



ENVIRONMENTAL PROTECTION AGENCY

[FRL-9912-58-Region 2]

New York State Prohibition of Discharges of Vessel Sewage; Final Affirmative Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of determination.

SUMMARY: Notice is hereby given that, pursuant to Clean Water Act Section 312(f)(3), the State of New York has determined that the protection and enhancement of the quality of the New York State (NYS or the State) area of Lake Erie requires greater environmental protection, and has petitioned the United States Environmental Protection Agency, Region 2, for a determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for those waters, so that the State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters.

NYS has proposed to establish a “Vessel Waste No Discharge Zone” for the NYS area of Lake Erie stretching from the Pennsylvania-New York State boundary to include the upper Niagara River to Niagara Falls. The proposed No Discharge Zone encompasses approximately 593 square miles and 84 linear shoreline miles, including the navigable portions of the Upper Niagara River and numerous other tributaries and harbors, embayments of the Lake including Barcelona Harbor, Dunkirk Harbor and Buffalo Outer Harbor, and other formally designated habitats and waterways of local, state, and national significance.

On December 6, 2012, the EPA completed a review of NYS's petition and issued a tentative affirmative determination in the Federal Register that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels for such waters are reasonably available.

During the 30-day public comment period, the EPA received significant comments regarding the availability of adequate pumpouts for commercial vessels. Specifically, two commenters submitted that the December 6, 2012 notice did not contain adequate information about the availability of pumpout facilities for large commercial vessels. Subsequently, the EPA and New York State collected additional information to demonstrate the reasonable availability of pumpout services for commercial vessels that use the New York area of Lake Erie.

EPA Response to Public Comments on the September 27, 2013 Tentative Affirmative Determination

On September 27, 2013, EPA published notice of its tentative affirmative determination ("TAD") that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available within the New York State waters of Lake Erie, and its approval of New York's proposal to ban the discharge of treated and untreated sewage from vessels into those waters under Clean Water Act ("CWA") § 312(f)(3). (78 Fed. Reg. 59681) Public comments were solicited for 30 days and the comment period ended on October 28, 2013.

EPA received a total of eight comments via letter and email. Six of the commenters support EPA's tentative affirmative determination and two commenters oppose it. All of the relevant comments received have been considered, as discussed below, and EPA hereby issues a final affirmative determination that adequate facilities for the safe and sanitary removal and treatment

of sewage from all vessels are reasonably available within the New York State waters of Lake Erie.

Comment 1: Several commenters, including boaters, residents, Non-Governmental Organizations (NGOs) and community advocates, expressed strong support for the establishment of a vessel waste no discharge zone (“NDZ”) for the New York waters of Lake Erie. Some commenters pointed out that this action will reduce pathogens and chemicals, improve water quality and further protect drinking water and restore the Lake.

Response: The petition was submitted under CWA § 312(f)(3), which allows New York to establish a vessel sewage no discharge zone if the state determines that the protection and enhancement of the quality of some or all of the waters within the state require greater environmental protection and if EPA determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available within those waters. Therefore, while these comments are consistent with New York’s determination of need, that determination is beyond the scope of EPA’s review.

Comment 2: Two commenters stated that New York’s petition did not include the additional information about available commercial pumpout trucks that was included in the republication.

Response: In a letter to EPA dated September 6, 2013, prior to the republication, DEC supplemented its petition with the commercial pumpout information, and that information was subject to public review and comment in the pending TAD.

Comment 3: Two commenters stated that the petition did not include the information required to be submitted by New York State under 40 C.F.R. § 140.4(a).

Response: The commenters did not specify what information was allegedly missing from New York's petition, and EPA has determined that New York's petition supports a finding that adequate facilities for the safe and sanitary removal and treatment of sewage from commercial vessels are reasonably available. Specifically, the petition contains information demonstrating that four pumpout truck companies are available to serve the ports of Buffalo and Lackawanna, with a total of ten trucks and a total pumpout capacity of 33,500 gallons.

Comment 4: Two commenters stated that the public record is inadequate because it does not include any communications with, or information provided by, the vendors to support EPA's determination and because several questions suggested by the commenters were not asked of the vendors.

Response: EPA is not required to publish all of its, or the state's, fact-finding communications, as long as the data relied upon by EPA is published and subject to public scrutiny and comment. The Federal Register notice for the pending TAD contained all of the data and criteria upon which EPA based its tentative determination, including two criteria (hose fittings, flexibility and length, and head pump pressure) that were suggested by the same two commenters and incorporated by EPA and DEC in their evaluation of the adequacy of the commercial pumpout companies. Other questions suggested by the two commenters were deemed by EPA and DEC to

be irrelevant to EPA's determination, and therefore were not explored. For example, the commenters asked that the petition include references, insurance coverage, port access agreements, spill procedures, employee training information, and testing and labeling of hoses, none of which is required by the law or is otherwise necessary for EPA's determination.

Comment 5: Two commenters stated that three of the four commercial pumpout companies "declined to service [their] vessels outright (two in writing, one orally)," and submitted a copy of a fax from Macken Services, Inc., an email from Ball Toilet and Septic Service and an email from Western New York Septic Tank Cleaning Service purporting to demonstrate those declinations.

Response: The purported declinations are responses to a different and more elaborate survey that the commenters sent to the companies, which contains several questions that are irrelevant to EPA's finding of adequacy. Therefore, a refusal to answer that survey is not equivalent to a refusal to provide the pumpout services that the companies specifically told EPA and DEC that they could provide. Additionally, the purported response from Macken Services, Inc, is actually consistent with EPA's findings, even if it doesn't answer all of the commenter's additional questions to their satisfaction. Further, the responses from Ball Toilet and Septic Service and Western New York Septic Tank Cleaning Services are not specific about which questions they are responding to, and therefore, do not rebut the answers that the companies provided for New York's petition. Finally, there is no evidence of the purported oral declination. While it might be presumed that the commenters are referring to Meyer Septic Service (because the comments do

not include any purported written declination from Meyer), there is no evidence or description of that alleged oral declination.

Comment 6: Two commenters stated that Ball Toilet and Septic Service does not meet the minimum criteria because it has no spill control plan or sewage pumping training, and because it only has three trucks, with holding tanks that are too small for vessels that hold 4,000 – 111,000 gallons, require 3 hours advance notice, and cannot guarantee their availability.

Response: A spill control plan is not required for EPA to determine that the pumpout services are reasonably available. Regarding the holding capacity of the pumpout trucks, during the previous public comment period, one of these commenters submitted evidence to EPA that their members' vessels typically discharge sewage while holding less than 3,000 gallons, and, among the four companies that are available to provide pumpout truck services, there are a total of eight trucks with tanks equal to or greater than 3,500 gallons. Therefore, the pumpout truck companies have sufficient capacity to meet the needs of the commenters' vessels. Moreover, one commenter states that its members' vessels call on the Port of Buffalo 80 times per year (every 4-5 days), and another commenter states that its members' vessels each transit through the New York portion of Lake Erie approximately 30 times per year (also see Comment 10, below). These numbers are consistent with the numbers contained in the petition, and with EPA's determination that the four pumpout truck companies are capable of serving the waste disposal needs of the commenters' members' vessels.

Comment 7: One commenter stated that New York's petition should be denied because EPA Region 5 denied a petition from Ohio, in 2004, to designate the Ohio section of Lake Erie a no discharge zone.

Response: Ohio's petition submitted 10 years ago has no bearing on the instant determination because EPA must evaluate each petition on its own facts and merits in determining whether adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available.

Comment 8: Two commenters stated that New York's petition does not establish the need for greater environmental protection because their members' discharges conform to Coast Guard standards for marine sanitation devices ("MSDs") and Canadian effluent limitations for commercial vessels, respectively, and therefore pose no threat to human health or the marine environment.

Response: Section 312(f) of the CWA specifically contemplates the imposition of a ban on the discharge of treated or untreated sewage, notwithstanding any other requirements to control or limit pollutants in those discharges. Furthermore, EPA's determination in the instant matter is limited to evaluating the adequacy of pumpout facilities, and does not include a review of the adequacy of New York's Certification of Need or the water quality impacts of any particular pollutant or source.

Comment 9: One commenter stated that the establishment of a NDZ is an inadequate solution to water pollution in Lake Erie and also argues that its members' vessels should be exempt from the ban because the petition does not demonstrate that they are a significant source of water pollution.

Response: Section 312(f) of the CWA does not require that the NDZ be a total solution to all water pollution problems in the proposed NDZ, or that the state demonstrate that any particular vessels are a significant source of pollution.

Comment 10: One commenter stated that EPA understates the vessel traffic in the proposed NDZ, and that the number is closer to 3,000 transits per year for its 100 member vessels.

Response: This number of vessels contradicts the commenter's claim, in the same comment letter, that it has 80 member vessels. In any event, as noted above, even assuming 3,000 transits for 100 vessels, each vessel would make, on average, 30 transits per year. Furthermore, not every vessel will need to discharge every time it transits through the Lake Erie NDZ.

Comment 11: Two commenters stated that EPA has failed to answer the state's petition within the 90 days required under the regulations, and therefore lacks authority to make the determination.

Response: EPA extended the public comment period and its consideration of this petition, including issuing a second TAD with additional information, in response to the same

commenters' request for an extension of time to comment on the first TAD and the same commenters' request, which EPA granted, for a meeting in order to share their concerns about the petition. Therefore, those commenters have not been harmed by EPA's extended consideration of the petition and have no valid objection to the extended timeline for which they advocated and from which they benefitted.

Comment 12: One commenter stated that the petition should have been reviewed under CWA § 312(f)(4)(B), as a request to only ban vessel sewage discharges in specified drinking water intake zones.

Response: The petition was submitted under CWA § 312(f)(3). While New York notes in the petition that much of the proposed zone could be designated as an NDZ under CWA § 312(f)(4)(B), which allows for the establishment of NDZs in drinking water intake zones, the petition goes on to state that, in order to designate the entire New York State section of Lake Erie as an NDZ, the state was submitting the information required for a CWA § 312(f)(3) petition, namely a Certification of Need, and a demonstration of the adequacy of pumpout facilities. Significantly, the petition contains no information about the location or extent of drinking water intake zones, nor does it contain any request to create NDZs in drinking water intake zones.

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The EPA Region 2 NDZ website is: <http://www.epa.gov/region02/water/ndz/index.html> A copy of the State's NDZ petition can be found there.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the State of New York has petitioned the United States Environmental Protection Agency, Region 2, (EPA) pursuant to section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the NYS area of Lake Erie.

New York State’s Certification of Need

The New York State Department of Environmental Conservation (DEC) developed its petition in collaboration with the New York State Department of State (DOS) and the New York State Environmental Facilities Corporation (EFC) in order to establish a vessel waste No Discharge Zone (NDZ) on the open waters, tributaries, harbors and embayments of the New York State area of Lake Erie, and has submitted a Certification of the Need for Greater Protection and Enhancement of Lake Erie waters. Below is a summary of the basis for New York’s certification.

The Great Lakes are the largest group of freshwater lakes on Earth, containing 95% of the fresh surface water in the United States and acting as the largest single reservoir on Earth. The glacial history and the influence of the Lakes themselves create unique conditions that support a wealth of biological diversity, including over 200 globally rare plants and animals and more than 40 species that are found nowhere else in the world.

Lake Erie is the smallest and shallowest of the Great Lakes, with depths that range from an approximate average of 24 feet in the western basin, to 82 feet in the deeper eastern basin. Because of its shallowness, it warms quickly in the spring and summer and cools quickly in the fall. As a result, Lake Erie is the most biologically productive of the Great Lakes.

The Lake Erie watershed is also home to approximately one-third of the total human population of the Great Lakes basin - 11.6 million people (10 million in the U.S. and 1.6 million in Canada), including 17 metropolitan areas with more than 50,000 residents. The majority, 11 million people, receive their drinking water from the Lake. Of all the Great Lakes, Lake Erie is exposed to the greatest stress from urbanization, industrialization and agriculture. Because the Lake Erie basin supports the largest population, it also surpasses all the other Great Lakes in the amount of effluent discharged from sewage treatment plants.

There are 18 designated Significant Coastal Fish and Wildlife Habitats in the two counties that comprise New York's Lake Erie shoreline including: Cattaraugus Creek, Dunkirk Harbor, Buckhorn Island Wetlands and Grand Island Tributaries. These habitats are essential to the survival of a large portion of lake fish or wildlife population and support populations of species which are of special concern and which have significant commercial, recreational, and educational value.

The New York State shoreline and waters of Lake Erie also host a variety of swimming, boating and recreational activities. These recreational activities act as a source of revenue to the regional economy by bringing people to the shoreline, where they patronize local businesses.

Virtually all of Lake Erie is classified by New York State as Class A waters. This classification means that the best uses of these waters are for drinking, culinary or food processing purposes, recreation and fishing, and that the waters shall be suitable for fish, shellfish, and wildlife propagation and survival. Also, when the water in the Lake is used as a source of drinking water, it must comply with the New York State Department of Health's (DOH) drinking water safety

standards. There are currently six New York municipal and community water supplies, including Buffalo and Erie County, that draw water from Lake Erie to serve approximately 275,000 people.

In summary, as one of the nation's premier water bodies, Lake Erie supports several important uses, including drinking water supplies, valuable habitats, commercial shipping, recreational boating and other recreational activities, and serves as an economic engine for the region. The protection and enhancement of the open waters, tributaries, harbors and embayments of the New York State area of Lake Erie require greater protection than is afforded by applicable federal standards. An NDZ designation covering the NYS waters of the Lake represents one component of a comprehensive approach to water quality management, which also includes initiatives to control point and non-point source pollution, including pollution associated with municipal discharges, combined sewer overflows, and storm water runoff.

Adequacy and Availability of Sewage Pumpout Facilities

Adequate pumpout facilities for recreational vessels are defined, under the Clean Vessel Act, as one pumpout station for every 300 – 600 boats. *See* Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines (Federal Register, Vol. 59, No. 47, March 10, 1994). Two major sources of information were consulted to develop a reasonable estimate of recreational vessel population. The first was DOS's Clean Vessel Act Plan ("Statewide Plan"), released in 1996. Using data from the Statewide Plan, the estimated number of recreational vessels in each of the counties bordering Lake Erie is 2,029. The second source for the State's estimate of the recreational vessel population is boater registrations, obtained through the New York State Office of Parks, Recreation and Historic Preservation's 2010 Boating Report (OPRHP Report) for the counties of Erie and Chautauqua (all of which have shoreline on Lake Erie). The data in

the OPRHP Report yields an estimate of 2,204 vessels with marine sanitation devices (MSDs) in the respective counties, which are assumed to operate in Lake Erie.

The State provided sufficient information about fifteen pumpout facilities that are publicly available for use by recreational and small commercial vessels in the New York State area of Lake Erie, and which either discharge to a holding tank, to a municipal wastewater treatment plant or to an on-site septic system. All fifteen were created through funding provided by the Clean Vessel Act (CVA) Grant Program, and are thus required to be open to the public. Nine additional marinas are located along Lake Erie in New York State, including five at which CVA funding could support the development of future pumpout facilities for recreational and small commercial vessels. However, only the fifteen CVA-funded facilities were considered in determining the adequacy and availability of pumpout facilities for those vessels. Those facilities are summarized in Table 1, below. Using those fifteen facilities, and the most conservative estimate of small vessel usage of the NYS area of the Lake, the ratio of pumpout facilities to recreational vessels is 15:2,204, or 1:147. This ratio falls well within the range recommended in the Clean Vessel Act guidance, and therefore demonstrates that adequate pumpout facilities for the safe and sanitary removal and treatment of sewage for recreational and small commercial vessels are reasonably available for the New York State area of Lake Erie.

Lake Erie is also used by large commercial vessels. The commercial vessel population was estimated using data from the National Ballast Information Clearinghouse, which records ballast water discharge reports for ships arriving, among other places, at the commercial ports in Buffalo and Lackawanna. In 2010, ballast manifests showed 62 vessels arriving at the Port of Buffalo and one arriving at the Gateway Metroport, in Lackawanna. The majority (58) of these vessels

were bulkers, with two passenger ship arrivals and one more listed as “other.” The single arrival in Lackawanna was also a bulker. Two commenters representing commercial vessel operators submitted comments stating that more than 62 large commercial vessels use the New York State area of Lake Erie. One commenter estimated that the number was closer to 80, while the other commenter estimated that the number was “over a hundred.”

Although there is no fixed commercial vessel pumpout facility at either the Port of Buffalo or the Port of Lackawanna, information submitted in the petition, and by companies that provide mobile pumpout services, demonstrates that at least four companies are available and qualified to provide pumpout services to large commercial vessels at either port. In addition to commenting on the number of commercial vessels using the NYS area of Lake Erie, the two commenters submitted criteria they believe are necessary for determining whether a pumpout truck is able to service their vessels. Those criteria were taken into consideration, and were partially incorporated into the list of final criteria the EPA used to determine the reasonable availability of those services. In addition, one commenter confirmed that, while large commercial vessels can hold multiple thousands of gallons of wastewater, it is more likely that when these vessels discharge sewage, their holding tanks contain less than 4,000 gallons of wastewater. Based on all of this information, the EPA had determined that four mobile pumpout companies, with approximately ten pumpout trucks (listed in Table 2, below), are able to provide pumpout services to large commercial vessels at the ports of Buffalo and Lackawanna. Assuming, conservatively, that 100 large commercial vessels use the NYS area of Lake Erie and given that at least four companies with as many as ten pumpout trucks are able to provide pumpout services to these vessels at both New York ports, the ratio of pumpout facilities to commercial vessels is at least 4:100, or 1:25. While the Clean Vessel Act guidance applies, by its terms, only to

recreational vessels, the ratio it recommends is instructive for purposes of determining the reasonable availability of pumpout services for large commercial vessels as well. In light of the relatively low ratio of pumpout companies to large commercial vessels (and the even lower ratio of pumpout *trucks* to large commercial vessels), adequate pumpout facilities for the safe and sanitary removal of sewage for large commercial vessels are reasonably available for the New York State area of Lake Erie.

Table 1: List of Sewage Pumpout Stations in the Lake Erie NDZ Serving Recreational and Small Commercial Vessels						
#	Name	Location	Contact Information	Days and Hours of Operation	Water Depth (feet)	Fee
1	City of Dunkirk – Municipal Dock	Dunkirk Harbor	716-366-9882	April 1 – November 15 6 am – 6 pm	6’ – 7’	\$5.00
2	Niagara Frontier Trans. Authority – Small Boat Harbor	Buffalo Harbor and Buffalo River	716-855-7230	May 15 – October 15 7:00 am - 10:30 pm	6’ – 8’	\$0.00
3	RCR Yachts Skyway Marina	Buffalo Harbor and Buffalo River	716-856-6314	April 1 – November 30 8:30 am - 5:30 pm	12’	\$5.00
4	City of Buffalo – Erie Basin Marina	Buffalo Harbor and Buffalo River	716-851-5389	May 1 – October 15 7:00 am - 7:00 pm	10’	\$6.50
5	Rich Marine Sales, Inc.	Buffalo Harbor and Buffalo River	716-873-4060	May 1 – November 1 9:00 am - 5:00 pm	6’	\$5.00

Table 1: List of Sewage Pumpout Stations in the Lake Erie NDZ Serving Recreational and Small Commercial Vessels						
#	Name	Location	Contact Information	Days and Hours of Operation	Water Depth (feet)	Fee
6	Harbour Place Marine Sales. Inc.	Buffalo Harbor and Buffalo River	716-876-5944	April 15 – October 31 24 Hours	12'	\$5.00
7	NYSOPRHP – Beaver Island State Park Transient Marina	Grand Island	716-278-1775	May 15 – October 15 24 Hours	10'	\$5.00
8	Blue Water Marine	Grand Island	716-773-7884	May 1 – November 1 9:00 am-7:00 pm	5'	\$ 0.00
9	Mid River Marina Inc.	Tonawanda Creek	716-875-7447	April 1 – September 30 9:00 am-6:00 pm	5'	\$5.00
10	Collins Marine Inc.	Tonawanda Creek	716-875-6000	April 1 – November 1 24 Hours	6'	\$5.00
11	The Shores/Placid Harbor Marine – Tonawanda Marine Develop Corp.	Tonawanda Creek	716-625-8235	April 15 – October 15 9:00 am-9:00 pm	12'	\$5.00
12	Niagara River Yacht Club	Tonawanda Creek	716-693-2882	May 1 – November 1 Dusk - Dawn	NA	\$3.00

Table 1: List of Sewage Pumpout Stations in the Lake Erie NDZ Serving Recreational and Small Commercial Vessels						
#	Name	Location	Contact Information	Days and Hours of Operation	Water Depth (feet)	Fee
13	Smith Boys of North Tonawanda – Upgrade	Tonawanda Creek	716-695-3472	April – November 24 Hours	8'	\$0.00
14	East Pier Marine, Inc.	Tonawanda Creek	716-693-6604	May 1- November 15 9:00 am - 8:00 pm	5'	\$5.00
15	NYSOPRHP- Big Six Mile Creek State Marina	Grand Island	716-278-1775	May 1- November 1 24 Hours	10'	\$5.00

Table 2: List of Sewage Pumpout Services Capable of Serving Large Commercial Vessels in the Proposed Lake Erie NDZ

#	Name Of Company	Location & Contact Information	# of Sewage Hauler Pumpout Trucks / Holding Capacity	Days and Hours of Operation	Hose Fittings & Length (feet)	Head Pump Pressure to Reach 46.5 Ft	Truck serve the Port Area	Fee/ Cost per 1,000 Gal
1	Macken Services, Inc.	22 Simme Road, Lancaster, NY 14086 Tel- 716 683 0704	3 sewage trucks - 2 4,000 gal and 1 - 2,500 gal	Mon – Fri 7:00 am - 5:00 pm; or by appointment	Flexible 100 ft	Yes	Yes	\$ 230
2	Meyer Septic Service	7130 Olean Road, South Wales, NY	3 sewage trucks - 3,500 gal each	Mon – Fri 8:00 am - 2:00 pm; or by	Flexible up to 175 ft	Yes	Yes	\$ 255

		14139 Tel- 716 652 0553		appointment				
3	Western New York Septic Tank Cleaning Service	3045 Daniels Road Wilson, NY 14172 Tel-716 751 9611	2 sewage truck - 4,000 gal each	Mon – Fri 7:00 am - 5:00 pm; or by appointment	Flexible up to 200 ft	Yes	Yes	\$ 350
4	Ball Toilet & Septic Service	3725 Jeffrey Blvd. Blasdell, NY14219 Tel-716 823 3606	2 sewage truck - 1,000 gal and 5,000 gal	Mon – Fri 6:00 am - 4:30 pm; or by appointment	Flexible up to 200 ft	Yes	Yes	\$ 230

Based on the information above, the EPA hereby makes a final affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are available for the waters of the New York State area of Lake Erie.

Dated: [INSERT Date of Publication IN THE FEDERAL REGISTER]

Judith A. Enck,

Regional Administrator, Region 2

6560-50-P

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