

May 2005

Do You Have a Permit?

Dennis L. Bryant

Just when ship owners and operators thought that the U.S. Environmental Protection Agency (EPA) was (for the most part) a problem only for landlubbers, a court decision has come along to shake one out of such complacency.

The story opens in 1972, when Congress adopted significant amendments to the Federal Water Pollution Control Act (FWPCA), commonly referred to as the Clean Water Act (CWA). Among the various provisions in this lengthy statute was one prohibiting discharge of any pollutant from any point source into navigable waters of the United States. The term "point source" includes vessel or other floating craft. The major exception to this broad prohibition was for discharges for which the EPA had granted a permit under the National Pollutant Discharge Elimination System (NPDES).

The NPDES is a complex and detailed program for controlling discharges of pollutants into waters of the United States. It allows factories and other point sources to continue to operate, but places limits on what can be discharged and in what quantities. The EPA permits frequently require monitoring of the discharges by the permittees, along with extensive recordkeeping. The EPA has authority to make unannounced inspections and review the records. Not infrequently, a permittee is cited or fined for recordkeeping violations.

Pollutant, as defined by the FWPCA, is very broad and includes solid waste, garbage, chemical wastes, biological materials, and heat, among other things. The 1972 Act included a provision dealing with marine sanitation devices, so sewage from vessels was specifically excepted from the definition of pollutant. When the EPA promulgated its regulations implementing the NPDES program, it exempted discharges of sewage from vessels, as well as effluent from properly functioning marine engines and any other discharge incidental to the normal operation of a vessel. The EPA interpreted its regulation as exempting ballast water discharges from the NPDES program.

In 1999, though, several environmental advocacy groups petitioned the EPA to repeal the ballast water discharge exemption from the NPDES program. The EPA denied the petition in 2003 and litigation ensued. On March 30, 2005, the federal district court in San Francisco granted the motion of the environmental advocacy groups for summary judgment and ordered

E-mail

dennis.l.bryant@gmail.com

Internet

<http://brymar-consulting.com/>

Maritime Reporter & Engineering News

<http://marinelink.com/en-US/magazines/Archive.aspx?MID=3>

Do you have a permit?

Page 2

May 2005

the EPA to repeal its regulation exempting discharges from vessels from the NPDES program. Further hearings are scheduled and the EPA is expected to appeal, but this is clearly a development that deserves the attention of all owners and operators of ships registered in the United States or that call in U.S. ports.

No one doubts that nonindigenous aquatic species present a serious threat to U.S. maritime ecosystems. Ballast water discharges are an important vector or means of transmission. The real issue is what is the best means of reducing the risk of further incursions of nonindigenous aquatic species via ballast water discharges.

The major flaws in the summary judgment decision are the court's literal reading of the FWPCA and the failure to consider the numerous developments that have occurred since the FWPCA amendments were enacted in 1972. At that time, no one (not even environmental advocates) considered ballast water to be a pollutant. Thus, it is not surprising that Congress addressed sewage discharges, while remaining silent on ballast water discharges.

When the dangers of zebra mussels and other maritime hitchhikers were recognized, Congress adopted the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and the National Invasive Species Act of 1996. The Coast Guard was directed to establish a voluntary ballast water management program (participation in the program was mandatory for ships entering the Great Lakes and for ships entering the Hudson River north of the George Washington Bridge). The national program has recently become mandatory for all ships carrying ballast water and calling at ports or places in the United States after operating outside the U.S. Exclusive Economic Zone (EEZ).

On February 13, 2004, the international community, under the sponsorship and guidance of the IMO, adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments (Ballast Water Convention). This Convention will enter into force 12 months after ratification by 30 nations representing 35% of the world's merchant shipping tonnage. Other nations (such as Australia) and various states (such as California) have their own ballast water management requirements.

While there are minor differences between the mandatory U.S. ballast water management program and the management program provided for by the Ballast Water Convention, both call for high seas ballast water exchange or equivalent measures to be undertaken by ships transiting from one location to a distant location while carrying ballast water. Ships are required to adopt and implement a ballast water management plan and to maintain records of ballast water uptakes and discharges. Experts who have analyzed ballast water exchange generally agree that, while not perfect, the program significantly reduces the risk of introduction of nonindigenous aquatic species into a new ecosystem by means of ballast water discharge.

Having a NPDES permit will not further reduce the risk of introduction of nonindigenous aquatic species into U.S. ports and waterways. The program, though, would significantly increase the bureaucratic maze for getting ships in and out of U.S. ports and would put masters

Do you have a permit?

Page 3

May 2005

and ship operators at risk of civil and/or criminal penalties related to the required monitoring process and associated paperwork. One only has to reflect on the fallout over oil record books to see where this could easily go.

A final problem with the recent district court decision is that it does not limit its impact just to ballast water management. The decision directs the EPA to revoke the entire vessel exclusion found at 40 CFR § 122.3(a). If this decision stands, ships would need NPDES permits for discharges of effluent from properly operating marine engines and for any other discharge incidental to the normal operation of a vessel. Such discharges might include use of the sea chest to cool the engine, seepage from the stern tube, and fish waste routinely thrown overboard by fishing vessels. The EPA has neither the manpower nor the expertise to administer such a program expansion.

One can only hope that, on reflection, the parties will develop a reasonable resolution to this new development. It behooves ship owners and operators, as well as responsible environmental advocacy groups, to meaningfully participate in this resolution process.

© Maritime Reporter and Engineering News