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EPA Issues Final Clean Water Act Permit for Incidental Discharges from Marine Vessels

On December 18, 2008, the United States Environmental Protection Agency (“EPA”) issued its final Clean Water Act (“CWA”) general permit covering discharges incidental to the normal operation of most commercial vessels, and published its notice of this on December 29, 2008. 73 Fed. Reg. 79473. Twenty-six different types of incidental vessel discharges, ranging from ballast water to deck runoff, are covered. This permit requirement is a “first” for the maritime community as, for the past three decades, these incidental discharges were exempt from CWA permitting requirements. **Starting on February 6, 2009,**¹ vessels operating in a capacity as a means of transportation, with certain exceptions described below, are prohibited from discharging any pollutant into waters of the United States unless authorized to do so in accordance with this new general permit or by an individual permit. This alert briefly describes the new general permit and its requirements, why it is so significant for the maritime industry, and what the regulated community should consider as it achieves compliance with this new program. Additional details and background regarding the new permit, including an industry webcast, can be found at the following link:

http://www.klgates.com/practices/ballast_water_resources/

Why is this permit program so different?

This permit program is different from most others that the maritime industry has previously faced because:

- It covers discharges from vessels beyond just ballast water – it includes 25 other incidental discharges never before regulated;
- It is administered and enforced by the EPA, not the United States Coast Guard, and contains extensive administrative, civil and criminal sanctioning authority that is often used in parallel;
- It gives the EPA significant new powers over the maritime industry including the power to inspect and vessels, impose conditions beyond those in the VGP, require production of information, records and the performance of testing and other evaluations,;
- Many, if not all, of the inspection records required under this program, and other materials documenting compliance with it, will be accessible to the public;
- Noncompliance must be reported to the EPA and, in many cases, publicly disclosed, and failure to do so could be a crime;

¹ According to EPA’s notice, the permit is “effective” as of December 19, 2008, the day on which the exemption for vessel discharges covered by the permit was set to expire as a result of a court order. See 73 Fed. Reg. at 79474. On December 19, 2008, however, a court issued an order extending the exemption until February 6, 2009. *Id.*

- The permit includes widely different conditions imposed by states, and that only apply in the waters of particular States;
- Ultimately, this program will be adopted in many States, giving them additional enforcement authority and the ability to adopt different and more restrictive standards;
- It may be enforced by private citizens and advocacy groups under the citizen suit provision, which is one of the most commonly used environmental laws.

Why was this permit issued?

The CWA, 33 U.S.C. §§ 1251-1387, is the primary federal law addressing water pollution in the United States. EPA, along with other federal, state and local agencies, administers the CWA. Section 301 of the CWA prohibits the discharge of any pollutant from a point source by any person into waters of the United States except as in compliance with the CWA's permit requirements and other sections of the law. 33 U.S.C. § 1311(a). The CWA creates the National Pollutant Discharge Elimination System ("NPDES") permit program. This program establishes a procedure and standards for obtaining a permit for every covered discharge of pollutants. For decades, an EPA regulation, 40 C.F.R. § 122.3, excluded discharges incidental to the normal operation of vessels from the Section 301 NPDES permit requirement. A lawsuit resulted in a court decision holding that EPA's incidental vessel discharge exclusion exceeded the agency's authority under the CWA.² As a result of the lawsuit, as of February 6, 2009, discharges incidental to the normal operation of vessels will be prohibited (and unlawful) unless covered by an NPDES permit.

What vessels are covered?

The Vessel General Permit ("VGP") applies to all vessels operating in a capacity as means of transportation, *except* recreational vessels, that have discharges incidental to their normal operations into waters covered by the VGP. For purposes of the VGP, a "recreational vessel" is a vessel that is: (1) manufactured or used primarily for pleasure; or (2) leased, rented, or chartered to a person for the pleasure of that person.³ The term "recreational vessel" does not include a vessel that is subject to United States Coast Guard inspection and that: (1) is engaged in commercial use; or (2) carries paying passengers.

With respect to: (1) commercial fishing vessels of any size; and (2) non-recreational vessels that are less than 79 feet in length, the coverage under the VGP is, at this time, limited to ballast water discharges only.⁴

The VGP applies to any covered discharge incidental to the normal operation of any covered vessel into "waters of the United States." The "waters of the United States" extend to the reach of the territorial seas, which are those waters extending three miles seaward of the ordinary low tide mark.⁵ The VGP applies no matter the flag of the vessel, and no matter how many times or for what length of time, the vessel is in waters of the United States. The VGP would likely apply to vessels in port and idle for seasonal periods.

The VGP contains requirements applicable to all covered vessels. Additional requirements are imposed for the

2 The circumstances leading up to this permit and the implications for the maritime industry of new efforts to impose U.S. environmental laws on it are discussed in several articles that can be found at the K&L Gates Newsstand, <http://www.klgates.com/newsstand/search.aspx>.

3 See Pub. L. 110-288, amending Section 502 of the CWA, 33 U.S.C. § 1362, to add a definition of "recreational vessel."

4 On July 31, 2008, Senate bill S. 3298 was signed into law (Pub. L. 110-299). This law generally imposes a two-year moratorium during which time neither EPA nor States can require NPDES permits for discharges, except ballast water discharges, incidental to the normal operation of vessels less than 79 feet and commercial fishing vessels of any size.

5 See 33 U.S.C. § 1362(7), (8); 40 C.F.R. § 122.2.

following eight specific types of covered vessels, which have discharges not shared by other types of covered vessels: medium cruise ships, large cruise ships, large ferries, barges, oil or petroleum tankers, research vessels, emergency boats, and vessels employing experimental ballast water treatment systems. (VGP, Part 5.)

What discharges are covered?

In the final VGP, EPA has identified 26 discharges incidental to the normal operation of commercial vessels and recreational vessels greater than 79 feet (24.08 meters) in length that are covered by the VGP:

1. Deck washdown and runoff and above water line hull cleaning	12. Firemain systems
2. Bilge water	13. Freshwater layup
3. Ballast water	14. Gas turbine wash water
4. Anti-fouling leachate from anti-fouling hull coatings	15. Graywater
5. Aqueous film forming foam	16. Motor gasoline and compensating discharge
6. Boiler/economizer blowdown	17. Non-oily machinery wastewater
7. Cathodic protection	18. Refrigeration and air condensate discharge
8. Chain locker effluent	19. Seawater cooling overboard discharge
9. Controllable pitch propeller hydraulic fluid and thruster hydraulic fluid and other oil sea interfaces including discharges from paddle wheel propulsion, stern tubes, thruster bearings, stabilizers, rudder bearings, azimuth thrusters, and propulsion pod lubrication	20. Seawater piping biofouling prevention
10. Distillation and reverse osmosis brine	21. Small boat engine wet exhaust
11. Elevator pit effluent	22. Sonar dome discharge
	23. Underwater ship husbandry
	24. Welldeck discharges
	25. Graywater mixed with sewage from vessels
	26. Exhaust gas scrubber wash water discharge

What discharges are not covered by the VGP?

EPA has identified several discharges that are not covered by the VGP: (1) discharges not subject to the former NPDES permit exclusion, including vessels being operated in a capacity other than as a means of transportation (e.g., energy or mining facilities), (2) sewage from vessels, (3) used or spent oil, (4) rubbish, trash, garbage or other material discarded overboard, (5) photo processing waste, (6) effluent from dry cleaning operations, (7) discharges of medical waste and related materials, (8) discharges of noxious liquid substances, (9) tetrachloroethylene (perchloroethylene) degreasers, and (10) discharges currently or previously covered by another permit. See Final VGP Fact Sheet at 28-30.⁶ Also, the permit materials explain that discharges incidental to the normal operation of a vessel are discharges that occur when a vessel is operated according to good marine practice or that result from the operation of properly and routinely maintained vessel equipment. EPA has stated that discharges that are not in line with good marine practice are not considered incidental to the normal operation of a vessel and, thus, not covered by the VGP. See Final VGP Fact Sheet at 22.

⁶ Further information regarding the regulation and handling of these ten non-covered discharges is available in the Final VGP Fact Sheet at 28-30.

How do you get a VGP?

Initial authorization under the VGP is automatic. That is, as of December 19, 2008, all covered vessels are authorized to discharge pursuant to the VGP. If your vessel is greater than or equal to 300 gross tons or the vessel has the capacity to hold or discharge more than 8 cubic meters (2113 gallons) of ballast water, you must, in accordance with the deadlines in the table below and beginning on June 19, 2009, submit a “Notice of Intent,” or “NOI,” in order to maintain or obtain coverage under the VGP.

CATEGORY	NOI DEADLINE	DISCHARGE AUTHORIZATION DATE
Vessels delivered to owner or operator on or before September 19, 2009	No later than September 19, 2009	Authorization granted until September 19, 2009. If EPA receives an NOI on or before September 19, 2009, uninterrupted coverage continues.
New Owner/Operator of Vessel– transfer of ownership and/or operation of a vessel whose discharge is previously authorized under this permit	By date of transfer of ownership and/or operation	Date of transfer or date EPA receives NOI, whichever is later
New vessels delivered to owner or operator after September 19, 2009	30 days prior to discharge into waters subject to this permit	30 days after complete NOI received by EPA
Existing vessels delivered to owner or operator after September 19, 2009 that were not previously authorized under this permit	30 days prior to discharge into waters subject to this permit	30 days after complete NOI received by EPA

NOI submissions will be publicly available information along with reports required under the permit, and the agency can use this information to impose additional vessel specific requirements.

What must be done to comply with the permit?

Each vessel’s compliance with the VGP can only be determined on a case-by-case basis. Generally, EPA has set standards for how each of the 26 incidental discharge streams must be managed. In some cases the pollutant must be removed from the discharge before it leaves the vessel. In other cases, the discharge has to be completely or substantially prevented. Adherence to those standards will constitute compliance with the VGP.

Most of the standards in the VGP that must be met are called “Best Management Practices” or “BMPs.” The BMPs are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices that are designed to prevent or reduce the pollution of “waters of the United States.” However, numeric effluent limits have been established in the VGP for graywater and pool and spa discharges from cruise ships, oily discharges, including oily mixtures, and residual biocide limits from vessels using experimental ballast water treatment systems. The permit also requires that discharges must be controlled as necessary to meet applicable water quality standards and that additional controls must be employed where necessary to,

for example: (1) be consistent with applicable waste load applications in waters with approved or established Total Maximum Daily Loads; or (2) comply with a State's or Tribe's antidegradation policies.

Some of the BMPs are drafted in non-mandatory language. For example, the BMPs for deck washdown provide that "cleaners and detergents should not be caustic or only minimally caustic and should be biodegradable." (Emphasis added.) The permit states that provisions stating that "EPA *recommends*" certain actions or that the permittee "*should*" take certain actions constitute recommendations by the agency. It is unclear whether failure to follow EPA's "recommendations" would be looked on unfavorably by the agency in an enforcement context.

How is compliance with the permit confirmed?

The VGP contains extensive *inspection, monitoring, reporting, and recordkeeping* obligations (VGP, Part 4) that require each vessel to document its own compliance or noncompliance and to undertake *corrective action* (VGP, Part 3) when noncompliance is discovered. Some of these requirements include:

- Routine visual self-inspections;
- Documentation of inspections in logbooks;
- Analytical monitoring and sampling;
- An annual comprehensive inspection;
- If the vessel is dry docked, a dry dock report;
- Records of violations of effluent limits, findings from inspections, and certain maintenance activities;
- Specialized records for certain discharges;
- An annual noncompliance report; and
- A one-time report and assessment due 30-36 months after issuance of the permit.

These requirements sometimes differ by vessel type.

What if compliance problems are found?

The VGP requires "corrective action" – action that must be taken to correct problems identified during an inspection or otherwise discovered. (VGP, Part 3.) The proposed permit sets out several "triggers" for corrective action, such as when BMPs are not actually reducing discharges that contain pollutants. Once the need for corrective action is triggered, a written corrective action assessment must be prepared. The proposed permit sets deadlines for taking corrective action. Any report of corrective action could result in the imposition of administrative, civil, or criminal penalties, as explained below.

What role do States play?

Section 401 of the CWA gives States the opportunity to certify that the VGP will not degrade their waters. According to EPA, if they decline to certify, the VGP is not effective in their waters. Vessels operating in such States will have to either cease all incidental discharges or leave the State's waters, since their incidental discharges will be unpermitted, or be exposed to suits not only by the government, but by environmental groups as well. Many States that have certified the VGP have added conditions that must be met. It is important that any vessel operator know whether the State waters in which they are operating have conditions attached to their approval of the VGP that must be met. State certification conditions can be found in Part 6 of the VGP.

In the near term, States will probably not be enforcing the VGP on behalf of EPA. Instead, they might develop their own VGP program under applicable state law. States do have some authority to impose stricter standards than those contained in the VGP. Ultimately, many States will seek approval from EPA to operate their own program under the CWA. 33 U.S.C. § 1342(b). These are commonly called “approved state programs.”

What are the consequences of violating the VGP?

Complying with the VGP is required by the CWA. Compliance includes not only meeting the standards for discharges, but also complying with all the paperwork requirements like those relating to inspections and recordkeeping. The remedies available to the government, if it proves a violation of the CWA, include:

- *Civil penalties* of up to \$37,500 per day for each day of violation. These can be assessed in a case brought in federal court, or in an administrative proceeding brought by the EPA and heard by an EPA hearing officer.
- *Injunctive relief* in the form of a court order that can, for example (a) prohibit the vessel from operating until the violation is corrected; (b) require that action be taken to correct harm from the violation; or (c) require that other compensatory action be taken to address environmental impacts related to the violations.
- *Criminal penalties* including fines and jail time for certain types of violations or for making false statements on documents required to be kept by the permit or CWA.
- *Suspension* or debarment from government contracts.

In addition to providing for enforcement by EPA, the CWA allows enforcement of its provisions, in certain circumstances, through “citizen suits” by private parties. See 33 U.S.C. § 1365(a)(1), (f). The remedies available to the government under the CWA, such as civil penalties and injunctive relief (see above), are generally available to citizen plaintiffs as well.⁷ In addition, citizen plaintiffs can seek to recover their attorney’s fees and costs. See 33 U.S.C. § 1365(a) & (d), 33 U.S.C. § 1319(d).

You can review the final VGP itself at the link above or at http://cfpub.epa.gov/npdes/home.cfm?program_id=350.

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⁷ All civil penalties resulting from judgments in citizen suits are paid to the United States Treasury, not the plaintiffs. 33 U.S.C. § 1319(d).

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