



EPA Publishes Final Vessel General Permit Following a Constitutional Trifecta, as Congress Acts, the Court Rules, and the States Set Their Own Terms

The U.S. Environmental Protection Agency (EPA) has issued the long-awaited Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (the VGP), setting forth the requirements to be applied to most vessel discharges within the waters of the United States. The publication of the VGP comes in the wake of Congressional action to relieve recreational and smaller commercial vessels from requirements of the U.S. Clean Water Act, actions by several states to impose additional local discharge conditions, and most recently and helpfully, a decision by the U.S. District Court for the Northern District of California to extend the deadline for compliance with the VGP to February 6, 2009. That extension will allow the industry some time to prepare for the requirements of the VGP, but while the industry scrambles to prepare, certain key issues remain to be resolved.

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Background

Under the Clean Water Act, all discharges of pollutants into U.S. waters are prohibited, unless authorized by a duly-issued permit or exempted. However, shortly after the Act went into effect, the EPA issued a regulation exempting discharges incidental to the normal operation of vessels. In December 2003, a coalition of environmental groups sued the EPA to repeal the vessel exemption. The court ultimately held in March 2005 that the vessel exemption was beyond EPA's authority to grant, and therefore ordered that the exemption be vacated. The EPA's appeal was not successful, and the court ultimately ordered that the vessel exemption be vacated by December 19, 2008.

With the removal of the vessel exemption, any vessel discharge not specifically allowed by a permit would violate the Act, and subject the owner and operator to potential criminal liability, civil penalties, and the risk of lawsuits. Because discharges are a normal, and often unavoidable, part of ship operations, the EPA had to move quickly to create a general permit to cover normal vessel discharges for the large number and wide range of vessels that use U.S. waters. The EPA recognized that it could not impose numerical effluent limits, as it normally does in connection with land-based discharges, so instead decided to identify the effluent limits as those discharge levels achieved when a vessel carries out certain "Best Management Practices" (BMPs) with regard to each of the discharges as set out in the VGP.

Congress also reacted to the court's decision, passing two laws to mitigate the loss of the vessel discharge exemption. The first law created a statutory exemption for recreational vessels. The second imposed a two-year moratorium on any permit requirements for commercial fishing vessels and non-recreational vessels less than 79 feet in length.

Due to the short time available to develop the VGP and the need to allow for public comments and input from the states, the EPA was not able to produce the Final VGP until December 19.

Presented with a motion by the EPA noting that the maritime industry would need some time to prepare for the requirements of the Final VGP, including the various state conditions, the court agreed to extend the vessel exemption through February 6, 2009. That extension, albeit short, means that the industry—and the regulators—will have at least some time to prepare for the Final VGP to go into effect.

That limited time will be sorely needed. The Final VGP includes multiple, and varying, requirements added to the VGP by states, which have the authority to add “conditions” to the VGP pursuant to the Clean Water Act. The exercise of that authority appears likely to lead to further confusion as water discharge regulations become “balkanized” on a state-by-state basis.

The States’ Role

Under § 401 of the Clean Water Act, a federal permit to conduct discharges must be subjected to certification by the state where the discharge will take place. The state can certify that the discharges allowed under the permit will comply with federal and state law within its jurisdiction, or it can make the certification, subject to specific conditions. If the state simply fails to respond, or otherwise elects to defer making a decision, it can be deemed to have waived its right to certify the federal permit.

Twenty-five states, two tribes, and one U.S. territory issued certifications in time to meet the EPA’s deadline. Two others (Alaska and Hawaii) have stated an intention to certify, but apparently did not do so in time. The remainder have waived, or at least the EPA has deemed them to have waived, their rights to certify the VGP. For those states that did certify the VGP, the conditions they have set out will become part of the VGP applicable to discharges in their respective state waters. The result is a patchwork of sometimes divergent regulations.

Hawaii and Alaska are currently deemed to have withheld certification. Unless they correct that situation by February 6, 2009, vessel discharges in those states’ waters will not be permitted under the Clean Water Act, which would have the effect of rendering vessel calls to those states legally perilous. Since those two states in particular are dependent upon water-borne trade, we expect them to promptly correct their current status.

With regard to those states and territories that have certified the VGP, several certified without conditions, or with de minimus conditions that are not likely to affect oceangoing vessels. For example, Florida has conditioned its certification on the inclusion of its longstanding prohibition of oil

discharges greater than 5.0 mg/L. But since most, if not all, commercial vessels operate under the assumption that no oil discharges are permitted in U.S. waters anyway, Florida’s condition is merely symbolic.

Several states conditioned their certifications on additional graywater discharge restrictions. Georgia certified the VGP with the condition that oceangoing vessels of 20 tons or more that discharge graywater must do so through a marine sanitation device. Maine restricted discharges of graywater and blackwater in its coastal waters and in “No Discharge Areas.” Other states, such as Connecticut, Illinois, Michigan, Nebraska, New Hampshire, New Jersey, and New York, effectively prohibited graywater and blackwater discharges, albeit with different deadlines.

On the Atlantic seaboard, New York and Massachusetts imposed nearshore ballast water exchange requirements, even though the EPA had concluded that such standards were not justified along the Atlantic and Gulf coasts, and the Coast Guard had specifically exempted nearshore voyages from ballast water exchange requirements. Importantly, the New York nearshore voyage ballast water exchange requirement does not include an exemption for delay or deviation of the voyage. By contrast, the Massachusetts nearshore ballast water exchange requirement imports the exemption by reference to the VGP’s requirements for Pacific nearshore voyage. Although the VGP states that the Massachusetts nearshore voyage requirements will be based on the Pacific nearshore voyage requirements for vessels having ballast tanks that are empty or contain unpumpable residual water, Massachusetts officials have advised that they intended to reference all of the Pacific nearshore voyage requirements.

New York also imposes a requirement for vessels that will enter New York waters to have ballast water treatment systems by 2012. Further, the New York standards applicable to those systems will be significantly more stringent than the ballast water standards promoted by the International Maritime Organization, which do not become effective until 2016.

In the Great Lakes, despite the history of ballast water regulation and the strong community of interest they share, the Great Lakes states could not agree to a uniform approach. As a result, vessel operators will face a patchwork of diverse rules. While New York will impose ballast water treatment system requirements as noted above, Ohio expressly rejected such requirements, because they have not been proven “practical and possible.” Instead, Ohio, along with Indiana, Illinois, Minnesota, Michigan, and Pennsylvania, basically adopted the IMO ballast water standards and timetable.

As expected, California issued the most extensive certification conditions under the VGP. In addition to ambiguous language suggesting imposition of a permitting fee, the California conditions will require vessels to comply with the full panoply of the state's numeric effluent limitations, which are significantly more stringent than international standards, and well ahead of international implementation schedules. Further, vessels will be required to carry out burdensome monitoring and testing of all waste streams identified in the VGP. How difficult compliance with the new California regime will actually be for vessel operators remains to be seen. Testing may show that the California numeric effluent limitations are largely irrelevant to most vessels, which could allow vessel operators to avoid the burden of continuous testing. However, vessel operators will bear a heavy initial burden to establish that they are in compliance. Doing so will require a thoughtful and well-planned environmental review of all vessel discharges. As an initial course, vessel operators would be wise to reduce all vessel discharges to an absolute minimum while in California waters.

Several other states and territories with significant interests in maritime commerce remained silent on the VGP, including Texas, Louisiana, Maryland, Virginia, Delaware, North Carolina, South Carolina, Alabama, Puerto Rico, the U.S. Virgin Islands, and American Samoa. They, along with Washington and Oregon, waived, or were deemed to have waived, their rights to certify the VGP.

Other Changes in the Final Permit

The Final VGP reflects several other changes, made in response to public comments and concerns following the publication of the Proposed VGP. Many of the changes represent an acknowledgement that the BMPs must be subject to other regulatory and safety requirements. For example, §§ 2.1.1 and 2.1.2 now include qualifications that material storage practices must be subject to Coast Guard regulations for the transportation, handling, carriage, and storage of pollutants. Other changes serve to ameliorate some of the VGPs requirements, or to more precisely clarify the scope of the requirements. For example, the Final VGP deleted the requirement that ballast water exchanges be conducted in waters at least 200 meters deep (§ 2.2.3.5); relaxed prohibitions against boiler blowdowns (§ 2.2.6); and allowed testing and training with the firemain system (§ 2.2.12).

A few changes imposed additional BMPs or restrictions, including additional requirements with regard to fueling lifeboats (§ 2.1.3) and a prohibition against cruise ships

discharging pool or spa water (§§ 5.1.1.2 and 5.2.1.2). Vessel operators that got a head start by drafting plans based on the Proposed VGP should review those plans against the Final VGP to ensure compliance with the latest requirements.

EPA Addresses Jurisdictional Issues, but Questions Remain

Several comments on the Proposed VGP, complained about the jurisdictional uncertainty posed by the VGP. The VGP purports to require vessels to carry out a number of actions, including weekly, annual, and drydock inspections, quarterly testing of waste streams, extensive record-keeping, training, and disciplinary actions. However, the "effluent limits" imposed by the VGP can only be applicable to discharges made within the three-mile territorial sea as defined in the Clean Water Act. Because most foreign-flag ships, and those U.S. flag ships engaged in foreign trade, are only in U.S. waters a limited number of days each year, the VGP, and by extension the BMPs required by the VGP, will not be applicable for most of their operations. However, as commenters noted, BMPs onboard ships can be difficult to turn "on" and "off." Moreover, whether the inspection requirements would need to be done even outside of U.S. waters was not clear.

The EPA sought to answer that question in the document "Proposed VGP: EPA's Response to Public Comments," published in the docket on December 29th. The agency states that the periodic inspection and reporting requirements should be "read in light of what they are—conditions prerequisite to discharge into waters of the U.S." Thus, a vessel entering U.S. waters must only conduct a weekly inspection during the week before coming into U.S. waters, and will not be required to conduct weekly inspections at other times when the vessel is outside of the U.S. Similarly, quarterly sampling would be required only during the quarter prior to entry into the U.S. and an annual inspection would be required during the year prior to entry into the U.S.

Notably, the Final VGP also amended the provisions for taking corrective actions in connection with problems, such as violation of permit requirements or ineffective control measures, to change the mandatory timing of such corrective actions. While the Proposed VGP required certain actions to be taken within two weeks, and others within three months, the Final VGP now provides that the actions must be taken by the later of the specified deadline or the vessel's return to U.S. waters.

The EPA appears to be making a strong effort to minimize the impact on the shipping industry while satisfying the

California-based federal courts and environmental groups. Nevertheless, the unilateral imposition by the U.S. of inspection and reporting requirements in excess of international norms, to be completed in some cases long before a vessel may enter the U.S., appears to breach standards of international comity and cooperation. The imposition of additional, sometimes contradictory requirements by states, through the VGP, further complicates the situation, creating the type of regulatory chaos that has already been the subject of several successful U.S. Supreme Court challenges. Although the fight has gone out of the EPA, it remains uncertain whether any shipping interests will challenge the notion of a single U.S. judicial circuit imposing requirements that will be applicable internationally, or whether Congress will undertake further corrective action.

Notices of Intent

The Final VGP finally set the dates by which vessels must file their Notices of Intent (NOIs) to be covered by the VGP. The EPA expects its “eNOI” electronic filing interface to be online by June 19, 2009. Vessels will then have until September 19, 2009 to file an NOI.

Thus, vessels will be deemed to be covered by the VGP effective February 6, 2009. To remain covered, a vessel must file its NOI between June 19 and September 19, 2009. Vessels that fail to file a NOI will cease to be covered by the VGP, and will therefore not be allowed to make any discharges into U.S. waters, unless and until they obtain an individual vessel permit (under an application process that has not yet been developed, but is expected to be burdensome, at best). After September 19, 2009, vessels filing a NOI will have to wait for a 30-day period before coverage will be deemed to begin,

unless the vessel was previously covered by the VGP.

Several commentators on the VGP asked about the idea of making “fleetwide” filings, as is currently done with vessel documentation applications, mortgages, and insurance documentation. Unfortunately, the EPA was not prepared to agree to such an approach. However, the agency did state that it would attempt to find ways to make its eNOI system more user-friendly and efficient.

Re-Cap

By February 6, 2009, vessels calling in U.S. ports must be prepared to comply with the VGP, including those additional conditions imposed by the particular state where the vessel will arrive. Although many of the requirements imposed by the VGP duplicate existing vessels plans and pollution prevention measures, vessels will still need to comply with new requirements, including more burdensome record-keeping requirements. Notably, vessels that will call in California should take steps immediately to comply with numerical effluent limits far more stringent than international standards, and will also need to comply with state reporting schemes. Further, vessels must submit NOIs on a timely basis, to ensure continued coverage under the VGP.

We encourage shipowners to complete comprehensive vessel discharge reviews incorporating the provisions of the VGP as soon as possible, so that issues can be resolved and personnel trained prior to arrival in U.S. waters by the impending deadline. Such plans should include specific analysis of the requirements of those states where the owner’s vessel will be calling.

If you have any questions regarding this briefing, please contact one of the following Winston & Strawn partners listed here.

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