Navigating EPA's Vessel Discharge Program

*By Jeffrey H. Wood & Brent A. Fewell**

Two-thousand-and-eight was, relatively speaking, not a blockbuster year for any major federal environmental initiatives. The Supreme Court issued a ruling in just one significant environmental case[1] and efforts to enact legislation on key environmental priorities failed. Indeed, the U.S. Environmental Protection Agency (EPA), while busy, promulgated just a few regulations which caught national attention.

This is not to say, however, that the reach of federal environmental law went unchanged. As sure as the Mississippi River flows south, every year seems to bring an expansion of federal environmental regulation to previously excluded, exempted, or otherwise overlooked activities or industries. 2008 was no exception, as large commercial vessels—already heavily regulated in their own right—became subject to an extensive EPA water discharge permitting scheme. This happened soon after the U.S. Court of Appeals for the Ninth Circuit affirmed the vacatur of a longstanding exemption for discharges incidental to the normal operation of a vessel from EPA's National Pollutant Discharge Elimination System (NPDES)—the federal permitting program created by the Clean Water Act of 1972 (CWA).

The nation's commercial and recreational vessel fleet, while subject to a wide range of other federal regulations, had operated free from NPDES requirements for over 30 years. As a result of the Ninth Circuit's ruling, literally millions of commercial and recreational vessels would have been required to obtain coverage under an NPDES permit by September 30, 2008. In fact, absent last minute action by Congress, over 18 million recreational boats and small fishing vessels would have been required to obtain permit coverage.

Still, since Congress chose not to provide relief to the commercial boating industry, over 60,000 commercial vessels including cruise ships, towboats, barges, and other vessels are now subject to a comprehensive NPDES permit program, which includes many burdensome requirements, but without providing much environmental benefit. To be fair, it was not EPA's idea (or desire) to bring vessels within the purview of the NPDES permit program, as it was clear to the agency for over 30 years that the NPDES program was neither intended to regulate vessel discharges nor particularly well-designed to do so. Nonetheless, due to the diligent efforts of some in the environmental community, the realm of federal NPDES regulation expanded in 2008 to encompass the commercial waterway transportation industry.

This article discusses the vessel discharge exclusion adopted by EPA in 1973 and the recent vacatur of that de minimis exclusion by a federal district court in California, a decision which the Ninth Circuit affirmed. After discussing legislative efforts to deal with this issue, this article describes EPA's new Vessel General Permit for large commercial vessels. The article concludes by discussing the need for additional congressional action to exempt all vessel discharges from the NPDES program in favor of a separate set of nationwide standards crafted specifically for these kinds of sources.

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The 1973 Vessel Discharge Exclusion

Environmental enactments of the 1970s were, for the most part, broad in scope and application. Perhaps the most sweeping environmental legislation of the 1970s were the 1972 amendments to the Clean Water Act, wherein Congress aimed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate all pollutant discharges by 1985.[2] To do so, Congress established a federal NPDES permitting program, which was designed to minimize or reduce the effects of billions of gallons of untreated sewage and industrial wastewaters that were severely impacting the quality of America's waters.[3]

Under the CWA, no person can discharge any pollutant from any point source into the navigable waters of the United States unless authorized to do so by an NPDES permit.[4] Congress defined the key jurisdictional terms broadly. "Navigable waters," for example, was defined as "waters of the United States, including the territorial seas."[5] (For an interesting discussion of the significant federalism questions raised by this jurisdictional term, please see Thomas Casey's article in this edition of *Engage*.) "Pollutant" was defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[6] "Point source" was defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[7] And "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source..."[8]

Although Congress granted the EPA administrator a certain level of discretion in giving functional meaning to these terms, Congress's choice of definitions left little room for exclusions. Where it did intend for exclusions to exist, Congress usually spoke directly. For example, Congress excluded from NPDES coverage "sewage from vessels" and any "discharge incidental to the normal operation of a vessel of the Armed Forces."[9]

This left a variety of de minimis discharges potentially subject to NPDES permitting which, absent some reasonable regulatory exclusion, would have resulted in an overload of the permitting system. For that reason, when EPA originally promulgated its NPDES permitting regulations in 1973, it presumed a certain level of regulatory discretion to exclude de minimis discharges and adopted 40 C.F.R. § 122.3, which stated:

The following discharges do not require NPDES permits:

(a) 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*. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.[10]

EPA's regulation exempting vessel discharges, which went essentially unquestioned for 30 years, was based on a relatively simple proposition. EPA explained in 1973: "Most discharges from vessels to inland waters are now clearly excluded from the [NPDES] permit requirements. *This type of discharge generally causes little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically*."[11] And when an unwieldy, administrative permitting requirement vastly outweighs the environmental benefits, courts historically have not been unsympathetic to both the agency and the regulated community.[12]

However, an agency's authority to adopt regulatory exclusions is substantially curtailed, if not completely extinguished, when Congress has spoken clearly that the particular regulatory program should be broadly applied. So, it should have come as little surprise that, when presented with an ultra vires challenge to the vessel discharge exclusion, a federal district court in California and, on appeal, the Ninth Circuit would opt for vacatur of the exclusion, particularly in light of perceived environmental problems associated with ballast water and other vessel discharges. Prior to this litigation, a number of courts had commented on agency discretion to adopt de minimis exclusions from broad statutory programs.[13] It was this debate that was front-and-center in the legal battle over the validity of the vessel discharge exclusion.

Vacatur of the Vessel Discharge Exclusion

Ballast water was the real focus of environmental concerns about vessel discharges. The last decade has witnessed an increase in the spread of certain non-indigenous invasive aquatic species, such as the Eurasian water milfoil and zebra mussel, which have infested the Great Lakes and elsewhere. Many such species are picked up in ballast drawn from foreign waters and, like aquatic hitch-hikers, are relocated and deposited in other waters when ballast is discharged and exchanged. These species in some cases have out-competed and adversely impacted other native aquatic populations.

Prompted mainly out of concern over the spread of these invasive species, environmental groups petitioned the EPA in 1999 to repeal the vessel discharge exclusion and to regulate ballast water under the NPDES permit program. EPA had long been sympathetic to this concern, but the agency believed that the CWA was a poor vehicle for regulating ballast water and instead pointed to other statutory authorities, such as the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990, which required the Coast Guard to develop ballast water regulations. After EPA denied the petition in 2003, environmental groups filed suit.

In defending the vessel discharge exclusion, EPA advanced a number of arguments, including the fact that Congress had acquiesced to the exclusion more than 30 years prior and had never sought to overturn the exclusion. The district court, however, rejected this argument on the basis that the exclusion was clearly in conflict with Congress' "clear intent" that no pollutant could be discharged without a NPDES permit.[14] Accordingly, the district court concluded that the exclusion exceeded EPA's authority under the CWA and ordered its vacatur.[15] Looking to the text of the statute, the court noted that the CWA prohibits the "discharge of any pollutant" except as authorized by an NPDES permit.[16] The court, pointing to this as the clear intent of Congress, declined to extend any deference to the agency's de minimis concept, even if it was reasonable.[17] The Ninth Circuit affirmed in July of 2008, agreeing with all essential aspects of the lower court's ruling.[18]

The district court ultimately ordered that EPA's vessel discharge exclusion would be vacated as of September 31, 2008, a deadline which was subsequently extended to December 19, 2008, and then again to February 6, 2009. In place of the vessel discharge exclusion, EPA was compelled to adopt and implement an NPDES permit for vessel discharges. Otherwise, all vessels operating in the nation's waters would, upon vacatur of the exclusion, be deemed in violation of the Clean Water Act, creating a very real threat of substantial civil and criminal penalties, or citizen suits, even for doing little more than allowing rainwater to flow off the deck of a boat. Accordingly, time was of the essence—to either convince Congress to codify a vessel discharge exclusion or put a permit in place authorizing those discharges to continue.

From the perspective of a Federalist, the district court's decision, which was upheld by the Ninth Circuit, is a mixed bag. On the one hand, the court construed and applied the statute in a manner which was faithful to the language used by Congress. The CWA is, after all, a broad statute with very few exemptions, making it difficult to criticize a court for rendering a decision much like any other strict constructionist would have done.[19] However, the district court failed to properly take into account the significant burdens on EPA and the regulated community which would result from a speedy vacatur of the vessel discharge exclusion. In that regard, the court exercised a level of discretion which, while perhaps not abusive, was not necessarily in keeping with concepts of good governance.

Congressional Response

Since the district court ruled, Congress has debated the passage of legislation to resolve this matter, including the applicable technology and standards that should apply. Despite efforts to pass the Ballast Water Management Act, a comprehensive bill sponsored by Senator Inouye (D-HI) that would have required national uniform ballast water treatment standards and exempted industry from NPDES permitting, very little progress on federal legislation has been made.

Industry has long argued that an exemption from NPDES permitting for its vessel discharges—even just a temporary exemption—was necessary and reasonable in light of the other federal priorities which the industry is currently implementing.[20] Industry also argued as a general matter that EPA was not equipped to deal with a vessel discharge program, since EPA had no real experience with the industry and no vessels of its own to monitor compliance and enforce such a program. Moreover, the regulation of aquatic species as a "pollutant" under the Clean Water Act is legally suspect.[21] Therefore, industry supported a standards-based program implemented by the Coast Guard, outside of the Clean Water Act permitting program. Disagreements between industry and environmental groups on how such a program should be implemented delayed progress in bringing about a comprehensive legislative solution.

A number of states, such as Michigan, Washington and Oregon, concerned about the impact of invasive aquatic species on their state waters, grew weary waiting for a federal legislative solution to the problem and began adopting state laws subjecting vessels to state permits and effluent limits. Industry, which was highly concerned about an unwieldy patchwork of state laws, supported the notion of federal preemption of state laws that, absent preemption, would make compliance by vessels engaged in interstate movement virtually impossible. However, Senator Boxer (D-CA)—backed by a number of environmental groups—opposed any relief that would preempt more stringent state requirements.

Finally, in late 2008, Congress passed two pieces of legislation that provide temporary relief for most recreational and fishing vessels. The first, the Clean Boating Act of 2008, Pub. L. 110-188, provides a temporary two-year exemption from NPDES permitting for recreational vessels and small fishing boats, in order to allow time to study whether it is necessary to require NPDES permits for those vessels. In that regard, the voices of millions of recreational boat owners (which translates to millions of voters) were heard. The other bill, Pub. L. 110-299, provides a two-year moratorium on the requirement that all vessels smaller than 79 feet in length obtain coverage under the NPDES permit program. Notwithstanding significant lobbying efforts by the commercial towing and cruise ship industries, large non-recreational vessels (including cruise ships, towboats, and barges) were not granted relief by Congress in 2008.

EPA's Vessel Discharge Permit Program

In June 2007, EPA published a notice of intent to begin the process of creating a vessel discharge permit program.[22] One year later, in June 2008, EPA published its "Draft National Pollutant Discharge Elimination System General Permit for Discharges Incidental to the Normal Operation of a Vessel."[23] A public notice and comment period ensued, and on December 18, 2008, a day before the NPDES vessel discharge exemption was to be vacated, EPA posted on its website a 163-page final Vessel General Permit ("VGP").[24] A note on the website explained that the permit would be effective the next day. Industry scrambled for another last minute extension from the courts. Fortunately, within a matter of hours, the federal district court with jurisdiction over the issue extended by 48 days its vacatur deadline, effectively pushing the compliance date for the VGP to February 6, 2009. In the interim, a notice regarding the availability of the final VGP was published in the Federal Register on December 28, 2008.[25]

The final VGP is applicable to most large non-recreational vessels, including commercial towboats, barges, cruise ships, ferries, oil tankers, research vessels, and fire/police boats.[26] The permit authorizes "discharges incidental to the normal operation of a vessel,"[27] a term which EPA defined with reference to a list of virtually all conceivable kinds of vessel discharge streams—26 in total, ranging from deck runoff, bilge water and ballast water to chain locker effluent, firemain system water and graywater.[28] For each of the 26 discharges, EPA has created a set of best management standards and requirements designed to minimize any potentially adverse environmental impacts. EPA also included within the VGP additional requirements specifically applicable to the various kinds of covered vessels.[29] Authorization to operate under the permit is available immediately to all covered vessels. By September 19, 2009, all larger commercial vessels must have filed a "notice of intent" with EPA to be covered by the VGP.[30]

The VGP is, like the district court's decision before it, a mixed bag from industry's point of view. On one hand, the regulated community has reasons to appreciate EPA's efforts. First, EPA deserves credit for crafting the VGP under the significant time constraints imposed by the courts. Certainly, from the regulated community's perspective, the draconian enforcement provisions in the CWA made operating without an NPDES permit in place untenable, as doing little more than washing a vessel could have resulted in civil or even criminal penalties, and citizen suits.

Moreover, EPA deserves credit for working hard to try to ensure that, while compliant with the requirements of the CWA, the permit is not unnecessarily burdensome. Whether EPA succeeded in that regard is subject to debate, but EPA did at least wisely opt for a general, as opposed to an individual, permitting regime where one standardized permit is applied across an industry instead of requiring each individual owner or operator of a commercial vessel to seek permit coverage separately. As the Ninth Circuit had noted, "[o]btaining a permit under the CWA need not be an onerous process."[31]

EPA is not, however, free from all criticism. Some within industry were disappointed by EPA's decision to apply the Ninth Circuit's precedent nationwide when, at least arguably, doing so was not mandatory. For example, in 1998, after the Fourth Circuit vacated a wetlands regulation found at 33 C.F.R. Section 328.3(a)(3), the Clinton Administration's EPA and the U.S. Army Corps of Engineers issued guidance explaining that it would not consider the rule vacated nationwide, choosing instead to simply deem the rule vacated "within the states constituting the Fourth Circuit."[32] This time around, the Bush Administration's EPA, under direction of the U.S. Department of Justice, opted against that approach.

Other aspects of the VGP might be criticized as unnecessarily complex (e.g., the VGP spans 163 pages when other general permits are often half as voluminous), overly bureaucratic (e.g., the permit requires vessel owners and operators to submit separate regulatory documentation for

each individual vessel, as opposed to allowing a simpler, fleet-wide submittal),[33] or even pedantic (e.g., the permit provides that new vessels delivered after September 19, 2009 are not authorized to discharge, and as a result, are not authorized to operate, until 30 days after a complete notice of intent is received by EPA).[34]

In addition to these (and other) criticisms regarding the VGP, the very nature of the NPDES program itself presents its own set of significant challenges when applied to commercial navigation. Importantly, under Section 401 of the CWA, states are authorized to impose their own conditions and requirements on top of the VGP if a state deems it necessary to ensure that the permitted discharges do not violate the state's water quality standards.[35] In response to the VGP, more than 20 states exercised their Section 401 certification authority and imposed additional standards and requirements to the VGP, thereby creating a patchwork of additional state-imposed standards and requirements. Indeed, 40 pages of the VGP cover these state-imposed terms.

Some of these state conditions were particularly onerous, such as Illinois's original decision to prohibit all graywater discharges in Illinois waters.[36] Since the vast majority of vessels operating on the nation's 27,000 miles of inland waterways do not have graywater storage systems, Illinois's seemingly innocuous condition meant that crews living aboard a towboat travelling in Illinois waters (such as the Illinois River, parts of the Mississippi and Ohio Rivers, etc.) could not shower, use the sinks, or wash their clothes or dishes. While EPA ultimately removed this condition from the VGP, one day before the prohibition would have gone into effect, this example illustrates a larger point: a vessel traveling the nation's inland waterway system could be subjected to a dozen or more different state vessel discharge requirements along a single voyage.

A Roadmap for Congressional Action

As EPA has itself conceded, the federal NPDES permitting program is ill-equipped to address the problem of vessel discharges.[37] As well, certain members of Congress have questioned the wisdom of the courts' decision and expressed reservation regarding the application of NPDES permits to vessels.[38]

In addition, commercial vessels are already subject to extensive, overlapping regulatory requirements designed to protect human health and the environment. For example, part 1321 of the CWA prohibits the discharge of oil or hazardous substances into the navigable waters of the United States in harmful quantities.[39] The Refuse Act prohibits the discharge or depositing of any refuse matter or any material of any kind into the navigable waters in a manner that could impede navigation.[40] The Ocean Dumping Act prohibits the dumping of any material from a vessel of the United States without a permit.[41] The Act to Prevent Pollution from Ships implements the provisions of the International Convention for the Prevention of Pollution from Ships generally prohibits the disposal of plastics and other garbage into the sea.[42] Likewise, the Oil Pollution Act prohibits the discharge of oil into navigable waters, requires reporting of spills, and imposes significant restrictions on the types of vessels that can carry petroleum.[43] The Comprehensive Environmental Response, Compensation and Liability Act makes owners or operators of vessels used to transport hazardous substances potentially liable for releases of those substances to the environment.[44] U.S. Coast Guard regulations mandate that all sewage generated aboard a vessel must be processed and treated in approved marine sanitation device sewage treatment systems aboard the vessel.[45] A variety of other international, federal, and state restrictions apply as well, as do various other practices adopted voluntarily by industry.

An unduly burdensome and complicated NPDES permitting regime risks redirecting attention away from safety and security issues which are paramount for people working aboard moving vessels. Consequently, Congress should adopt comprehensive legislation to re-exempt vessel discharges from the NPDES permit program, and in its place, establish a limited set of nationwide standards for vessel discharges. This suggested legislation (perhaps to be titled, "the Clean Commercial Boating & Barging Act of 2009") would need to include several key components; namely, (1) provide the U.S. Coast Guard with sole authority for regulating ballast water discharges and all other discharges incidental to the normal operation of a vessel; (2) authorize the Coast Guard to promulgate national uniform standards and management practices for such discharges; and (3) provide for increased federal funding for the development of cost-effective ballast treatment technologies and funding for states to monitor and control the spread of harmful aquatic non-indigenous invasive species. Congress could also provide a role for EPA and the States in developing and establishing these standards and management practices.

With the swearing-in of a new Democratic President and Democrat-controlled Congress, 2009 is primed to be a hallmark year, much like 1972, for expanded federal environmental regulation. It will undoubtedly surpass 2008 in that regard. As Congress pushes through its environmental reform agenda, however, it should also give due consideration to ideas, even if they come from the Right, on refining and recalibrating existing federal environmental laws to ensure that good governance prevails. Federal regulation of discharges from vessels might be a good place to start.

Endnotes

1 Winter v. NRDC, 129 S. Ct. 365 (2008) (vacating injunction against Navy's use of mid-frequency active sonar in waters off Southern California in light of concerns about impacts to marine mammals).

2 33 U.S.C. § 1251(a).

3 *Id.* § 1342.

4 *Id.* § 1311(a).

5 *Id.* § 1362(7).

6 *Id.* § 1362(6).

7 *Id.* § 1362(14).

8 *Id.* § 1362(12) (including also "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft").

9 *Id.* § 1362(6). The definitions above are provided as they currently exist in federal statute. Note, however, that some of the original 1972 definitions differed in some respects. Of particular relevance to this article, in 1996,

Congress substituted "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" for "sewage from vessels." Pub. L. 104-106, § 325(c)(3).

10 40 C.F.R. § 122.3(a) (emphasis added).

11 38 Fed. Reg. 13,528 (May 22, 1973) (emphasis added).

12 *See, e.g.,* NRDC v. Costle, 568 F.2d 1369, 1380-81 (D.C. Cir. 1977) ("We are and must be sensitive to EPA's concern of an intolerable permit load.").

13 *See*, *e.g.*, Monsanto Co. v. Kennedy, 613 F.2d 947, 955 (D.C. Cir. 1979) (recognizing FDA's authority to rely on a "de minimis" exemption principle); Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979) (recognizing at least some agency authority to adopt de minimis exemptions from statutory regimes, and explaining: "Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." [internal citations omitted]); NRDC v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992) (rejecting EPA's reliance on inherent authority to adopt "de minimis" exemptions from the Clean Water Act and stating that "once Congress has delineated an area that requires permits, EPA is not free to create exemptions… The de minimis exemption is only available where a regulation would yield a gain of trivial or no value" [internal citations omitted]).

14 *See* Northwest Envtl. Advocates v. EPA, 2005 WL 756614, at *9 (N.D. Cal. 2005) (granting summary judgment to the plaintiffs on the basis that 40 C.F.R. § 122.3(a) was ultra vires, and ordering EPA to repeal the exclusion); Northwest Envtl. Advocates v. EPA, 2006 WL 2669042, at *14 (N.D. Cal. 2006) (vacating the challenged portions of 40 C.F.R. § 122.3(a) effective September 30, 2008).

15 2005 WL 756614, at *13.

16 *Id.* at *8-9.

17 *Id.* at *8-9 (ending the analysis at *Chevron* step one).

18 537 F.3d 1006 (9th Cir. 2008). No party sought review by the U.S. Supreme Court.

19 This says nothing, of course, about the merits of the other non-statutory grounds advanced by EPA in the litigation.

20 For example, industry is currently implementing the U.S. Coast Guard's new Transportation Worker Identification Credential ("TWIC") requirements, which were mandated by Congress after 9/11 as part of the Maritime Transportation Security Act of 2002. As part of that effort, the industry is currently working to ensure that its associates obtain "TWIC" cards (i.e., the biometric security credential required for unescorted access to inland ports and other areas important to homeland security) by the 2009 deadline. Similarly, industry is preparing for compliance with EPA's new marine diesel engine emissions standards (*see* 73 Fed. Reg. 25,098) and various other initiatives of the U.S. Coast Guard such as implementation of new guidance related to "Crew Endurance Management Systems" and the anticipated new Subchapter M requirements.

21 Although the term "pollutant" includes "biological materials," 33 U.S.C. § 1362(6), the extension of that definition to all aquatic species would produce illogical results. Since the passage of the CWA, the definition of pollutant has generally been construed in the context of waste-like materials, not biological organisms generally. Applying that term broadly to all biological organisms could result in the regulation of all non-indigenous aquatic species, including the Asian carp, which has been introduced into certain U.S. waters and can grow over 100 pounds, as a pollutant. Such a broad construction not only has implications for the NPDES permitting program, but for the establishment of water quality criteria and standards, the listing of impaired waters, and the development of total maximum daily loadings for such species. Congress clearly did not intend the NPDES program to be implemented in this manner.

22 *See* 72 Fed. Reg. 34,241 (June 21, 2007).

23 *See* 73 Fed. Reg. 34,296 (June 17, 2008).

24 EPA has established a website with information about the VGP at http://cfpub.epa.gov/npdes/home.cfm?program_id=350.

25 73 Fed. Reg. 79,473.

26 "Recreational vessels" are not covered by the VGP but those vessels are subject to regulation under Section 312(o) of the Clean Water Act. Non-recreational vessels (less than 79 feet in length) and all commercial fishing vessels are not subject to the VGP. Likewise, vessels of the Armed Forces are not covered.

27 *See* Final VGP at 2.

28 Final VGP at Part 1.2.2. "Graywater" is created on board a vessel usually through the operation of kitchen sinks, showers, and washing machines.

29 Final VGP at Part 5.

30 73 Fed. Reg. at 79,477. A notice of intent ("NOI") must be filed for vessels which are either 300 or more gross tons or have the capacity to hold or discharge more than 2113 gallons of ballast water. Until September 19, 2009, vessels required to submit a NOI are automatically authorized to discharge in accordance with the VGP's requirements, and companies may begin filing NOIs as early as June 19, 2009.

31 537 F.3d at 1010. Several lawsuits have been filed challenging the VGP, including at least one lawsuit filed by business interests (*Lake Carriers Ass'n v. EPA*, pending in the D.C. Circuit) and two lawsuits by environmental groups (*NRDC v. EPA*, pending in the Second Circuit; and *Northwest Envtl. Advocates v. EPA*, pending in the Ninth Circuit).

32 *See* Guidance for Corps and EPA Field Offices in Light of United States v. Wilson (May 29, 1998), available at http://www.usace.army.mil/cw/cecwo/reg/wilson.pdf.

33 *See* Final VGP at Part 1.5.

34 *See id.*

35 33 U.S.C. § 1341(a).

36 On February 3, 2009, just three days before the Illinois graywater prohibition would have gone into effect, a state circuit court in Springfield, Illinois granted a preliminary injunction to prevent the graywater prohibition from going into effect. Soon thereafter, Illinois EPA asked USEPA to remove the prohibition from the state's Section 401 certification, which USEPA did just one day before the VGP went into effect.

37 In June 2008, James Hanlon, the director of EPA's Office of Wastewater Management, told the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment that "the NPDES program does not currently provide an appropriate framework for managing ballast water and other discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port to port, state to state, and country to country." BNA, Daily Environment, at A-2 (June 13, 2008). Mr. Hanlon continued: "[D]ischarges from such highly mobile sources would be more effectively and efficiently managed through the development of national, environmentally sound, uniform discharge standards." *Id.*

38 Rep. John Boozman (R-Ark.), for example, who was the ranking member on the House subcommittee, said the court had "overreached" in a way that would lead to a "regulatory morass" for commercial vessel owners and operators. *Id.*

39 33 U.S.C. § 1251 et seq.,

40 33 U.S.C. § 407.

41 33 U.S.C. § 1401 *et seq.*

42 33 U.S.C. § 1901 *et seq.*

43 33 U.S.C. § 2701 *et seq.*

44 42 U.S.C. § 9601 *et seq.*

45 *See* 33 C.F.R. § 159.7.