

## RESPONSE TO COMMENTS

### COMMENTS RECEIVED ON THE DRAFT SECTION 401 WATER QUALITY CERTIFICATION FOR DISCHARGES FROM VESSELS COVERED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S (USEPA'S) DRAFT VESSEL GENERAL PERMIT FOR DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF COMMERCIAL AND LARGE RECREATIONAL VESSELS (VGP)

December 5, 2008

This document is in response to comments received by the Michigan Department of Environmental Quality (MDEQ), Water Bureau, on the draft Section 401 Water Quality Certification (Certification) for discharges from vessels covered by the USEPA's draft VGP. The draft Certification was public noticed from July 21 to August 10, 2008. Comments were received from Mr. Thomas Cmar on behalf of the Natural Resources Defense Council, Northwest Environmental Advocates, and the Environmental Law and Policy Center; and Mr. Neil Kagan on behalf of the Michigan United Conservation Clubs (MUCC) and the National Wildlife Federation (NWF). Individual comments were summarized to capture major points and are presented in summary format in this document. The name of the commenter is included for each comment.

Please note that the draft Certification for discharges from vessels covered by the USEPA's draft General Permit for Discharges Associated with Recreational Vessels (RGP), which was also public noticed from July 21 to August 10, 2008, has been withdrawn by the MDEQ. The USEPA no longer requires certification of the RGP due to legislation passed by the Congress and signed by the President. The Clean Boating Act of 2008, P.L. 110-288 (S.2766), removes the requirement to provide coverage to recreational vessels under the National Pollutant Discharge Elimination System (NPDES) program.

Finally, the universe of vessels requiring coverage by the USEPA's VGP has been modified by two pieces of federal legislation. The Clean Boating Act of 2008 removes the requirement to provide coverage for recreational vessels greater than 79 feet in length under the NPDES program. Congress also passed and the President signed P.L. 110-299 (S.3298), a bill that provides a two-year NPDES permit moratorium for all commercial fishing vessels and also for other commercial vessels that are less than 79 feet in length. However, vessels in those two classes that discharge ballast water still require coverage under the NPDES program for their ballast water discharges. As a result of the legislation, the MDEQ does not need to address recreational vessels or commercial fishing vessels and commercial vessels less than 79 feet in length that do not discharge ballast water in its final Section 401 Certification.

**1. Comment:** We support the MDEQ's efforts to address the weaknesses in the VGP through the Section 401 certification process, in particular by conditioning certification on compliance with the requirements of the Michigan Ballast Water Control General Permit (MIG1400000).  
**(Cmar)**

**Response:** We appreciate your support for this component of the Certification. Inclusion of Condition No. 2 in the final Certification will ensure all ballast water discharges from oceangoing vessels to Michigan waters receive adequate treatment to prevent the discharge of aquatic nuisance species.

**2. Comment:** The Michigan Ballast Water Control General Permit (MIG1400000) only applies to so-called “Salties” i.e., oceangoing vessels, while not applying to so-called “Lakers” i.e., vessels that only travel within the Great Lakes. Although “Lakers” do not play a primary role in introducing invasive species into the Great Lakes, they do play a significant role in spreading invasive species after they have been introduced. The MDEQ should condition certification of the VGP on the compliance of all covered vessels, including “Lakers,” with the requirements of the Michigan Ballast Water Control General Permit. **(Cmar)**

**Response:** We agree ballast water discharges from “Lakers” play a significant role in contributing to the spread of aquatic nuisance species that are already present in the Great Lakes. However, we also believe that an effective and collaborative process to evaluate the threat posed by these discharges and determine effective controls will require full stakeholder participation and more time than is available in this 401 Certification process. Consequently, we did not include a condition to require treatment of “Laker” ballast water. We propose instead to take up this issue as our next step in addressing discharges from vessels should we obtain federal authority to issue permits related to these discharges. Michigan plans to consider regulation of ballast water discharges from non-oceangoing vessels should we apply and obtain federal authority to issue permits related to discharges from vessels. In addition, Condition No. 10 of the final Certification reserves the MDEQ’s right to modify the Certification to require “Lakers” to install and operate ballast water treatment systems, if a determination is made by the MDEQ’s Director that such treatment systems are necessary, available, and cost-effective.

**3. Comment:** The MDEQ should affirmatively condition certification of the VGP on compliance with a water quality-based standard at least as strict as the “natural invasion rate” standard adopted by California for aquatic invasive species in ballast water. Such a water quality-based standard is necessary both to ensure that the VGP is consistent with Michigan’s antidegradation policy and to provide full protection of designated uses from aquatic invasive species. **(Cmar)**

**Response:** Michigan has not promulgated a specific water quality-based standard that applies to aquatic nuisance species in ballast water discharges. Instead, Section 3103(a) of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA) includes the goal to prevent the introduction of aquatic nuisance species within the Great Lakes. The MDEQ is confident the ballast water treatment requirements imposed by Condition No. 2 of the final Certification will adequately prevent the introduction of aquatic nuisance species.

As indicated in our Response to Comment No. 2, Michigan plans to consider regulation of ballast water discharges from non-oceangoing vessels should we apply and obtain federal authority to issue permits related to discharges from vessels.

**4. Comment:** The MUCC and NWF support the Certification condition that prohibits blackwater and graywater discharges to Michigan waters, and the Certification condition that prohibits the lowering of water quality of Michigan’s Outstanding State Resource Waters or their tributaries. The MUCC and NWF support these Certification conditions because they contribute to the goal of preventing any further invasions of nonindigenous species to the Great Lakes. **(Kagan)**

**Response:** The MDEQ appreciates the MUCC’s and NWF’s support for Conditions No. 1 and No. 5 of the final Certification.

**5. Comment:** The VGP cannot be salvaged by the other conditions in the MDEQ’s draft Certification in terms of fully protecting Michigan waters from ballast water discharges of

invasive species. The VGP is incapable of stopping the introduction of new invasive species or preventing the damage they will cause. The VGP would merely perpetuate the use of ballast water exchange and saltwater flushing; two management practices that are patently inadequate to protect water quality. Continued reliance on these ineffective practices will lead to more invasions of nonindigenous species and devastating violations of water quality standards (WQS). **(Kagan)**

**Response:** The MDEQ agrees that ballast water exchange and saltwater flushing alone are inadequate management practices to prevent more invasions of nonindigenous species to Michigan waters via ballast water discharges. However, the MDEQ disagrees with the MUCC's and NWF's claim that the VGP cannot be adequately conditioned via the certification process to sufficiently protect Michigan waters. Condition No. 2 of the final Certification requires that ballast water discharged to Michigan waters by "Salties" is adequately treated to effectively prevent the discharge of aquatic nuisance species. The ballast water treatment methods considered by the MDEQ to be effective in preventing the discharge of aquatic nuisance species to Michigan waters include: (1) Hypochlorite Treatment; (2) Chlorine Dioxide Treatment; (3) Ultra Violet Radiation Treatment Preceded by Suspended Solids Removal; and (4) Deoxygenation Treatment.

As indicated in our response to Comment No. 2, Michigan plans to consider regulation of ballast water discharges from non-oceangoing vessels should we apply and obtain federal authority to issue permits related to discharges from vessels. In addition, Condition No. 10 of the final Certification reserves the MDEQ's right to modify the Certification to require "Lakers" to install and operate ballast water treatment systems, if a determination is made by the MDEQ's Director that such treatment systems are necessary, available, and cost-effective.

**6. Comment:** The MDEQ cannot certify the VGP because no federal NPDES permit regulating vessel discharges in Michigan waters is allowed under the federal Clean Water Act. The USEPA does not have the authority to issue an NPDES permit to regulate vessel discharges in Michigan waters. The authority and responsibility to issue such NPDES permits rests with the MDEQ alone. This permit issuance authority and responsibility to regulate discharges incidental to the normal operation of a vessel passed to Michigan as part of the USEPA's delegation of the NPDES program. The USEPA lost its authority to issue NPDES permits upon delegation. Therefore, no USEPA permit for vessel discharges is allowed, much less required in Michigan. Since a certification under Section 401 is only appropriate if a federal permit is required, the MDEQ has no basis for certifying the VGP. **(Kagan)**

**Response:** The MDEQ agrees that the proposed argument could be constructed, but the USEPA is on record in disagreement with the argument presented by Mr. Kagan. Rather than potentially engage in a lengthy court battle that could leave Michigan waters vulnerable, the MDEQ chooses to certify with conditions that would ensure the protection of the waters of the state and to reserve the right to challenge the USEPA's authority at a later date. Additionally, the MDEQ is considering applying for federal authority to issue permits related to discharges from vessels.

**7. Comment:** Condition No. 6 of the MDEQ's draft Certification, which states, "all discharges in Michigan waters from vessels covered by the USEPA's VGP are prohibited from causing or contributing to exceedances of the Michigan WQS," cannot be met. The VGP's Treatment-Based Effluent Limitations and Related Requirements (namely, ballast water exchange and saltwater flushing) are not stringent enough to assure compliance with Michigan WQS. **(Kagan)**

**Response:** See Response to Comment No. 5. The MDEQ would also note that Condition No. 6 of the final Certification applies broadly to the WQS and is a condition imposed on all discharges from vessels.

**8. Comment:** The USEPA's VGP is not consistent with the antidegradation policy for Tier 1 or Tier 2 waters. **(Kagan)**

**Response:** The MDEQ has concerns similar to those expressed by the commenter with the USEPA's position regarding the applicability of the antidegradation policy as presented in Section 4.5 of the Proposed Vessel General Permit Fact Sheet. The MDEQ communicated these concerns to the USEPA in a June 29, 2008, letter submitted in response to the June 17, 2008, Federal Register notice soliciting comments on the USEPA's draft VGP.

**9. Comment:** The MDEQ must itself regulate ballast water discharges through its NPDES program. The MUCC and NWF urge the MDEQ to implement the spirit of the conditions included in the draft Certification by issuing its own NPDES permits to fully protect Michigan waters from ballast water discharges of invasive species. **(Kagan)**

**Response:** The MDEQ has already initiated discussions with the USEPA to identify and investigate the actions and steps that need to be taken by the MDEQ to facilitate the issuance of NPDES permits to regulate vessel discharges.