

Client Alert

April 2013

EPA Issues Final 2013 Vessel General Permit

Permit Includes New Numeric Effluent Limitations Applicable to Vessels With Ballast Water Tanks

On March 28, 2013, the Environmental Protection Agency (EPA) issued the final National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP). The 2013 VGP, issued under the Clean Water Act (CWA), replaces the 2008 VGP and regulates discharges incidental to the normal operation of commercial vessels greater than or equal to 79 feet in length.¹ The 2013 VGP will be effective on December 19, 2013, when the current 2008 VGP expires.² The 2013 VGP includes, for the first time, numeric effluent limitations applicable to vessels with ballast water tanks, placing a stringent limit on the number of living organisms per cubic meter of ballast water that a vessel can discharge and retain coverage under the CWA permit.

EPA issued the 2008 VGP as an NPDES permit in response to a court decision overturning EPA's prior exemption for discharges incidental to normal vessel operations. *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008). 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 U.S. Coast Guard requirements, can result in a confusing, impractical and costly patchwork of vessel regulation. According to the House Transportation and Infrastructure Committee's oversight plan for the 113th Congress, the committee is planning to continue to review and address concerns with the regulation of vessel discharges under the VGP.

Implications for Industry Sectors Involved in Marine Shipping

The 2013 VGP continues to regulate 26 specific discharge categories addressed by the 2008 VGP. The VGP establishes numeric ballast water discharge limits for living organisms in the ballast water of large commercial vessels, replacing the nonnumeric 2008 VGP limits with more stringent standards. Notably, the 2013 VGP generally aligns with numeric standards set by ballast water management regulations issued by the U.S. Coast Guard in 2012 and with international standards. EPA has expressed the numeric effluent limit for ballast water discharges as numbers of living organisms per cubic meter of ballast water. As with the 2008 VGP, vessels enrolled in, and meeting the requirements of the U.S. Coast

¹ See EPA Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharge Incidental to Normal Operation of a Vessel, available at http://www.epa.gov/npdes/pubs/vgp_frnotice2013.pdf (March 29, 2013). The notice of final permit issuance has been made public, but notice has not yet been published in the Federal Register.

² EPA has also issued a Draft Small Vessel General Permit (sVGP) for commercial vessels less than 79 feet and all commercial fishing vessels. 76 Fed. Reg. 76,721 (Dec. 8, 2011). The sVGP would require specific best management practices to minimize discharges of pollutants, such as measures to manage fuels, oils, graywater, ballast water and fish hold effluent. The sVGP also includes provisions for recordkeeping and inspections. The sVGP is still undergoing interagency review and will be finalized "later this year," according to a statement from EPA.

Guard's Shipboard Technology Evaluation Program (STEP) will be deemed to be in compliance with the numeric limitations.

EPA has established a staggered schedule for implementation of the numeric limits, requiring existing vessels with a ballast capacity of 1,500 to 5,000 cubic meters to comply by their first dry-docking after January 1, 2014, and vessels that were constructed before January 1, 2012, with a ballast capacity either less than 1,500 cubic meters or greater than 5,000 cubic meters, to comply by January 1, 2016. EPA estimates that most retrofits will be completed by 2018. Vessels constructed after December 1, 2013, that are subject to the numeric limits, would be required to comply with the ballast water discharge standards immediately upon entering into service. Under the 2013 VGP, these ballast water limits may be met through one of four ways: use of a treatment device prior to discharge, transfer of the ship's ballast water to a third party for onshore treatment at an NPDES-permitted facility, use of treated municipal/potable water for ballast, or through a decision not to discharge the ballast water at all.

In addition, the final 2013 VGP includes numeric limits for exhaust gas scrubber effluent that are consistent with International Maritime Organization guidelines. The 2013 VGP imposes more stringent technology-based effluent limits in the form of best management practices for discharges of oil to sea interfaces (e.g., stern tubs, thrusters, hydraulic pitch propellers, wire rope lubrication) and increases the mandate for use of "environmentally acceptable lubricants" (EALs) in U.S. waters (e.g., vegetable oils, synthetic esters and polyalkylene glycols). The 2013 VGP also contains monitoring requirements for certain larger vessels for ballast water, bilgewater, graywater and/or exhaust gas scrubber effluent that discharge into waters subject to the permit.

The final permit also includes new requirements on copper and selenium discharges and releases of invasive species in order to ensure compliance with the Endangered Species Act (ESA). Due to a concern regarding the high sensitivity of aquatic species to copper, raised by the National Marine Fisheries Service (NMFS) in its ESA consultation with EPA, the VGP requires that "vessel owners/operators shall consider using anti-fouling coatings that rely on a rapidly biodegradable biocide or other alternative rather than copper-based coatings." And if vessels opt to continue to use copper-based anti-fouling coatings, the permit requires that they must document how they reached that decision.

Additionally, in the event that the permitting moratorium for commercial fishing vessels is not extended past December 18, 2014, the 2013 VGP will be available, for the first time, to authorize discharge of fish hold effluent and establish appropriate best management practices for this discharge type after that date. Finally, EPA made several administrative changes to the VGP in an attempt to improve efficiency, including clarifying that electronic recordkeeping is permitted, eliminating duplicative reporting, and allowing for consolidated reporting for certain vessels.

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, water rights negotiations and 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.

About Hunton & Williams LLP

Hunton & Williams LLP provides legal services to corporations, financial institutions, governments and individuals, as well as to a broad array of other entities. Since our establishment more than a century ago, Hunton & Williams has grown to more than 800 lawyers serving clients in 100 countries from 19 offices around the world. While our practice has a strong industry focus on energy, financial services and life sciences, our experience extends to more than 100 separate practice areas, including bankruptcy and creditors' rights, commercial litigation, corporate transactions and securities law, intellectual property, international and government relations, regulatory law, products liability, and privacy and data security. For additional information visit our website at www.hunton.com.

If you have questions about the developments discussed in this client alert, or other maritime environmental issues, please contact us.

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