

January 26, 2009

Barry M. Hartman  
D 202.778.9338  
F 202.778.9100  
barry.hartman@klgates.com

**VIA EMAIL ONLY**

Mr. Martin McDermott  
Senior Trial Counsel  
Environmental Defense Section  
U.S. Department of Justice  
Environmental and Natural Resources Division  
950 Pennsylvania Avenue, N.W.  
Room 2141  
Washington, D.C. 20530

**Re: Lake Carriers' Association v. Johnson, D.C. Circuit Nos. 09-1001, 09-1010 Petitions for Review - National Pollutant Discharge Elimination System ("NPDES") Vessel General Permit (VGP) issued December 18, 2008, 73 Fed. Reg. 79473 (December 29, 2008)**

Dear Martin:

As we discussed, our firm represents the Lake Carriers' Association (LCA) in connection with the above referenced petition of review filed in the U.S. Court of Appeals for the D.C. Circuit. As I discussed with you last week, the purpose of this letter is to confirm the Department's intention regarding the filing of the record in the D.C. Circuit in accordance with its obligations set forth in 28 U.S.C. §2112(a)(1), and that the Department will seek to have all other petitions pending in other circuits transferred to the D.C. Circuit.

LCA filed its initial petition (D.C. Cir. No 09-1001) on January 5, 2009. It has also come to our attention that at least two other petitions for review of the VGP have been filed, one in the U.S. Court of the Appeals for the Ninth Circuit on January 12, 2009, and the other in the U.S. Court of Appeals for the Second Circuit on January 16, 2009. *See Northwest Environmental Advocates, et al. v. EPA* (9<sup>th</sup> Cir. No. 09-70115); *Natural Resources Defense Council, Inc. v. EPA* (2<sup>nd</sup> Cir. No. 09-0244).

Mr. Martin McDermott  
January 26, 2009  
Page 2

As you know, 28 U.S.C. §2112(a)(1) provides:

If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order.

For purposes 28 U.S.C. §2112, the VGP for which review is sought was issued on December 18, 2008. Pursuant Fed. R. App. P. 26, the ten-day period subsequent to that issuance date ended on January 5, 2009. To our knowledge, LCA's January 5, 2009 petition for review of the VGP filed in the D.C. Circuit and served on you on that date, was the only such petition filed on or before January 5, 2009. Accordingly, the Department is obligated to file the record for this appeal in the D.C. Circuit, notwithstanding the filing of other petitions in other circuit courts, and those other petitions (and any future ones filed within 120 days of issuance of the VGP), should be transferred to the D.C. Circuit.

Section 509 of the Clean Water Act ("CWA") provides that judicial review of the VGP may be had by filing a petition for review within 120 days of "issuance" of the permit. 33 U.S.C. §1369. The VGP itself and EPA's website notice specifically and unequivocally provided that the permit was "issued" by EPA on December 18, 2008 and, moreover, became "effective" on December 19, 2008. *See* [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=350](http://cfpub.epa.gov/npdes/home.cfm?program_id=350). The agency confirmed this in its Federal Register notice of December 29, 2008. *See* 73 Fed. Reg. 79473 (Dec. 29, 2008).

After specifically announcing that the VGP was issued on December 18 and effective on December 19, EPA indicated in its December 29, 2008 Federal Register notice that, pursuant to 40 C.F.R. §23.2, the VGP would be issued for purposes of Section 509 of the Clean Water Act at "1:00 p.m. eastern time (standard or daylight, as appropriate) on ... the date that is two weeks after the date when the document is published in the Federal Register ...." 73 Fed. Reg. 79473. It is untenable for EPA to take the position that it may have a permit that is "issued" and "effective" for the regulated community, yet not "issued" for purposes of judicial review until sometime thereafter. That is, EPA may not, under 40 C.F.R. §23.2 or the CWA in these circumstances, lawfully impose a permit obligation on the regulated community and at the same time, prevent the regulated community or other interested parties from obtaining judicial review of that permit obligation. Additionally, 40 C.F.R. §23.2 provides that its timing provisions do not apply where the Administrator otherwise explicitly provides an issuance date. Here, the Administrator otherwise explicitly provided that it the VGP was issued on December 18, 2008 and effective on December 19, 2009.

Mr. Martin McDermott  
January 26, 2009  
Page 3

No court has ever upheld the application of 40 C.F.R. §23.2 to defer judicial review until after the action being reviewed is already issued and effective. In fact, at least one court has expressly rejected such a notion. In *Virginia Electric Power Company v. EPA*, 610 F.2d 187 (4<sup>th</sup> Cir. 1979), the agency had promulgated regulations under the CWA, which were subject to judicial review under section 509 of the Act, just as the VGP permit is here. The regulations at issue in *Virginia Power* were deemed by EPA to be issued for purposes of judicial review after they were published in the Federal Register (thus deferring judicial review), but well *before* they became effective. See *Virginia Power*, 610 F.2d at 188; 44 Fed. Reg. 32854 (June 7, 1979). The Fourth Circuit held that EPA's use of the deferral mechanism in *Virginia Electric* was appropriate, because "the exposure to judicial review commenced prior to the stated time at which the regulations were to become effective for substantive purposes." *Id.* Moreover, the Fourth Circuit specifically said that its approval of EPA's use of a deferral mechanism to clarify the start date for a judicial review period "does not imply that an agency may postpone for any period of time past the time of *substantive effectiveness* of regulations their exposure to judicial review." *Virginia Electric*, 610 F.2d at 189 (emphasis added). The deferral mechanism at issue in *Virginia Electric* ultimately was the basis for the current regulation relied on by EPA here. See 50 Fed. Reg. 7268 (Feb. 21, 1985).

Here, given the statements made by the EPA on December 18, 2008, and again in the Federal Register on December 29, 2008, the 120-day judicial review period necessarily started to run on December 18, 2008 – the date the VGP was, in fact, "issued." Applying the timing provisions of Fed. R. App. P. 26, the 10-day period in 28 U.S.C. §2112 expired on January 5, 2009. Because LCA filed its petition for review in the D.C. Circuit on January 5, 2009, and no others were filed on or before that date, the Department has the obligation to "file the record in [the D.C. Circuit] ... notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1).<sup>1</sup> Under these circumstances, it would be inappropriate for the Department to invoke 28 U.S.C. §2112(a)(3), and notify the Judicial Panel on Multidistrict Litigation that two or more petitions have been filed in different circuits within the initial ten-day period, because that is not the case. Please notify us immediately if the Department disagrees and intends to attempt to invoke 28 U.S.C. § 2112(a)(3), so that we have an opportunity to advise the court of our position. We further request that any notification by the agency be accompanied by this letter notifying the panel of our position.

---

<sup>1</sup> LCA filed a second, protective petition for review (D.C. Cir. No.09-1010), on January 12, 2009, in the event it is determined that EPA's regulation at 40 C.F.R. §23.2 is applicable.

# K&L|GATES

Mr. Martin McDermott  
January 26, 2009  
Page 4

Please contact me if you should have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Barry M. Hartman". The signature is written in black ink and includes a long, horizontal flourish at the end.

Barry M. Hartman  
Christopher Nestor