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Raising the Stakes



Three Things You Should Know About the EPA'S New Vessel General Permit.

By Sarah Beason, Barry Hartman and Mark Ruge

In the not-so-distant future the Environmental Protection Agency (EPA) will release its latest draft vessel general permit (VGP), sometimes known as VGP 3.0. The draft will be the agency's latest permutation in an ongoing effort to regulate discharges from vessels, most notably ballast water discharges, which are considered a major source of invasive species.

Every maritime executive therefore needs to know the following three takeaways as the next chapter of the vessel discharge saga unfolds:

- (1) VGP 3.0 will be here before you know it;
- (2) last year's Second Circuit decision raises the stakes for VGP 3.0, and
- (3) now is the time for stakeholders to begin engaging on VGP 3.0.

If the last ten years have been the "environmental regulation decade" for the maritime industry, federal oversight of ballast water discharges has been a major part of it. A decade ago the EPA did not regulate nonhazardous discharges from vessels. Today, all that has changed.

Rise of the VGP

Over the past ten years ballast water regulation has unfolded at a dizzying pace. As a result of a court order in the mid-2000s, the EPA began regulating vessel discharges. Under the authority of the Clean Water Act, it established a broad, industry-wide permit, the VGP (rather than individual vessel-by-vessel permits), to put in place a series of requirements for vessel operators to eliminate invasive species (a "pollutant") from ballast water. Each permit can last five years.

The EPA issued its first VGP in 2009 and its second, VGP 2.0, in 2013. VGP 2.0 was challenged by environmental organizations, and last year the Second Circuit Court of Appeals ruled that it was "arbitrary and capricious" in several key areas, all of which directly related to the EPA's decision to adopt the International Maritime Organization's (IMO) standard as the ballast water treatment standard under the Clean Water Act. Rather than reopen VGP 2.0, however, the EPA decided to address the Second Circuit decision in VGP 3.0.

VGP 3.0 promises to be the most impactful of the agency's regulatory schemes, each of which has tightened the limits on vessel discharges. The combination of a developing ballast water treatment industry, implementation of new international standards and looming vessel treatment installation deadlines all but guarantees that VGP 3.0 will be one of the most important (and expensive) regulatory standards on the horizon for America's maritime industry.

Timing

The current VGP expires on December 19, 2018, and VGP 3.0 will become effective the next day. It's tempting to assume that stakeholders are a long way from having to worry about it, but that would be a serious mistake. The proposed VGP 2.0 was publicly released two years before it was implemented. If the EPA follows the same schedule this time, the notice for the proposed VGP 3.0 would be published this December, in the final days of the Obama Administration.

VGPs require more lead time than the standard maritime regulation. Because they are issued under the authority of the Clean Water Act, they must not only go through public comment at the federal level but also be reviewed, certified and potentially modified by each affected state, which often uses its own public comment process. In the case of VGP 2.0, there were 16 months between the date it was proposed and the date it became final (plus another eight months before it became effective).

Even if the EPA doesn't publicly release the proposed VGP 3.0 until next summer, its staff will surely be actively involved in preparing the draft, conducting studies and reviewing crucial data by early next year. This means that in upcoming months it will be making crucial decisions that could shape the regulatory framework until 2024, when VGP 3.0 expires. In fact, the EPA has already started some of the underlying technical work in preparation for VGP 3.0.

The Second Circuit Decision

In the first VGP, the EPA did not set specific quantitative standards for the presence of invasive species that could be discharged in ballast water – mainly because it did not have sufficient time to do so and the IMO standards remained partially unsettled.

Between the first and second VGPs, the IMO standards became final, and the Coast Guard, which is responsible under a different law for creating ballast water treatment standards and approving treatment equipment, adopted the IMO standard. In VGP 2.0, the EPA also adopted the IMO standard as the “best available technology” under the Clean Water Act, over the objections of some groups that wanted a more stringent standard. The EPA also declined to require onshore treatment as an alternative to onboard systems and gave an exemption to certain older vessels.

The Second Circuit essentially ruled that the EPA did not adequately explain why it made these decisions or justify its decision-making process. The court said the agency had to better explain three decisions: (1) why it thought the IMO standard met the requirements of the Clean Water Act as “best available technology”; (2) why it did not consider onshore treatment, and (3) why it believed the exemption it granted was justified.

The court effectively ruled that the legal standard for discharges of ballast water under the Clean Water Act was more stringent than the agency's determination and might have to be met regardless of the Coast Guard or IMO standards. Thus, instead of VGP 2.0 serving as the starting point for VGP 3.0, the EPA was essentially ordered to go back to the drawing board using the first VGP and do much more to regulate ballast water and explain the agency's decisions.

In addition to addressing the court's concerns, two important practical considerations will likely impact the EPA's drafting of VGP 3.0 – harmonization with Coast Guard ballast water regulations and onshore treatment capacity.

As noted, the Coast Guard already has a set of ballast water regulations in place and a process for approving treatment systems based on meeting the IMO standard. The incongruity that exists today is that vessels are supposed to meet the IMO standard but the Coast Guard has not yet approved equipment to allow them to do so.

The EPA's decision on the appropriate standard in VGP 3.0 could further complicate compliance. If the EPA, acting under a different standard than the Coast Guard, decides that discharged ballast water must be “cleaner” than what the Coast Guard requires, and the Coast Guard has already approved (and some companies have already installed) equipment that meets the IMO standard but not the EPA standard, vessel owners and operators would have the impossible task of complying with two incongruent standards.

If the EPA proposes onshore treatment as a way of avoiding this incongruity, this too could present compliance issues. Onshore treatment would require that billions of gallons of ballast water be offloaded and treated in local sewage treatment plants. However, many of these plants are already overloaded and unable to handle normal sewer water, nevermind ballast water from vessels. And the logistics of transporting ballast water from the vessel to the plant would present significant challenges.

Get Engaged!

If not already, EPA officials will shortly be undertaking analyses and setting the stage for decision-making crucial to the future of vessel discharge regulation. Now is the time for stakeholders to conduct the necessary studies, gather the relevant data and propose ideas on how to improve VGP 3.0. EPA officials have already said publicly on a number of occasions that they are willing to accept such information and suggestions as they gear up for VGP 3.0.

Two rules of legislative and regulatory advocacy urge early stakeholder engagement. First, it is always wiser to attempt to shape regulatory proposals as early in the process as possible – before positions become as encrusted as a zebra mussel-covered intake pipe. Second, any company or individual with recommendations for improving the VGP process should be offering them to the EPA. Stakeholders who are effectively engaged can manage the risks and create opportunities with regard to compliance. Those who fail to engage, however, are planning to fail.

As they say in Washington, if you're not at the table, you're probably on the menu. – **MarEx**

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48vince • 2 days ago

Hopefully, in the "not too distant future", the arrogant and bullying EPA itself will be either sharply curtailed or eliminated altogether. It's out-of-touch, entrenched army of Gauleiters and ideologically driven Orwellian bureaucrats has become a noxious, burdensome and expensive liability we can ill afford. As long as the EPA is in existence, all of us will potentially be "on the menu".

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