

Client Alert

May 2013

New Vessel General Permit Challenged in Ninth Circuit As Groups Seek Stricter Effluent Limit for Ballast Water

On May 3, 2013, Northwest Environmental Advocates (NWEA) and the Center for Biological Diversity (CBD) filed a petition requesting the US Court of Appeals for the Ninth Circuit to review the final 2013 National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP).¹ The 2013 VGP, issued under the Clean Water Act (CWA) by the US Environmental Protection Agency (EPA or Agency) on March 28, 2013, authorizes discharges incidental to the normal operation of commercial vessels greater than or equal to 79 feet in length.² The VGP, which becomes effective on December 19, 2013, includes, for the first time, numeric effluent limits applicable to vessels with ballast water tanks, placing a limit on the number of living organisms per cubic meter of ballast water discharged by a vessel. NWEA has advocated for a “zero discharge” limit.

In the petition for review, NWEA and CBD note generally as a cause of their action “a substantial interest in the EPA’s issuance of the VGP because ... [it] will have adverse impacts on the Petitioners’ and their members’ interests in the unique aquatic ecosystems found in waters of the United States.”³ Although the petition does not identify the specific claims that the groups intend to bring, the groups have advocated for a “zero discharge” limit, or zero detectable living organisms, as the VGP’s numeric limit for ballast water discharges.⁴ NWEA asserts that “EPA failed to place the burden of controlling invasive species on those who create the problem, instead of those who are suffering the consequences of it.”⁵ NWEA also asserts that “[i]n this new permit EPA has compounded the high environmental and economic costs associated with existing invasive species by avoiding Clean Water Act requirements that would prevent new invasions.”⁶

NWEA brought the original litigation that led to EPA’s regulation of vessel discharges under the VGP. EPA issued the 2008 VGP as a NPDES permit in response to a Ninth Circuit decision overturning EPA’s prior exemption for discharges incidental to normal vessel operations.⁷ Shipping and other industry groups have expressed concern over difficulties involved in regulating mobile sources, such as vessels that regularly cross the waters of many states, under the NPDES permit program. These industries have expressed frustration that conditions imposed by the CWA Section 401 state certification process, and the overlap of VGP conditions with US Coast Guard requirements, can result in a confusing, impractical and costly patchwork of vessel regulations. EPA introduced the draft 2013 VGP on November 30, 2011.

¹ Petition for Review at 1, *NWEA v. EPA*, No. 13-71565 (9th Cir. filed May 3, 2013) (Petition for Review).

² 78 Fed. Reg. 21,938 (April 12, 2013).

³ Petition for Review at 2.

⁴ *NWEA et al.*, Comments on Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel at 22 (Feb. 21, 2012), Doc. ID No. EPA-HQ-OW-2011-0141-0577 (NWEA Comments); see generally Press Release, NWEA, EPA Again Fails to Control Invasive Species from Ship Discharges (Apr. 7, 2013) (Press Release).

⁵ Dan Egan, *EPA Issues New Rules for Ballast Water Discharges*, JOURNAL SENTINEL, Mar. 30, 2013, <http://www.jsonline.com/news/wisconsin/epa-issues-new-rules-for-ballast-water-discharges-p59brae-200687651.html>.

⁶ *Id.*

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

The 2013 VGP, which will replace the 2008 VGP, continues to regulate 26 specific discharge categories addressed by the 2008 VGP. The 2013 VGP's numeric ballast water discharge limits generally align with the numeric standards set by ballast water management regulations issued by the US Coast Guard in 2012 and with international standards. The VGP places a stringent limit on the number of living organisms per cubic meter of ballast water that a vessel can discharge.⁸ The goal of these limits is to achieve significant reductions in the number of living organisms discharged via ballast water into waters subject to the CWA and covered by the VGP.⁹ EPA initially proposed a stricter effluent limit for ballast water, but modified the limit in the final VGP based on the absence of sufficient technology to detect and treat organisms at the originally proposed levels. In addition, EPA stated that it did not believe a "zero detection" standard would enhance environmental protection beyond that contained in the final VGP.¹⁰

This (and potentially other) litigation involving the VGP is of particular concern to vessel, port, energy and other industries that engage in or rely upon commercial vessel operations, and may be of wider interest based on issues involving the regulation of living organisms as pollutants under the CWA.

How Hunton & Williams LLP Can Help

Hunton & Williams LLP has an extensive water and marine resources practice and regularly counsels and represents clients in all facets of CWA regulation. Hunton & Williams was named "Law Firm of the Year: Water Law Practice" in the 2013 edition of *U.S. News – Best Lawyers*[®] and received a Tier 1 national ranking as a "Best Law Firm: Environmental Law." These designations follow the practice's recent designation as a Law360 Environmental Group of the Year for the third year in a row (2010–2012). Hunton & Williams has a comprehensive, nationwide practice involving the Clean Water Act, with significant experience in NPDES permitting under Section 402, water quality under Section 303, Section 404 permits for discharges of dredged or fill material, water supply concerns and water rights negotiations, as well as Oil Pollution Act of 1990, National Environmental Policy Act and Endangered Species Act issues that often arise in connection with Clean Water Act permits and litigation. We regularly represent individual businesses and trade associations across numerous industries subject to CWA regulation in permitting, rulemaking, litigation and enforcement actions. We have long represented, counseled and defended members of the shipping industry in vessel pollution cases.

⁸ Consistent with an EPA Science Advisory Board (SAB) recommendation that ballast water management could be improved by certain practices, including treatment of ballast water in onshore reception facilities, the VGP allows vessel owner/operators subject to the concentration-based numeric treatment limit to meet their obligations in one of four ways: 1) discharge treated ballast water meeting the applicable numeric limits; 2) transfer of the ship's ballast water to a third party (which may be onshore or on another vessel such as a treatment barge); 3) use of treated municipal/potable water as ballast water; or 4) by not discharging ballast water.

⁹ EPA, Final 2013 Vessel General Permit: Brief Overview of the Final Permit (Mar. 2013), *available at* http://www.epa.gov/npdes/pubs/vgp_overview2013.pdf.

¹⁰ EPA, 2013 VGP: EPA's Response to Public Comments (Mar. 28, 2013), Doc. ID No. EPA-HQ-OW-2011-0141-0926 (citing National Academies of Science 2011 study titled "Assessing the Relationship Between Propagule Pressure and Invasion Risk in Ballast Water," at 117-118).

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