

EPA Issues General Permit for Vessels

Background

On December 18, 2008, EPA issued its Vessel General Permit (“VGP”) for discharges incidental to the normal operation of vessels. The permit responds to a 2005 U.S. District Court vacatur of EPA’s decades-old exclusion of those discharges from permitting under the Clean Water Act’s (“CWA”) National Pollutant Discharge Elimination System (“NPDES”).¹ *Northwest Environmental Advocates v. EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005) While that case was originally viewed as an attempt to bring discharges of ballast water under NPDES control, it achieved that result by bringing down the permitting exclusion that had insulated ballast water, as well as a host of other discharges incidental to the normal operation of vessels, from the NPDES program.

Taken by itself the decision would have had a broad reach indeed. For example, it would have required permits for over 18,000,000 recreational boats, expanding by roughly 36 times the number of NPDES permits currently in existence. In July of 2008, however, Congress passed two laws that modified the scope of the District Court’s decision and thereby defined the scope of the new Vessel General Permit.

The first of these was the Clean Boating Act of 2008, Pub. L. No. 110-188 (July 29, 2008). There, Congress amended the CWA to permanently exempt recreational vessels from NPDES permit requirements. In lieu of NPDES permitting, recreational vessels were made subject to a new regulatory regime jointly implemented by EPA and the Coast Guard and modeled on the Uniform National Discharges Standards (“UNDS”) program currently applied to vessels of the armed forces.

Second, Congress passed and the President signed a bill instituting a two-year moratorium on NPDES permitting for commercial fishing vessels and other non-recreational vessels less than 79 feet long. During the two-year period, EPA is to study the discharges of the covered vessels, invite public comments, and submit a final report to Congress within fifteen months of the bill’s enactment. The moratorium does not extend to any ballast water discharge or other incidental vessel discharge that EPA or the State affirmatively determine are contributing to a violation of water quality standards. Such specially identified discharges will require permits and will fall within the scope of the VGP.

¹ 40 C.F.R. 122.3(a). The exclusion, however, did not apply to “rubbish, trash, garbage, or other such materials discharged overboard.” The exclusion also did not extend to other discharges from vessels operating in a capacity “other than as a means of transportation,” such as an energy or mining facility, a seafood processing facility, or an oil exploration vessel. *Id.*

Permit Scope

The VGP's focus is on vessels "operating in a capacity as a means of transportation." It applies to a broad array of discharges "incidental to the normal operation of a vessel"— including deck runoff, bilgewater, and ballast water—into waters of the United States. Even if a waste stream falls into one of the categories of discharges covered by the VGP, it will be excluded from coverage if it contains industrial or manufacturing materials or other discharges not derived from the normal operations of the vessel. Discharges considered outside the scope of a vessel's "normal operations," and therefore ineligible for VGP coverage, include used or spent oil, photo processing or dry cleaning effluent, medical waste discharges, discharges of noxious liquid substance residues, and tetrachloroethylene degreasers. In addition, discharges currently or previously covered by NPDES permits are ineligible for coverage under the VGP. Sewage, which was excluded from NPDES permitting under the prior EPA rule, is similarly excluded from VGP coverage and continues to be regulated under section 312 of the CWA.

These limitations on coverage essentially maintain EPA's prior division between NPDES discharges and discharges subject to other regulatory programs, with the exception that discharges "incidental to the normal operations of a vessel" now require a permit. For vessels generally covered by the permit but with some discharges that fall outside of VGP permit coverage, both the VGP as well as an individual permit may be necessary. Alternatively, vessel owners or operators may decide to seek an individual permit to cover all of the vessel's discharges.

The VGP's substantive requirements are grouped into four categories: (1) technology-based effluent limits applicable to all vessels; (2) technology-based effluent limits for specific discharges; (3) water quality based effluent limits; and (4) requirements applicable to specific classes of vessels. Additional requirements from 28 states and tribes are also incorporated into the VGP through the CWA section 401 certification mechanism.

Technology-Based Effluent Limits Applicable to All Vessels

Section 2.1 of the VGP sets out a series of control measures required for all vessels covered under the permit. For example, the permit requires that vessel owners or operators take special precautions for the storage of toxic and hazardous materials and cargoes that could wash overboard or dissolve upon contact with rain or surface water spray. Vessel owners or operators must also ensure that fuel spills or overflows do not result in releases of harmful quantities of oil, take steps to minimize spills and overflows, and ensure prompt containment and cleanup where spills occur. Ships covered under the MARPOL convention must ensure that discharges of oily mixtures are less than 15 parts per million, while other vessels must ensure that such discharges do not contain harmful quantities of oil.

This section also contains a catchall provision requiring vessels to comply with "any applicable regulations" promulgated by the Coast Guard relating to the safe transportation, handling, carriage, and storage of pollutants, as well as provisions of the CWA, the Act to Prevent

Pollution from Ships, the National Marine Sanctuaries Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Oil Pollution Control Act. Because these statutes and regulations are currently being implemented, EPA determined that they represent the best practicable technology (“BPT”) for pollutants and the best available technology economically achievable (“BAT”) for toxic and non-conventional pollutants under the CWA. In effect, this makes compliance with the terms of those other programs—some of which exist under statutory authority other than the CWA and respond to statutory mandates foreign to the CWA’s definition of appropriate technology-based standards—enforceable, including by citizen suits, under the mechanisms of the Clean Water Act.

Technology-Based Effluent Limits for Specific Discharge Categories

Section 2.2 of the VGP contains technology-based effluent limits for a list of twenty-six specific types of discharges. The bulk of these discharge-specific VGP provisions relate to ballast water discharges. The VGP requires that vessels maintain “Ballast Water Management Plans” detailing ballast water management strategies and requires key crew members and other staff to have adequate training on management and treatment procedures in the plan. Vessel owners and operators must “avoid” ballast water discharges in sensitive marine environments and must “minimize” the uptake of ballast water in certain high-risk areas such as sewage outfalls or dredged areas. The VGP suggests control measures to minimize ballast water discharges, but does not mandate any particular measure. Onshore treatment of ballast water, however, must be explored for vessels whose design allows for safe transfer of ballast water to shore and if compatible onshore treatment is economically practicable.

Requirements for exchanges² of ballast water vary depending on whether the vessel is ocean-going, engaged in Pacific nearshore voyages, or entering the Great Lakes. For ocean-going vessels³ with ballast intakes from areas within 200 nautical miles from shore, an exchange is required for any tanks that will discharge into waters of the United States. The exchange must be conducted in waters beyond the Exclusive Economic Zone (“EEZ”), more than 200 nautical miles from shore, and must be commenced as early in the voyage as possible. Vessels engaged in Pacific nearshore voyages⁴ must conduct exchanges in waters beyond 50 nautical miles from

² The VGP defines “exchange” as the replacement of the water in a ballast tank using either the “flow-through exchange” or “empty/refill exchange” methods. In a flow-through exchange, ballast waters are flushed out by pumping water from the mid-ocean or coastal exchange zones into the bottom of the tank and allowing tank water to overflow from the top. In an empty/refill exchange, ballast water is pumped out until the tank is empty, and then refilled with water from the mid-ocean or coastal exchange zones.

³ Ocean-going vessels are vessels with ballast intakes from areas within 200 nautical miles of shore but that will subsequently operate beyond the Exclusive Economic Zone (“EEZ”) and more than 200 nautical miles from shore.

⁴ Vessels engaged in Pacific nearshore voyages are: vessels engaged in coastwise trade; vessels transiting between Pacific ports that travel between more than one Captain of the Port Zone; and all other vessels that sail from foreign, non-U.S. pacific, Atlantic, or Gulf of Mexico ports that do not sail further than 200 nautical miles from shore but that discharge ballast water into waters of the United States.

shore, and in waters more than 200 meters deep, before discharging ballast water into waters of the United States. Vessels entering the Great Lakes must comply with a separate regulation for “Ballast Water Management for Control of Nonindigenous Species in the Great Lakes and Hudson River.” For vessels that operate outside of the EEZ and beyond 200 nautical miles from shore and subsequently enter the Great Lakes must conduct saltwater flushing of ballast water at least 200 nautical miles from shore. If vessels have no ballast water or have unpumpable residual water, ballast tanks must either be sealed or the vessel must undertake saltwater flushing of tanks. The VGP also lists exemptions from ballast exchange requirements in several circumstances, including where an exchange would be unsafe or where the vessel uses an alternative, environmentally sound method of ballast water management.

Water Quality-Based Effluent Limitations

The VGP does not contain express water quality based effluent limitations. Instead, the permit states that discharges “must be controlled as necessary to meet applicable water quality standards” in the waterbody. Although EPA expects that compliance with the VGP’s other requirements will sufficiently control discharges to meet water quality standards, EPA reserves the authority to impose additional water-quality standards on a case-by-case basis. Vessel owners and operators may also have additional requirements for discharges into impaired waters—EPA or state agencies will inform owners and operators when such requirements apply.

Vessel Class Specific Requirements

Additional requirements apply to vessels according to their vessel class. The vessel classes are: large cruise ships, medium cruise ships, large ferries, barges, oil or petroleum tankers, emergency vessels, and vessels employing experimental ballast water treatment systems. Though the provisions for each class differ, most contain additional effluent limitations, educational and training requirements, and monitoring or recordkeeping requirements.

State Certifications under CWA Section 401

State concern over vessel discharges, particularly ballast water, resulted in an exceptionally active use of the CWA section 401 certification mechanism. The VGP summarizes key requirements contained in the certification conditions of twenty-eight states and tribes. Many of the certifications are extensive and have numerous additional requirements for vessels operating in their respective jurisdictions. For example, California’s certification prohibits discharges of many of the waste stream categories that are excluded from VGP coverage, while Vermont’s certification requires vessels with these discharges to obtain an individual water quality certification from the state agency. Other states⁵ prohibit discharges of waste stream categories specifically included in VGP coverage, such as graywater and bilge.

⁵ New York, for example, prohibits the discharge of graywater and bilgewater, while New Jersey prohibits only graywater but places additional limitations on the discharge of bilgewater.

Minnesota and Michigan will require vessels meeting certain applicability criteria to obtain state permits for ballast discharges. Vessels operating in states that have submitted certifications will need to consult both the VGP as well as applicable state certification provisions to determine the full scope of their permitting obligations.

Effective Date and Authorization under the VGP

Although EPA issued the VGP on December 18, 2008, the U.S. District Court for the Northern District of California recently signed an order providing that the prior EPA exemption under 40 C.F.R. § 122.3(a) will be vacated as of February 6, 2009. Therefore, EPA notes on its website that the regulated community “need not comply with the terms of [the VGP] until February 6, 2009.” To obtain coverage under the permit, EPA will offer an Electronic Notice of Intent (“NOI”) system available in June of 2009. Only vessels greater than or equal to 300 gross tons or with the capacity to hold or discharge more than 8 cubic meters (2113 gallons) of ballast water are required to submit an NOI; other vessels are automatically covered under the permit and authorized to discharge according to its requirements.

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