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US Environmental Protection Agency's Vessel General Permit Regulations Go Into Effect February 6, 2009

On December 18, 2008 the US Environmental Protection Agency (EPA) issued the 2008 Vessel General Permit (VGP) regulating discharges incidental to the normal function of vessels operating as a means of transportation. Such discharges were previously excluded from EPA's regulatory authority, until a recent court decision prompted a change in policy. EPA estimates that approximately 61,000 domestically flagged commercial vessels and 8,000 foreign-flagged vessels may be affected by the VGP.

Background

The US District Court for the Northern District of California recently ruled that EPA violated the law by exempting ballast water discharges and any other discharges incidental to the normal operation of a vessel from the National Pollutant Discharge Elimination System (NPDES) established by the Clean Water Act (CWA). While the NPDES had traditionally focused on fixed shore facilities discharging into US waters, the court's order required EPA to develop a new regulatory regime applicable to vessels. As a result, commercial vessels in US waters are automatically covered by the VGP and must now comply with its new requirements for vessel discharges as of February 6, 2009.

Requirements - VGP

The 162-page VGP contains an extensive and detailed list of requirements including general effluent limitations applicable to all discharges, limitations applicable to specific discharge streams, narrative water quality-based limitations, as well as inspection, monitoring, recordkeeping and reporting requirements for vessel discharges up to three nautical miles from land (US territorial seas). The VGP applies to nonrecreational and

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commercial vessels more than 79 feet in length, and additional requirements are applicable to certain vessel types. With respect to commercial fishing vessels of any size and nonrecreational vessels less than 79 feet in length, the VGP will apply to ballast water discharges only.

Beginning on February 6, 2009 commercial vessels sailing US waters must comply with the VGP. The VGP provides specific requirements for several types of discharges including bilge water, ballast water, deck washdown and runoff (including rainwater), antifouling leachate from hull coatings, aqueous film forming foam, boiler/economizer blowdown, cathodic protection, chain locker effluent, controllable pitch propeller hydraulic fluid, distillation and reverse osmosis brine, elevator pit effluent, firemain systems, freshwater layup, gas turbine wash water, gray water, motor gasoline and compensating discharge, nonoily machinery wastewater, refrigeration and air condensate, rudder bearing lubrication, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, sonar dome discharge, stern tube oily discharge, underwater ship husbandry, welldeck discharges, gray water mixed with sewage and exhaust gas scrubber wash water discharge.

The VGP also imposes additional requirements for eight types of vessels that have unique characteristics resulting in discharges not shared by other types of vessels including medium cruise ships, large cruise ships, large ferries, barges, oil or petroleum tankers, research vessels, rescue boats and vessels employing experimental ballast water systems.

Requirements – Notice of Intent

Owners and operators of vessels weighing more than 300 gross tons or with the capacity to discharge more than eight cubic meters (2,113 gallons) of ballast water must submit a detailed Notice of Intent (NOI) to obtain future permit coverage and operate under the VGP (smaller vessels are covered automatically). The NOI states that the operator will comply with the VGP. The vessel operator must identify which regulated discharges are applicable to the vessel. Once the NOI is submitted, the vessel must comply with the VGP and the NOI is subject to verification by US Coast Guard, and state and local officials. The NOI is valid for five years.

Requirements – Inspection, Monitoring, Recordkeeping and Documentation

Vessels must make routine inspections weekly or per voyage of each discharge to ensure compliance. Log entries are required to document the inspections. Each vessel must also conduct quarterly sampling of discharges that are not readily visible (i.e. below the water line). Further, each vessel must complete an annual audit of all discharges including audit of all

inspection records and pollution prevention equipment. Selected discharges must be reported to the EPA. Also, vessel inspections will be required during scheduled dry-dockings. Importantly, all recordkeeping will be treated as certified affirmations with the author subject to criminal sanctions for false or inaccurate records.

Murky Waters and Concerns

Several concerns exist when the VGP goes into effect on February 6, 2009.

Under the CWA, each state must certify (or waive certification) that the VGP is sufficient to comply with state water quality standards before the permit becomes effective in that state. Until then, EPA has told the states that any ship discharging in that state's waters will be in violation of the CWA. Each state may also add special conditions or additional requirements as part of its certification. Currently, the certification status of Wisconsin, Oregon, Alaska and California is uncertain. In a recent press conference, EPA strongly recommended that vessels sailing in state waters should consult that state's specific permit requirements under Section 6 of the VGP, which may differ from the general permit requirements.

Further concerns will arise as the VGP is implemented:

- **Enforcement** – Who will enforce the VGP? It is uncertain at this time whether the lead enforcement role will be assumed by EPA or the Coast Guard.
- **Applicability** – The VGP requires comprehensive year-round revisions to best management practices and frequent self-inspections. Since the permit applies inside three miles of the US coast, does this require all the inspections and documentation for international voyages? Or spot vessels spending only a small time in those waters?
- **Insurance** – Protection and indemnity insurance coverage for vessels requires legal compliance. Discharging in violation of the VGP would potentially result in a loss of coverage. These insurance concerns also apply to charter parties.
- **Recordkeeping** – The new rules create expansive recordkeeping requirements, which might invite aggressive false record prosecutions like those seen in recent oily water separator cases. Violations of the CWA are severe and include civil penalties up to US\$32,500 per day per violation, criminal prosecution, sanctions and heavy fines.
- **Reporting** – Owners and operators must report all instances of noncompliance with the VGP at least once per year, and they must report any noncompliance that may endanger health or the environment to the appropriate EPA Regional Office within 24 hours of becoming aware of the circumstances. For each vessel, owner/operators

are required to submit a one-time report between 30 months and 36 months after obtaining permit coverage.

- **Operators** – During a recent press conference, EPA stated that clarification of the term "operator" would be forthcoming. For the time being, it is unclear how this term applies to charterers and whether time charterers are considered operators under the VGP.

Recommendations

While there is a nine-month grace period (until September 19, 2009) for owners and operators to submit the NOI to be covered under the VGP, compliance with the permit provisions will be required starting February 6, 2009. EPA strongly recommends owners and operators submit NOIs before September 19, 2009 to avoid a mandatory 30-day waiting period before entering US territorial waters. EPA assures that it will focus on compliance assistance versus enforcement during the first six to nine months.

Owners and operators should review the [NOI form](#) on the EPA website to determine which discharges are applicable to the vessel. A compliance program should be developed and implemented and the NOI submitted to EPA.

Vessel owners and operators must understand and comply with the inspection, monitoring, recordkeeping, reporting and documentation requirements of the VGP. Company and compliance personnel, as well as crew members, should be trained and prepared to comply with the new regulatory program and take prompt corrective action to remedy any violations.

Preparation, training and shoreside verification of shipboard activities will ensure that enforcement risks are minimized, while compliance is maximized.

More information is available on [EPA's website](#).

Squire Sanders has a team prepared to deal with the unique environmental and maritime concerns faced by clients due to this recent development in the law. Please contact your principal Squire Sanders lawyer or one of the individuals listed in this alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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