

December 9, 2011

Practice Groups:**Maritime,
Environmental, Land
and Natural
Resources**

EPA Issues Draft of the Next Vessel General Permit for Public Review – Comments Due By February 21, 2012

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On December 8, 2011, the United States Environmental Protection Agency (EPA) published for comment in the Federal Register a new, draft federal Clean Water Act Vessel General Permit (VGP) that would regulate discharges from commercial vessels greater than or equal to 79 feet in length, excluding military and recreational vessels.¹ If finalized, this draft VGP would succeed the current VGP, which was issued in December 2008 and expires on December 19, 2013.² This alert describes the key new features of the draft VGP, some of the issues that it raises, and the process for commenting on it.

A key feature of the draft VGP is numeric ballast water discharge limits for most vessels, as opposed to the full suite of best management practices for ballast water discharges contained in the current VGP. As explained below, EPA has established the ballast water discharge limits at the United States Coast Guard (USCG) Phase I proposed discharge standard/International Maritime Organization (IMO) standard with a rolling implementation schedule, similar to that established by the USCG proposal and IMO.

The draft VGP, as well as the draft fact sheet and economic analysis for the permit, is subject to a 75-day comment period that ends on February 21, 2012. EPA has indicated its intention to issue the final VGP in November 2012, a year in advance of the expiration of the current VGP, in order to allow vessel owners and operators time to prepare for new permit requirements, and to provide sufficient time to consider state conditions that might be added to the VGP pursuant to the state certification process in Section 401 of the Clean Water Act.³

Background of the VGP

The current, and first, VGP was issued by EPA on December 18, 2008 and published in the Federal Register on December 29, 2008.⁴ A brief description of the Clean Water Act regulatory background and history of events that led to the creation of the VGP can be found in our prior alert, *EPA Issues Final Clean Water Act Permit for Incidental Discharges From Vessels* (Jan. 2009).⁵ Twenty-six different types of incidental discharges, ranging from ballast water to deck runoff, were covered by the

¹ 76 Fed. Reg. 76716 (Dec. 8, 2011).

² EPA is also proposing a new, draft Clean Water Act Small Vessel General Permit (sVGP) to authorize discharges incidental to the normal operation of non-military and non-recreational vessels less than 79 feet in length because the P.L. 110-299 moratorium (subsequently extended by P.L. 111-215) expires on December 18, 2013. These laws generally provide that no Clean Water Act permits are required for incidental discharges (except discharges of ballast water) from vessels less than 79 feet and commercial fishing vessels. This alert focuses on the draft VGP, not the draft sVGP.

³ 33 U.S.C. § 1341.

⁴ 73 Fed. Reg. 79473 (Dec. 29, 2008).

⁵ Available at:

<http://www.klgates.com/resources/xpqPublicationDetailKNLG.aspx?xpST=PubDetail&pub=5211>.

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permit. The VGP was a “first” for the maritime community as, for the prior three decades, these incidental discharges were exempt from federal Clean Water Act permitting requirements.

There have been several major issues surrounding EPA’s regulation of incidental vessel discharges historically exempt from federal Clean Water Act permitting requirements. One such issue was whether the agency should use the general permit process or the individual permit process. Because of the short time that EPA had to issue the first VGP, the agency’s decision was to propose a nationwide general permit program for incidental vessel discharges previously covered by the exclusion, rather than issuing vessel-by-vessel individual permits or having states develop and seek approval of state permit programs for these discharges. To date, no individual permit process has been created by EPA for incidental vessel discharges. A second issue was whether EPA would use specific numeric limitations or “best management practices,” or “BMPs,” for the covered incidental discharges. Most of the standards in the current VGP, including those related to ballast water discharges, are expressed as BMPs rather than specific numeric limitations. A third issue was how to deal with potentially conflicting state standards that can be added to the VGP pursuant to the state certification process in Section 401 of the Clean Water Act. In the current VGP, dozens of potentially conflicting state Section 401 conditions were added to the final permit after the public comment period had closed.

Litigation over the current VGP in the D.C. Circuit Court of Appeals resulted in a settlement that, among other things, called for EPA to:

- Include in the next draft VGP numeric concentration-based effluent limits for discharges of ballast water expressed as organisms per unit of ballast water volume.
- Propose the next draft VGP by November 30, 2011, and issue the final VGP by November 30, 2012, a full year before the current permit is scheduled to expire in order to provide the regulated community with time to familiarize itself with the new permit and take appropriate measures to come into compliance with new requirements.
- Provide states with at least six months after publication of the new, draft VGP to grant, grant with condition, deny or waive certification under Section 401 of the Clean Water Act.

In connection with the VGP litigation and settlement, EPA jointly commissioned two scientific studies with the USCG to better inform EPA’s understanding of ballast water discharges. The first study was led by the National Academy of Sciences National Research Council (NAS). EPA and the USCG requested the study to inform their efforts to derive environmentally protective numeric ballast water discharge limits under their respective regulatory programs.⁶ The second study was led by EPA’s Science Advisory Board (SAB). This study evaluated the status of ballast water treatment technologies. Information from both the NAS and SAB reports was considered by EPA in developing the ballast water limits in the proposed draft VGP, discussed below.⁷

The Proposed Draft VGP

The proposed draft VGP would continue to regulate twenty-six specific discharge categories that are contained in the current VGP, and for the first time, would authorize the discharge of fish hold

⁶ A copy of this study is available at:
http://www.epa.gov/npdes/pubs/nas_final_report_prepublication_version.pdf.

⁷ A copy of this study is available at:
[http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/6FFF1BFB6F4E09FD852578CB006E0149/\\$File/EPA-SAB-11-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/6FFF1BFB6F4E09FD852578CB006E0149/$File/EPA-SAB-11-009-unsigned.pdf).

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effluent (which was previously exempt by Public Law 111-215). Significant proposed changes to the current VGP have been grouped by EPA as follows: changes to ballast water requirements, changes to other incidental discharge effluent requirements, and changes to administrative requirements.

Changes to Ballast Water Requirements. EPA is proposing, for the first time, more stringent numeric technology-based effluent limitations that are applicable to vessels with ballast water tanks. These numeric effluent limitations will largely replace the non-numeric effluent limitations (BMPs) for ballast water in the current VGP. EPA has expressed the numeric effluent limit for ballast water discharges as numbers of living organisms per cubic meter (*i.e.*, as a maximum acceptable concentration). Those numeric limits, as set forth in Section 2.2.3.5 of the draft VGP, are:

1. For organisms greater than or equal to 50 micrometers in minimum dimension: discharge must include fewer than 10 living organisms per cubic meter of ballast water.
2. For organisms less than 50 micrometers and greater than or equal to 10 micrometers: discharge must include fewer than 10 living organisms per milliliter (mL) of ballast water.
3. Indicator microorganisms must not exceed:
 - (i) For Toxicogenic *Vibrio cholerae* (serotypes O1 and O139): a concentration of less than 1 colony forming unit (cfu) per 100 mL.
 - (ii) For *Escherichia coli*: a concentration of fewer than 250 cfu per 100 mL.
 - (iii) For intestinal enterococci: a concentration of fewer than 100 cfu per 100 mL.

As noted, these proposed technology-based numeric effluent limits for the discharge of living organisms in ballast water are equivalent to the USCG Phase I proposed discharge standard, which is the same standard adopted by the IMO in 2004, “International Convention for the Control and Management of Ships’ Ballast Water and Sediments.”⁸ According to EPA, it has established the limits because several treatment technologies have been shown to be safe, reliable and effective at reducing viable living organisms in ballast water discharges to meet these limits. Further, according to EPA, it has been demonstrated that several of these technologies are commercially available for shipboard installation and their use is economically achievable.

EPA has proposed a staggered implementation schedule for certain existing vessels for achieving the numeric limitation by the first drydocking after January 1, 2014 or January 1, 2016 (depending upon vessel size), which may extend beyond the permit term for some vessels. Vessels newly constructed after January 1, 2012 that are subject to the numeric limitation must meet those limits upon entering U.S. waters upon the effective date of the permit.

Under the draft VGP, vessel owner/operators subject to the concentration-based numeric discharge limitations would be able to meet their obligations in one of four ways: discharge ballast water meeting the applicable numeric limits of the VGP; transfer the ship’s ballast water to a third party for treatment at an NPDES permitted facility; use treated municipal/potable water as ballast water; or not discharge ballast water. Vessel owner/operators using a ballast water treatment system must use a system which has been shown to be effective by testing in accordance with the EPA-ETV protocol for the verification of ballast water treatment technology conducted by an independent third party laboratory, test facility or test organization. As in the 2008 VGP, vessels enrolled in, and meeting the

⁸ See 74 Fed. Reg. 44632, 44634 (Aug. 28, 2009) (“Standards for Living Organisms in Ships’ Ballast Water Discharged in U.S. Waters,” USCG Notice of Proposed Rulemaking).

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requirements of the USCG's Shipboard Technology Evaluation Program (STEP) would be deemed to be in compliance with the numeric limitations.

The numeric concentration-based treatment limits for ballast water discharges would not apply to some vessels. Special requirements would apply to the following vessel classes: vessels operating exclusively within a limited area on short voyages; unmanned, unpowered barges; and existing bulk carrier vessels (commonly known as "Lakers") built *before* January 1, 2009 that operate exclusively in the Great Lakes upstream of the Welland Canal (referred to as existing "confined Lakers"). All confined Lakers built after January 1, 2009, however, would be required to meet ballast water treatment numeric technology-based effluent limits found in the VGP.

The draft VGP would impose several BMPs for vessels until they are required to meet the numeric ballast water limits that EPA has found to be available, practicable and economically achievable. These interim requirements are substantially similar to those in the current VGP.

EPA has included in the draft VGP three management measures specific to existing confined Lakers. These include developing sediment management measures, minimizing the amount of ballast water taken in nearshore environments, and requiring inspection of sea chest screens and repair as necessary. EPA believes these requirements are economically practicable and achievable, and represent common sense approaches to managing ballast water discharges for vessels when they have not installed ballast water treatment systems. If existing confined Lakers are retrofitted to meet the numeric effluent limits in the draft VGP, these vessels would no longer be required to perform these management measures.

Changes to Other Incidental Discharge Effluent Requirements. With respect to non-ballast water discharges, the draft VGP:

- contains best management practices for discharges of oil to sea interfaces, requiring that all "powered new build" vessels (those constructed after December 19, 2013) must use "environmentally acceptable lubricants" in their oil-to-sea interfaces;
- authorizes the discharge of fish hold effluent and establishes appropriate best management practices for this discharge type;
- includes numeric limits for exhaust gas scrubber effluent that are consistent with those established by IMO guidelines for this discharge type;
- specifically seeks input as to whether to include more stringent numeric limits for bilgewater for certain vessels, which would decrease the amount of oil (and potentially other pollutants) discharged into U.S. waters; and
- contains monitoring requirements for certain larger vessels for ballast water, graywater, and exhaust gas scrubber effluent if they discharge into waters subject to the permit.

Changes to Administrative Requirements. On the administrative front, the draft VGP, among other proposed changes:

- clarifies that electronic recordkeeping is allowed under the permit, stating that "records may be kept electronically" if the records are (1) in a format that can be read in a similar manner as a paper record, (2) legally dependable with no less evidentiary value than their paper equivalent, and (3) accessible to the inspector during an inspection to the same extent as a paper copy stored on the vessel would be, if the records were stored in paper form;

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- requires permittees not required to submit a notice of intent (NOI) to be covered by the permit to complete and keep a Permit Authorization and Record of Inspection (PARI) Form onboard their vessel at all times;
- would consolidate the one-time report and annual noncompliance report into one annual report; and
- would authorize a combined annual report for unmanned, unpowered barges if they meet specified criteria to maximize efficiency and reduce burden on a significant portion of the regulated universe.

EPA is specifically requesting comment on the administrative changes in the draft VGP and is soliciting suggestions for other efficiency improvements. Many of these provisions were addressed in a series of “Frequently Asked Questions” that EPA issued in connection with the current VGP.⁹

Comment Period and Public Meetings

As noted above, EPA is soliciting comments on the draft VGP, as well as the draft fact sheet and economic analysis for the permit. The comment period is open for 75 days from the December 8, 2012 Notice announcing the draft VGP in the Federal Register, with comments due to EPA on or before February 21, 2012.¹⁰ Instructions for submitting comments are included in the Notice. EPA has already scheduled a public hearing (January 11, 2012 – Washington, D.C.) and a public meeting (January 23, 2012 – Chicago). Depending on interest, an additional public meeting may be scheduled. EPA has indicated its intention to schedule a webcast in the latter part of January 2012 to provide information on the draft VGP and to answer questions for interested parties that are unable to attend the public hearing or meeting. Further information regarding the public hearing, meeting and webcast can be found in the Notice and on EPA’s website for the draft VGP - <http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm>.

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⁹ Those “Frequently Asked Questions” can be viewed at:
http://cfpub.epa.gov/npdes/faqs.cfm?program_id=350.

¹⁰ 76 Fed. Reg. at 76716.

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