151.2015 titled ''Is a vessel in innocent passage exempt from the mandatory requirements?'' vessels merely traversing the territorial seas of the U.S. (*i.e.*, not entering or departing a U.S. port, or not navigating the internal waters of the U.S.) are exempt from the requirements of 33 CFR part 151. Vessels merely traversing the territorial seas of the U.S. would be considered engaged in ''innocent passage.''

One commenter requested clarification on the definition of ''waters of the U.S.,'' asking if the term means ''territorial waters'' (12 nm from shore) or the U.S. EEZ (200 nm from shore).

''Waters of the U.S.,'' as stated in 33 CFR 151.2025, means waters subject to the jurisdiction of the United States as defined in 33 CFR 2.05–30, including the navigable waters of the United States. For this regulation, the navigable waters include the territorial sea as extended to 12 nautical miles from the baseline, pursuant to Presidential Proclamation No. 5928 of December 27, 1988. We are revising that definition to correct the citation from 33 CFR 2.05–30 to 33 CFR 2.38.

One commenter requested clarification on distance and depth requirements for ballast water exchange.

As stated in § 151.2035(b)(1), ballast water exchange must be performed in an area no less than 200 nm from any shore. Neither the proposed rulemaking nor the final rule for mandatory BWM contains a depth requirement for ballast water exchange.

Two commenters requested clarification for the term ''discharge only the amount operationally necessary.''

This term was intended to allow vessel operators some flexibility in their cargo operations and BWM practices, while protecting the receiving environment to the extent practicable. If ballast water exchange has not been conducted prior to entering U.S. waters, and a vessel operator must conduct cargo operations in a U.S. port, the operator may release the amount of ballast water necessary to conduct safe cargo operations. The vessel operator must make a note of the discharge into the U.S. port on the ballast water reporting form.

Four commenters expressed concern regarding the breadth of these regulations. Two commenters stated concern that some vessels are exempt from conducting ballast water exchange due to voyage constraints and suggested that these vessels employ alternative BWM methods. Two commenters stated that ballast water exchange is not an ''effective solution'' and should not be the ''default solution.'' The Coast Guard should instead focus on a ''zero discharge'' standard.

We understand that ballast water exchange is not the final answer in preventing the introduction of NIS. Currently, there are no alternative BWM methods to ballast water exchange that have been approved by the Coast Guard. We are exploring environmentally sound alternative BWM methods that are at least as effective as ballast water exchange and intend to approve those methods that meet the above criteria in the future. We are not mandating the use of alternative methods in this final rule. Additionally, the Coast Guard intends to establish ballast water discharge standards that prevent the introduction of NIS and are both environmentally protective and economically feasible. As described in the Notice of Intent for our Programmatic Environmental Impact Statement (68 FR 55559), one of the alternatives under consideration would ''result in the discharge of no detectable viable organisms larger than 0.1 microns,'' which is, in essence, a ''zero discharge'' alternative.

One commenter stated that it is premature to establish a mandatory BWM program without first establishing ballast water discharge standards.

We disagree with this commenter. The intent of this final rule is to convert the voluntary BWM program to a mandatory program if we deemed the voluntary BWM program inadequate, as required by NISA. We believe it is inefficient to develop discharge standards without first having an overarching BWM program in place. The Coast Guard is in the process of establishing ballast water discharge standards and evaluating shipboard treatment technologies that could be employed to meet these standards. Ballast water discharge standards will be the subject of a future rulemaking.

Three commenters stated that the mandatory BWM program does not address vessels with no ballast on board (NOBOBs) and that ballast water exchange is not a final answer to preventing the introduction of NIS.

While our final rule for mandatory BWM does not address NOBOBs, we believe that addressing these vessels is an important factor in the prevention of NIS introductions. As a first step, the Coast Guard now requires NOBOBs to submit ballast water reporting forms, as stated in the final rule titled ''Penalties for Non-submission of Ballast Water Management Reports'' published on June 14, 2004 (69 FR 32864). We will continue to explore the issue of NOBOBs entering U.S. waters, and these vessels may be included in a future rulemaking.

One commenter suggested removing the term ''voluntary guidelines'' in § 151.2015 and replacing it with ''mandatory program.''

We agree with the commenter and have amended § 151.2015 to reflect this change.

Three commenters suggested that the definition of ballast water tanks be clarified.

We have added the definition for ''ballast tank,'' currently found in § 151.1504 (151 subpart C) to § 151.2025 (151 subpart D). This definition will

help clarify which vessels must comply with the rule.

One commenter recommended that language regarding the BWM plan in § 151.2035(a)(7) should be changed from ''ship's officer'' to ''those responsible for its implementation.''

We agree with the commenter and have amended § 151.2035(a)(7) to clarify the specificity needed in the BWM plan.

One commenter recommended that language in § 151.2035(b)(4) should state that reception facilities be approved by the Coast Guard for receipt and treatment of ballast water.

We disagree with the commenter. The Coast Guard does not currently have the statutory authority to approve reception facilities; therefore adding the language requested by the commenter would be inappropriate. In order to eliminate the confusion created by this provision, and for the reasons discussed in greater detail in the ''Environment'' section, below, we are deleting § 151.2035(b)(4).

Comments Regarding Coastwise Trade

Two commenters recommended that the Coast Guard, in consultation with Canada and IMO, adopt a single set of national or regional ballast water exchange zones along the West Coast to address concerns regarding coastwise voyages. An additional ten commenters asked the Coast Guard to adopt regulations addressing coastwise trade and recommended that we convene a panel of experts to develop alternative ballast water exchange zones within the EEZ.

The final rule does not address coastwise trade because vessels on these voyages cannot conduct a mid-ocean ballast water exchange, due to the fact that they do not travel outside 200 nm of any shore. The Coast Guard is examining the possibility of establishing alternative ballast water exchange zones. As part of this effort, we participated in a workshop for alternative ballast water exchange zones in October 2003, and believe the ideas exchanged at this and future workshops could provide a sound, scientific basis for establishing ballast water exchange zones within the EEZ.

One commenter stated that vessels engaged in coastwise trade should be required to submit ballast water reporting forms.

We agree. As stated in the final rule titled ''Penalties for Non-submission of Ballast Water Management Reports'' (69 FR 32864), as of August 13, 2004, these vessels are required to submit ballast water reporting forms.

One commenter stated that vessels on domestic voyages that do not conduct ballast water operations outside the EEZ should be exempt from this rule.

We agree and as stated in § 151.2005(b), only those vessels equipped with ballast tanks that enter U.S. waters from beyond the EEZ must conduct BWM, with the exception of those vessels exempted in §§ 151.2010 and 151.2015.

Comments on Barges and Towing Vessels

Four commenters asked the Coast Guard to recognize the uniqueness of domestic barges and towing operations by accepting different approaches to ballast water management.

The Coast Guard appreciates the uniqueness of all types of vessels. However, if a barge or tug vessel operates outside the EEZ, it will be required to conduct ballast water management, unless it meets the requirements under § 151.2037.

Three commenters asked the Coast Guard to exempt inland towing vessels and barges from BWM requirements, as they are not equipped with ballast water tanks.

We disagree. Inland towing vessels and barges may be covered even if they are not equipped with ballast water tanks. As stated in the definition for ''ballast tank,'' any vessel that carries ballast water must comply with these regulations. NISA, while allowing for exemptions from BWM, mandates that the BWM program be based on the best scientific information possible. We do not currently have information that would allow us to make specific exemptions for inland towing vessels and barges. We note, however, that those inland towing vessels and barges that never carry ballast water do not fall within the applicability section of this regulation; therefore, no specific exemption is needed. Additionally, vessels that do not transit outside the EEZ, such as most inland towing vessels and barges, are not subject to mandatory BWM requirements.

Four commenters asked the Coast Guard not to require BWM plans for barges and towing vessels that operate within the EEZ. One of these commenters also asked the Coast Guard to provide a template to assist them in developing their plans.

We believe that if towing vessels and barges are equipped with ballast water tanks or use other tanks to ballast and deballast water, these vessels will be required to maintain a BWM plan specific to those vessels. At this time, the Coast Guard does not intend to develop a template for a BWM plan. We recommend that these vessels seek assistance from their class societies or maritime associations. We also suggest that vessel owners refer to IMO guidelines for IMO Resolution A.868(20) Annex 1, which are available in the public docket for this rule.

We received four comments regarding the ballast water reporting form. Two commenters asked the Coast Guard to develop a new ballast water reporting form specific to barges and towing vessels. One commenter expressed concern with the ballast water reporting form. One commenter recommended that the ballast water reporting form include a listing of all locations where ballast water was discharged.

Comments regarding the ballast water reporting form were addressed in the Discussion of Comments section of the final rule for ''Penalties for Non-submission of Ballast Water Reporting Forms'' [69 FR 32864]. At this time we do not intend to develop a ballast water reporting form that is specific to barges and towing vessels; however, we are exploring a potential redesign of the reporting form. Additionally, we wish to note that the locations of all ballast water discharges are already part of the ballast water reporting form. Operators are required to log the coordinates (latitude/longitude) or port where the ballast water was discharged. Ballast water sources are required to be similarly reported on the form.

Two commenters asked the Coast Guard to allow tug and barge operators that carry ballast water and serve domestic coastwise trade to submit reports every 30 days, rather than 24 hours prior to arrival at the first U.S. port. These commenters argued that monthly reporting would ease the administrative burden on the vessel operator.

We disagree with this comment. To change the submission requirements of ballast water reports for tugs and barges from 24 hours to 30 days would delay the accounting of BWM practices, thus denying the Coast Guard the means of enforcing compliance with mandatory ballast water reporting requirements. If the operators of these vessels know their destinations in advance, they may submit multiple reports of their BWM practices to the Coast Guard prior to their arrival.

One commenter stated that coastwise barges will be unable to comply with § 151.2035(b)(1 through 3) because it is ''unsafe'' for barges to conduct ballast water operations in the open sea.

As previously stated, vessels engaged in coastwise trade will not be expected to conduct mandatory BWM under this final rule. Additionally, § 151.2037 states that a vessel that cannot meet the requirements of § 151.2035(b)(1–3)

because of safety concerns will not be prohibited from discharging ballast water in areas other than the Great Lakes and Hudson River; however, the vessel must discharge only that amount that is operationally necessary and make ballast water records available to the local COTP upon request.

Comments on Compliance and Enforcement

Three commenters asked how the Coast Guard would ensure that a vessel has conducted BWM.

The vessel owner or operator must maintain accurate copies of the ballast water records onboard the vessel as required by 33 CFR 151.2045 and the forms must be readily available upon request. Additionally, we will use the ballast water reporting forms that must be submitted in advance of a vessel arriving at a U.S. port as required by 33 CFR 151.2040 to verify and ensure that the vessel has conducted BWM. We are actively pursuing ballast water exchange verification technologies, and when these technologies are available, we will employ them as appropriate.

One commenter requested a discussion on penalties, including failure to keep required records, failure to record why BWM was not conducted, and the range of potential penalties for these violations.

We addressed penalties for violations of BWM and non-submission of reporting forms at length in the preamble to the final rule titled ''Penalties for Non-submission of Ballast Water Reporting Forms'' [69 FR 32864].

Two commenters raised issues regarding penalties. One commenter asked if monetary penalties for violating these regulations would be based on a flat fee or a weighted fee based on ship size or amount of ballast water. One commenter asked that the Coast Guard assess penalties that deter inaccurate reporting or failure to report ballast water discharge information.

Monetary civil penalties associated with violations of this rule will not be based on a flat fee or based on ship size or ballast water amount. Penalties for failure to comply with any of the BWM regulations, including reporting requirements, will be assessed on a case-by-case basis. We have the discretion to issue a penalty of up to $27,500, depending on the facts of each individual case, and each day is considered a separate violation, pursuant to NISA.

One commenter urged the Coast Guard to use the existing Port State Control (PSC) program to enforce the BWM program.

We partially agree with the commenter. BWM reports will not be considered in the ''scoring matrix'' used to prioritize boardings and inspections under the Coast Guard's PSC program at this time. However, inspectors boarding vessels that arrive in U.S. ports may ask for any documentation regarding a vessel's BWM practices during the inspection process. Inspectors may also target specific vessels if they believe these vessels are not in compliance with the mandatory BWM provisions. As a result, BWM maybe become a future part of PSC. We intend to publish a NVIC that describes our intended enforcement activities for BWM. The NVIC will be available to all interested stakeholders through their local COTP or the Office of Operating and Environmental Standards at *http://www.uscg.mil/hq/gm/mso/index.html.*

Comments Beyond the Scope of This Rule

One commenter recommended that a fund be established from noncompliance fees to remediate ballast water-related impact areas.

We think this type of program is a novel concept; however, the Coast Guard does not currently have the authority to establish or administer such a program.

Five commenters stated that establishing ballast water discharge standards should be a priority for the Coast Guard.

We agree with commenters; however, ballast water discharge standards will be addressed in a future rulemaking.

One commenter stated that vessels on voyages outside the EEZ that do not perform any ballasting operations while outside the EEZ should not have to submit a ballast water reporting form.

We disagree with the commenter. As stated in the final rule titled ''Penalties for Non-submission of Ballast Water Management'' [69 FR 32864], vessels are required to submit a ballast water reporting form if they transit within U.S. waters, regardless of where they operate, with minor exceptions, such as a vessel in innocent passage.

Two commenters stated that the rule does not give any consideration to the National Aquatic Invasive Species Act (NAISA).

While introduced into Congress, NAISA has not yet been enacted. We will monitor NAISA's progress through Congress, but will not begin implementing any portions of the Act before it becomes law.

One commenter stated that the Coast Guard's highest priority should be establishing an experimental technology approval program.

On January 7, 2004, the Coast Guard published NVIC 01–04, as announced in the **Federal Register** (69 FR 1082), describing the STEP application process. We are actively reviewing and providing feedback on all applications received to date.

One commenter recommended that the Coast Guard consider a specific treatment technology.

The Coast Guard cannot recommend specific technologies without first evaluating their effectiveness and environmental soundness. We encourage any parties that believe they have shipboard technologies to prevent the introduction of NIS to participate in the Coast Guard's STEP.

One commenter suggested that the Coast Guard encourage the Canadian and Mexican governments to adopt BWM regulations similar to ours.

We agree that international coordination, particularly with Canada and Mexico, is essential for the successful prevention of NIS introductions. The U.S. is currently working with Canada under the auspices of the International Joint Commission to address the prevention of NIS. Both Canada and Mexico participate as invited observers to the Aquatic Nuisance Species Task Force. We will continue to work with all countries to address the challenges posed by invasive species.

Regulation Evaluation

This rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget has reviewed it under that Order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that Order. It is significant under the regulatory policies and procedures of the Department of Homeland Security. A final Regulatory Evaluation is available in the docket as indicated under **ADDRESSES.** A summary of the Regulatory Evaluation follows and is available in the public docket for this rule.

We received 5 comments on the Regulatory Evaluation. One commenter stated that annual costs for BWM should be explained in the final rule.

We have included a summary of the annual costs for BWM in this preamble to the final rule. A detailed analysis of annual costs for BWM can be found in the final Regulatory Evaluation, which is available in the public docket for this rule.

Two commenters stated that our estimated costs for ballast water exchange were too low. One commenter stated that a single exchange for a large

bulk carrier would be several times more than our estimate. The second commenter stated that the annual cost for container ships would be higher than our estimate.

Our cost-per-exchange estimates are based on information from class societies, ballast water literature, and the U.S. Maritime Administration. We believe that the alternate estimates provided by the commenters greatly overstate, in one case by an order of magnitude, the costs of ballast water exchange. Additionally, these commenters did not provide documentation or substantiation for their alternate estimates. We have not, therefore, modified our cost estimates based on these comments.

One commenter generally agreed with the analysis, but expressed concern that costs to the environment were understated and more information should be provided. Another commenter stated that we must consider the costs to local communities and ecosystems if NIS continue to gain a foothold in Alaskan waters.

We did not estimate the annual benefit of BWM in monetary terms. Instead, we supplied a literature review providing estimated damages resulting from invasions. In this review, we discuss potential damages from NIS to local communities and ecosystems. Much of this literature revolves around the damages caused by the zebra mussel in the Great Lakes and Mississippi River basin. In our Regulatory Evaluation, we were careful to note that we do not believe that this rule will prevent a species as destructive as the zebra mussel from becoming established because the uncertainties surrounding invasions are numerous. We believe that ballast water exchange will provide a measure of protection to the environment. However, ballast water exchange is not the final answer to preventing invasions and, therefore, we do not wish to overstate the potential benefits of exchange. We will revisit environmental damages in our Regulatory Assessment and Environmental Impact Statement in a future rulemaking for ballast water discharge standards. A summary of the Regulatory Evaluation follows.

This Regulatory Evaluation identified the vessel population affected by the rule and provides cost and benefit models for the current principal option of BWM provided for under the rule-ballast water exchange. Any vessel equipped with ballast tanks entering U.S. waters from outside the EEZ must conduct BWM, with minor exceptions. The vessel population was categorized by vessel type under the assumption that vessels in different cargo services and of different sizes likely manage ballast water in different ways. We estimated that approximately 7,420 vessels will be affected and approximately 11,500 ballast water exchanges will be performed annually. Annual costs totaled approximately $15.8 million. The 10-year present value cost for this rule is $116.7 million. These costs do not account for the Great Lakes program, which was not part of this rule.

The benefit assessment expanded on the analysis conducted for costs by focusing on the probability of viable organisms being introduced into U.S. waters through ballast water discharge, both before the rule and following the implementation of mandatory BWM. A probability of a reduction in the number of invasions of NIS was calculated using data on voyages, vessel types, ballast water volumes, and exchange effectiveness, as well as order-of-magnitude assumptions about the probabilities of inoculations, introductions, and invasions resulting from ballast water discharges. The calculations indicated the rule may result in avoiding approximately 10 inoculations that result in invasions for each year the rule is in effect. While there is considerable uncertainty in these calculations and the order-of-magnitude assumptions (referred to as the ''rule of 10s'' in the Regulatory Evaluation) are admittedly an oversimplification of a complex problem, we believe their simplicity and transparency are compelling. To date, there is no national estimate of the invasion rate of NIS, and we cannot compare our baseline invasion estimate to other, more limited estimates regarding invasions. Our findings are broadly consistent, however, with other estimates of the rate of NIS invasions. One study finds that in the San Francisco Bay and Delta, invasions have increased from one new species every 55 weeks (1851–1960) to one new species every 14 weeks (1961–1995) (Cohen and Carlton, 1998). Another study posits that invasion rates may have increased in the San Francisco Bay and the Great Lakes over the past several decades (Mills, et al., 1993). Finally, some researchers believe that the increase of initial invasions is best described by an exponential function (Ruiz, et al., 2000). Using our simple methodology, we found that an invasion occurs about twice every 3 weeks somewhere in the U.S.

There is considerable difficulty in estimating monetized damages resulting from NIS invasions. Some species impose significant, long-term damages on marine industries and infrastructure. Other species may create subtle disturbances in ecosystems that are difficult to quantify. Still others may be relatively benign. There have been attempts to estimate monetized damages for a few species, most notably the zebra mussel. One study estimated costs to Great Lakes water users, mostly due to fouling of intake structures, of $120 million over the time period 1989 to 1994 (Hushak, 1996). Another estimated cumulative zebra mussel impacts of $750 million to $1 billion over the time period 1989 to 2000 (Carlton, 2001). Other species for which monetized damage estimates have been developed include the Asian clam ($1 billion per year, OTA, 1993) and European green crab ($44 million per year, CRS, 1999). Eight Federal agencies that sit on the National Invasive Species Council collectively spent $514 million in 1999 and $631 million in 2000 for the control and management of NIS (GAO, 2000).

We have not reviewed the methodologies used to produce these estimates in detail, though all of them (except expenditures by Federal agencies) involve considerable uncertainty. They are indicative, however, of the magnitude of damages that may result from particularly destructive invasions. It is likely, however, that most invasions would result in considerably lower damages than the numbers reported in these studies. Because of the lack of data on damages potentially associated with any but the most destructive invasions, we have not tried to monetize the benefits of the rule. If the rule resulted in avoiding even one invasion of this magnitude over the course of several decades, however, the benefits of the rule would most likely justify the costs.

Small Entities

We did not receive any comments on small entities. Of the affected population of all vessels arriving at U.S ports, we estimate that 21 vessels of the 171 U.S. flag vessels, are owned by 10 small businesses. Approximately 35 large companies own the remaining 150 U.S.-flagged vessels. We estimate all vessels will choose the alternative of conducting a mid-ocean ballast water exchange. The cost of complying with this rule is the cost of exchanges performed by the vessel added to the cost of additional maintenance required for the ballast water pumping system. The cost per exchange is a function of vessel type. Each vessel's costs will be a function of the cost of exchange for that vessel type multiplied by the number of trips into U.S. waters from outside the U.S. EEZ. Thus the annual

impact on the revenue for a small business will vary with the number of entries the vessel makes from outside the U.S. EEZ. In order to estimate the upper bound of that impact, we calculated the cost of exchange for the maximum number of exchanges possible for the years 1999 and 2000. We then assumed that weather conditions and transit tracks allowed exchanges for all of these entries. For the annual cost of the rule, the number of vessels owned by each small business is multiplied by the number of exchanges performed, and the resulting product is then multiplied by the cost of exchange for the particular vessel type, and added to the maintenance cost of 10 percent of the capital cost of the ballast pump. Of the 10 small businesses that own vessels affected by the rule, we found revenue for nine. For the remaining company where no revenue information was available, we assumed revenue of $1 million for the purposes of the analysis. Table 1 gives the effect of the rule on the average annual revenues for the small business affected. For more detailed information, refer to the Regulatory Evaluation in the docket.

TABLE 1.—EFFECT OF BWM ON AVERAGE ANNUAL REVENUE FOR SMALL BUSINESS ENTITIES OWNING U.S.-FLAGGED VESSELS

Percent of annual revenue that is BWM rule cost	Total small entities per impact category
0–3	8
3–5	2
> 5	0
Total	10

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rule. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Bivan Patnaik, G–MSO–4, Coast Guard, telephone 202–267–1744, e-mail: *Bpatnaik@comdt.uscg.mil*.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule modifies an existing collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). We received several comments regarding general collection of information issues. These comments were addressed in the discussion of comments above.

As required by 44 U.S.C. 3507(d), we submitted a copy of the proposed rule to the Office of Management and Budget (OMB) for its review of the collection of information. OMB approved the change to the collection on September 9, 2003: OMB Control Number 1625–0069, expiring on September 30, 2006.

You are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We received three comments pertaining to Federalism.

Two commenters asked how the Coast Guard is developing partnerships with State agencies to coordinate various BWM policies and research programs for treatment installation. A third commenter asked if States wishing to require stricter standards could issue ''supplements'' that would be enforced only in the issuing States.

As stated in the ''Federalism'' section of the proposed rulemaking, Congress clearly intended for a Federal-State cooperative regime and not for Federal preemption of State requirements. Thus, each State is authorized under NISA to develop its own regulations, including its own research programs, if it believes that Federal regulations or programs are not stringent enough.

We have analyzed this rule under Executive Order 13132. NANPCA contains a ''savings provision'' that provides States the authority to ''adopt or enforce control measures for aquatic nuisance species, [and nothing in the Act would] diminish or affect the jurisdiction of any States over species of fish and wildlife.'' 16 U.S.C. 4725. It also requires that ''all actions taken by Federal agencies in implementing the provisions of [the Act] be consistent with all applicable Federal, State and local environmental laws.'' Thus, the congressional mandate is clearly for a Federal-State cooperative regime in combating the introduction of aquatic nuisance species into U.S. waters from ships' ballast tanks. This makes it unlikely that preemption, which would necessitate consultation with the States under Executive Order 13132, would occur.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble. We did not receive any comments regarding unfunded mandates.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. We did not receive any comments regarding the taking of private property.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. We did not receive any comments regarding civil justice reform.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children. We did not receive any comments regarding the protection of children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it will not have a substantial direct effect on one or more Indian

tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We did not receive any comments regarding Indian Tribal governments.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order. Although it is a ''significant regulatory action'' under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211. We did not receive any comments regarding energy effects.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that preparation of a PEA is necessary and is available in the public docket for this rule. The PEA and Finding of No Significant Impact (FONSI) have been completed and are available in the public docket for inspection. We received nine comments regarding the environment.

Two commenters expressed concern regarding limitations on ballasting in areas near coral reefs, dredging operations, tidal flushing, darkness, and sediment, stating that these types of areas are where their barges load and discharge. One of these commenters also added his concern that his company will not be able to comply with the BWM options.

While we appreciate the commenters' concerns and the effects this rule will have on general operations, we believe that the requirements for ballasting and the options for BWM are necessary to protect the environment from the damages caused by NIS. In order to comply with these requirements, the commenters will have to adjust their ballasting operations accordingly.

One commenter stated that the Coast Guard should include an Essential Fish Habitat determination in the PEA, as required by the Magnuson-Stevens Fishery Act.

We agree with the commenter and have included language regarding essential fish habitat in the PEA.

Two commenters requested that we include language in § 151.2035 regarding conducting BWM near pods of whales, convergence zones, and boundaries of major currents in order to protect threatened or endangered species.

We agree and have amended § 151.2035 to reflect these changes.

Under the consultation process of the Endangered Species Act, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) recommended that the Coast Guard work with ballast water reception facilities and any relevant permitting authorities to address any potential effects to listed species or critical habitats and compliance with the Endangered Species Act.

We have consulted extensively with FWS and NMFS in regards to the issue of approval of facilities to receive ballast water. Currently, there are no ballast water reception facilities in the United States approved for the treatment of ballast water to remove NIS. The Coast Guard is not involved in the regulatory or approval process for ballast water reception facilities. Anyone wishing to establish a ballast water reception facility that would discharge to waters of the United States would need to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. Forty-five States and the U.S. Virgin Islands have been approved to issue NPDES permits, and would be the relevant permitting authority. In the remainder of the States, territories, and Indian country that have not been approved to issue NPDES permits, the NPDES permitting authority would be EPA. In the case of a ballast water reception facility that discharges into a local sewage collection system rather than directly to waters of the United States, the discharge would need to comply with local pretreatment requirements and national prohibited discharge standards under section 307 of the Clean Water Act. Non-storm water discharges into a municipal separate storm sewer system are prohibited. Because of these issues, we cannot state with certainty that allowing vessels to discharge their ballast water into a reception facility would be as effective as ballast water exchange in preventing and controlling infestations of NIS as per NISA. As a result, we are eliminating this option from § 151.2035.

The only additional comment regarding reception facilities was a request for Coast Guard approval of such entities, an act that we are not legally authorized to perform. As stated previously, there are no ballast water reception facilities in the United States approved for the treatment of ballast water to remove NIS, nor do we believe there are any applications for approval for such facilities on file. Additionally, all vessels equipped with ballast water tanks would need to be retrofitted with ballast water shore connections in order to utilize a shore-side reception facility. As stated in the Regulatory Evaluation, we do not expect any vessels to utilize the option of discharging into a shore-side facility. Accordingly, we do not believe that eliminating this option from § 151.2035 will have any immediate effect on regulated industry.

The Coast Guard will continue to work with other Federal agencies, such as FWS and NMFS, to examine and resolve issues surrounding ballast water treatment facilities.

Three commenters encouraged the Coast Guard to pursue environmentally sound alternatives to ballast water exchange.

We agree with the commenters. As required by NISA, we are working to facilitate development of alternatives to ballast water exchange that are environmentally sound. To do this, we encourage industry and others to participate in the STEP announced in the **Federal Register** on January 7, 2004 (69 FR 1082, NVIC 01–04).

In considering the environmental impact of this rule, as stated earlier in this section, we believe the PEA is necessary because this rule requires vessels with ballast tanks entering U.S. ports around the country, subject to conditions discussed above, to have completed one of the mandatory BWM practices. Although the national mandatory BWM program provides vessels with ballast tanks the option of using one of three BWM practices, ballast water exchange is likely to be the most used practice for reasons discussed earlier. However, this PEA is necessary to ensure the potential environmental effects of the three BWM practices are considered.

The Coast Guard has considered the implications of the Coastal Zone Management Act (16 U.S.C. 1451, *et seq.*) with regard to this rule. Under this Act, the Coast Guard must determine whether the activities proposed by it are consistent with activities covered by Federally approved coastal zone management plans for each State, which may be affected by this federal action. A listing of 29 States and Territories with federally approved coastal zone management plans can be found in Appendix E of the PEA for this rule.

The Coast Guard has determined that the mandatory BWM program will have no effect on the coastal zones of the listed States and Territories. In addition,

we found the regulations in the final rule were consistent, to the maximum extent practicable, with the enforceable policies of the Federally-approved coastal zone management plans and submitted a consistency determination to that effect. The State Administrators for each of the listed States and Territories with coastal zone management plans responded, concurring with the Coast Guard consistency determination that implementing a mandatory BWM program would be consistent with their respective coastal zone management plans.

The Coast Guard provided the U.S. Fish and Wildlife Service and the National Marine Fisheries Service with a copy of the final rule and its environmental assessment of the rule. This information initiated an informal Section 7 Consultation per the Endangered Species Act (16 U.S.C. 1531, *et seq.*), which resulted in both agencies concurring with the Coast Guard's determination that this rule is not likely to adversely affect listed or proposed species or their critical habitats.

List of Subjects in 33 CFR Part 151

Administrative practice and procedure, Oil pollution, Penalties, Reporting and recordkeeping requirements, Water pollution control.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 151 as follows:

PART 151—VESSELS CARRYING OIL, NOXIOUS LIQUID SUBSTANCES, GARBAGE, MUNICIPAL OR COMMERCIAL WASTE, AND BALLAST WATER

Subpart D—Ballast Water Management for Control of Nonindigenous Species in Waters of the United States

■ 1. The authority citation for subpart D is revised to read as follows:

Authority: 16 U.S.C. 4711; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 151.2015 to read as follows:

§ 151.2015 Is a vessel in innocent passage exempt from the mandatory requirements?

A foreign vessel merely traversing the territorial sea of the U.S. (i.e., not entering or departing a U.S. port, or not navigating the internal waters of the U.S.) is exempt from the requirements of this subpart.

■ 3. In § 151.2025—

■ a. Add in alphabetical order the definition of ''Ballast tank'' as set out below;

■ b. Under the definition for ''Exchange,'' redesignate paragraph (a) to (1); and

■ c. Revise the definition of ''Waters of the United States'' as set out below:

§ 151.2025 What definitions apply to this subpart?

* * * * *

Ballast tank means any tank or hold on a vessel used for carrying ballast water, whether or not the tank or hold was designed for that purpose.

* * * * *

Waters of the United States means waters subject to the jurisdiction of the United States as defined in 33 CFR § 2.38, including the navigable waters of the United States. For this regulation, the navigable waters include the territorial sea as extended to 12 nautical miles from the baseline, pursuant to Presidential Proclamation No. 5928 of December 27, 1988.

■ 4. In § 151.2035—

■ a. Revise the section heading to read as set out below;

■ b. Revise the introductory text for paragraph (a) to read as set out below;

■ c. Add paragraph (a)(2)(vii) to read as set out below; and

■ d. Revise paragraphs (a)(7) and (b) to read as set out below:

§ 151.2035 What are the required ballast water management practices for my vessel?

(a) Masters, owners, operators, or persons-in-charge of all vessels equipped with ballast water tanks that operate in the waters of the U.S. must:

* * * * *

(2)(vii) Areas with pods of whales, convergence zones, and boundaries of major currents.

* * * * *

(7) Maintain a ballast water management plan that has been developed specifically for the vessel that will allow those responsible for the plan's implementation to understand and follow the vessel's ballast water management strategy.

* * * * *

(b) In addition to the provisions of paragraph (a) of this section, if the vessel carries ballast water that was taken on in areas less than 200 nautical miles from any shore into the waters of the U.S. after operating beyond the Exclusive Economic Zone, you (the master, operator, or person-in-charge of a vessel) must employ at least one of the following ballast water management practices:

(1) Perform complete ballast water exchange in an area no less than 200 nautical miles from any shore prior to discharging ballast water in U.S. waters;

(2) Retain ballast water onboard the vessel;

(3) Prior to the vessel entering U.S. waters, use an alternative environmentally sound method of ballast water management that has been approved by the Coast Guard;

■ 5. Add § 151.2036 to read as follows:

§ 151.2036 If my voyage does not take me into waters 200 nautical miles or greater from any shore, must I divert to conduct a ballast water exchange?

A vessel will not be required to deviate from its voyage, or delay the voyage, in order to conduct a ballast water exchange.

■ 6. Add § 151.2037 to read as follows:

§ 151.2037 If my vessel cannot conduct ballast water management practices because of its voyage and/or safety concerns, will I be prohibited from discharging ballast water?

(a) A vessel that cannot practicably meet the requirements of § 151.2035(b)(1) because its voyage does not take it into waters 200 nautical miles or greater from any shore for a sufficient length of time and elects to retain ballast water on board, or because of the safety concerns contained in § 151.2030, will not be prohibited from the discharge of ballast water in areas other than the Great Lakes and the Hudson River. However, the vessel must discharge only that amount of ballast water operationally necessary to ensure the safety of the vessels for cargo operations and make ballast water records available to the local Captain of the Port upon request.

(b) A vessel that cannot practicably meet the requirements of § 151.2035(b)(3) because its alternative environmentally sound ballast water management method is inoperable must employ one of the other ballast water management practices stated in § 151.2035(b). If the vessel cannot employ other ballast water management practices due to voyage or safety concerns, the vessel will not be prohibited from the discharge of ballast water in areas other than the Great Lakes and the Hudson River. However, the vessel must discharge only that amount of ballast water operationally necessary to ensure the safety of the vessels for cargo operations and make ballast water records available to the local Captain of the Port upon request.

Dated: July 21, 2004.

Thomas H. Collins,

Admiral, U.S. Coast Guard, Commandant.

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