

What to Expect in Environmental Enforcement in the Obama Administration:

The New Clean Water Act Vessel General Permit Program

Barry M. Hartman
K&L Gates LLP

www.klgates.com

Connecticut Maritime Association
Legal: Current Issues and Developments
March 25, 2009

Vessel General Permit – Basics

- Federal Clean Water Act requires a permit for discharge of any pollutant into waters of the US from a point source unless exempted
- Pollutant – dirt, hot water, toxics, sediment, and even different water-this is NOT ONLY ABOUT OIL
- Point source – a pipe or a vessel including run off from a deck

Vessel General Permit – Basics *(cont.)*

- Since 1972 incidental discharges from vessels have been exempt by regulation
- 2006: an environmental group obtained federal court ruling that EPA lacks power to issue this exemption

Vessel General Permit – Basics *(cont.)*

- 2008 EPA proposed a nationwide permit governing incidental discharges from vessels
- Exemption expired on February 6, 2009
- *Vessels may not discharge any pollutant into waters of the United States except as provided for in the VGP or individual permit*

Vessel General Permit – Basics *(cont.)*

- Six Parts to Permit
 - General Conditions
 - Effluent Limits
 - Corrective Action Requirements
 - Monitoring, Inspection, Recordkeeping, Reporting
 - Vessel-Specific Requirements
 - State and Other Supplemental Requirements

Vessel General Permit – Basics *(cont.)* **What is Required?**

- Sets requirements for the management of 26 kinds of discharges
- Modifies and adds to requirements based on kind of vessels
- Imposes some notification requirements on some vessels
- Contains inspection and self reporting obligations

The Final Vessel General Permit Where must you comply?

- “waters of the United States”—up to 3 miles seaward from low tide mark.
- Applies no matter the flag of the vessel, and no matter how many times or for what length of time, the vessel is in waters of the United States.
- Likely applies to **vessels in port** and idle for seasonal periods.

The Final Vessel General Permit Why It Matters

- Not just about ballast water
- Consent to inspect and search
- EPA enforcement NOT COAST GUARD
- Public access to compliance records
- Serious civil and criminal penalties
- Citizens may sue for violations

Vessel General Permit 26 Discharges

- | | |
|---|---|
| <ol style="list-style-type: none">1. Deck washdown and runoff and above water line hull cleaning2. Bilge water3. Ballast water4. Anti-fouling leachate from anti-fouling hull coatings5. Aqueous film forming foam (AFFF)6. Boiler/economizer blowdown7. Cathodic protection8. Chain locker effluent | <ol style="list-style-type: none">9. Controllable pitch propeller hydraulic fluid and thruster hydraulic fluid/ other oil sea interfaces including discharges from paddle wheel propulsion, stern tubes, thruster bearings, stabilizers, rudder bearings, azimuth thrusters, and propulsion pod lubrication10. Distillation and reverse osmosis brine11. Elevator pit effluent12. Firemain systems13. Freshwater layup |
|---|---|

Vessel General Permit 26 Discharges *(cont.)*

14. Gas turbine wash water	20. Seawater piping biofouling prevention
15. Graywater	21. Small boat engine wet exhaust
16. Motor gasoline and compensating discharge	22. Sonar dome discharge
17. Non-oily machinery wastewater	23. Underwater ship husbandry
18. Refrigeration and air condensate discharge	24. Welldeck discharges
19. Seawater cooling overboard discharge	25. Graywater mixed with sewage from vessels
	26. Exhaust gas scrubber wash water discharge

Examples of Pollutants Covered

- Aquatic nuisance species
- Nutrients
- Pathogens (e.coli/fecal coliform)
- Oil and grease
- Metals
- Biochemical Oxygen Demand
- pH
- Total suspended solids
- Other toxics
- Non toxics with toxic effects

Vessel General Permit What Is Not Covered?

- Discharges not subject to the former NPDES permit exclusion
- Sewage
- Used or spent oil
- Rubbish, trash, garbage
- Photo processing waste
- Effluent from dry cleaning operations
- Medical waste
- Noxious liquids
- Tetrachloroethylene (perchloroethylene) degreasers
- Discharges currently or previously covered by another permit

Vessel General Permit What Is Not Covered?

Discharges NOT covered by this permit are prohibited unless another permit allows them

Vessel General Permit What Is Not Covered? *(cont.)*

- Discharges that are NOT “incidental to the normal operation of a vessel”
- Discharges regulated under individual permits (MSDs)
- Discharges from a lack of “good marine practice”
- Discharges from equipment not properly maintained
- Discharges caused by casualties, improper maintenance, or negligence

Vessel General Permit Requirements A Closer Look

- Notice of intent to comply
- Inspection and identification of discharge streams
- Best Management Practices to manage 26 streams
- Reports of noncompliance
- Corrective action

Vessel General Permit Notice Of Intent

- Must submit an NOI if:
 - Vessel is greater than or equal to 300 gross tons
 - Vessel can hold or discharge 8 cubic meters of ballast water
- Publicly available information
- Agency can use this information to impose additional vessel specific requirements.

The Final Vessel General Permit Who Must File NOI?

- Owners / Operators of vessels delivered **on or before September 19, 2009**
 - Must file no later than September 19, 2009
 - Authorization granted until that date; if an NOI is filed prior to September 19, 2009, uninterrupted coverage continues

The Final Vessel General Permit Who Must File NOI? *(cont.)*

- Owners / Operators of new vessels delivered **after September 19, 2009**
 - Must file 30 days prior to any discharge
 - Authorization granted 30 days after complete NOI received by EPA

The Final Vessel General Permit Who Must File NOI? *(cont.)*

- New Owners / Operators of vessels for which discharge was **previously authorized**
 - Must file by date of transfer of ownership / operation
 - Authorization granted on date of transfer or date EPA receives NOI, whichever is later
 - Might apply to every transfer of control of unmanned barge to new operator

The Final Vessel General Permit Who Must File NOI? *(cont.)*

- Owners / Operators of existing vessels delivered after September 19, 2009, for which discharge was **not previously authorized** under the VGP
 - Must file 30 days prior to any discharge
 - Authorization granted 30 days after complete NOI received by EPA

How Do I Comply?

- No fixed formula for compliance
- EPA has set standards for how each of the 26 incidental discharge streams must be managed:
 - Some require removal of the pollutant prior to discharge
 - Some require prevention of the discharge itself

How Do I Comply? *(cont.)*

- Two types of limits
 - Technology limits (what is possible to reduce pollutants in a discharge)
 - Water quality limits (what is needed to avoid degrading receiving waters)

How Do I Comply? *(cont.)*

- Good News:
 - With a few exceptions, the VGP does not have quantitative effluent standards that require monitoring and testing of streams and laboratory analysis

How Do I Comply? *(cont.)*

- Bad News
 - There is no one size fits all answer to how to make sure your discharge streams do not violate the VGP
 - Key:
 - Planning
 - Training
 - Management

How Do I Comply? *(cont.)*

- Planning
- Training
- Management
- Documentation

Best Management Practices (“BMPs”)

- best practicable control technology ***currently available***”

- best available technology ***economically achievable***”

Best Management Practices (“BMPs”) *(cont.)*

- Non-mandatory language may still be mandatory



Best Management Practices (“BMPs”)

- “Consistent with all other relevant laws”
- “Consistent with good marine practices that prevents excessive discharge....”
- “Minimize by practicing proper maintenance”
- Exchange ballast water “as early as practicable”

Best Management Practices (“BMPs”)

- “Owner/operators must use these non-fluorinated substitutes for training **when practicable and achievable.**”
- “Most effective BMP is to conduct maintenance and training activities **as far from shore as possible.**”
- “Not all biodegradable soaps are appropriate.”

Best Management Practices (“BMPs”)

- “Using visual observations ...”
- “Vessels that generate wet exhaust must be maintained in **good operating condition**”
- BMP encourages all waste to be collected and disposed of **properly**
- Require that the seals or fittings be maintained in good working order to prevent leakage

How Do I Develop BMPs?

- Develop a BMP working group
- Identify and assess discharge streams
- Institute a BMP policy statement for each BMP
- Ensure good housekeeping
- Preventive maintenance is key
- Incorporate an inspection and training program
- Ensure it is implemented and followed
- Keep detailed records
- Regular reevaluation of BMP based on data

How Do I Develop BMPs?

- EPA and international resources:
 - PPIC
 - ICPIC
- Industry associations
 - AWO
http://www.klgates.com/FCWSite/ballast_water/Guidance/AWO_BMP_Manual.pdf
 - Marshal Islands
http://www.klgates.com/FCWSite/ballast_water/Guidance/MarshaII_IsI_VGP_Guidance.pdf

BMPs and Recordkeeping

- The EPA will expect the permit holder to prove it was using Best Management Practices
- Often this means keeping records to document compliance
- Regulations require that records be maintained and presented if requested
- EPA has five years to bring enforcement actions
- False statements on record books is punishable by up to five years in prison

How Do I Comply?

- In addition to BMPs, the permit also requires that discharges must be controlled as necessary to meet applicable water quality standards
- Even if your vessel complies with BMPs, more stringent limitation might be necessary

How Do I Comply? *(cont.)*

- Read the following documents:
 - Final Permit
 - Fact Sheet
 - Technical Report (“Battelle Report”)

- All available on K&L Gates website:
http://www.klgates.com/practices/vessel_discharge_resources/

Special Requirements in Certain States

- The VGP contains special conditions for 28 states
- Applies to discharges in those states' waters

Special Requirements in Certain States— Examples

- Florida: stricter effluent limits on oil, fuel, and oily mixture discharge
- Guam: avoidance of discharge in coral spawning areas during spawning

Inspection and Reporting Obligations (§ 4)

- Inspection
 - Routine visual inspections – requires sampling
 - Analytical monitoring
 - Comprehensive annual vessel inspections
 - Dry-dock inspections
- Reporting
 - Records of violation
- Recordkeeping
 - Annual non-compliance report

Certifications Required for Submissions to EPA

“I have no personal knowledge that the information submitted is other than true, accurate, and complete.”

Training

- Paperwork necessary but not necessarily sufficient
- Be careful of training modules, software and pitches

Corrective Action Obligations (§ 3)

- **VGP requires “corrective action”**
- **Triggers for corrective action - noncompliance**
- **Corrective action assessment**
- **Deadlines for corrective action**
- **Effect of corrective action**

Enforcement

- Civil Enforcement
 - *Civil penalties* of up to \$37,500 per day of violation
 - *Injunctive relief* could:
 - prohibit vessel from operating until violation corrected
 - require that action be taken to correct harm from violation
 - require that other compensatory action be taken to address environmental impacts related to the violations.

Expectation for Enforcement

- 24,000 vessels expected to be subject permit
- If 1% have some violative condition =240
- If 10% ?= 2400

Civil Judicial Enforcement Actions

- Liability (Did you do it?)
- Penalty (How much will the fine be?)
- Injunctive Relief (How much will it really cost?)

REMEMBER:

You CANNOT challenge the validity
of a permit provision in an
enforcement action!

Criteria for Assessment of Civil Penalties

- Seriousness of violations;
- Economic benefit of noncompliance;
- History of violations;
- Good faith efforts to comply;
- Economic impact on violator;
- Other factors as justice may require

Economic Benefit of Noncompliance Resources

- EPA Enforcement Economic Models:
<http://www.epa.gov/compliance/civil/econmodels/index.html>
 - BEN Model: calculates violator's economic savings in delaying or avoiding pollution control measures

Governmental Civil Enforcement Penalties: Examples

- *United States v. Pearl Shipping Co.* – \$1.4M in civil penalties to settle claims arising from M/T Command oil spill
- *United States v. Icicle Seafoods, Inc.* – \$900,000 in civil penalties to settle claims arising from illegal discharge of pollutants

Clean Water Act: Penalty Policy

- Penalty =
 - Economic Benefit from noncompliance
 - + Gravity of violation
 - +/- Gravity Adjustment Factors
 - Litigation Considerations
 - **Ability to Pay**
 - Supplemental Environmental Projects

Penalty Policy

- Gravity= \$1000 x (a + b + c + d)
 - A—Significance: the degree of exceedance of effluent limits (scale of 0 to 20)
 - B—Environmental and Health: real or potential harm to humans or environment (scale of 0 to 50)
 - C—Number of violations: how many limits in the permit were violated (scale of 0 to 5, based on percentage)
 - D—Significance of non-limit violations

Criminal Penalties

- ***Criminal penalties* for certain types of violations or for making false statements on documents required to be kept by the permit or CWA**
 - **Fines**
 - **Jail Time**

Why Worry About Environmental Enforcement?

- Profits
- Publicity
- Prison/Penalties

Profits

\$\$\$\$\$\$\$\$\$\$\$\$



Connecticut Maritime Association
Legal: Current Issues and Developments
March 25, 2009

Profits

Criminal Sentencing: Disgorgement of Profits

**Civil Enforcement: Economic Benefit of
Noncompliance**

Profits

AES Discloses Oklahoma Plant Filed False Pollution Reports; Stock Plunges

Publicity



Connecticut Maritime Association
Legal: Current Issues and Developments
March 25, 2009

Publicity

- **04/15/04** *Company faces \$10M fine for Buzzards Bay Oil Spill*
- **12/20/06** *Dumping by tanker nets record fine*
- **07/24/08** *Felony charges for ship's management*

Prison



Connecticut Maritime Association
Legal: Current Issues and Developments
March 25, 2009

Criminal Liability May be Based on Negligence

- lack of ordinary care

- Likely to focus on failure of management / training

JOHN JOSEPH COTA, and
FLEET MANAGEMENT LIMITED,

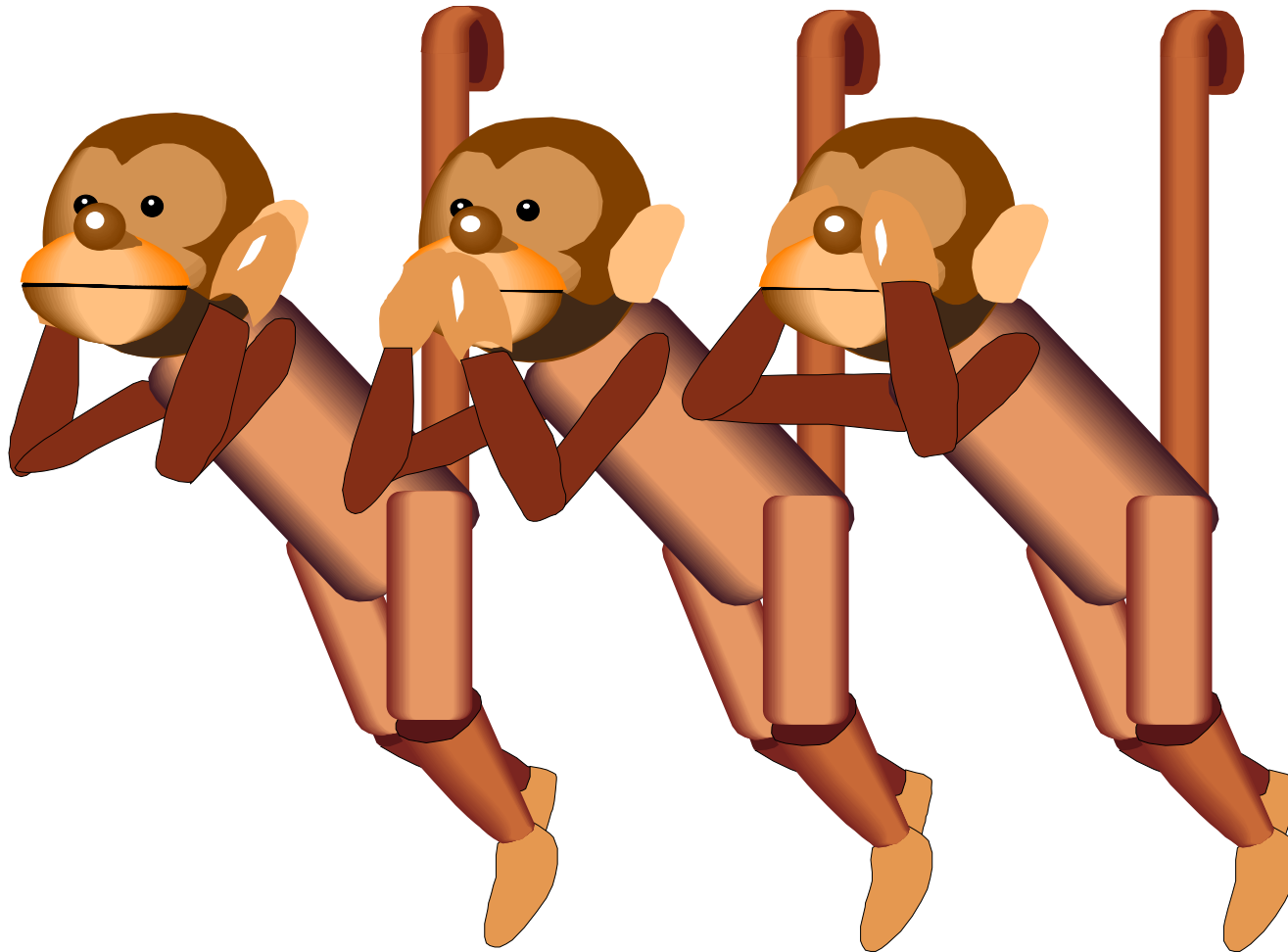
0 did negligently discharge and cause the discharge of oil in such quantities as may be
1 harmful from a vessel, the *M/V Cosco Busan*, into and upon the navigable waters of the
2 United States. Specifically, on or about November 7, 2007, defendants John Joseph Cota
3 (Cota) and Fleet Management Limited (Fleet), acting by and through its agents and
4 employees, negligently caused more than 50,000 gallons of heavy fuel oil to be
5 discharged from the vessel into San Francisco Bay by acting in a negligent manner, that
6 included, one or more of the following:

B. Fleet and Cota failed to navigate an allision free course;

“Knowing” Violation Required for Felony Under CWA

Conscious Disregard = Knowledge

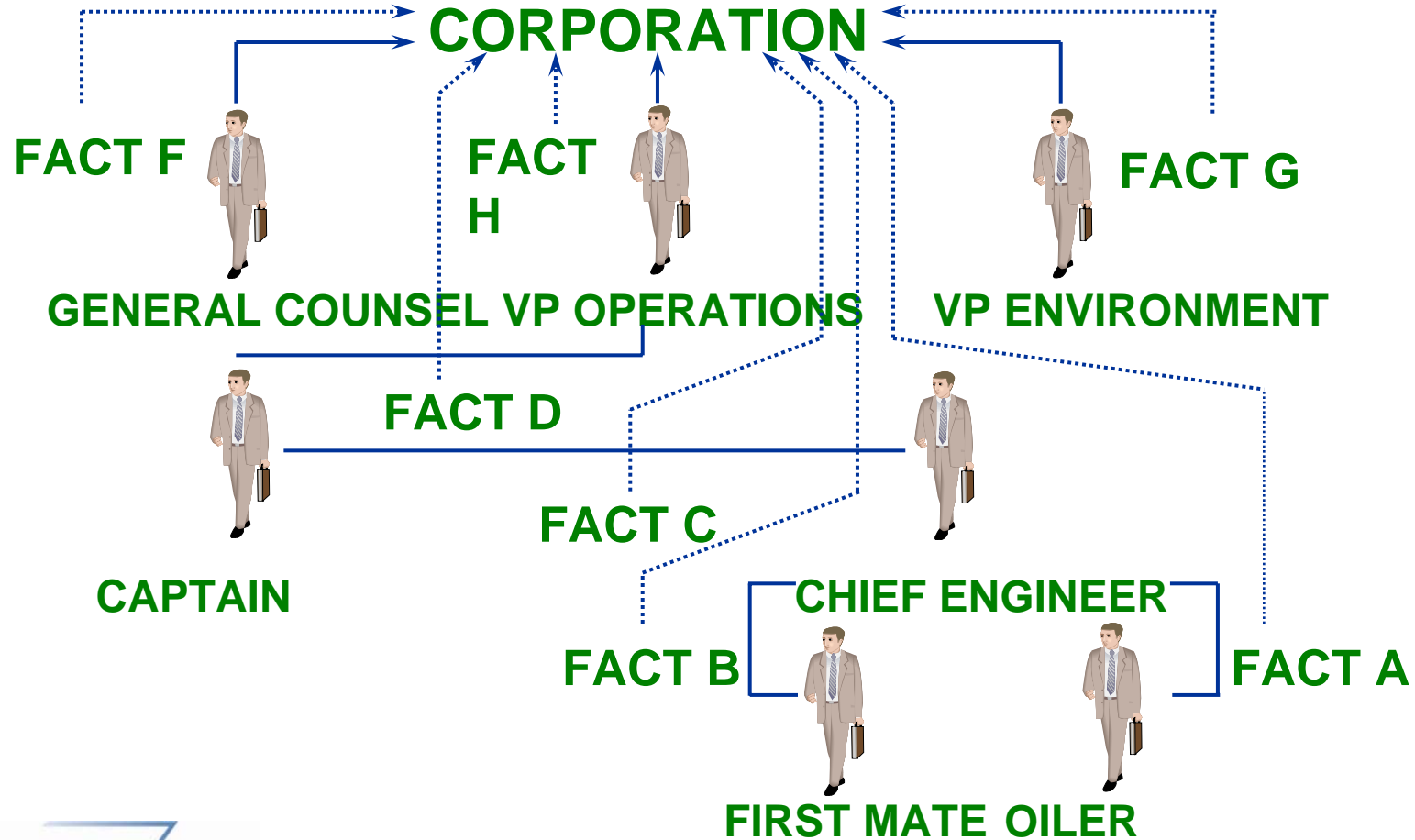
- “deliberately closed his eyes to what would otherwise have been obvious to him”
- “failing to investigate if he is in possession of facts which cry out for investigation”
- Specific intent not required



Individual Criminal Liability Vicarious Liability of Ship Owner/Captain/Supervisors for Conduct of Crew

- Responsible Corporate Officer Doctrine
 - Corporate officers may be liable for the acts of their employees where they “stand[] in responsible relation to a public danger”
- *United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997)
 - officers may be liable for sending unseaworthy vessel to sea based on vicarious liability

Corporate Vicarious Liability



Other Relevant Statutes

- False Statements – 18 U.S.C. § 1001
- Conspiracy – 18 U.S.C. § 371
- Obstruction of Justice – 18 U.S.C. §§ 1505-1510
- Aiding and Abetting – 18 U.S.C. § 2
- Accessory After the Fact – 18 U.S.C. § 3

Citizen Lawsuits *(cont.)*

- Section 505 of CWA
- Gives private citizens and groups the power to enforce the law when government chooses not to do so using all of the same powers given the government except criminal enforcement.

Citizen Suit Enforcement

- Recovery of attorneys' fees and costs if the plaintiff "prevails"
- **Need not have harm to violate the CWA**

Citizen Suit Enforcement

“environmental law is written in such a way that a cartel of environmental advocacy groups is formed and maintained through citizen suits.”

Benson, “Unnatural Bounty: Distorting the Incentives of Major Environmental Groups,” PERC Policy Series, Issue Number PS-37, July 2006 at 9.
<http://www.perc.org/perc.php?id=842>

Future Changes To Permit

- New information, not available at the time of permit issuance
- Should such new information show that ballast water treatment technologies, which are at least as effective as ballast water exchange, have become commercially available for installation on ships, EPA may determine this to be new information justifying modification of the permit under 40 CFR 122.62(a)(2).

What's Next?

- Legal Challenges
 - Lake Carriers Assoc. v. EPA
 - Northwest Envir. Advocates v. EPA
 - NRDC v. EPA
- Five year term
- EPA reconsideration

QUESTIONS?

http://www.klgates.com/practices/vessel_discharge_resources/

barry.hartman@klgates.com

202.778.9338

www.klgates.com

Connecticut Maritime Association
Legal: Current Issues and Developments
March 25, 2009