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www.klgates.com

Authors:**Barry M. Hartman**

barry.hartman@klgates.com

+1.202.778.9338

Mark Ruge

mark.ruge@klgates.com

+1.202.661.6231

Susan B. Geiger

susan.geiger@klgates.com

+1.202.661.3818

Akilah Green

akilah.green@klgates.com

+1.202.661.3752

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The Winds of Change Continue to Blow: Coast Guard Proposes New Ballast Water Discharge Limitations

Comments Due on November 27, 2009

New concentration levels for living organisms in ballast water discharges will soon become a reality for vessel owners and operators discharging ballast water into U.S. internal waters and within 12 nautical miles of shore. Ballast water exchanges will be replaced by the installation of equipment that meets the newly proposed standards for concentration of living organisms in ballast water discharges.

The U.S. Coast Guard is establishing these concentration levels to encourage development of the technology needed to meet the Phase One and Phase Two performance standards included in the proposed rule. Phase One standards, which are proposed to become effective in 2014 or 2016 for existing vessels (depending on the volume of ballast water discharged) and for new vessels constructed in or after 2012, adopt the “living organism” standards included in the International Maritime Organization’s (“IMO”) Ballast Water Management Convention, which has not yet come into force.¹ Phase Two standards, which could come into effect in 2016, could be as much as 1,000 times more stringent than Phase One standards.

The proposed rule and its Draft Programmatic Environmental Impact Statement can be found at Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters, 74 Fed. Reg. 44,632 (Aug. 28, 2009) and Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters: Draft Programmatic Environmental Impact Statement, 74 Fed. Reg. 44,673 (Aug. 28, 2009). Both documents may also be found at http://www.klgates.com/practices/vessel_discharge_resources.

The rules being proposed by the Coast Guard are not the only ballast water requirements that govern vessels. Under the Vessel General Permit (“VGP”) recently issued by the U.S. Environmental Protection Agency (“EPA”) under the federal Clean Water Act, vessel operators must also comply with additional ballast water management requirements. In addition, states retain the right to issue their own ballast water requirements. Several states, including California, Michigan, Minnesota, New York, and Washington, have adopted or have begun the process of adopting their own ballast water rules. A discussion of the VGP can be found at http://www.klgates.com/practices/vessel_discharge_resources.

¹ The IMO standards will enter into force 12 months after ratification by 30 states representing 35% of the world merchant shipping tonnage. Currently, 18 states representing 15.36% of world merchant shipping tonnage have ratified the standards. The United States has not yet ratified these standards.

Unlike the current requirements for mandatory ballast water exchange, these new proposed requirements will apply to all vessels, even those operating in domestic waters. The only exemptions are for those vessels that operate solely within one Captain of the Port area, crude oil tankers operating in the domestic trade, foreign vessels on innocent passage, vessels of the armed forces, and vessels owned by other nations that are in noncommercial service.

The proposed “living organism” concentration standards, which will be enforced through port state and flag state inspections, are likely to be the first of several new numerical standards adopted for discharges from vessels operating in U.S. waters.

Phase One: Consistent with the IMO

Phase One of the proposed regulations will require the installation of equipment needed to bring any ballast water discharged into compliance with specific concentrations of living organisms. These concentrations are significantly less stringent than standards that were debated but not enacted last year in Congress. They are also far less stringent than those adopted and now being imposed by the State of California. Table 1 below summarizes the Coast Guard’s proposed Phase One concentration standards.

Table 1—Phase One Allowable Concentrations of Living Organisms in Ballast Water Discharge, by Size

	Large organisms >50 microns in size	Small organisms >10 and ≤50 microns in size	Organisms <10 microns in size	Bacteria		
				Toxigenic <i>Vibrio cholerae</i> (O1 and O139)	<i>E. Coli</i>	Intestinal enterococci
USCG: Phase 1	<10 per m ³	<10 per ml	n/a	<1 cfu per 100 ml	<250 cfu per 100 ml	<100 cfu per 100 ml
Alternative 2	<10 per m ³	<10 per ml	n/a	<1 cfu per 100 ml	<250 cfu per 100 ml	<100 cfu per 100 ml
Alternative 3	<1.0 per m ³	<1.0 per ml	n/a	<1 cfu per 100 ml	<126 cfu per 100 ml	<33 cfu per 100 ml
Alternative 4	<0.1 per m ³	<0.1 per ml	n/a	<1 cfu per 100 ml	<126 cfu per 100 ml	<33 cfu per 100 ml
Alternative 5	Removal or inactivation of <u>all</u> living membrane-bound organisms (including bacteria and some viruses) larger than 0.1 micron.					

The date for compliance with Phase One technology requirements is based on the volume of ballast water discharges, vessel construction date, and the date of dry dockings of the vessel. Table 2 below summarizes the Coast Guard’s proposed Phase One implementation schedule.

Table 2—Proposed Phase One Implementation Schedule

	Vessel’s ballast water capacity (cubic meters, m ³)	Vessel’s construction date	Vessel’s compliance date
USCG: Phase 1	New vessels: All Existing vessels: Less than 1,500 1,500-5,000 Greater than 5,000	On or after January 1, 2012 Before January 1, 2012 Before January 1, 2012 Before January 1, 2012	On Delivery. First drydocking after January 1, 2016. First drydocking after January 1, 2014. First drydocking after January 1, 2016.

Under this proposal, ballast water discharged from vessels that do not travel outside of 200 nautical miles would be allowed (except for travel in the Great Lakes or the Hudson River) until the vessel is required to have installed approved ballast water management equipment.

Phase Two: Can It Be Met?

Before the Coast Guard implements stringent new Phase Two requirements, the proposed rule requires that it undertake a practicability review in early 2013 to examine whether the technology can be practicably implemented, in whole or in part, by the compliance date and if testing protocols can assure accurate measurement of compliance with the standard. Table 3 below summarizes the Coast Guard’s Phase Two requirements.

Table 3—Phase Two Allowable Concentrations of Living Organisms in Ballast Water Discharge, by Size

	Large organisms >50 microns in size	Small organisms >10 and ≤50 microns in size	Organisms <10 microns in size	Bacteria		
				Toxigenic <i>Vibrio cholerae</i> (O1 and O139)	<i>E. Coli</i>	Intestinal enterococci
USCG: Phase 2	<1 per 100 m ³	<1 per 100 ml	<1,000 living bacterial cells per 100 ml; <10,000 viruses per 100 ml	<1 cfu per 100 ml	<126 cfu per 100 ml	<33 cfu per 100 ml

If a more stringent standard could be implemented sooner than 2016, the Coast Guard will proceed with that standard. If the Coast Guard determines that technology could not practicably be made available in time to achieve the more stringent standard anticipated for 2016, the effective date of Phase Two (or elements of it) will be delayed in response to the findings of the review. Another practicability review will be undertaken as appropriate, but at least every three years, until the standard is fully implemented. Once the new standard is set, it will similarly be reviewed every three years.

If the more stringent 2016 standard is determined to be practicable for the industry, the effective date will be the same for all vessels, rather than staggered based on discharge volumes. Table 4 summarizes the Coast Guard’s proposed Phase Two implementation schedule.

Table 4—Proposed Phase Two Implementation Schedule

	Vessel’s ballast water capacity	Vessel’s construction date	Vessel’s compliance date
USCG: Phase 2	New vessels: All Existing Vessels: All	On or after January 1, 2016 Before January 1, 2016	On Delivery. First drydocking after January 1, 2016, unless the vessel installed a ballast water management system (BWMS) meeting the phase-one standard before January 1, 2016, then 5 years after installation of the BWMS meeting the phase-one standard.

Significant Cost, Especially for Small Businesses

The Coast Guard acknowledges the significant cost impact of the new ballast water equipment requirements on the more than 7,000 vessels to which the proposed requirements will apply. The proposed rule states that the 10-year cost for installation will be over **\$1 billion**, with the largest amounts required between 2012 and 2016, when the bulk of the fleet must install new on-board equipment. The majority of businesses affected (57 percent) are likely to be small businesses, which the Coast Guard has noted will incur considerable costs.

Issues

Ballast water treatment technology has been under development for more than 10 years. The issues raised by the desire to stop the transport of invasive species are difficult to resolve. For example, what are the waste issues that will be created by any particular type of technology used? Will the wastes generated create their own issues for water quality? Will this be another example of technology being required on vessels before its operational reliability is sufficient, as many have said of the original requirement for oil-water separators? Will the operational problems that the industry faced with oil-water separators be taken into account during the practicability review? Will owners and operators be held liable for the operation of the technology in conditions that have not been fully tested? How can a testing protocol be developed that takes into account all of the variations in ship size, design, and trading routes that affect the type and quantity of living organisms in ballast water? What factors should the Coast Guard take into account in determining that a more stringent standard can be implemented by the proposed compliance date? Can that determination vary by type of vessel, by type of service, or by any other factor relevant to the wide variety of services provided by the maritime industry?

The Coast Guard's rulemaking is an important step forward in this debate, but EPA is also working on a ballast water standard. Will the industry find itself subject to conflicting federal requirements? Will the standard adopted by the Coast Guard cause even more states to proceed with their own standards?

Comments Due

Comments on the proposed rule are due on November 27, 2009. The Coast Guard will hold public hearings on the proposal. It will announce hearing dates in the future.

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