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## U.S. Court Rejects Industry Challenge to Ballast Water Provisions of the EPA's Vessel General Permit Program

In another setback to industry groups calling for changes to the Vessel General Permit (VGP), the Court of Appeals for the District of Columbia recently rejected an industry challenge to the Environmental Protection Agency's (EPA) inclusion of state-specific ballast water standards in the VGP. The VGP currently contains some one hundred state-specific conditions from 25 states, and vessels moving between the various states are required to comply with each state's ballast water requirements. These standards often are more stringent than U.S. federal or International Maritime Organization (IMO) requirements. Deflecting industry group arguments that compliance with so many restrictions is impracticable, the court in *Lake Carriers' Association v. Environmental Protection Agency* stated that the EPA has no authority to override state requirements, and suggested that Congress needs to amend the Clean Water Act (CWA) to address the shipping industry's concerns. *Lake Carriers' Association v. Environmental Protection Agency*, No. 09-1001 (DC Cir., July 22, 2011).

The lawsuit was brought by marine trade groups, including The American Waterways Operators and The Lake Carriers' Association, who challenged the VGP, claiming that the EPA had violated its regulatory process by issuing the final permit without providing interested parties the opportunity to comment on the multiple state-specific conditions that had been added. The EPA contended that it was not required to seek comments from the regulated community on the state conditions. In a ruling that offers little solace to the maritime community, the court rejected the agency's procedural argument but accepted the EPA's position that the agency had no authority under the CWA to reject or alter the state conditions in any event. Thus, even if the agency had opened the state requirements for public comment, as required by agency procedures, the EPA could not amend or reject the state requirements at issue. Therefore, the court determined that "[p]roviding notice and an opportunity for comment on the state certifications would have served no purpose, and we decline to require EPA to do a futile thing."

The multiple and often contradictory state regulations create a confusing playing field for the

maritime community. They also call into question the applicability of the CWA's discharge permit program, which was intended to address nonmobile point sources such as factories, to mobile discharge points such as commercial ships that transit a variety of different jurisdictions. Following the *Lake Carriers' Association* decision, the fight to normalize ballast water standards will have to take place in the U.S. House of Representatives. There, legislators will need to overcome competing state interests to adopt a uniform set of ballast water regulations or perhaps risk dampening commercial vessel operations in the United States.

Click to view the [Lake Carriers' Association decision](#).

## VGP UPDATE

Notwithstanding the industry challenge discussed above, the EPA is required to issue the next draft VGP for public review and comment by November 30, 2011. See [Important Changes Ahead for the EPA's Vessel General Permit Program \(April 2011\)](#). Further, under the VGP program, owners and operators of each vessel are required to submit a one-time report to the EPA between 30 and 36 months after obtaining permit coverage. The EPA had planned to make the one-time report form available electronically through the electronic Notice of Intent (eNOI) system by June 19; however, according to the agency's website, minor complications have delayed its online release.

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## 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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