



Clean Water Act: EPA Issues New Vessel General Permit With Numeric Limits for Ballast Water Discharges

By Meline MacCurdy

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EPA has released a final permit covering vessel discharges under the Clean Water Act (CWA) that for the first time sets numeric effluent limits for ballast water discharges from large commercial vessels. The new Vessel General Permit (VGP) will replace the current VGP when it expires in December 2013. The most significant change in the new permit is the inclusion of numeric effluent limits to control the release of invasive species in ballast water, a change made in response to the terms of a settlement reached with the State of Michigan and several environmental groups. *See EPA to Add Numeric Limits to Ballast Water Discharge Rules Under Settlement with Environmental Groups*. In addition to setting numeric limits, the new VGP imposes new requirements relating to non-ballast water discharges, including first-time requirements for commercial fishing vessels at the end of 2014 barring a Congressional extension of the moratorium on regulating this class of vessels.[1]

Background

Under the CWA, a National Pollutant Discharge Elimination System (NPDES) permit is required for discharges of any “pollutant” from a “point source,” including a “vessel or floating craft,” into navigable waters of the United States.[2] The term “pollutant” includes “biological materials.”[3] EPA initially excluded “incidental discharges” from vessels from the permitting requirements of the NPDES program, [4] but, as discussed below, developed the current VGP in 2008 under court order.

The term “incidental discharges” encompasses a range of wastewater discharges from vessels during normal operations. For example, “graywater” is water that has been slightly used, such as water from laundry or bathing, and “bilge water” is water that collects on the inside of a vessel and is pumped out. Also included in the definition is “ballast water,” which has been the focus of the dispute regarding incidental vessel discharges for some time. Ballast water is water that a vessel takes in and/or releases to compensate for changes in the vessel’s weight as cargo is loaded or unloaded, or as fuel and supplies are consumed. As a vessel travels, it can inadvertently bring on board aquatic organisms in ballast water from one port and later release those same organisms at another port, where they are not native and can cause environmental harm. The zebra mussel is a prominent example of an invasive species whose inadvertent introduction to U.S. waters has caused unintended harm. In the Pacific Northwest, fish and wildlife agencies are particularly concerned about the introduction of invasive aquatic species such as smooth cordgrass, Oyster drill, European green crabs, non-native tunicates, and zebra mussels, all of which take passage in ballast water.

Environmental petitioners and, eventually, intervening states[5] challenged the regulation exempting incidental vessel discharges nearly thirty years after the regulation took effect. The Northern District of California vacated EPA’s exemption for incidental discharges in decisions issued in 2005 and 2006, holding that the exemption exceeded EPA’s CWA authority and that a permit is necessary for vessel discharges that had been exempted by EPA’s regulation.[6] In 2008, the Ninth Circuit affirmed the

district court's decision.[7] In light of the significant impact of the decision on the national shipping industry and regulatory agencies, the court granted EPA a stay of the decision vacating the regulation until February 6, 2009 to allow EPA time to implement a permit.

EPA responded by developing the current VGP, which it issued in December 2008.[8] On February 6, 2009, all non-exempt vessels operating as a means of transportation that discharge ballast water or other incidental discharges into U.S. waters became required to seek coverage under the VGP.[9] Due in part to legislative action in response to the Ninth Circuit's decision, the current VGP covers all incidental discharges from non-recreational vessels greater than 79 feet in length, except commercial fishing vessels, and ballast water discharges from all non-recreational vessels (except military vessels). The VGP establishes non-numeric effluent limits and a range of best management practices (BMPs) for twenty-six types of incidental discharges. The permit also incorporates U.S. Coast Guard requirements for ballast water management and exchange, sets specific requirements for ballast water exchanges for certain vessels, and sets training, documentation, and reporting requirements for vessels equipped with ballast water tanks.

The New VGP

The new version of the VGP will replace the existing VGP when it expires at the end of 2013. The final VGP largely tracks the draft permit that EPA released in December 2011.[10] However, EPA made several changes to the VGP based on the nearly 5,500 comments that EPA received on the draft permit.

The VGP covers vessel discharges in all U.S. states and territories, including those jurisdictions that implement other aspects of the NPDES program. The permit covers owners and operators of non-recreational large vessels (79 feet and over) operating in a capacity as a means of transportation, such as cruise ships, ferries, barges, mobile offshore drilling units, oil tankers or petroleum tankers, bulk carriers, cargo ships, container ships, other cargo freighters, refrigerant ships, research vessels, and emergency response vessels. The permit also covers commercial fishing vessels, even though the current Congressional moratorium exempts non-ballast water discharges from these vessels. If the moratorium is not renewed at the end of 2014, commercial fishing vessels will be able to apply for coverage under the VGP.

The most significant change in the new VGP is the inclusion of numeric effluent limits for ballast water expressed as the maximum concentration of living organisms in ballast water, as opposed to the current non-numeric requirements. EPA states that the numeric effluent limits are expected to substantially reduce the risk of introduction and establishment of invasive species in U.S. waters. The permit also contains maximum discharge limitations for biocides and residuals.

The numeric effluent limits in the VGP would not apply to all vessels. Those that will be required to comply with the numeric limits will do so under a staggered implementation schedule that has been relaxed from the draft VGP for new vessels. Certain existing vessels must achieve the numeric effluent limits for ballast water by the first drydocking after January 1, 2014 or January 1, 2016, depending on the vessel size. EPA pushed forward by one year the date on which "new build" vessels are constructed—from January 1, 2012 to January 1, 2013. These vessels are subject to numeric limits upon the effective date of the new permit. Vessels that have deferred deadlines for meeting the numeric standards must meet BMPs, which are substantially similar to current requirements.

The VGP deviates from the draft VGP by excluding four categories of vessels from the numeric ballast water discharge requirements: (1) inland and certain seagoing vessels less than 1,600 gross registered

tons; (2) vessels operating exclusively within a limited area on short voyages; (3) unmanned, unpowered barges; and (4) vessels constructed before January 1, 2009 that operate exclusively in the Laurentian Great Lakes. EPA excluded these vessels from the numeric requirements after considering comments expressing concern that existing technologies for these vessels do not qualify as the best available technology economically achievable (BAT).

Vessels that are subject to the numeric effluent limits for ballast water can meet these limits in four ways: (1) treat ballast water prior to discharge; (2) transfer the ship's ballast water to a third party treatment at an NPDES permitted facility; (3) use treated municipal/potable water as ballast water; or (4) not discharge ballast water. Like the 2008 permit, vessels that are enrolled in and meet the requirements for the Coast Guard's Shipboard Technology Evaluation Program would be deemed in compliance with the numeric limitations. The VGP also includes multiple mandatory practices for all vessels equipped with ballast water tanks, such as avoiding the discharge or uptake of ballast water in a manner that could impact sensitive areas (such as marine sanctuaries, preserves, parks, shellfish beds, or coral reefs), routine cleaning of ballast water tanks, using ballast water pumps in lieu of gravity draining, and minimizing ballast water discharges to the extent practicable.

The new VGP also imposes a variety of changes for non-ballast water discharges. For example, the changes include the imposition of more stringent BMPs for discharges of oil-to-sea interfaces in an effort to reduce the toxicity of oil leaked into U.S. waters. The VGP will require new vessels to use technically feasible "environmentally acceptable lubricants" in their oil-to-sea interfaces. Based on comments received from the draft VGP, EPA has clarified the circumstances in which this BMP is technically infeasible. Additionally, the VGP includes BMPs specific to commercial fishing vessels that may become subject to the NPDES program after 2014. The permit authorizes the discharge of fish hold effluent, but subject to specific BMPs. In response to comments on the draft VGP, the current permit clarifies that the prohibition on discarding unused bait overboard is limited to unused live bait, and only if the live bait is outside the waterbody or watershed from which it was caught.

Additional changes to the new VGP include numeric limits for exhaust gas scrubber effluent, and monitoring requirements for some larger vessels for graywater, exhaust gas scrubber effluent, and ballast water. Based on public comment, EPA has decreased the frequency of these monitoring requirements set forth in the draft VGP. EPA has also made several administrative improvements in the new VGP, such as a clarification that electronic recordkeeping is appropriate, streamlined reporting requirements into one annual report (as opposed to an annual report and a one-time report), and the opportunity for a combined annual report for unmanned, unpowered barges, subject to specified criteria.

In addition to the requirements in the new VGP, vessel owners and operators must meet twenty-five sets of state-specific requirements under the CWA's § 401 certification process. In a July 2011 decision, the D.C. Circuit upheld these requirements in EPA's current VGP over challenges from industry. *See Vessels Required to Meet State as Well as Federal Permit Conditions for Incidental Wastewater Discharges*. Because the CWA § 401 process allows tribes and states to impose their own requirements for vessels operating within their waters, vessels operating in multiple jurisdictions could face potentially conflicting conditions specific to each jurisdiction that they travel through.

The new VGP includes a tiered requirement for obtaining coverage based on the size of the vessel and the amount of ballast water carried. Vessels that are either 300 gross tons or larger or have the capacity to carry more than eight cubic meters of ballast water must submit notices of intent (NOIs) to receive permit coverage between six and nine months after the permit's issuance date. Vessels that do not need to submit NOIs are automatically authorized under the permit.

Small VGP Pending Final Action

EPA published a draft Small Vessel General Permit (sVGP) in December 2011, at the same time that it published the draft VGP. The draft sVGP would regulate incidental discharges from vessels under 79 feet long, which have been exempt from non-ballast water permit requirements due to a Congressional moratorium that is currently set to expire in December 2014. EPA is currently reviewing comments on the draft sVGP and intends to issue a final permit later this year. For additional information regarding the draft sVGP, see *Draft Vessel General Permits to Impose Numeric Limits for Ballast Water, Extend Regulation to Small Vessels*.

For more information regarding this article, please contact Meline MacCurdy or any member of Marten Law's Water Quality practice group.

[1] EPA's VGP and related documents are available at this link. For information regarding the scope and history of the VGP, see *Battle of the Bilge: EPA Issues Draft NPDES Permits for Incidental Boat Discharges; EPA General Permit for Ballast Water Discharge Goes Into Effect*.

[2] 33 U.S.C. §§ 1342, 1362(14); 40 C.F.R. 122.1(b).

[3] 33 U.S.C. § 1362(6).

[4] 40 C.F.R. § 122.3(a) (excluding "effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or *any other discharge incidental to the normal operation of a vessel*," from the NPDES program).

[5] The intervening states included New York, Illinois, Michigan, Minnesota, Wisconsin and the Commonwealth of Pennsylvania.

[6] *Northwest Env'tl. Advocates v. EPA*, 2005 WL 756614 (N.D. Cal. Mar. 30, 2005); *Northwest Env'tl. Advocates v. EPA*, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006).

[7] *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008).

[8] 73 Fed. Reg. 79473 (Dec. 29, 2008).

[9] See Clean Boating Act of 2008, Pub.L. No. 110-288, 122 Stat. 2650 (2008) (exempting recreational vessels); Permits for Discharges from Certain Vessels, Pub.L. No. 110-299, 122 Stat. 2995 (2008) (granting two-year moratorium for regulation of non-ballast water discharges from smaller vessels and commercial fishing vessels); Discharges Incidental to Normal Operation of Vessels, Pub. L. No. 111-215, 124 Stat. 2347 (2010) (extending moratorium prohibiting NPDES permitting for discharges incidental to the normal operation of fishing vessels and smaller vessels until December 2013); Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, § 703 (extending moratorium prohibiting NPDES permitting for discharges incidental to the normal operation of fishing vessels and smaller vessels until December 2014).

[10] 76 Fed. Reg. 76716 (Dec. 8, 2011).

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