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CLEAN BOATING ACT OF 2008

—————
JUNE 23, 2008.—Ordered to be printed
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Mrs. BOXER, from the Committee on Environment and Public Works, submitted the following

R E P O R T

[To accompany S. 2766]

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (S. 2766) to amend the Federal Water Pollution Control Act to address certain discharges incidental to the normal operation of a recreational vessel, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSES OF THE LEGISLATION

The purposes of the Clean Boating Act of 2008 (the Act) are to codify the exclusion of discharges incidental to the normal operation of recreational vessels from permitting requirements under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (commonly known as the Clean Water Act), and to require management practices and performance standards for discharges from such vessels.

GENERAL STATEMENT AND BACKGROUND

The Act amends the Clean Water Act to provide that no permit shall be required by the EPA Administrator under the national pollutant discharge elimination system (NPDES) for certain categories of discharges from recreational vessels. The following discharges from recreational vessels would be excluded from permit require-

ments: graywater; bilge water; cooling water; weather deck runoff; oil water separator effluent; effluent from properly functioning marine engines; and any other discharge that is incidental to the normal operation of such vessels.

In 1973 EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from NPDES permitting requirements. EPA's denial of a petition seeking repeal of that regulation was published in September 2003 and subsequently challenged in the U.S. District Court for the Northern District of California. In September 2006 the court issued an order revoking the applicable regulatory exclusion, effective September 30, 2008. EPA estimates that the court's order could affect over 13 million recreational vessels.

The Act provides that the Clean Water Act section 402 permit requirements, 33 U.S.C. § 1342, shall not apply to recreational vessels. A "recreational vessel" is defined as any vessel that is leased, rented, or chartered to a person for that person's pleasure or that is manufactured or used primarily for pleasure, excluding vessels that are subject to Coast Guard inspection and that are engaged in commercial use or that carry paying passengers.

The Act requires the EPA Administrator to: (1) develop management practices for recreational vessels to mitigate the adverse impacts on waters of the United States of discharges incidental to normal vessel operation (excluding sewage) in any case in which the Administrator determines that the use of those practices is reasonable and practicable; and (2) promulgate federal standards of performance (which may distinguish among vessel types, classes, and sizes, as well as new and existing vessels) for each discharge for which such a management practice is developed. The Act calls for the Secretary of the Department in which the Coast Guard is operating to promulgate regulations governing the design, construction, installation, and use of management practices for recreational vessels as necessary to meet such standards of performance. It prohibits operation of recreational vessels in or discharges from those vessels into waters of the United States or waters of the contiguous zone, other than in compliance with such standards.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 would provide that the Act may be cited as the "Clean Boating Act of 2008".

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

Section 2 would amend Section 402 of the Clean Water Act, 33 U.S.C. § 1342, by adding a new subsection (r), to provide that no permit shall be required under the Clean Water Act by the EPA Administrator (or by a State, in the case of an approved permit program under subsection 402(b)), for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

Section 3. Definition

Section 3 would define the term “recreational vessel” to mean any vessel that is (a) manufactured or used primarily for pleasure; or (b) leased, rented, or chartered to a person for the pleasure of that person. It would exclude from the definition of the term “recreational vessel” any vessel that is subject to Coast Guard inspection and that (i) is engaged in commercial use; or (ii) carries paying passengers.

Section 4. Management practices for recreational vessels

Section 4 would add a new subsection (o) to Section 312 of the Clean Water Act, 33 U.S.C. §1322, that would apply to any discharge, other than a discharge of sewage, from a recreational vessel that is: (a) incidental to the normal operation of the vessel; and (b) exempt from permitting requirements under Section 2 (new Section 402(r) of the Clean Water Act).

The EPA Administrator, in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Commerce, and interested States, is required to determine the discharges incidental to the normal operation of a recreational vessel for which it is reasonable and practicable to develop management practices to mitigate adverse impacts on the waters of the United States. Such determinations would be promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. In making those determinations, the Administrator would be required to consider: (i) the nature of the discharge; (ii) the environmental effects of the discharge; (iii) the practicability of using a management practice; (iv) the effect that the use of a management practice would have on the operation, operational capability, or safety of the vessel; (v) applicable Federal and State law; (vi) applicable international standards; and (vii) the economic costs of the use of the management practice.

Initial determinations must be made not later than 1 year after the date of enactment. Every 5 years thereafter, the Administrator is required to review the determinations and, if necessary, revise the determinations based on any new information available to the Administrator.

The Administrator would develop management practices for recreational vessels in any case in which the Administrator determines that the use of those practices is reasonable and practicable.

For each discharge for which a management practice is developed, the Administrator, in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Commerce, other interested Federal agencies, and interested States, would promulgate, in accordance with the Administrative Procedure Act, 5 U.S.C. § 553, Federal standards of performance for each management practice required with respect to the discharge. In promulgating those standards, the Administrator is authorized to take into account considerations including the classes, types and sizes of vessels, and whether the vessels are new or existing. The Administrator is also required to consider the factors in paragraph (2)(B), including: (i) the nature of the discharge; (ii) the environmental effects of the discharge; (iii) the practicability of using a management practice; (iv) the effect that the use of a management practice would have on the operation, operational capability, or

safety of the vessel; (v) applicable Federal and State law; (vi) applicable international standards; and (vii) the economic costs of the use of the management practice. The Administrator would have authority to provide for a waiver of the applicability of the standards as necessary or appropriate to a particular class, type, age, or size of vessel.

The standards of performance for a management practice are required to be promulgated not later than 1 year after the date of a determination that the management practice is reasonable and practicable. Every 5 years thereafter the Administrator is required to review the standards and, if necessary, revise the standards based on any new information available to the Administrator.

The Secretary of the department in which the Coast Guard is operating would be required to promulgate regulations governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet the standards of performance promulgated, as soon as practicable after the Administrator promulgates such standards, but not later than 1 year after the date on which the Administrator promulgates the standards.

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

After the effective date of the regulations promulgated by the Secretary of the department in which the Coast Guard is operating, the owner or operator of a recreational vessel would be prohibited from operating in, or making any discharge incidental to the normal operation of the vessel into, the waters of the United States or the waters of the contiguous zone, if the owner or operator of the vessel is not using any applicable management practice meeting standards established under Section 4.

LEGISLATIVE HISTORY

S. 2766 was introduced by Senator Nelson of Florida and Senator Boxer on March 13, 2008. They were later joined by the following cosponsors: Senators Whitehouse, Reed, Isakson, Vitter, Cardin, Mikulski, Burr, Snowe, Crapo, Chambliss, Cochran, Collins, Levin, Voinovich, Stabenow, Craig, Dole, Feinstein, Corker, Bayh, Coleman, Landrieu, Specter, Kohl, Wicker, Dodd, Carper, Bond, Brown, Webb, Bunning, Klobuchar, Schumer, Martinez, Lugar, Kerry, and Allard (as of June 18, 2008). The bill was read twice and referred to the Senate Committee on Environment and Public Works. The Committee met on May 21, 2008, when S. 2766 was ordered favorably reported without amendment by a voice vote.

HEARINGS

The Committee did not hold hearings on S. 2766 during the 110th Congress.

ROLLCALL VOTES

There were no rollcall votes. The Committee on Environment and Public Works met to consider S. 2766 on May 21, 2008. A quorum of the Committee being present, S. 2766 was reported favorably without amendment by a voice vote.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b)(2) of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill would relieve owners or operators of approximately 13 million recreational boats of certain current court-ordered permitting requirements under the current Clean Water Act. As noted below, the Congressional Budget Office has concluded that the bill will not establish any private-sector mandates.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the Committee finds, consistent with the determination of the Congressional Budget Office, that S. 2766 would impose no Federal intergovernmental unfunded mandates on State, local or tribal governments. The Committee further agrees with the Congressional Budget Office that the bill does not impose private sector mandates.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 2766—Clean Boating Act of 2008

S. 2766 would direct the Environmental Protection Agency (EPA) to investigate discharges of pollution from recreational boats to determine what types should be regulated and to promulgate standards of performance for managing those discharges. The U.S. Coast Guard (USCG) would be responsible for enforcing the standards developed by the EPA.

CBO estimates that implementing S. 2766 would have no significant effect on the federal budget because the EPA is already required to regulate discharges from recreational boats that it deems should be regulated, and either that agency or the USCG must enforce such regulations. The two agencies are currently carrying out those responsibilities. Enacting the legislation would not affect revenues or direct spending.

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

On June 3, 2008, CBO transmitted a cost estimate for H.R. 5949, the Clean Boating Act of 2008, as ordered reported by the House Committee on Transportation and Infrastructure on May 15, 2008. The two bills are nearly identical, and the CBO cost estimates are the same.

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

SENATOR INHOFE'S ADDITIONAL VIEWS

Senator Inhofe agrees that legislation is necessary to clarify and make permanent the long standing and common sense recreational vessel exemption from the National Pollution Discharge Elimination System (NPDES) permitting requirement under the Clean Water Act (CWA) for discharges incidental to the normal operation of a vessel into navigable waters. However, this "incidental discharge" exemption has historically encompassed both recreational and commercial vessels and has been in place for the life of the CWA without any attempts by Congress to amend or revise the regulatory exemption. Additionally, no sound evidence indicates that negative environmental impacts have resulted from this exemption by either recreational or commercial vessels. Therefore, in Senator Inhofe's view a straightforward, uninhibited incidental discharge exemption for both recreational and commercial vessels is necessary and prudent.

Language in S. 2766 requires that the Administrator of the Environmental Protection Agency in consultation with the Secretary of the Coast Guard must review incidental discharges and recommend best management practices for recreational vessels. The Secretary of the Coast Guard shall promulgate performance standard regulations encompassing the Administrator of the Environmental Protection Agencies' recommendations. Senator Inhofe believes that increasing agency burdens with insufficient reason is costly and unnecessary. In addition, all recreational boat owners might be required to purchase expensive and superfluous equipment for pre-existing vessels in order to meet requirements created by this act. Section 4 undermines the basic statutory requisite of eliminating needless government regulation and vessel owner burden.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

* * * * *

FEDERAL WATER POLLUTION CONTROL ACT

* * * * *

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) * * *

* * * * *

SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(1)(A) * * *

* * * * *

SEC. 312. (a) For the purpose of this section, the term—

(1) “new vessel” includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters, the construction of which is initiated after promulgation of standards and regulations under this section;

(2) * * *

* * * * *

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

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

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

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

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

(A) *DETERMINATION.*—

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

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

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

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

(i) *the nature of the discharge;*

(ii) *the environmental effects of the discharge;*

(iii) *the practicability of using a management practice;*

(iv) *the effect that the use of a management practice would have on the operation, operational capability, or safety of the vessel;*

- (v) applicable Federal and State law;
- (vi) applicable international standards; and
- (vii) the economic costs of the use of the management practice.

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

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

(3) *PERFORMANCE STANDARDS FOR MANAGEMENT PRACTICES.*

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

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

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

- (i) distinguish among classes, types, and sizes of vessels;
- (ii) distinguish between new and existing vessels; and
- (iii) provide for a waiver of the applicability of the standards as necessary or appropriate to a particular class, type, age, or size of vessel.

(D) *TIMING.*—The Administrator shall—

- (i) promulgate standards of performance for a management practice under subparagraph (A) not later than 1 year after the date of a determination under paragraph (2) that the management practice is reasonable and practicable; and
- (ii) every 5 years thereafter—

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

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

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

(B) *REGULATIONS.*—

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

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

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

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

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

* * * * *

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) * * *

* * * * *

(q) *COMBINED SEWER OVERFLOWS.*—

(1) *REQUIREMENT FOR PERMITS, ORDERS, AND DECREES.*—Each permit, order, or decree issued pursuant to this Act after the date of enactment of this subsection for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) * * *

* * * * *

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

SEC. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

(b) * * *

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

(1) * * *

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(24) *OIL AND GAS EXPLORATION AND PRODUCTION.*—The term “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) *RECREATIONAL VESSEL.*—

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

- (i) *manufactured or used primarily for pleasure; or*
- (ii) *leased, rented, or chartered to a person for the pleasure of that person.*

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

- (i) *is engaged in commercial use; or*
- (ii) *carries paying passengers.*

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