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Two recent developments concerning the Vessel General Permit (VGP) program and California's marine fuel use standards will result in more stringent environmental regulatory requirements for vessels trading to the United States.

Important Changes Ahead for the EPA's Vessel General Permit Program

Vessel owners and managers will confront rigorous new requirements in the next version of the Environmental Protection Agency's (EPA) VGP, particularly with respect to standards for ballast water discharges. The new requirements were announced recently in connection with a settlement in *Natural Resources Defense Council, Inc. (NRDC), et al. v. EPA*, in which the NRDC, the National Wildlife Federation, other environmental groups, and the State of Michigan claimed that the ballast water regulations contained in the first VGP were not adequate. The settlement will result in a number of changes to the VGP, but most significantly, the EPA has agreed to develop, and vessels will be required to meet, specific numerical standards to control the number of organisms present in ballast water discharges.

These numerical discharge limits are markedly different from the EPA's earlier approach to ballast water discharges, which echoed the standards set forth in the U.S. Coast Guard's ballast regulations and simply required vessels to utilize best management practices. For example, under the current VGP, vessel operators are directed to minimize the uptake of ballast water in "areas known to have infestations or populations of harmful organisms and pathogens."

LEGAL CHALLENGE TO THE VGP

As a result of the 2008 ruling in the *Northwest Environmental Advocates* case, ballast water discharges, like other discharges incident to routine vessel operations, are now regulated under the Clean Water Act (CWA). The CWA requires that all point sources of water pollution, both land- and sea-based, must meet specific effluent standards, based on the level of available control technology. Where the EPA determines that the technology-based standards are not adequately protective of the environment, more stringent water quality-based standards may be used. In 2009, as the EPA was developing the VGP, a coalition of environmental groups and the State of Michigan (an important Great Lakes state) sued the agency, alleging that the EPA's proposed standards for ballast water did not comply with the CWA's discharge control requirements. As the original VGP's standards included neither

technology-based nor water quality-based numerical standards, the petitioners argued that the VGP's "best management practices" approach was too lax.

On March 8, 2011, the EPA reached a settlement with the plaintiffs. Most significantly, the settlement requires the EPA to include in the next VGP "numeric concentration-based effluent limits for discharges of ballast water expressed as organisms per unit of ballast water volume." These concentration-based effluent limits will separately address three categories of organisms: macrofauna/zooplankton, phytoplankton, and indicator microbes. The EPA may resort to best management practices standards only if the agency can demonstrate that it is technically infeasible to calculate appropriate numerical standards.

The EPA has commissioned two scientific reports to aid in the development of the new standards. The first, to be prepared by the National Academy of Sciences, will address the ecological risks associated with organisms in ballast water, with the aim of developing ecologically protective numerical standards. The second, to be prepared by the EPA's Science Advisory Board, will evaluate currently available ballast water technology. The EPA has requested that both studies be completed by May 31, 2011, so that it may incorporate the results into the draft of the next VGP. One option the EPA is considering is whether simply to adopt California's existing numerical standards for organisms in ballast water.

The settlement also requires the EPA to include in the VGP new monitoring requirements for onboard ballast water treatment systems. The EPA has stated that at least one parameter would require monitoring monthly, or perhaps more frequently, and that nonconformities must be reported. These additional monitoring and reporting requirements will only add to the already complex system of logs and records that must be maintained under the VGP program and present another opportunity for faulty records to lead to penalties.

The EPA has committed to coordinating the implementation of the new ballast standards with the individual coastal states, many of which have their own, more stringent discharge requirements. Section 401 of the CWA allows the individual states to add to the VGP conditions applicable to discharges in state waters, and this has resulted in a regulatory patchwork of conflicting requirements. The EPA will be meeting with states in the Great Lakes, Pacific, Gulf, and Atlantic regions on a periodic basis to discuss coordination of the various permit requirements.

TIMING AND NEXT STEPS

The settlement does not alter the current VGP expiration date of **December 19, 2013**. The settlement requires the EPA to issue for public review and comment the next draft VGP by **November 30, 2011**, and to issue the final VGP by **November 30, 2012**, more than a year before the original permit expires. Stakeholders should watch closely for the draft VGP in the autumn of this year and be prepared to comment quickly, as the comment period may be brief. The EPA allowed a public comment period of only 45 days for review of the current VGP and has indicated that it would allow for a 45- to 60-day comment period on the next draft.

The full text of the [Settlement Agreement](#) is available here.

Ninth Circuit Upholds California's Vessel Fuel Rules with Broad View of State Marine Jurisdiction

In a ruling that broadly endorses a state's authority to regulate conduct well seaward of the

three-mile territorial limit, the Ninth Circuit Court of Appeals recently upheld California's marine fuel use regulations, which require vessels to utilize cleaner marine fuels when operating within twenty-four nautical miles off the California coast. *Pacific Merchant Shipping Assoc. v. Goldstene*, No. 09-17765 (9th Cir., Mar. 28, 2011). The decision, which pertains only to vessels calling on California ports, highlights the risk of a state-by-state patchwork of vessel emission requirements.

The regulations at issue have a long history. In 2007, the California Air Resources Board (CARB) sought to reduce vessel emissions from auxiliary diesel engines by imposing a set of emissions standards. The Pacific Merchant Shipping Association (PMSA) sued the agency, claiming that emissions standards could only be established by the federal Environmental Protection Agency under the Clean Air Act. In a decision that was affirmed by the Ninth Circuit, the district court agreed that CARB's standards were preempted by the Clean Air Act and enjoined the agency from enforcing the rules.

CARB took the court's admonition and carefully redrafted its vessel emission rules as a set of allowable in-use fuel requirements rather than impermissible emission standards. The new rules were adopted by the agency on April 16, 2009, and require that vessels calling on California's ports "use cleaner marine fuels in diesel and diesel-electric engines, main propulsion engines, and auxiliary boilers on vessels operating within twenty-four nautical miles off the California coastline." On April 27, 2009, the PMSA again sued the agency, arguing that the regulations were preempted by the federal Submerged Lands Act (SLA), which limits California's jurisdiction to its territorial boundary, three miles from its coastline. The district court rejected PMSA's claims, and the industry group appealed.

In a ruling that repeatedly emphasizes the environmental impacts of commercial vessel traffic on California's poor air quality and the health of its citizens, the Ninth Circuit found that California had "clear justification" to enact the vessel fuel rules. In extending California's reach beyond the territorial limit, the Court reasoned that "a state law regulating extraterritorial conduct in the high seas immediately adjacent to the state's territorial waters satisfying the well-established effects test should generally be sustained."¹ Moreover, the Court found that while the vessel fuel rules may result in an "expansive and even possibly unprecedented state regulatory scheme," California has a right to mitigate its environmental problems, which "are themselves unusual and even unprecedented."

In response to the Ninth Circuit's ruling, the PMSA released a statement explaining that the industry was disappointed with the decision and that the vessel fuel rules "remain a unique attempt to expand [California's] authority." Ultimately, California's vessel fuel rules will be impacted by the International Maritime Organization's designation of the North American Emission Control Area (ECA), which extends up to 200 nautical miles from the coasts of the United States, Canada, and the French territories. The North American ECA, which becomes enforceable in August 2012, imposes a schedule for meeting certain marine fuel standards that in some respects overlap with California's vessel fuel rules.

The [Ninth Circuit decision in *Pacific Merchant Shipping Assoc. v. Goldstene*](#) is available here.

[PMSA's press release](#) responding to the ruling is available here.

The [EPA's regulatory announcement](#) concerning the North American ECA is available here.

¹ Under the "effects test," states may enact reasonable regulations to monitor and control conduct that occurs outside of their jurisdiction if that conduct affects its territory.

FOR MORE INFORMATION

Robinson & Cole LLP has represented vessel owners and managers on a wide variety of regulatory and compliance matters. For more information, please contact one of the following attorneys:

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