

Going Ballistic Over Ballast Water Regulations

Law360, New York (January 23, 2014, 12:21 PM ET) -- 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 Jan. 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 issued the 2013 Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (effective Dec. 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 type-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.

The EPA and 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 type-approved. The 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 and operators will not face serious administrative, civil or even criminal sanctions for failing to install the equipment in time. This article describes the conundrum that the industry is facing.[4]

Ballast Water Discharge Limits and Treatment Technologies

Both the Coast Guard and EPA advocate a technology-based method to bring ballast water discharges within applicable standards. The agencies differ, however, on whether the unavailability of necessary technology should expose a vessel owner or 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]

The EPA's 2013 VGP imposes numeric ballast water discharge limits for most vessels.[7] The EPA intended for 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, the 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 and 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 its regulations if the equipment was not approved or available, the 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 and operators have sought extensions from the Coast Guard. The first of these was granted in late December 2013. That is also when the EPA issued its Enforcement Response Policy[9] that was — and apparently will be — provided to all vessel owners and operators who are granted Coast Guard extensions to the implementation schedule.[10]

The enforcement policy provides no certainty that vessel owners and 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 the EPA's schedule and regardless of the Coast Guard having not approved the technology.[11] Instead, the response articulates the factors that the EPA 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 the 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, the EPA's decision on whether to bring an enforcement action against

vessel owners and 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 EPA's 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, the EPA has not provided vessel owners and operators with any greater certainty that it will not take enforcement actions against them as it did before it issued the enforcement policy.

What's Next?

To date, the 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, the EPA has apparently suggested that any vessel owner or operator seeking an extension should: (1) consider filing for an individual National Pollutant Discharge Elimination System (“NPDES”) permit to replace the general permit[14] or (2) seek a judicial or administrative consent decree. The prospect of thousands of vessels seeking individual permits from multiple regions of the EPA through the formal NPDES process is a formidable challenge. The second option would require that a vessel owner or 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.

Alternatively, the EPA may prefer that vessel owners and operators install International Maritime Organization (“IMO”) type-approved ballast water management equipment, such as Coast Guard Alternate Management System (“AMS”) approved equipment that 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 and operators millions more than was anticipated when the 2013 VGP “Best Available Technology” analysis was performed. Some simply may not be able to afford the economic risk of installing technology that may not ever be type-approved (and then they will have to replace it). Others who can afford it still risk liability if type approval does not occur before the AMS approval expires. Still others may be able to afford it and may be in a position of selecting equipment that underwent the most rigorous testing from the most reputable labs to gain IMO type approval and, therefore, has the greatest chance of being type-approved.

The current problem stems from approaching deadlines for meeting ballast water discharge standards, a lack of Coast Guard type-approved ballast water management equipment and vessel owner and operator concerns that Coast Guard AMS-approved ballast water management equipment — which is foreign type-approved equipment given temporary approval by the Coast Guard — may not gain Coast Guard type approval.

The Coast Guard is concerned that it has not received any completed applications for type approval from equipment manufacturers; however, as of October 2013, 29 ballast water management systems had received type approval by other countries under IMO guidelines.[15] Coast Guard ballast water discharge standard regulations require such equipment to meet specific EPA testing standards and to be tested by a Coast Guard-approved testing lab to receive type approval. Currently, only two testing labs have gained Coast Guard approval.[16]

This leads to a number of issues that hopefully will be addressed:

- Will the Coast Guard consider whether its lack of type approval applications may be related to differences between U.S. and foreign countries' testing requirements and the probable increased cost in a limited testing facility market of additional testing to meet U.S. requirements?
- While the Coast Guard's decision to grant temporary extensions to the implementation schedule is intended to provide relief to vessel owners and operators, will that decision significantly undercut the U.S. market for Coast Guard AMS-approved ballast water management equipment and, if so, will it constrain the revenue available to some equipment manufacturers to pay for additional U.S.-required testing to gain Coast Guard type approval?
- Will this set of circumstances cause the U.S. ballast water discharge standard implementation regime to fall well behind international implementation of the IMO standards?
- As the deadlines for installing equipment — and discharging treated ballast water — approach, will the EPA agree to give any greater certainty to the industry or is it willing to allow the current uncertainty to increase compliance costs or economic impacts above the level contemplated when these regulations were developed?

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[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).

[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 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 reason. 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] <http://www.imo.org/OurWork/Environment/BallastWaterManagement/Documents/table%20updated%20in%20October%202012%20including%20TA%20information.pdf>

[16] <http://cgmix.uscg.mil/EQLabs/EqLabsSearch.aspx>

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