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February 17, 2012

Water Docket
Attn: Docket ID No. EPA-HQ-OW-2011-0141
Environmental Protection Agency
Mail Code: 4101T
1200 Pennsylvania Ave. NW
Washington DC 20460

Re: Comment on Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of Vessels

Dear Ladies and Gentlemen:

American Cruise Lines, Inc. ("ACL") respectfully submits the following comments to the Environmental Protection Agency's ("EPA's") Notice of Draft National Pollutant Discharge Elimination System ("NPDES") General Permits for Discharges Incidental to the Normal Operation of a Vessel, 76 Fed. Reg. 76716-76725 (Dec. 8, 2011).

I. Background on American Cruise Lines

ACL is a privately held operator of a limited number of small overnight passenger cruise ships specializing in small ship cruising on close coastal and inland waterways and rivers of the United States. ACL owns six small vessels all built after 2002 comprising, we believe, the world's newest fleet having berth or state room accommodations for 100 or more passengers. ACL's ships typically carry about 100 or more overnight passengers on coastal and inland itineraries in the Pacific Northwest, Maine, New England Islands, Hudson River, Chesapeake Bay, the Historic South & Golden Isles, Florida, and the Mississippi River.

Passenger cruising with ACL is focused on a narrow market of well-educated and culturally discriminating clientele and is intentionally contrary to the experience offered by mass-market operators carrying thousands of passengers per voyage and offering extravagances such as onboard casinos and swimming pools. The hallmark of cruising with ACL is the ability of its small vessels to reach deep into smaller and shallower U.S. ports where larger cruise ships cannot go, allowing our passengers the opportunity to explore the cultural benefits and history of America's unique smaller towns and attractions without the crowds and clamor of the typical mass-market cruise setting.

ACL's ships are among the smaller overnight passenger cruising vessels currently operating in the U.S., and perhaps the world. Most in the cruise industry would describe a "small" cruise ship as one which carries fewer than 1,500 overnight passengers. Our ships carry less than 10% of that number, none more than 150. Larger U.S. flag overnight passenger cruise ships must be designed, built, and operated so as to comply with Subchapter H of Title 46 of the Coast Guard regulations but for reasons related primarily to costs of construction and operation, none have been built for several decades. By contrast, ACL's ships are designed and built to be sufficiently small so as to qualify for Subchapter K or T and not subject to the requirements of Subchapter H applicable to larger ships. ACL's ships' small size is economically important. By building small enough to comply with Coast Guard Subchapter K or T regulations, ACL avoids the much higher manning and construction costs associated with vessels built to the large ship requirements. By keeping our ships small ACL keeps costs down so that we may compete in our specific market segment.

ACL is committed to the safety of its passengers and the well-being of the waterways and ports in which it operates. ACL strives to comply with all local, state, and federal laws and regulations, including those that seek to protect and preserve the environment. ACL has never been sanctioned for failure to comply with environmental laws and regulations.

II. Summary of Comment

In the proposed 2013 Vessel General Permit (VGP 2.0), the degree of graywater purification currently applicable to "medium cruise ships" is essentially the same level of purification as is required of the category of ships qualifying as "large cruise ships." Compare Part 5.2.1.1 (graywater management requirements for medium cruise ships) with Part 5.1.1.1 (graywater management requirements for large cruise ships). But in most important critical aspects "medium cruise ships," particularly those such as ACL's ships at the lower size range of this category and which carry less than 150 passengers, are entirely unlike "large cruise ships" which carry sometimes many thousands of passengers and for which the graywater management standards are designed. ACL submits that Part 5.2.1.1 of VGP 2.0 unfairly discriminates against small entity U.S. flag coastwise trade overnight passenger cruise ships such as ACL by unduly and unnecessarily burdening them with the same graywater management requirements as pertain to large foreign flag cruise ships and which are unachievable for small ships of ACL's size.

Part 5.2.1.1 of VGP 2.0 is therefore seriously flawed in several respects. As the EPA acknowledges in its Fact Sheet comments,¹ at least for small U.S. flag coastwise trade cruise ships in the 100-249 passenger/crew capacity size range, the proposed requirements present an unachievable standard and a serious barrier to commerce. Also, the EPA has failed to comply

¹ Proposed 2013 Vessel General Permit (VGP) Fact Sheet ("Fact Sheet") § 7.2.1.2 at 174-75.

with the Regulatory Flexibility Act (“RFA”)² by performing the required economic analysis of the impact of the Part 5.2.1.1 graywater requirements on cruise ships in 100-249 passenger/crew capacity size range. See, Economic and Benefits Analysis of the Proposed 2013 Vessel General Permit (“Economic Analysis”), at 104 n. 49.

The Part 5.2.1.1 graywater management requirements can only be met by installing equipment so large and heavy that it cannot be retrofitted onto a small cruise ship (one with 100-249 passenger/crew capacity). Although the EPA’s Fact Sheet comments indicate that many large foreign flag cruise ships have already met the graywater requirements by simply installing the required equipment, the same is not true of the small U.S. flag coastwise trade segment of the cruise ship industry, the industry segment which includes ACL and which the EPA has omitted from its Economic Analysis. Further, imposing such extreme graywater management requirements on small cruise ships with only 100-249 passenger/crew capacity is not necessary for achieving the goals of the VGP, especially considering the fact that these small cruise ships do not carry the thousands of passengers, and typically do not provide the more extravagant features contributing to excessive or toxic graywater discharge such as swimming pools and photo labs, commonly found on large cruise ships.

We submit that small cruise ships (including all those with 100-249 passenger/crew capacity) should be required to meet only the more reasonable “best practices” standards. Specifically, to comply with the RFA the EPA must conduct an economic analysis for the effect of graywater management requirements on cruise ships with 100-249 passenger/crew capacity. The graywater management requirements of proposed VGP 2.0 should be modified so as to be realistically achievable for this category of small cruise ships. We submit that a regulatory flexibility analysis of this industry segment will prove the “best practices” standard to be appropriate. Detailed guidance should be provided in the final 2013 VGP as to how cruise ships of this size can feasibly achieve the graywater management requirements.

Lastly, ACL submits that in Part 5.2.1.1 of VGP 2.0, the date that is referred to as the date on and after which construction of medium cruise ships must comply with the requirements stated therein should be December 29, 2008, which is the date the Notice of the issuance of the 2008 VGP (VGP 1.0) was first published in the Federal Register.

III. Discussion

A. To Comply with the Regulatory Flexibility Act, the Economic Analysis for Part 5.2.1.1 Must Include Cruise Ships with 100-249 Passenger/Crew Capacity

² Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857, *amending* Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq.*).

The Regulatory Flexibility Act (“RFA”) requires that an initial regulatory flexibility analysis must be performed in order to describe the impact of the proposed permit on small businesses when the permit is likely to have a “significant economic impact” on “a substantial number of small entities,” and to consider alternatives that will achieve the agency’s statutory goal while minimizing the burden on small entities.

By the applicable standard, ACL is a “small business” for purposes of the RFA. See 13 C.F.R. § 121.201. This is because ACL is within the 2007 NAICS class 483114, identified as “Coastal and Great Lakes Passenger Transportation,” currently employs fewer than 500 employees, and has always employed fewer than 500 employees.

The EPA has candidly announced that it did not perform an economic analysis on all ships within the 100-499 passenger/crew capacity classification identified in the VPG as the “medium cruise ships” category. As the EPA stated in its Economic Analysis:

The estimated number of medium cruise ships in Table 4-25 [that shows the affected vessel population required to meet VGP Part 5 requirements specific to “large” and “medium” cruise ships] was determined based upon a 250-499 passenger/crew capacity classification rather than the 100-499 range. However, based on data provided by CLIA, there are very few cruise ships within the 100-249 passenger/crew capacity classification.

Economic Analysis, at 104 n. 49. Based on the data provided by CLIA³ the EPA therefore dismisses the entire segment of the cruise ship industry in the 100-249 passenger/crew capacity size range saying that it: “therefore expects that the estimate [of the number of medium cruise ships] is only slightly below the actual universe of medium cruise ships.” This conclusion completely ignores the group of smaller, U.S. flag coastwise trade overnight passenger cruise ships with 100-249 passenger/crew capacity in which ACL’s ships fall and which comprise an economically distinct segment of the cruise ship industry.

All of the cruise ships owned by ACL are in the category ignored by the EPA: ships sailing under U.S. flag, coastwise trade privileged, and within the EPA’s 100-249 passenger/crew capacity classification. Other cruise operators also operate similarly small cruise ships under U.S. flag in coastwise trade in U.S. rivers, lakes, and coastal waters. Many of these

³ We note that the membership of CLIA (Cruise Lines International Association) consists of primarily owners of much larger foreign flag cruise ships engaged in international cruising, not the owners of smaller, U.S. flag cruise ships engaged in coastwise trade in rivers, lakes, and coastal waters. See <http://www.cruising.org/> In fact there is an entire segment of the cruise ship industry segment comprised of these smaller U.S. flag coastwise trade cruise ships with 100-249 passenger/crew capacity.

are members of the Passenger Vessel Association (PVA). See <http://www.passengervessel.com/>. Moreover, most cruise ships within 100-249 passenger/crew capacity size category are owned by entities qualifying as “small businesses” for purposes of the RFA. By excluding that category of cruise ships from the Economic Analysis performed for Part 5.2.1.1 of the VGP, the EPA has failed to comply with the RFA. In fact Part 5.2.1.1 of the VGP will have a “significant economic impact” on “a substantial number of small entities,” including but not limited to ACL, which therefore cannot be excluded from the EPA’s economic analysis.

1. Small U.S. Flag Coastwise Trade Cruise Ships Comprise an Entire and Distinct Industry Segment and Therefore, a Substantial Number of Small Entities

The RFA expressly requires an economic analysis to consider whether the proposed permit will, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). Legislative history for the RFA confirms that the term “substantial” is intended to mean a substantial number of entities within “a particular economic or other activity.” See SBA “A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act,” at 19 (June 2010) (hereinafter “SBA Guide”).

As indicated above by the explanation of the specific characteristics of cruising with ACL, small U.S. flag coastwise trade cruise ships calling in smaller ports and harbors in the United States comprise a distinct economic industry segment sharing “a particular economic or other activity” for purposes of the RFA. SBA Guide, at 15. Ships in this industry segment do not travel internationally because they generally can only operate in rivers, lakes, and coastal waters. In order to qualify for coastwise trade privileges, they must meet stringent requirements of being U.S.-built, U.S.-owned, and U.S.-operated. See, e.g., 46 U.S.C. §§ 12112, 55103, et seq. The larger foreign flag cruise ships operating internationally are not permitted to carry passengers between U.S. ports as do the much smaller ships in ACL’s industry segment. 46 U.S.C. § 289. Instead of carrying at most a few hundred passengers interested in the cultural and historic attractions available in the smaller harbors and ports on U.S. rivers, lakes, and coastal waters, the international cruising market in which the larger foreign flag cruise lines operate involves typically thousands of passengers cruising in much, much larger ships with nearly endless on-board activities which are themselves the primary passenger attraction.

Coastwise trade by small ships under U.S. flag is thus very distinct from and different than the international trade of larger foreign flag overnight passenger cruise lines. Because the U.S. flag coastwise trade cruise ship operators are small businesses comprising an entire and economically distinct segment of the cruise industry which would be very adversely affected by the graywater management requirements of Part 5.2.1.1 of the proposed VGP 2.0, for purposes of the programs and policies of the RFA, they comprise a “substantial number” of “small entities” as to which a regulatory flexibility analysis is required. See SBA Guide, at 15.

2. Part 5.2.1.1 Would Have a Direct, Significant Adverse Economic Impact on the Industry Segment Consisting of Cruise Ships with 100-249 Passenger/Crew Capacity

Part 5.2.1.1 of the proposed VGP would have a direct, significant adverse economic impact on essentially every member of the U.S. flag coastwise trade small cruise ship industry segment. Despite the significant difference in size between medium cruise ships, particularly those at the smaller end of the “medium cruise ship” category, and “large cruise ships,” by requiring the same level of graywater purification for both categories of ships, VGP 2.0 effectively requires that all ships in the entire “medium cruise ships” category must carry the very same graywater purification equipment as is required of ships in the “large cruise ships” category, namely an advanced wastewater treatment system (“AWTS”) facility. Carriage of the AWTS is an insurmountable obstacle which will prevent small cruise ships in the 100-249 passenger/crew capacity size from being able to achieve Part 5.2.1.1 requirements.

Physically, ACL’s experience is that ACL’s small cruise ships cannot be designed and built, much less retrofitted, with AWTS equipment designed for large cruise ships. AWTS equipment is large and heavy, much larger and much heavier than standard marine sanitation devices (“MSDs”) used to control blackwater discharges. By ignoring the critical impact of the large size and heavy weight of AWTS equipment on small cruise ships, the EPA has imposed an unachievable requirement on cruise ships in the 100-249 passenger/crew capacity size range.

Size is obviously important in a smaller ship not just because space is at a premium. It is recognized by design professionals that the degree of difficulty of the nautical design problem increases exponentially, not simply in a linear fashion, as the size of the ship decreases. Even if some means were found to overcome the size problem, a further design difficulty is presented by the substantial weight of AWTS equipment. Because it is so heavy, AWTS equipment would have significant impact on a small cruise ship’s draft and, potentially, on its stability.

If ACL builds bigger ships, the ships then might be able to accommodate AWTS equipment with sufficient capacity for the number of passengers to be carried, but the ships would then not be able to access the small harbors and ports for the cultural and historic attractions ACL’s passengers seek. Indeed, as these larger ships would likely have to be built to comply with Subchapter H standards, not Subchapter K or T, new building for this market would likely continue not to be economically feasible at all. As a difficult working alternative, ACL considered pumping graywater through the smaller, lighter, onboard MSDs for purification, but then learned this would not be sufficient to meet the requirements of Part 5.2.1.1. ACL even considered the absurd possibility of installing AWTS equipment aboard a small barge to be towed behind the cruise ship. Simply put, ACL sees no viable solution available in today’s market for the AWTS equipment design problem for small (150 passenger) cruise ships. The EPA must give further study and guidance on how cruise ships in the 100-249 passenger/crew capacity size range are to meet the EPA’s graywater discharge requirements.

We note that the EPA has correctly acknowledged the practically insurmountable challenge that installation of heavy AWTS equipment on ships in the 100-249 passenger/crew

size range would present. In the EPA's Fact Sheet, on pages 174-175, Section 7.2.1.2 discusses costs of the requirements for existing medium cruise ships built before December 19, 2008 unable to voyage more than 1 nm from shore. On page 175, the Fact Sheet states, in part:

EPA determines that it is not economically practicable or achievable to require all existing medium cruise ships which are unable to travel outside 3 nm to meet the requirements of Part 5.2.1.1.1 [graywater discharge location and rate] at this time.

In connection with graywater generally, Section 4.4.15 on page 138 of the Fact Sheet likewise states, in part:

EPA does not expect existing vessel owner/operators to install graywater treatment storage capacity.

In view of these acknowledgements by the EPA of the adverse economic effect of Part 5.2.1.1 on cruise ships in the 100-249 passenger/crew capacity size range, which are correct as a matter of fact according to ACL's experience, the final version of VGP 2.0 should not impose the graywater effluent requirements of Part 5.2.1.1.1 on ships of this small size.

ACL submits that the current permitting structure as to graywater discharge imposed on the overly broad defined category of "medium cruise ships" is unduly burdensome on the industry segment in the 100-249 passenger/crew capacity size range. The VGP places enormous adverse pressure on the viability of the U.S. flag coastwise trade small ship cruising industry segment and thereby gives an unfair advantage to large, foreign flag cruise lines. The extension of the stringent VGP graywater purification standards to small cruising vessels creates a barrier to entry in an economically distinct industry segment in which U.S.-built, U.S.-owned, U.S.-operated cruise operators could otherwise compete. This discrimination is not justified by the actual environmental impacts of small cruise ship graywater discharge and imposes a "significant economic impact" on "a substantial number of small entities," in violation of the RFA.

B. Promulgate a "Best Practices" Standard for Cruise Ships in the 100-249 Passenger/Crew Capacity Size Range

The only correct alternative is for the EPA to consider and promulgate less burdensome graywater management requirements for ships in the industry segment consisting of ships in the 100-249 passenger/crew size range. ACL submits that promulgation of a "best practices" standard would both meet the goals of the EPA under the Clean Water Act and would provide an economically and physically feasible alternative with which the industry segment could comply.

A lesser standard of graywater treatment for cruise ships with 100-249 passenger/crew capacity in which best practices are undertaken to minimize harmful discharge, consistent with the smaller size of these ships and their inability to carry the required AWTs equipment, is well

justified. This is particularly true for ships such as those of ACL which do not have swimming pools, photo labs, or other sources of the most toxic forms of graywater. Subjecting these small cruise ships to potentially prohibitive regulation, especially when the total amount of graywater discharged by this category of ships is *de minimus* in comparison to that of the far larger ships which constitute the large majority of cruise ships currently operating in U.S. waters, cannot be justified. The less burdensome “best practices” alternative for this category of ships should be considered, analyzed, and implemented.

C. The Term “Issuance Date” as Used in Part 5.2.1.1.1 of VGP 1.0 Should Be Replaced with “December 29, 2008” in Part 5.2.1.1 of VGP 2.0, i.e., the Date of Public Announcement

The discussion in Sections A and B above is directed to the proposed VGP 2.0 to take effect on December 19, 2013. Although VGP 1.0 (the 2008 VGP) was given effect on an urgent basis in view of litigation matters discussed at 73 Fed. Reg. 79474 (Dec. 29, 2008), the comments discussed in Sections A and B above apply equally to it as well as to VGP 2.0.

VGP 1.0 noted that “vessels unable to voyage 1 nm from shore must meet the requirements of Part 5.2.1.1.1 if they were constructed on or after the issuance date of this permit [VGP 1.0].” The effect was to exempt certain vessels from the graywater discharge location and rate requirements of VGP 1.0.

Part 5.2.1.1 of proposed VGP 2.0 now would replace the term “issuance date” as used in Part 5.2.1.1.1 of VGP 1.0 with the date of December 19, 2008. This is contrary to logic and case law authority.

VGP 1.0 was first published and thereby made available to the public on December 29, 2008. 73 Fed. Reg. 79474 (Dec. 29, 2008). Because the general public could not have acted to comply with VGP 1.0 prior to December 29, 2008, ACL submits that in Part 5.2.1.1 of VGP 2.0, the date on and after which construction of medium cruise ships must comply with the requirements stated therein should be December 29, 2008, which is the date on which the Notice of the issuance of the VGP was first published in the Federal Register.

Using December 29, 2008 as the issuance date is in accordance with court decisions in which the determination of the “issuance date” was at issue. Courts have stated that the verb “issue” clearly refers to an act of public announcement and not to the act of arriving at a private decision within the agency. Florida Manufactured Housing Association, Inc. v. Cisneros, 53 F.3d 1565 (11th Cir. 1995); see Avia Dynamics, Inc. v. Federal Aviation Administration, 641 F.3d 515 (D.C. Cir. 2011) (holding that the 60 day deadline began to run on the date the order was officially made public); Public Citizen Inc. v. Mineta, 343 F.3d 1159 (9th Cir. 2003) (holding that a regulation is “issued” on the date that the regulation is made available for public inspection).

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D. Future Efforts in Cooperation.

ACL submits that the EPA must address the serious issues with the proposed VGP 2.0 with active acknowledgement that correction is needed. At least for small U.S. flag coastwise trade cruise ships in the 100-249 passenger/crew capacity, the proposed graywater management requirements present an unachievable standard and a serious barrier to commerce. Because the proposed VGP 2.0 is likely to have a "significant economic impact" on "a substantial number of small entities" in coastwise trade with small U.S. flag ships of this size, the EPA must perform an initial regulatory flexibility analysis and consider alternatives that will achieve the goals of the Clean Water Act while minimizing the burden on small entities.

ACL submits that in lieu of applying the exacting standards of Part 5.2.1.1 to cruise ships with 100-249 passenger/crew capacity, the less burdensome "best practices" alternative for this category of ships should be considered, analyzed, and implemented. ACL would be happy to work with the EPA in developing VGP 2.0 in a manner that adequately balances the business concerns of small cruise ship operators with the important public goals of environmental protection.

Yours truly,



Timothy J. Beebe
Vice President

TJB/maa

cc: David McL. Williams, Esq.