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EPA Issues Final General Permit for Discharges Incidental to the Normal Operation Of Vessels

On December 18, 2008, the United States Environmental Protection Agency ("EPA") issued the final version of the National Pollution Discharge Elimination System ("NPDES") General Permit for Discharges Incidental to the Normal Operation of a Vessel ("Vessel General Permit" or "VGP"). The VGP sets forth the practices and procedures to be followed by most commercial vessels operating in United States waters for discharges incidental to normal operations, and subjects such discharges for the first time to NPDES permitting under the Clean Water Act ("CWA"). Such discharges previously had been excluded from the NPDES permit requirements since the original regulations were issued in 1973. All vessels subject to the VGP must be in compliance by February 6, 2009. The Notice of Availability of the VGP was published in the Federal Register on December 29, 2008. 73 Fed. Reg. 79473.

How Did We Get Here?

In December 2003, the long-standing exclusion of discharges incidental to the normal operation of vessels was challenged in a lawsuit in the District Court for the Northern District of California. This lawsuit arose out of the denial of a petition by several groups, filed with the EPA in 1999, to repeal the exclusion, primarily based on concerns about the effects of ballast water discharges. In September 2003, EPA denied the petition. In 2005, the District Court ruled that the exclusion for vessel discharges exceeded EPA's authority under the Clean Water Act. On appeal, the District Court's ruling was upheld.

Originally, the District Court ruled that the exclusion was vacated on December 19, 2008, which forced EPA to issue the VGP or else all discharges incidental to the normal operation of vessels would have been prohibited in U.S. waters after that date. The District Court subsequently extended the compliance deadline until February 6, 2009, to allow the industry to adequately prepare for and implement the VGP requirements. In addition, requirements for inspections, training, recordkeeping and reporting must be met by February 19, 2009.

Congress enacted two laws that impact the types of vessels subject to the VGP. One law exempted all recreational vessels from the NPDES requirements. The other imposed a two-year moratorium during which no NPDES permit may be required for discharges incidental to the normal operation of vessels of less than 79 feet in length and of fishing vessels of any length, except that the VGP does apply to discharges of ballast water from such vessels during the two-year moratorium period.

The General Permit and Its Requirements

The VGP requirements apply to discharges incidental to the normal operation of a vessel into waters of the United States, which includes all internal navigable waters and the waters of the U.S. territorial sea out to 3 nautical miles. The final VGP addresses 26 vessel discharge streams, including deck washdown and runoff, above the water line hull cleaning, bilge water and discharges from Oily Water Separators, ballast water, leachate from anti-fouling hull coatings, blowdown from boilers and economizers, firemain systems and graywater. For each discharge type, the VGP establishes effluent limits for certain constituents found in the effluent, and best management practices to be implemented to decrease the amount of constituents in the discharges. Finally, there are vessel-specific requirements for eight types of vessels, including cruise ships, large ferries, barges, oil tankers and research vessels.

In addition, the VGP requires some administrative actions. For instance, there are requirements for routine inspections and monitoring of all areas of the vessel from which discharges originate. These must be entered in the ship's logbook. There are also analytical monitoring requirements for certain types of vessels, and a requirement for a comprehensive annual inspection to ensure permit compliance. There is a one-time permit report that must be submitted between 30 and 36 months after a vessel becomes covered by the permit. Finally, there are some crew training requirements

Beginning February 6, 2009, vessels are deemed to be covered by the VGP. In order to maintain coverage, the owner or operator of a vessel that is either 300 or more gross tons, or has the capacity to hold or discharge more than 8 cubic meters (2113 gallons) of ballast water must file a Notice of Intent ("NOI") to be covered no earlier than June 19, 2009, and not later than September 19, 2009. All other vessels are automatically covered under the VGP and are not required to file an NOI.

The primary problem for vessel owners and operators under the VGP is the fact that best management practices are difficult to implement on an "as needed" basis – that is, only when vessels that do not operate regularly in U.S. waters come into U.S. waters. In an attempt to reduce the impact of the inspection and recordkeeping requirements on such vessels, the EPA has stated that a vessel entering U.S. waters must only conduct the required weekly inspection during the week prior to entering waters, and is not required to conduct such weekly inspections during times it is operating outside U.S. waters. Further, any quarterly sampling or annual inspections required under the VGP are only required to be done during the quarter or year prior to entry into the U.S. respectively.

Can the Various States Impose Their Own Discharge Requirements?

Normally, under the NPDES regulations, it is the individual States or Territories that issue individual permits for discharges into their waters. The issuance of the VGP means that vessels are not required to obtain NPDES permits from each of the States or Territories in which they operate.

However, under the CWA, EPA may not issue a permit authorizing discharges into the navigable waters of a State or U.S. Territory until that State or Territory has granted certification or waived its right to certify. If a State or Territory believes that more stringent requirements than those contained in the VGP were necessary to meet CWA requirements, the State or Territory could include those more stringent requirements in its. These more stringent requirements are incorporated into the VGP and are applicable to any vessel discharges into the waters of that State or Territory.

Twenty-five States and one U.S. Territory issued certifications for the VGP. Twenty-three other States either waived or were deemed to have waived certification. The remaining two states, Alaska and Hawaii, withheld certification, so the VGP does not currently apply in those States. EPA has stated that it will announce the availability of coverage under the VGP in these States as soon as it receives the necessary certifications or waivers. It is expected that these States will act before February 6, 2009, because they are so dependent upon waterborne commerce.

Among the States that certified the VGP, California provided the most extensive list of conditions to the certification. The most potentially problematical of the conditions is that California is requiring vessel discharges to comply with more stringent effluent constituent limits than in the VGP. Further, there are burdensome monitoring and testing requirements for all types of discharges identified in the VGP. Thus, vessels calling in California ports should reduce discharges of any type as much as possible, and need to take additional measures to ensure that they are in compliance with the California requirements that are incorporated into the VGP for those waters.

Violations and Enforcement of the VGP

Violations of the VGP must be reported at least once a year to the appropriate EPA regional office, except certain spills and discharges identified in the VGP that must be reported within 24 hours if they endanger public health or the environment. The VGP also requires corrective actions to be taken to address any violations within the deadlines specified in the VGP or before a vessel returns to the United States, as applicable.

Violations of the VGP are potentially subject to civil or criminal penalties for discharging without a permit or for discharges that exceed the discharge limit. In addition to EPA and the Coast Guard, States will have a role in enforcing the requirements of the VGP. Finally, the Clean Water Act also allows for citizen suits to enforce permit conditions, but because such suits can be brought for violations that are either continuous or intermittent, it is impossible to predict in the context of vessel discharges how major a role such suits will ultimately play in the enforcement of the VGP.

Venable LLP

Venable has an experienced group of environmental and maritime attorneys that can assist vessel owners and operators in dealing with issues associated with compliance with the VGP. Our attorneys have assisted many vessel operators in developing comprehensive environmental compliance programs and in auditing compliance programs. Venable attorneys have served as counsel in the DOJ, EPA and the Coast Guard, and they have represented many shipping company owners, operators and employees in dealing with criminal, civil, and citizen suit enforcement actions of CWA provisions by federal and state enforcement agencies.

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