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EPA and Coast Guard Disagree on How to Address Industry Obligations to Meet January 1, 2014 Implementation Deadline For New Ballast Water Discharge Limits

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Under the National Invasive Species Act of 1996,¹ the U.S. Coast Guard regulates ballast water discharged from vessels by requiring installation of certain technologies that treat ballast water prior to discharge. The installed technologies must meet Ballast Water Management Discharge Standards according to a phased-in schedule that began on January 1, 2014. The Coast Guard must approve any technology before it may be placed on a vessel. Under the Clean Water Act,² the U.S. Environmental Protection Agency (“EPA”) issued the 2013 Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (effective December 19, 2013)³ (“2013 VGP”), which requires the same vessels to comply with certain numeric ballast water discharge limits through installation of the same technology and on the same schedule as the Coast Guard requires. However, because the Coast Guard has not yet approved the technology necessary to meet the standards as was anticipated when the requirements were established, many vessels will not be able to meet the new standards in accordance with the current schedule, given the long lead time associated with testing, approval, production, and installation of that equipment. EPA and the Coast Guard, however, have taken different positions on how to address this problem. The Coast Guard is formally granting legal protection to vessels that cannot install the new technology because it has not yet been approved. EPA, on the other hand, declined to follow this approach, and although promising to “take this into account,” is providing no assurance that vessel owners/operators will not face serious administrative, civil, or even criminal sanctions for failing to install the equipment in time. This alert describes the conundrum that the industry is facing.⁴

Ballast Water Discharge Limits and Treatment Technologies

Both Coast Guard and EPA advocate a technology-based method to bring ballast water discharges within applicable standards. The agencies differ, however, on whether the

¹ 16 U.S.C. § 4701 *et seq.*

² 33 U.S.C. § 1251 *et seq.*

³ EPA issued the current iteration of the VGP on March 28, 2013, pursuant to the Clean Water Act. The 2013 VGP regulates discharges from commercial vessels greater than or equal to 79 feet in length, excluding military and recreational vessels. Additional information on the 2013 VGP and its creation can be found in [EPA Issues 2013 Vessel General Permit](#) (K&L Gates Client Alert, April 2, 2013).

⁴ Background on these programs can be found at [EPA Issues Draft of the Next Vessel General Permit for Public Review - Comments Due by February 21, 2012](#) (K&L Gates Client Alert, Dec. 9, 2011); [EPA Issues Preliminary Study on Vessel Discharges for Fishing Industry and Smaller Cargo Vessels](#) (K&L Gates Client Alert, March 30, 2010); [The Winds of Change Continue to Blow: Coast Guard Proposes New Ballast Water Discharge Limitations](#) (K&L Gates Client Alert, Nov. 27, 2009).

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unavailability of necessary technology should expose a vessel owner/operator to civil and criminal sanctions for not installing equipment in order to comply with the standards.

In requiring vessels to install approved ballast water management systems, the Coast Guard recognized that, despite best efforts, technology that meets the Coast Guard's standards simply may not be available in time to meet the implementation schedule.⁵ As such, Coast Guard regulations allow the Coast Guard to authorize temporary extensions to the implementation schedule.⁶

EPA's 2013 VGP imposes numeric ballast water discharge limits for most vessels.⁷ EPA intended vessels to achieve the numeric limits by employing the same technology approved by the Coast Guard. When the Coast Guard issued its ballast water regulations and the EPA issued the 2013 VGP, they both concluded that safe, reliable, and effective treatment technologies existed that could sufficiently reduce viable organisms in ballast water discharges to meet the numeric limits. However, EPA took a different approach than the Coast Guard regarding whether delays in ballast water management equipment manufacturers obtaining type approval from the Coast Guard should impact vessel owners/operators' obligation to comply with the standards. Section 1.9.1 of the 2013 VGP acknowledged that, while the Coast Guard may grant extensions under the Coast Guard's regulations if the equipment was not approved or available, EPA could still enforce its ballast water standards, regardless of the Coast Guard extensions.

EPA's Enforcement Response

As it turns out, the Coast Guard has not yet approved the technology needed to meet applicable standards. The Coast Guard anticipated this problem in September 2013.⁸ As a result, over the last few months, upwards of 200 vessel owners/operators have sought extensions from the Coast Guard. The first of these was granted in late December 2013. That is also when EPA issued its Enforcement Response Policy⁹ ("Enforcement Policy") that was – and apparently will be – provided to all vessel owners/operators who are granted Coast Guard extensions to the implementation schedule.¹⁰

The Enforcement Policy provides no certainty that vessel owners/operators who have obtained extensions from the Coast Guard will not face massive administrative, civil, and even criminal fines for not meeting the requirements of the 2013 VGP to install that technology according to EPA's schedule and regardless of the Coast Guard having not approved the technology.¹¹ Instead, the response articulates the factors that EPA

⁵ Existing vessels with ballast water capacity between 1,500 and 5,000 m³ must comply starting January 1, 2014, while existing vessels with ballast water capacity less than 1500 m³ or greater than 5,000 m³ must comply starting January 1, 2016. All newly-built vessels constructed on or after December 1, 2013, have to comply with the discharge standards upon delivery. 33 C.F.R. Table 151.2035(b).

⁶ 33 C.F.R. § 151.2036.

⁷ 2013 VGP at § 2.2.3.5. The ballast water discharge standards in the 2013 VGP are equal to the Coast Guard Phase I discharge standards, which will be implemented on a rolling implementation schedule equal to those adopted by the International Maritime Organization in 2004.

⁸ See [Extension CG-OES Policy Letter 13-01](#) (Sept. 25, 2013).

⁹ See [EPA's Enforcement Response Policy for EPA's 2013 Vessel General Permit: Ballast Water Discharges and U.S. Coast Guard Extensions Under 33 C.F.R. Part 151](#) (Dec. 27, 2013).

¹⁰ This Alert does not address whether the current regulations still qualify as "Best Available Technology" due to the lack of type-approved equipment.

¹¹ Under the Clean Water Act, violations of the 2013 VGP could result in civil penalties of up to \$37,500 per day of violation, criminal penalties for "knowing" violations that could result in prison sentences of up to three years, and fines

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enforcement personnel “should” take into account in determining whether to enforce the 2013 VGP’s ballast water numeric discharge limits for vessels granted Coast Guard extensions.¹²

The Enforcement Policy also specifically states that EPA’s enforcement discretion does not apply to criminal violations (e.g., “knowing” violations) or “grossly excessive ballast water discharges,” a term that is not defined. Under the Enforcement Policy, EPA’s decision on whether to bring an enforcement action against vessel owners/operators will ultimately depend on “all relevant facts and circumstances.” This is, of course, the standard applicable to all enforcement actions, with or without the Enforcement Policy.

The Enforcement Policy and the Coast Guard extension decisions, together, illustrate an all too common theme: two federal agencies that have overlapping authority to regulate ballast water discharges decline to reconcile those authorities in a manner that provides any certainty or consistency for those seeking to comply. While one agency has said it will grant extension requests that protect the regulated community from liability, the other has declined to do so, and instead says, essentially, “trust us, we will be fair.” Although it acknowledges the existence of the Coast Guard extensions, EPA has not provided vessel owners/operators with any greater certainty that it will not take enforcement actions against them than it did before it issued the Enforcement Policy.

What’s Next?

To date, EPA has not done what it said it might do when it issued the 2013 VGP: reopen the permit in light of new facts and modify the implementation schedule.¹³ Instead, EPA has apparently suggested that any vessel owner/operator seeking an extension should (1) consider filing for an individual National Pollutant Discharge Elimination System (“NPDES”) permit to replace the general permit¹⁴, or (2) seek a judicial or administrative consent decree.¹⁵ The prospect of thousands of vessels seeking individual permits from multiple regions of EPA through the formal NPDES process is a formidable challenge. The second option would require that a vessel owner/operator first violate the law by discharging ballast water without first installing approved technology, which in turn could result in imposition of civil or criminal penalties.

that could reach \$50,000 per day. 40 C.F.R. §122.41(a); 73 Fed. Reg. 75,340 (Dec. 11, 2008). Higher criminal fines may also be assessed under the Alternative Fines Act. 18 U.S.C. § 3571.

¹² Specifically, EPA personnel should “take into account conditions expressed in the Coast Guard’s extension letter such as whether the vessel conducts complete ballast water exchange in an area 200 nautical miles from any shore prior to discharging ballast water into the waters of the United States, adheres to the Coast Guard’s ballast water management plan as well as to recordkeeping and reporting provisions, and complies with all other applicable ballast water requirements under relevant Coast Guard regulations and the VGP. When a vessel has adequately undertaken these measures (as well as any other reasonably available or appropriate measures under the circumstances to minimize the extent or the effects of the VGP ballast water numeric discharge exceedance), EPA will consider such violations of the 2013 VGP ballast water numeric discharge limit a low enforcement priority.” [EPA’s Enforcement Response Policy for EPA’s 2013 Vessel General Permit: Ballast Water Discharges and U.S. Coast Guard Extensions under 33 C.F.R. Part 151](#) (Dec. 27, 2013).

¹³ 2013 VGP at § 1.9.1 (Permit Reopener Clause).

¹⁴ This option existed under the 2013 VGP as well for any permit holder, and for any reasons. To date only one company has been known to seek an individual permit, and that was for a non-ballast water discharge, and none have been granted. See [Lake Michigan Carferry, Inc., S.S. Badger](#).

¹⁵ EPA has also suggested that vessel owners/operators install Coast Guard AMS-approved equipment, which is only valid for five years because it has not been “type-approved” by the Coast Guard, and risk that it will not be type-approved, requiring that it be completely replaced within five years. This option may cost many vessel owners/operators millions more than was anticipated when the 2013 VGP economic feasibility analysis was performed.

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