



December 18, 2008

## Are the new NPDES Permitting Requirements for Vessels on your Radar?

### *EPA Expected to Issue Final NPDES General Permit for Vessel Discharges*

The United States Environmental Protection Agency (EPA) intends to issue a general permit this month that will immediately regulate the discharges from vessels. The general permit will become effective upon issuance. This means that as soon as December 19, 2008, all owners and operators of commercial vessels 79 feet or greater will for the first time be subject to Clean Water Act (CWA) permitting requirements for discharges incidental to the normal operation of a vessel.

The final permit is expected to be largely consistent with the draft permit issued for notice and comment by EPA in June 2008. *See* National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vehicle, 73 Fed. Reg. 34,296, 34302 (June 17, 2008).

### Background

In December 2003, the long-standing exclusion of discharges from vessels from the NPDES program became the subject of a lawsuit in the U.S. District Court for the Northern District of California. The District Court determined that the exclusion exceeded EPA's authority under the CWA and in September 2006 issued a final order in September 2006 providing that "the blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 CFR 122.3(a), shall be vacated as of September 30, 2008." *Nw. Env't'l Advocates et al. v. EPA*, 2006 WL 2669042 (N.D. Cal).

EPA filed an appeal in the U.S. Court of Appeals for the Ninth Circuit. On July 23, 2008, the Ninth Circuit Court of Appeals affirmed the District's Court's decision. *Nw. Env't'l Advocates et al. v. EPA*, 537 F.3d 1006 (9th Cir. 2008). The district court subsequently extended the date of vacatur to December 19, 2008, which in essence established a

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court-imposed deadline for EPA to issue the rule by tomorrow. It is not known whether EPA will seek an extension to the deadline.

On July 31, 2008, Senate bill S. 3298 was signed into law (P.L. No. 110-299). This law imposes a two-year moratorium during which time neither EPA nor states can require NPDES permits for discharges from vessels that are 79 feet and commercial fishing vessels of any length. Thus, the final general permit issued by EPA will be limited to vessels 79 feet and larger.

### The General Permit

The general permit issued by EPA will apply to all covered vessels that discharge into waters of the United States, regardless of whether a state is authorized to implement other aspects of the NPDES permit program. The vessel discharges covered by the general permit are discharges excluded from NPDES permitting programs under 40 C.F.R. § 122.3 and, therefore, are not considered a part of any currently authorized state NPDES program. 40 C.F.R. § 123.1(i)(2). EPA has not yet outlined its plan for how states may obtain approval to implement NPDES permitting for vessel discharges within their jurisdictions.

Owners and operators of vessels that are greater than 300 tons or that have the capacity to hold or discharge more than eight cubic meters (2,113 gallons) of ballast water will be required to submit a notice of intent (NOI) form to receive permit coverage. However, the final permit is expected to provide a nine-month grace period in which to complete and submit the NOI. All other owners and operators will be automatically authorized by the general permit to discharge according to the permit requirements.

The general permit addresses 28 potential vessel discharge streams, including ballast water, deck runoff, bilgewater discharge, and graywater discharge, by establishing effluent limits and best management practices (BMPs) to control the discharge. Discharges that are not covered by the general permit include garbage or trash, sewage, used or spent oil, and discharges of industrial materials such as solvents from dry-cleaning operations, medical waste, or photo processing effluent.

In addition to these standard or common requirements, the general permit outlines further requirements for eight specific classes of vessels, such as cruise ships, research vessels, large ferries, and barges. For example, the additional permitting requirements for barges include: a) preventing contamination of condensation; 2) requiring barges to have spill rails and to plug scuppers; and 3) prohibiting a discharge with a visible oil sheen. It also requires a visual inspection for a visible sheen every time water is pumped from below deck.

Finally, the general permit will include requirements for routine inspections (*e.g.*, once per week and a comprehensive annual inspection, etc.), monitoring (depending on discharge type), recordkeeping (*e.g.*, documentation of inspections in a log book, etc.), and reporting (*e.g.*, noncompliance reporting, one-time permit reporting, etc.).



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This is significant because, as early as December 19, 2008, discharges from the normal operation of vessels will be regulated by EPA under the Clean Water Act for the first time. Most importantly, vessels will now be subject to enforcement by EPA for noncompliance with these permitting requirements, including penalties of up to \$32,500 for each violation per day.

Any owner or operator of a vessel should immediately evaluate: 1) whether any of its vessels are subject to the regulation; 2) the types of discharges covered by the permit and which standards are applicable to those discharges; 3) the general and more specific standards applicable to its operations (*e.g.*, the additional requirements applicable to cruise ships, large ferries, barges, etc.); 4) for owners, whether there are any contractual issues with contract carriers (the operators); and 5) develop and implement a compliance program meeting the necessary inspection, monitoring, reporting, and training requirements. King & Spalding has experienced Clean Water Act lawyers that can assist you in assessing your compliance obligations under these new requirements.

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