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The Perfect Storm: Ballast Water Discharges Face Potential New Regulatory, Legislative and Judicial Rules

On June 21, 2007, the U.S. Environmental Protection Agency (EPA) announced that it was taking the first steps toward developing a program that would require National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA) for the discharge of pollutants incidental to the normal operation of vessels.¹ For over 30 years, such discharges have been exempt from the CWA's permit requirements. The notice sought relevant information from the public to help EPA decide on the framework for a permit program, which will represent the first time the agency has attempted to regulate routine discharges from vessels of all sorts, ranging from recreational boats to massive cargo carriers. Over 1,700 comments were received by the EPA² from an array of interested parties, including owners and operators of recreational and commercial vessels, state regulators, and environmental advocates. As a result of a court order, the agency is currently required to develop and implement this program by September 30, 2008, but that order is being appealed. At the same time, Congress is considering legislation that, if enacted, could establish new standards for ballast water discharges and if enacted could render the EPA proposal unnecessary. This alert describes these developments and what the regulated community might expect the next steps will be.

Background

EPA's June 21, 2007 notice was prompted by a lawsuit in the U.S. District Court for the Northern District of California, in which the court found that the three decade-old EPA regulation excluding certain discharges incidental to the normal operation of vessels from NPDES permitting exceeded EPA's statutory authority.³ The court issued a final order in September 2006 that will vacate the regulatory exclusion for discharges incidental to the normal operation of vessels effective September 30, 2008. As of that date, these kinds of discharges will be prohibited under the CWA unless the discharge is covered under an NPDES permit. Although the court's order has been appealed to the U.S. Court of Appeals for the Ninth Circuit, EPA believed it was "prudent to initiate responsive action now rather than await the outcome of that appeal."⁴

The regulation of discharges from normal operations of vessels—especially ballast water discharges—has many moving parts. The environmental challenge stems from the fact that, for decades, ballast water might have contained a variety of biological constituents (*e.g.*, so-called "invasive species") not native to the waters where it is discharged. Those invasive species might then propagate, eventually upsetting the ecological balance in receiving waters. Zebra mussels in the Great Lakes are one example of such an invasive

¹ 72 Fed. Reg. 34241 (June 21, 2007).

² See Docket Id. No. EPA-HQ-OW-2007-0483, available at <http://www.regulations.gov>.

³ *Id.*

⁴ *Id.*

species. EPA recently testified before Congress that, just within the Great Lakes, zebra mussels alone are estimated to have cost between \$750 million and \$1 billion in losses to natural resources and damage to infrastructure between 1989 and 2000.⁵ Costs for the treatment and control of zebra mussel impacts on industrial and municipal facilities are estimated at \$100-200 million annually in the Great Lakes.⁶

In 1973, after the CWA was enacted, EPA issued regulations exempting certain kinds of discharges from the CWA permit requirements. One regulation exempted certain discharges incidental to the normal operation of vessels, (including ballast water) from the permit requirements, largely because at the time it was thought that such discharges “generally cause little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically.”⁷ In 1999, 15 environmental groups petitioned EPA to repeal the regulation because of the growing problem of invasive species in places such as the Great Lakes, some of which were thought to have been introduced through ballast water discharges. On September 9, 2003, EPA denied the petition, reasoning that Congress had demonstrated through several legislative enactments that it agreed that the EPA’s long-standing exemption was appropriate.⁸ Those legislative enactments included alternative regimes to deal with vessel operational discharges outside of the CWA, such as the U.S. Coast Guard’s regulatory program pursuant to the Nonindigenous Aquatic Nuisance Prevention and Control Act⁹ and National Invasive Species Act.¹⁰

⁵ See Testimony of Benjamin H. Grumbles, Assistant Administrator, Office of Water, U.S. EPA, Before the Water Resources and Environment Subcommittee of the House Transportation and Infrastructure Committee, March 7, 2007, available at www.epa.gov/ocir/hearings/testimony/110_2007_2008/2007_0307_bhg.pdf.

⁶ *Id.* The accuracy of these estimates is in substantial dispute.

⁷ 40 C.F.R. § 122.3(a); 38 Fed. Reg. 13,528 (May 22, 1973).

⁸ 68 Fed. Reg. 53,165 (September 9, 2003). EPA’s decision on the petition for rulemaking can be downloaded at <http://www.epa.gov/npdes>, under the tab “Recent Additions.”

⁹ Codified at 16 U.S.C. §§ 4701 *et seq.*

¹⁰ *Id.*

In addition, this year several additional bills have been introduced in both the House and Senate, calling for ballast water treatment and procedures for ballast water exchange in an effort to address growing concerns with invasive species in U.S. waters. One such bill, Senate Bill 1578, which would have established a federal ballast water management program, stalled earlier this month. Individual states are also taking action. For example, as of January 1, 2007, oceangoing ships using Michigan ports are required to obtain a permit from the state. The permit will be issued only to those vessels able to demonstrate that they will not discharge aquatic invasive species into state waters. New litigation to impose more controls on ballast water discharges is also on the horizon. Some environmental groups have sent notices of their intent to sue to several international shipping companies under the CWA for failure to have permits for ballast water discharges. Another environmental group recently sued the State of Minnesota in an effort to compel it to develop a program to regulate ballast water discharges.¹¹

EPA is thus faced with the need to develop a regulatory program for permitting ballast water discharges by September 30, 2008, a judicial appeal that might reverse the decision requiring that program, and potential legislation to make such a program unnecessary. Vessel owners and operators are faced with the potential obligation to get a permit before they can discharge ballast and other water from their normal operations starting on October 1, 2008, even though such permit programs do not yet exist. The regulated community, therefore, must carefully consider the nature of the comments EPA received, in order to evaluate what next steps the agency will take.

Summary of Comments

In its June 21, 2007 notice, EPA framed the issue by first explaining how and why it arose. It then requested information on a number of issues to assist

¹¹ *State of Minnesota ex rel. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency* (Ramsey County District Court, Second Judicial District) (August 27, 2007).

it in developing a framework for a NPDES permitting program governing discharges incidental to normal operations of vessels. Those issues included:

- What existing public and private data sources are available for use in identifying, categorizing, and describing the numbers and various types of commercial and recreational vessels currently operating in waters of the United States and that may have discharges incidental to their normal operation?
- What is the best way to inform vessel owners of the need to obtain NPDES permit coverage and what existing public and private data sources are available that will assist in identifying vessel owners and operators?
- What existing public and private data sources are available that identify the types of normal operations onboard commercial and recreational vessels that give rise to discharges and the characteristics of such discharges?
- What existing information is available as to potential environmental impacts of discharges incidental to the normal operation of vessels?
- What international, federal, and state limitations or controls already exist on discharges incidental to the normal operation of vessels?
- What existing information is available on the types of pollution control equipment or best management practices currently used (or in active development), and what, if any, are the practical limitations on their use?
- What existing information is available as to commercial and recreational vessel traffic patterns?

In response to these questions, EPA received over 1,700 comments. Few specifically addressed the questions raised by the notice. The vast majority of comments were submitted by recreational boaters, representatives of the recreational boating industry and related groups. These commenters, with very few exceptions, requested that the permitting exemption for discharges incidental to the normal operation of vessels be maintained as to recreational boats. Many of the recreational boaters' submissions declared their

support of House Bill 2550, the "Recreational Boating Act of 2007," which would maintain the exemption. In support of maintaining the permit exemption, recreational boating commenters cited a host of feasibility and cost concerns that would arise if the CWA's NPDES permitting program was imposed on recreational boats. For example, many commenters noted that NPDES permitting requires testing of effluent standards to determine if discharges contain pollutants that exceed the water quality standards of the regulated water body into which it discharges. Because recreational boats are mobile, different water quality standards would apply depending on the location of a boat at any given time.

A number of individuals representing the interests of commercial vessel operators submitted comments. These commenters cited to many of the same concerns with the proposed permitting process as recreational boaters and stated that the exemption should be maintained. However, most of the commercial vessel commenters stated that, in the event that commercial vessels will not be exempt from the NPDES permitting process, general permits rather than individual ones are the most appropriate solution. They suggested that the general permit categories should be defined according to geographic region, vessel size, vessel type, and whether or not the boats contained ballast water. Some commenters suggested that permits should not be required for any other discharge incidental to the normal operation of a commercial fishing vessel other than ballast water.

Comments submitted by some of the larger, international shipping entities acknowledged the need to achieve a practical solution with respect to ballast water discharges that will properly address legitimate environmental concerns without impeding trade or exposing commercial shipping to higher standards than other users whose operations and activities also have a direct impact on water quality. Many noted that great strides have been taken to ensure that ballast water discharges do not contain pollutants that might harm the environment. These commenters stressed that any ballast water regime which may be developed by EPA as part of its NPDES program must be uniform and mesh with ongoing international efforts to address this issue, such as the International Maritime Organization's 2004 International Convention for

the Control and Management of Ships' Ballast Water and Sediments. Conflicting or inconsistent ballast water discharge requirements among the states, or as between EPA and the U.S. Coast Guard, or as between the United States and foreign countries would, as noted by these commenters, significantly impede U.S. and international commerce. One solution proposed was the development of a general permit for ballast water discharges by the EPA and U.S. Coast Guard, with primary enforcement authority being left with the U.S. Coast Guard, which has historically regulated and enforced discharges of ballast water. The shipping entities also stressed that, at this time, there is no commercially available ballast water treatment technology. Consequently, they noted that if a new regulatory program is created, it must give due regard to the time it will take before cost-effective treatment systems are developed, are commercially available, and are able to be installed on entire fleets.

Comments by environmental regulators and environmental advocacy groups stressed the need for EPA to develop rules regulating the discharge of pollutants (especially ballast water) from vessels as soon as possible. One commenter, the New York State Department of Environmental Conservation, proposed that EPA develop a separate subpart in the federal regulations for vessel discharges similar to existing regulatory provisions for various specific categories of point sources. The agency recommended that EPA couple such rulemaking with development of a general permit for transoceanic vessels, followed by other general permits as appropriate for different categories of vessels tailored to the pollution problems they present. These initial permits, the agency noted, could be followed by refinement of the permitting structure for transoceanic vessels, possibly including the issuance of individual permits or the creation of subcategories of general permits for particular types of vessels.

How EPA will react and respond to the 1,700-plus comments it received remains to be seen. In recent Congressional testimony, EPA stressed, as it did in the June 2007 notice, the need to address the significant

impacts of aquatic invasive species.¹² EPA, however, disagreed with the court order that prompted its June 2007 notice, noting that, in its view, the CWA “does not currently provide an appropriate framework for addressing ballast water and other discharges incidental to the normal operation of vessels.” Rather, EPA appears to support enactment of appropriate legislation “to strengthen the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, and the National Invasive Species Act of 1996 in order to ensure the establishment of environmentally-sound, uniform, Federal ballast water discharge standards and requirements.”¹³ In particular, EPA noted its belief that the structure and basic approach of the 2004 International Maritime Organization’s ballast water Convention “could serve as a useful model when considering additional domestic legislation.”¹⁴

The EPA notice, the responding comments, the outcome of the appeal of the judicial decision requiring that EPA develop a ballast water discharge program, the pending legislation, the new lawsuits being threatened and brought by environmental groups against the industry and regulators, and the international efforts to address ballast water discharges combine to create a perfect storm of complex and multifaceted issues surrounding the regulation of ballast water discharges. Finding a solution that is palatable to all of the various competing interests will be challenging. The regulated community in particular should consider how it should participate in these multifaceted efforts.

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The K&L Gates Maritime Environmental Group represents and has represented a broad range of maritime entities on environmental litigation, regulatory and legislative matters, including all elements of the ongoing disputes over discharges from vessels.

¹² See Testimony of Benjamin H. Grumbles, *supra*.

¹³ *Id.*

¹⁴ *Id.*

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