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EPA Set to Issue NPDES General Permit for Incidental Vessel Discharges by December 19 *CWA exemption for incidental vessel discharges to be vacated on that date*

A Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP) for discharges incidental to the normal operation of commercial vessels is scheduled to be issued December 19, 2008, by the U.S. Environmental Protection Agency. Some 42,000 domestically flagged commercial vessels and 8,000 foreign-flagged vessels are likely to be subject to the new permit requirements and related CWA prohibitions. Violations of CWA permit conditions can subject businesses to administrative and civil enforcement, as well as the risk to both businesses and individuals of criminal enforcement. In addition, private citizens can bring suit to enforce the CWA.

The VGP will include technology-based effluent limits for 28 discharge types, including ballast water discharges. The proposed permit requires mid-ocean ballast water exchanges, log book and records maintenance, and annual reports of noncompliance. To meet their own state water-quality standards, some states are expected to seek more stringent requirements than those imposed by the VGP.

The VGP follows the 2006 decision in *Northwest Environmental Advocates v. EPA*, in which a federal district court

in California struck down the EPA's regulatory exemption of incidental vessel discharges from NPDES permitting. That ruling was upheld in July by the U.S. Court of Appeals for the Ninth Circuit. After an extension, the district court set December 19 as the date for the EPA to issue the new permit. The *Federal Register* notice of the proposed VGP is available online at: www.epa.gov/npdes/regulations/vessel_frnotice.pdf, and the proposed permit is available at: www.epa.gov/npdes/pubs/vessel_commercial_permit.pdf.

Limiting Legislation

Notwithstanding legislation that limited the scope of the permit coverage (exempting recreational vessels, commercial-flagged fishing vessels and vessels of less than 79 feet in length), a wide variety of vessels will be covered by the VGP, including large container vessels, cruise ships and other types of commercial vessels more than 79 feet long.

Implications: Increased Enforcement

On December 19, all vessels subject to the VGP will require permit coverage for discharges into the U.S. three-mile territorial sea or inland waters of pollutants incidental to normal operations.

Permit requirements include: timely submission of a Notice of Intent (NOI) to receive VGP coverage; application of specific best management practices (BMPs); and recordkeeping, monitoring, inspection and reporting procedures.

The VGP does not include a phase-in compliance period. Owners and operators of covered vessels should determine whether they have incorporated the new requirements into their regulatory compliance programs since they are expected to comply with the terms of the VGP at the time of its issuance. Any vessel operator/owner who will not be in compliance with the VGP on December 19 should consult legal counsel for compliance assistance and to avoid an enforcement action. CWA enforcement against vessel owners, operators and officers has been a priority of the EPA for more than 10 years, and this new permit program appears likely to increase enforcement focus on the maritime industry.

These issues were the subject of a recent report issued by the Congressional Research Service titled "Regulating Ballast Water Discharges: Current Legislative Issues." The report, which examines regulation of ballast water discharges, concerns with separate state regulatory programs, and legislative approaches currently under consideration for the regulation of ballast water discharges, is available at http://assets.opencrs.com/rpts/RL34640_20080828.pdf.

How Hunton & Williams Can Help

Hunton & Williams regularly counsels and represents vessel owners and operators, trade groups and others potentially impacted by the VGP. Our attorneys have participated in many judicial reviews of regulatory programs and have assisted companies seeking to engage in risk reduction through implementation of compliance programs and internal reviews. We regularly

represent regulated businesses in CWA enforcement by government authorities and citizens.

Hunton & Williams attorneys have experience with virtually every aspect of the Clean Water Act and the Oil Pollution Act of 1990, including the NPDES permit program. We have counseled clients and prepared comments in response to a number of significant technology-based and water quality-based rules the EPA has proposed. We also have experience in the growing number of air emissions-related regulatory programs vessels are now facing at the state, federal and international levels. Finally, we have long represented the shipping industry, including counseling and defense of vessel pollution cases.

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

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