Response to Comments Document
"Guidance for Vessel Sewage No-Discharge Zone Applications (Clean Water Act Section 312(f))"
Docket ID No.: EPA-HQ-OW-2020-0392

On June 27, 2022, the U.S. Environmental Protection Agency's Office of Wetlands, Oceans, and Watersheds requested comment on the draft "Guidance for Vessel Sewage No-Discharge Zone Applications (Clean Water Act Section 312(f))" (87 FR 38151).

EPA received 10 unique public comments on the guidance document. The public comments are available in Docket Number: EPA-HQ-OW-2020-0392.

This Response to Comments Document uses the shorthand "(f)(3)" and "(f)(4)" to refer to the no-discharge zone designation types under Clean Water Act section 312(f)(3) and Clean Water Act section 312(f)(4), respectively.

Comment #1 (Optional information should be required):

Most commenters asserted that some or all the information identified as "optional" throughout the draft guidance should be required for an application to be considered complete by EPA, particularly for (f)(3) applications. While requiring additional information requires additional resources from the state and EPA, commenters urge that much of this information is necessary for EPA to arrive at an informed determination. As EPA explains in Section 1.3, submission of optional information by a state can provide a clearer depiction of the unique circumstances in a waterbody, which can assist EPA in arriving at a more informed determination. However, states are not required to provide optional information and an application will not be marked incomplete if this information is not provided or available. EPA can only require the information identified in the Agency's implementing regulations at 40 CFR 140.4. For example, an (f)(3) application from a state shall include a certification that the protection and enhancement of the waters described in the petition require greater environmental protection than the applicable Federal standard; a map showing the location of commercial and recreational pump-out facilities; a description of the location of pump-out facilities within waters designated for no discharge; the general schedule of operating hours of the pump-out facilities; the draught requirements on vessels that may be excluded because of insufficient water depth adjacent to the facility; information indicating that treatment of wastes from such pump-out facilities is in conformance with Federal law; and information on vessel population and vessel usage of the subject waters. Guidance documents do not have the force and effect of law and EPA is limited to requiring only information that can be reasonably interpreted to be based on the current regulations.

One commenter stated that EPA has discounted any failure to provide required information by articulating that states are not required to provide supplemental information. As explained above and in the guidance, states are not required to provide optional information and an application will not be considered incomplete if this information is not provided or available. However, EPA may conduct its own information gathering, as needed and appropriate, to ensure that the Agency has sufficient information to make an informed determination. The Agency is not restricted to considering only the information provided by the state in an application. EPA also provides an opportunity for public comment prior to issuing a final determination to ensure that additional information of relevance can be provided by a variety of interested parties.

To further clarify how EPA will consider required versus optional information, the Agency has added new language in the guidance to address circumstances where a state is unable to provide required information, or where alternative information may be available to serve a similar purpose. The guidance now clarifies that, in review of a particular application, EPA may return the application, obtain the information independently, or issue a tentative determination noting any application deficiencies for public comment.

Comment #2 (Applications for all three designation types should be evaluated based on same costs and economic impact metrics):

One commenter supported the breadth of cost considerations that EPA is using to evaluate (f)(4) applications and stated that all applications should be evaluated using the same costs (including retrofit costs) and economic impact metrics. As explained in Section 2.2.2 of the draft guidance, EPA's cost analysis for (f)(3) applications does not consider costs that cannot be attributed to the no-discharge zone designation or to costs that do not vary based on the adequacy and availability of facilities. This is in line with the outcome of recent litigation, concluded in 2022, wherein the U.S. District Court for the District of Columbia held that the kinds of costs that EPA must consider in its determination are those that "bear on the accessibility of the facilities," and "retrofit costs fall outside that category." *Am. Waterways Operators v. Regan*, No. 18-CV-2933 (APM) (D.D.C. Feb. 14, 2022)

EPA considers more expansive cost metrics for (f)(4) applications due to EPA's more expansive role, which includes proceeding through the federal rulemaking process. Pursuant to Executive Order 12866, EPA should consider costs and benefits during the issuance of all rules.

Comment #3 (Application information requirements):

Commenters suggested the inclusion of additional information to be provided by the state, largely for (f)(3) applications. The specific requests are broken down first by general comments and then by section from the draft guidance.

General: Commenters asserted that EPA should require states to perform GIS spatial analysis and smart mapping to accurately identify resources and issues and to explain whether and how vessels in the proposed area will be able to use adequate and reasonably available facilities when their traffic patterns require those facilities. EPA does not support requiring the use of GIS spatial analysis or smart mapping but has added this suggestion to the guidance as an option for states' awareness. One commenter also suggested limiting the applicability of certain application information requirements based on type of facilities or vessel traffic. First, the commenter explained that information on pumpout facility operating capacity is difficult to obtain from recreational marinas, since facility operators are generally unable to provide it without research. As such, the commenter proposed that EPA include an assumption that the information is more applicable to pumpout facilities serving commercial vessels. EPA disagrees since the referenced information is identified as optional. The state should provide such information, when available, to provide a fuller picture of the unique circumstances in the proposed waters. Additionally, the commenter requested that EPA only require estimates for volume of sewage generated in applications for waterbodies with extensive commercial vessel traffic. EPA disagrees because, information indicating that treatment of wastes from facilities is in conformance with Federal law is a required component of the state's application, per 40 CFR 140.4(a)(6). EPA's responsibility under this provision extends to ensuring that wastewater treatment facilities have the capacity to accept the increased volumes of sewage due to vessels pumping out, should the no-discharge

zone be approved. The increased volume does not only result from commercial vessels pumping out, but also recreational vessels. As such, EPA does not believe it is appropriate to limit the applicability of this information requirement to just waterbodies with extensive commercial vessel traffic.

Section 2.1.1: Regarding a state's certificate of need, one commenter stated that the state's analysis must assess the impacts of a proposed no-discharge zone for both untreated and treated sewage. The discharge of untreated sewage within U.S. waters is already prohibited, regardless of no-discharge zone status, therefore it is unnecessary to assess the impacts of untreated sewage as part of this analysis. The optional information identified in Section 2.1.1 considers the environmental conditions prior to a designation, which are based on the discharge of treated sewage from vessels. Another commenter suggested that EPA should request data on nutrients rather than fecal bacteria or pathogen loads, since Type I and II marine sanitation devices treat waste for pathogens already. EPA notes that the optional information identified in Section 2.1.1 specifically requests water quality data, including information on nutrients.

Section 2.1.2: Commenters recommended several additions to the map(s) of facilities. These included adding that the state must identify existing federal navigation channels and commercial vessel traffic routes, as well as the distance (time or miles) each mobile facility operator is prepared to travel and the response time. EPA notes that Section 2.1.7 already requires the state to identify any relevant navigation routes used by vessels that would be affected by a no-discharge zone designation, and so EPA did not include the same requirement in Section 2.1.2. For mobile facilities, Section 2.1.2 already requires that the state identify the origin point(s) of mobile pumpout facilities as well as separate maps indicating the geographic service area for each. As optional information, EPA also requests that the state provide estimations of response time to vessels' requests for service, as well as the distance, in time or miles, each operator is prepared to travel. Finally, commenters emphasized that the map should clearly identify the type(s) of vessels capable of calling at each facility. EPA believes that this suggestion is adequately addressed within Sections 2.1.3 and 2.1.5, noting that a state should identify the types of vessels serviced by each pumpout facility, preferably in a table format providing other pertinent information for each facility.

Section 2.1.3: One commenter provided several textual edits, many of which were minor clarifying edits (e.g., adding "at each pumpout facility" to certain bullets in the Optional Information section). The commenter also suggested adding the following text to the bullet for type(s) of vessels that can be serviced: "at each pumpout facility and any service restrictions (e.g., whether access is limited to certain vessels or customers)." For the bullet on draft and berth limitations, the commenter added width and height. Finally, for the bullet on facility operating capacity, commenter added "including working daily capacity and average available capacity." EPA incorporated these recommended edits, since various pieces of information related to service/access restrictions are required or optional elsewhere in the document, width and height are also relevant restrictions, and this information would be helpful to include in the table. For operating capacity, EPA accepted the edits but added: "(if limited by the size of an onsite holding tank)." The daily and average available capacity are less relevant for facilities with a direct sewer line to a wastewater treatment facility. Several commenters requested that EPA require the application to identify the available connection options at each pumpout facility. EPA agrees that connection specifications are a relevant factor that may restrict a vessel's ability to use a facility

and has added this to the list of optional information requested in Section 2.1.5. Finally, one commenter requested that this section require separate information for commercial and recreational vessels. EPA disagrees with this request because, as noted elsewhere in this document, the guidance already delineates between commercial and recreational vessels. Per Sections 2.1.3 and 2.1.5, the state should identify the types of vessels serviced by each pumpout facility, preferably in a table format providing other pertinent information for each facility.

Section 2.1.5: One commenter provided in-text edits for the bullet on maximum height and the percentage of vessels excluded from using facilities. EPA accepted both edits, adding "(both total height and height above the waterline)" and "and associated vessel types" to each bullet, respectively. Commenters also requested that other vessel characteristics be included, such as connection specifications, total sewage volumes to be handled, and sewage pump flow rate requirements. EPA has added connection specifications and sewage pump flow rate requirements, but not total sewage volumes to be handled, since this issue is covered in Section 2.1.3 for pumpout facility operating capacity, as well as in Section 2.1.6 for general waste handling.

Section 2.1.6: One commenter requested that EPA require the state to identify the expected maximum daily capacity of each pumpout facility to compare to maximum daily demand by commercial vessels. EPA agrees that identifying capacity limitations at each facility is important to ensuring that waste can be handled properly and that facilities are adequate. However, EPA notes that in Section 2.1.6 for facilities with holding tanks EPA already requires that the application identify the size of an onsite holding tank and how frequently it is serviced. Additionally, Section 2.1.3 was modified to include as optional information the working daily capacity and average available capacity for pumpout facilities.

Section 2.1.7: Regarding vessel population and usage, commenters articulated that the estimate for usage should include estimates on a daily and seasonal basis and should cover five or more years and consider projected population increases. EPA does not believe that it is reasonable for the state to estimate daily fluctuations in usage. Additionally, Section 2.1.7 already requires the application to identify the times of year that different vessel classes are expected to operate within the proposed waters, which would include seasonal variations. EPA has added a recommendation that states consider whether vessel population estimates are representative of typical operations, and to consider a few years of historic usage, as appropriate. However, EPA's responsibility is to determine whether "adequate facilities *are* reasonably available" (emphasis added), and so only considers the present rather than a projection of future usage. As such, EPA does not believe it is reasonable to require the state to provide such a projection in the application. Finally, commenters requested that EPA require the validation of vessel population and usage with the vessel population, not just using third party sources. While EPA cannot require the state to validate the information with the affected vessel population, language was added to Section 2.1.7 to remind states that the information provided should be verifiable and, to the extent possible, should be validated with the affected vessel population. EPA further notes that such vessel operators have an opportunity to provide comments on the application and EPA's tentative determination, should operators believe that the vessel population and usage figures are inaccurate.

Comment #4 (Recommended information sources):

Commenters provided input on the "Recommended Information Sources" that EPA provides for some application information requirements. For Section 2.1.7, one commenter recommended that

EPA direct states to evaluate and average commercial vessel traffic in the proposed area over time (e.g., five years) by consulting Automatic Information System (AIS) data. This would supplant EPA's current recommendation that states use the U.S. Coast Guard's "Merchant Vessels of the United States." For the same section, another commenter recommended the inclusion of the National Census of Ferry Operators, compiled by the U.S. Department of Transportation's Bureau of Transportation Statistics. EPA agrees and has updated the Recommended Information Sources subsection of Section 2.1.7.

Comment #5 (Cost tool):

Commenters submitted recommendations and concerns regarding the "No-Discharge Zone Cost Analysis Tool" ("the Tool").

As a general matter, one commenter shared the belief that states should be required to provide all Tool inputs to EPA as part of a complete application to ensure that states engage local stakeholders. The state is only required to provide the information identified in the regulations at 40 CFR 140.4(a) for (f)(3) applications. Additionally, the responsibility to ensure that facilities are "reasonably" available falls to EPA. Therefore, EPA will supplement the information provided by the state and engage local stakeholders, as needed, to fill in the Tool inputs. However, EPA does believe that "early and often" stakeholder engagement leads to improved outcomes and has added language in the guidance to encourage states to conduct pre-application outreach.

Another overarching concern raised by commenters is that the Tool should be used only for cost analysis, not for facility availably/pumpout capacity. One commenter elaborates that a more detailed Tool is required to adequately project demand and capacity, while another notes that estimates and default numbers may not replicate real-life production. EPA agrees that the screening analysis portion of the Tool is just one piece of information available to EPA to consider facility availability, and that the Tool is primarily used for cost analysis. EPA must factor in myriad other considerations from the application, such as access restrictions, into a determination about facility availability. EPA also agrees that estimates and default numbers may not replicate real-life production; however, EPA will endeavor to obtain as representative of a picture as possible using the Tool as well as other information provided in the application or obtained through independent data gathering and public comments.

In the same vein, another commenter asserted that the Tool needs to take into account the information listed in the seven application requirements and include those specific details, such as connections and draft. Further, one commenter stated that excess receiving capacity does not ensure reasonable availability due to other factors, such as draft limitations. As explained in the preceding paragraph, the Tool is intended to represent just one facet of the information to be used in forming the Agency's determination. The Tool itself cannot reasonably account for all the information provided in the state's application. Instead, the Tool focuses on some of the factors that influence the increase in baseline operating costs for affected vessel classes. The information listed in the seven application requirements is also critical and is considered alongside the representative overview of cost implications provided by the Tool's outputs.

One commenter stated that inputs should be based on the most demanding requirements for each vessel type/category, otherwise, each individual commercial vessel should be separately accounted for in the analysis. EPA's statutory role is to determine the reasonable availability of adequate facilities for *all* vessels; therefore, the Tool considers an average vessel within a class to

provide the most representative estimate of demand for facilities and cost implications. If most vessels within the vessel class can operate viably based on current pumpout capacity, adequate facilities may be reasonably available (contingent on other relevant non-cost factors from the application) even if an increase to the baseline operating costs is untenable for some vessels within a class. As such, it is not EPA's role to ensure that each individual commercial vessel can continue to operate in the proposed no-discharge zone.

One commenter stated that the assessment of demand should include maximum daily sewage offload requirements, not just annual total or average daily sewage volumes. EPA disagrees because the screening analysis of the Tool already calculates the maximum daily demand, in gallons per day, for pump out services. Before applying the uniform demand scenario, the Tool calculates ranges for demand and capacity, the results of which are shown in Table 1 and Figure 1 of the Output tab. Minimum demand equates to the demand from vessels that pump out every day, while maximum demand reflects the total daily demand from all vessel classes. EPA then applies the uniform demand scenario to model the frequency with which demand may exceed capacity, based on each vessel class's months of operation and pumpout frequency. These results are depicted in Table 2 of the Output tab, which includes estimates of the volume of sewage pumped on the days of the year with the lowest and highest volumes, as well as the percent of days when capacity meets demand.

The issue of oceangoing vessels was raised by two commenters. One recommended that the cost analysis include oceangoing vessels, since many such vessels are equipped with a combination Type II/Type III system and tank capacity varies significantly. The other recommended that EPA consider cruise ship sewage volumes in the calculations. While the commenter acknowledges that cruise ships generally do not offload sewage ashore, factors such as size and location of the proposed no-discharge zone and the itinerary and capabilities of cruise ships in the area may influence whether these vessels require facility availability. EPA agrees that oceangoing vessels may need to be included in the cost analysis performed for specific applications where the operational characteristics of affected vessels warrants inclusion. EPA has added clarifying language to this effect in Section 2.2.2 and Appendix C. However, EPA does not believe it necessary to update the Tool to include oceangoing vessels by default, since the Tool currently only includes by default the vessels classes most likely to be impacted by a designation.

One commenter urged EPA to clarify that all vessel and cost inputs to the Tool should be based on the vessel population operating within the proposed area unless extenuating circumstances prevent the information from being acquired. This same general comment on the Tool was reiterated specifically for certain inputs to Table C-2 and all inputs for Table C-4, with the commenter stating that, to the maximum extent possible, the inputs should be based on averages for the specific area and its commercial vessel population. EPA agrees and has added this clarifying language.

Several comments related to the default values used in the Tool. One commenter noted that fuel price is frequently updated, readily available, and can vary significantly based on location, concluding that in certain locations it is unsuitable to estimate financial impact based on the national average. While EPA will retain a default value for fuel price in the Tool, EPA agrees that fuel price can be highly variable and may necessitate information gathering by the Agency to obtain the current price when evaluating a specific application. The same commenter disagreed with the default value of zero for distance traveled since facilities may not be co-located with fueling stations. The commenter implies that this information should instead be gathered through

conversations with local vessel and facility operators. While EPA agrees that facilities may not always be co-located with fueling stations, EPA does not have a basis for providing an alternative default value to zero. However, this input can be updated when applying the Tool to any specific application. Finally, the commenter requests that an input be required for facility operating months rather than assuming year-round operation for the default value. EPA agrees and has changed the facility operating months inputs to required, since the regulations require the state to provide the operating schedule of facilities in the application.

A commenter also disputed whether vessels can schedule a pumpout ahead of time at a facility, particularly for vessels that are transient and for which advance schedule may be impractical. EPA agrees that advance scheduling may not always be practical and has built in a "buffer time"[1] as well as a calculation of "wait time"[2] into the Tool to account for potential delay.

Two commenters raised concerns about the definitions and sources of vessel information in Appendix E and the associated figures in the "Sewage Gen & Pumpout Int" tab of the Tool. For the "large cruise ships" category, the first commenter recommended caution in using both the cited percentage of ships with AWTS due to performance concerns, as well as the estimate for sewage generation rate. For "medium and small cruise ships (excursion vessels)," the commenter further raised concerns that the percent of ships with AWTS may be an overestimate and recommended additional data collection. The commenter further noted that for both "medium and small cruise ships (excursion vessels)" and "passenger ferries with overnight accommodations," sewage discharge rates may not be comparable to large cruise ships. EPA agrees that caution should be used in employing this national data, since it is based on numerous sources and assumptions. Where possible, EPA will use information specific to the vessel population operating in the waters proposed for a no-discharge zone, thereby overriding the use of the default values. However, due to the absence of specific new sources of data, EPA has kept the referenced values as-is. The second commenter proposed that EPA rename "passenger vessels without overnight accommodations (ferries)" to "passenger vessels (including ferries) without overnight accommodations" to avoid confusing terminology. EPA agrees and has updated the identifiers. The commenter also provided a recent U.S. Coast Guard document to highlight a potential inaccuracy in EPA's estimated number of vessels for this vessel population. Considering this information, EPA updated the vessel population in the Tool and reflected the change in Appendix E of the guidance document.

Finally, one commenter noted that EPA may not need to use the Tool for future no-discharge zones of equivalent size and scope to most existing NDZs, which are not excessively large in area. As explained in Section 2.2.2, EPA agrees and may elect not to use the Tool, or use a simplified version of the Tool, for applications that present minimal cost implications. Instead, EPA will explain the decision-making process on cost in the final determination.

[1] Buffer time represents the additional time associated with pumping out other than the time spent actively pumping. This could include time for activities such as positioning the vessel or hooking up the pumpout equipment to the vessel.

[2] The analysis assumes that vessels would incur wait time costs only on days where minimum capacity does not meet demand, so wait time costs depend on the output from the uniform demand scenario analysis. On these days, the analysis assumes that each vessel would have to wait for one other vessel to pump out ahead of it. The average wait time is determined using the weighted average time to pump out, weighted by the number of vessels in each class.

Comment #6 (Communications with states and stakeholders):

One commenter raised concerns about EPA's informal review of states' applications prior to formal submittal, suggesting that such communications are "secret" meetings between EPA and states that constitute a process flaw. The commenter proposed allowing affected parties to participate in the pre-application conversations. State agency staff frequently contact EPA with a myriad of questions regarding the different designation types and the application process. At this early stage, the state may not have a full understanding of the vessel population's current sewage handling practices, the vessels that may be affected, and the available pump out infrastructure. As the state develops the application, the state may ask EPA to review certain pieces of the application or conduct a preliminary review of the contents of the application. During this review, EPA can provide early feedback regarding the contents of the application and may identify missing or incomplete information. EPA does not provide any further support for application development, nor does EPA directly or indirectly characterize the likelihood of an affirmative determination. However, as noted in the response to Comment 5, above, EPA does believe that "early and often" stakeholder engagement leads to more complete and accurate applications and has added language in the guidance to encourage states to conduct pre-application outreach.

Another commenter proposed that EPA solicit public comments before issuing a tentative affirmative determination, explaining that such a determination signals that the Agency believes facilities to be reasonably available and commenters are therefore forced to disprove this assessment. EPA believes the public is better served if EPA provides its initial thinking on the application through a tentative determination, rather than offering only the contents of the application through a notice of receipt to the public. As such, EPA intends to continue with the tentative and final determination format.

Comment #7 (Additional relevant laws and regulations):

One commenter recommended that EPA consider how other regulations, such as MARPOL Annex IV, may impose limitations on vessels and their handling of sewage as it relates to facility availability. EPA agrees that certain vessels must adhere to the requirements of MARPOL Annex IV, even when operating in U.S. waters, which may influence these vessels' pumpout facility needs. EPA has updated the guidance in Sections 1.2.4 and 2.2.2, as well as Appendix B, to include a brief summary of MARPOL Annex IV and to acknowledge these potential additional requirements.

Another commenter suggested that EPA update the information in Appendix B regarding the Clean Vessel Act grant program to clarify that such funds may not be used for the construction or operation of commercial pumpout facilities. EPA agrees and has now identified this limitation on the use of Clean Vessel Act grant funds.

Additionally, one commenter requested that EPA provide information on certain unique laws and regulations for cruise ships in Alaska, including Title XIV ("Certain Alaskan Cruise Ship Operations") and the U.S. Coast Guard's regulations at 33 CFR Part 159 Subpart E ("Discharge of Effluents in Certain Alaskan Waters by Cruise Vessel Operations"). EPA agrees and has updated the guidance in several places, including Sections 1.2.2 and 1.2.4 and Appendix B.

Comment #8 (Messaging and word choice):

Several commenters recommended the use of "waterfront facility" instead of "marina" as the preferred catch-all term for marinas, ports, docks, and harbors to avoid confusion, since marinas are typically for recreational/pleasure boats. EPA agrees and has updated the guidance to replace "marina" with "waterfront facility." Throughout the document, EPA has also endeavored to clarify when "facility" refers to a waterfront facility or pumpout facility.

One commenter explained that the phrase "inadequately treated sewage" used in Section 1.2 suggests that sewage treated by a marine sanitation device is not harmful and recommended modifying the language to read that sewage has been treated by a marine sanitation device to meet federal standards of performance. EPA notes that the phrase "inadequately treated sewage" is taken directly from the Clean Water Act statute; however, EPA has modified the language.

Commenters also suggested that EPA reinforce that the NDZ program is designed for specific waters that require greater protection than afforded by the federal discharge standard, which already prevents the discharge of raw and inadequately treated sewage. EPA agrees with this proposed addition and has added language in Section 1.2.2. The same commenter voiced a similar concern that EPA's explanation of when to pursue each designation type may push states to pursue an (f)(4)(A) designation to avoid facility requirements for (f)(3) designations. The commenter suggested that EPA make it clear that (f)(4)(A) applications where adequate pumpout facilities are not available should be based on an urgent need for greater environmental protection of the subject waters. EPA agrees that the (f)(4)(A) designation is not intended as a means to avoid the (f)(3) facility requirements and has updated the explanation of when to pursue each designation type.

One commenter noted that the draft guidance only suggests that required information "should" be verifiable. The required regulatory components of a state's application are identified in 40 CFR Part 140, which does not specify that information be verifiable. However, EPA agrees that verifiable information is helpful to assist EPA in arriving at more informed determinations.

Regarding the Agency's approach to assessing cost, one commenter suggested EPA rephrase a sentence in Section 2.2.2 to read that "[t]he cost analysis focuses on non-oceangoing commercial vessels that generate sewage because commercial vessels operating *entirely* in localized areas would be the vessels most like to require use of a pumpout facility…" (emphasis added to denote proposed insertion of "entirely"). The commenter explained that this will better account for transient commercial non-oceangoing vessels that can either travel outside of the no-discharge zone to use pumpout facilities or temporarily suspend use of the head until outside the no-discharge zone boundaries. EPA did not add the word "entirely" to articulate that the cost analysis would focus only on vessels that operate entirely in a localized area. EPA's role under (f)(3) is to determine whether adequate facilities are reasonably available for *all* vessels operating in the proposed waters. This includes both resident and transient vessels. However, in reviewing each application, EPA endeavors to determine the actual impact of a designation on both the resident and transient vessels. This means that EPA's cost analysis may include oceangoing vessels and/or exclude transient vessels, where appropriate given the unique circumstances of the waterbody and operational profile of the vessels. EPA has updated Section 2.2.2 to clarify this flexibility.

Comment #9 (Definitions and clarifications):

Two commenters requested that EPA define "small entity vessels," which appears in Section 2.1.7. EPA agrees that a definition would be useful and has updated Section 2.1.7.

Another commenter requested that EPA provide a definition in Section 2.2.2 of "minimal cost implications," including a description of metrics used, so as to explain when EPA may decide not to use the Tool. EPA has not identified a particular threshold for when the Agency may decide not to use the Tool. However, the Agency explains the decision-making process in the tentative determination for each application to allow for the public to comment.

Clarification was requested regarding the length cutoffs identified in the Recreational Vessel Worksheet. The "Figure 2: Recreational Worksheet" not accounting for vessels 25 to 26 feet and 39 to 40 feet in length was an error and the Agency has made the correction.

One commenter stated that it was unclear why the specific location of a pumpout facility within a marina is needed, when draft limitations are already required. The tentative and final determinations issued by EPA in the *Federal Register* provide useful information to commenters and the public on facility availability. Providing the specific location of the facility allows EPA to validate that these facilities are indeed available to vessel operators, and further informs the public of facility locations if the no-discharge zone is established. The same commenter identified an inconsistency in the way EPA communicates about physical access limitations, such as draft, across Sections 2.1.3 and 2.1.5. As explained in Section 2.1.5, information on draft limitations is required in a state's application, per EPA's regulations. Information on berth and height limitations are optional since these factors are required information based on EPA's regulations. Section 2.1.3 notes that the use of a table is optional but useful for conveying information (including draft limitations).

Another commenter requested that EPA clarify in Section 2.2.2 that facility use costs are a per-visit cost input based on highest cost and that lost revenue for pumpout time and travel costs are calculated based on averages. Facility use costs are the estimated fees paid to use a pumpout facility. To generate an estimate, the Tool identifies the fee structures of each facility and uses an average of those facility fees. However, the Tool also identifies which of the available facilities have capacity to service each vessel class and only averages the fees from those facilities with the necessary capacity. For example, if the average fishing vessel is expected to pumpout 750 gallons of sewage per pumpout, only available facilities with capacities over 750 gallons will be used in determining the average facility use cost for fishing vessels. Pumpout time costs are the lost revenue to vessel operators resulting from the time required to use the pumpout facilities. This value is a combination of the actual time to pumpout (based on the volume being pumped and the working flow of the facility), as well as a "buffer time" that accounts for additional time not actively pumping. Travel costs are the lost revenue and fuel cost to vessel operators resulting from the time and distance to travel to a pumpout facility, should accessing a facility require substantial deviation from typical operations. As the commenter states, pumpout time costs and travel costs are based on expected averages for each vessel class.

A commenter explained that it is unclear if and how the Tool's screening analysis includes all commercial vessels regardless of whether they currently have a holding tank and requested additional clarifying language. The Tool does consider all vessels within each class, regardless of whether they have an existing holding tank. If EPA issues an affirmative determination, the resulting no-discharge zone would result in continued demand for pump outs by vessels with existing holding tanks, as well as vessels that will need to install holding tanks. As such, the Tool's screening analysis assumes that all vessels will require pump out services. The cost analysis, on the other hand, differentiates between vessels with and without holding tanks in the baseline (i.e., pre-designation). This is because vessels with holding tanks installed pre-

designation already incur the costs associated with using facilities as part of their baseline. Therefore, the Tool's output has separate expenditure test rows for vessels with and without holding tanks, since increases in baseline operating costs will differ.

Similarly, a commenter noted that default values are provided for "pumpout interval" even for vessel classes where the default value for "percent of vessels with holding tank installed" is zero percent and requested clarification regarding these seemingly contradictory parameters. The commenter further notes that if a vessel does not have a holding tank, it cannot pump out. As noted in the preceding paragraph, the Tool's screening analysis is modeling expected outcomes if a no-discharge zone is approved, which would mean that all vessels are equipped with holding tanks and need to be pumped out, thereby placing demand on available facilities. The pumpout interval is the average number of days a vessel in each class would operate between pumping out the holding tank. The percent of vessels with holding tanks installed is based on pre-designation values and is used to generate the different cost outputs described in the previous paragraph, rather than contributing to the screening analysis.

Comment #10 (General comments on guidance updates):

A few commenters voiced support for EPA's updates to the guidance, noting that EPA has listened to many previous recommendations. Commenters also appreciated the inclusion of a cost evaluation and the increase in transparency for stakeholders.

Another commenter stated that EPA failed to delineate issues between commercial and recreational vessels, noting that the impacts of a no-discharge zone are greater on commercial vessels; however, the commenter did not elaborate. For each section dedicated to one of the no-discharge zone designation types, EPA differentiated between recreational and commercial vessels. In Section 2.0 for (f)(3) applications, EPA further described how EPA's evaluation of an application would differ for recreational and commercial vessels.

The same commenter further stated that the draft guidance is internally inconsistent as to what is or is not required. The commenter elaborates that the guidance begins with a disclaimer that guidance does not having the force and effect of law, nor is it meant to bind the public or states; however, the guidance also says that an (f)(3) application must include certain specific information, thereby binding states to submit that information. EPA disagrees that there is an inconsistency because EPA's guidance does not have the force and effect of law. In this circumstance, the Clean Water Act and EPA's corresponding regulations at 40 CFR 140.4 have the force and effect of law. EPA through its guidance can only interpret the regulations to explain EPA's view on the meaning of the regulations, and EPA can help states understand the information that will assist the Agency in making determinations on states' applications. EPA issues guidance documents to inform, educate, clarify and/or enhance understanding of the regulations. Materials that could be broadly considered "guidance" may include interpretative memoranda, policy statements, manuals, bulletins, advisories, and documents like the one at issue here. Nonetheless, EPA can accept an application that is missing required information when the Agency determines that such information is not helpful or necessary to reach an informed determination, or where the Agency may obtain such information independently. The guidance has been updated to include language clarifying this point.

Finally, one commenter urged EPA to directly reference information and include links to make it easier for readers to locate resources. EPA notes that most of the references provided in the draft guidance are the source information for default values and other information used in the

development of the draft Tool. Where possible, EPA added direct links in Appendices C and E to these sources.

Comment #11 (Out of scope comments):

Two comments were out of scope. The first out of scope comment does not discuss vessel sewage regulations, state applications for vessel sewage no-discharge zones, or any subject raised in the draft guidance document or draft cost tool issued for public comment.

The second comment concerns a previous final affirmative determination issued by EPA in May 2021 in response to the state of Maryland's application to designate thirteen waterbodies in Anne Arundel County as a vessel sewage no-discharge zone pursuant to Clean Water Act section 312(f)(3). The commenter does not provide any specific comments on the draft guidance or draft cost tool for which EPA solicited comments. EPA determined the comment to be out of scope since the commenter is referring to a determination on a vessel sewage no-discharge zone application for which the Agency previously solicited public comment via the *Federal Register* (85 FR 59788).