

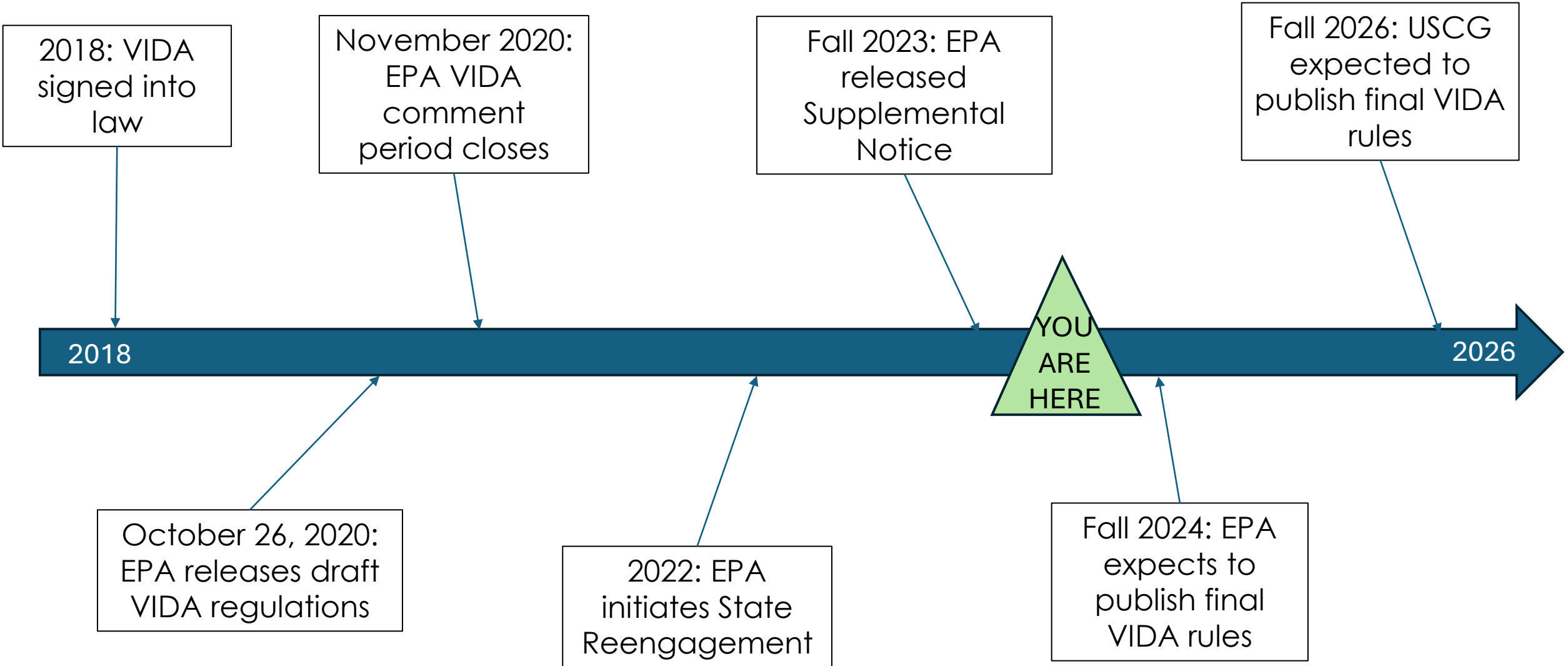
State and Federal VIDA Consultation



Pacific Ballast Water Group
Portland, OR
April 24, 2024

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VIDA timeline



Congressional Intent for States' Roles

- 33 U.S. Code § 1322
- **(p) UNIFORM NATIONAL STANDARDS FOR DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS**
 - **(5) IMPLEMENTATION, COMPLIANCE, AND ENFORCEMENT REQUIREMENTS**
 - **(A) Establishment**
 - **(i) In general:** As soon as practicable, but not later than 2 years, after the date on which the Administrator promulgates any new or revised standard of performance under paragraph (4) with respect to a discharge, the Secretary, **in consultation with States**, shall promulgate the regulations required under this paragraph with respect to that discharge.
 - **(iii) Coordination with States:** The Secretary, **in coordination with the Governors of the States**, shall develop, publish, and periodically update inspection, monitoring, data management, and enforcement procedures for the enforcement by States of Federal standards and requirements under this subsection.

States' Frustrations with EPA Process

- State “Engagement” \neq Consultation and Cooperation
- One-way conversations via webinars
- Initial process was rushed
- Re-engagement process only to reiterate and clarify comments
- States were never collaborators



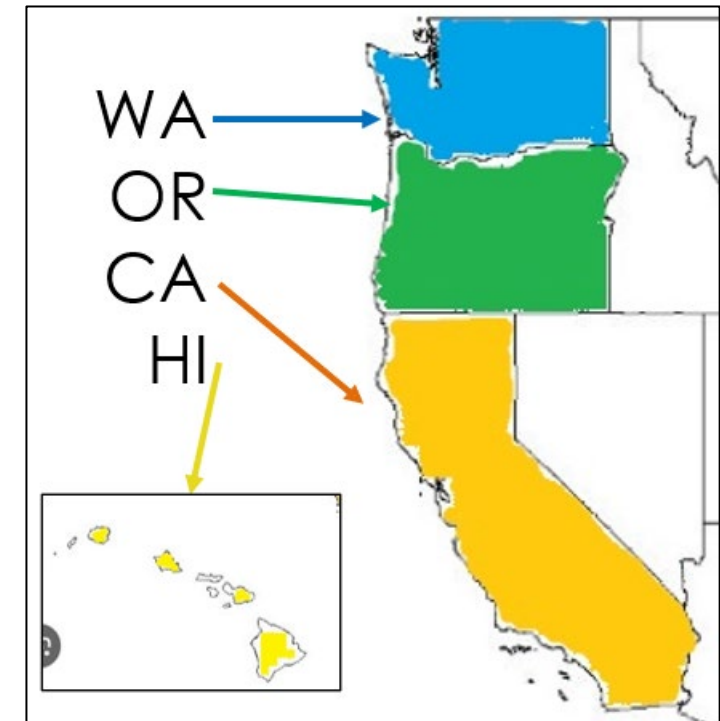
USCG Process Thus Far

- Quarterly meetings with States
 - Focus on:
 - data collection
 - data management
 - current reporting process
 - Missing so far:
 - Regulatory framework under consideration
 - States' roles in enforcement
 - Type approval?
- States should be consulted as collaborators



States' Expectations for USCG Proceedings

- Pacific States' Letter to USCG – June 14, 2023
 - Signed by:
 - Director of **WA** Department of Fish and Wildlife
 - Director of **WA** Department of Ecology
 - Executive Officer of **CA** State Lands Commission
 - Executive Director of **CA** State Water Resources Control Board
 - Director of **OR** Department of Environmental Quality
 - Chair of **HI** Department of Land and Natural Resources
- USCG response to Pacific States – July 26, 2023



States' Expectations for USCG Proceedings

- Pacific States' Request:
 - USCG provide a copy of their current draft VIDA rulemaking framework...
- USCG response:
 - ...we must adhere to the requirements governing the Federal rulemaking process, including the Administrative Procedures Act and applicable policies for ex parte communication...

States' Expectations for USCG Proceedings

- Pacific States' Request:
 - Discussions focus on actual draft rule language development...
- USCG response:
 - ...regulatory text may not be discussed with the public outside of the NPRM stage of the federal rulemaking process... due to limitations in the Administrative Procedure Act and ex parte communication policy...

Is USCG Prohibited From Consulting With States?

- Email from C. Scianni to USCG on February 13, 2024
1. We believe interagency consultation/collaboration is not actually an *ex parte communication*, by definition.

Per USCG Rulemaking Manual and APA:

“ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

**Public notice was given in VIDA statute

Is USCG Prohibited From Consulting With States?

2. Even if we accept that information sharing is an ex parte communication, the APA does not prohibit it for informal rulemaking.

It is well established in caselaw that the APA does not prohibit ex parte communications during informal rulemaking. Caselaw holds that Congress has made it clear where ex parte communications are and are not prohibited. In this case, Congress clearly directed it.

Is USCG Prohibited From Consulting With States?

3. USCG's own Rulemaking Manual provides exceptions to the self-imposed restriction on ex parte communications.
 - A. Allowed if communications are logged and disclosed in summary
 - B. Commandant has authority to determine whether ex parte communications are allowed on a case-by-case basis.

Summary of Ex Parte Communication Findings

1. Collaboration with States is not an ex parte communication
2. Even if we consider it an ex parte communication, the APA does not prohibit it for this type of rulemaking
3. USCG Rulemaking Manual provides several exceptions to self-imposed restriction.

Discussion of Next Steps