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Regulation of incidental discharges

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What started out as an attempt to get the Environmental Protection Agency (EPA) to regulate ballast water discharges is effecting a major change in environmental measures, recordkeeping, and reporting for ships operating in waters of the United States. Ship owners and operators must start planning now because the changes are expected to hit the industry just before Christmas.

Background

In 1972, Congress adopted significant amendments to the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act (CWA). Among its various provisions, the FWPCA established the National Pollutant Discharge Elimination System (NPDES) to regulate the discharge of pollutants for which discharge was not otherwise prohibited. Shortly thereafter, the EPA promulgated a rule excluding from the NPDES requirements "any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel." Although ballast water discharges were not specifically mentioned in the regulation, from the beginning they were included within its ambit.

In 1999, several environmental advocacy groups petitioned the EPA to regulate ballast water discharges under the NPDES program. The petition was denied, with the EPA stating, among other things, that subsequent to the enactment of the 1972 FWPCA amendments, Congress had charged the US Coast Guard with regulation of ballast water discharges. The environmental advocacy groups brought suit against the EPA, contending that the EPA rule excluding discharges incidental to the normal operation of a vessel was contrary to the statute and that the denial of the 1999 petition was improper.

The Federal District Court for the Northern District of California ruled in favor of the environmental advocacy groups and held that the incidental discharge regulation was in excess of the agency's authority. After a second hearing, the court ruled that the incidental discharge exclusion was to be vacated as of September 30, 2008 (this was subsequently extended to

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December 19, 2008). The decision was appealed to the US Court of Appeals for the Ninth Circuit, which affirmed the lower court ruling.

Discharge permit program

On June 17, 2008, the EPA published in the Federal Register a notice stating that each of its ten Regions proposed to issue Vessel General Permits (VGPs) under the NPDES program to commercial and recreational vessels greater than or equal to 79 feet in length to cover discharges incidental to the normal operation of those vessels. While smaller vessels were originally to be included in the overall permit program, most were exempted by subsequently adopted legislation. The EPA estimates that the best management practices (BMPs) in the VGP will cost the regulated industry between \$5.6 million and \$19.1 million annually. The permit is estimated to cost between \$7.1 and \$25.0 million annually.

The EPA now expects to promulgate the final VGP requirements in early December, giving industry very little time to come into compliance by the December 19 deadline.

Therefore, it is prudent for vessel owners and operators to commence compliance efforts now, based on the available information.

The VGP program will apply to ships in waters of the United States out to the traditional three nautical mile limit of the territorial sea.

Waste streams, best management practices, training, and recordkeeping

The VGP program will apply BMPs to 28 potential vessel discharge streams. These discharge streams include the obvious ones (such as ballast water and gray water), along with less obvious ones (such as leachate from anti-fouling hull coatings and leakage of hydraulic fluid from controllable pitch propellers). For each discharge stream applicable to that particular vessel, the owner or operator must adopt a BMP, establish procedures (written procedures are recommended) for implementing the BMP, provide training to the crewmembers who will conduct or supervise the BMP, keep records to evidence compliance, and submit reports as necessary.

Experience has shown that, while the operational aspects of environmental rules (such as use of oily water separators) may be difficult, it is the paperwork side (such as making entries in the oil record book) that leads to enforcement actions and convictions.

Under current plans, the EPA will require that a Notice of Intent (NOI) for discharges incidental to the normal operation of a vessel be submitted for each regulated vessel that is greater than or equal to 300 gross registered tons or has the capacity to hold or discharge more than eight (8) cubic meters (2113 gallons) of ballast water. Regulated vessels below these thresholds are not required to submit an NOI, but are still required to comply with the discharge limitations. In addition to providing owner/operator and vessel information, the NOI requires the

submitter to identify any and all waste streams from the vessel. Finally, the submitter must certify the accuracy of the information.

It is readily apparent that the NOI cannot be prepared and submitted until the owner/operator has at least thought through each of the 28 potential waste streams. These potential waste streams were first identified with regard to vessels of the armed forces. A few, such as sonar dome discharges, may be readily dismissed for commercial vessels. Others, such as aqueous film forming foam (frequently used in fire-fighting systems), will require some consideration. Failure to identify a listed waste stream in the NOI can have serious consequences, so care should be taken in preparation and submittal of the form.

Once a waste stream has been identified, a BMP must be adopted to minimize discharges. There are specific requirements for certain types of vessels, such as cruise ships, barges, and oil tankers. Persons involved in the BMP must be trained. The BMP must be implemented and records must be kept. The records and training information must be retained for a minimum of three years.

Ironically, the EPA has deferred to the Coast Guard's ballast water management program as the BMP for the ballast water waste stream, with the result that the original petition and the initial lawsuit were for naught. The consequences, though, will be with the marine industry for the foreseeable future.

Regular reports and reports of non-compliant events.

The VGP permit will be valid for up to five years from date of issuance. For each vessel, the owner/operator must submit a one-time report between 30 and 36 months after the permit is issued. The one-time report is submitted to EPA headquarters and should be submitted electronically.

All instances of non-compliance must be reported at least once annually. The non-compliance report is submitted to the EPA regional office responsible for the waters in which the event occurred. Any non-compliance that may endanger health or the environment must be reported orally within 24 hours. The oral report must be followed up with a written report to be submitted within five days of the event. Submittal of these reports is in addition to, not in lieu of, any reports that may be required under other laws or regulations.

Relationship to other federal laws and to state laws.

The NPDES program does not replace or supersede the requirements of any other federal law or regulation. It also does not preempt any state or local law or ordinance addressing the same subject matter. In many instances, the EPA delegates to state officials the authority to enforce EPA regulations, and to set higher standards.

Penalties and enforcement

The FWPCA provides both civil and criminal penalties for violations of the NPDES program. In addition, it allows for citizen suits against violators in some circumstances.

Details of enforcement have not yet been resolved. Although this is an EPA program, that agency has limited personnel in seaports and little experience aboard ships. The Coast Guard has personnel in the ports and massive experience aboard ships. One should expect a cooperative agreement between the two agencies addressing enforcement. One should also expect to see EPA (or state) personnel boarding commercial ships in the future, with or without Coast Guard partners.

Conclusion

The VGP program is arriving rapidly. The learning curve is huge. The impact is potentially great. Start preparing sooner, rather than later.