

IG Pollution Subcommittee – Ballast Water Management Seminar



The Ballast Water Conundrum – Options, Challenges and Practical Realities of Compliance

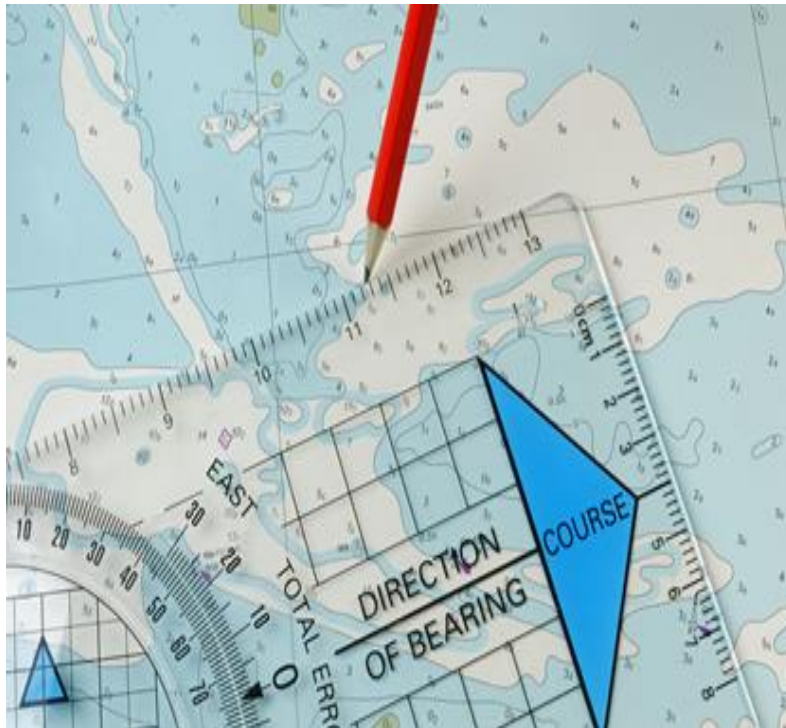
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What We'll Be Talking About ...



- Legal Framework
- Compliance Challenges
- Practical Realities
- Enforcement Risks

Ballast Water Requirements

- **IMO's Ballast Water Convention**
 - *Entry into force September 8, 2017*
 - Compliance date (at least for now) – first IOPP renewal after entry into force
 - Type-approval of Ballast Water Management Systems—different protocol than the US Coast Guard
- **U.S. Coast Guard's Ballast Water Management Program**
- **U.S. EPA's Vessel General Permit**



EPA's 2013 Vessel General Permit

- **History born in litigation**
- **Effective date December 19, 2013**
- **27 discharges covered**
- **Some requirements/differences from the original 2008 VGP**
 - Ballast water (numeric limits)
 - Monitoring and sampling requirements for treated ballast water
 - Avoid uptake in areas with infestations, near sewage outfalls or dredging, in darkness
 - Clean ballast tanks regularly, but no sediment discharge in VGP waters
- **Extensive recordkeeping, inspections, corrective actions**
- ***Separate and distinct civil and criminal penalties***

EPA's 2013 Vessel General Permit (cont.)

More Litigation....

- *On October 5, 2015 – U.S. Court of Appeals for the Second Circuit ruled that the EPA acted “arbitrarily and capriciously” in drafting the ballast water discharge provisions of its 2013 VGP*
- EPA must revise the permit or justify its decision in the 2018 VGP, which is expected to be published for comment in the summer/fall 2017
- *Nothing changes for now.*



State Certifications

- States' rights: they can regulate more stringently
...and many have for ballast water
- Numerous states have certified the VGP with additional ballast water provisions (AZ, CA, CT, HI, IL, IN, ME, MI, MN, NY, OH, RI, WA and WI)



Legislative Developments

- **Commercial Vessel Incidental Discharge Act**
 - **H.R. 1154** – introduced 2/16/17 and referred to the House Transportation and Infrastructure Committee and the House Environment and Public Works Committee (no action)
 - **S. 168** - introduced 1/17/17, referred to the Senate Commerce, Science and Transportation Committee and reported without amendment on 1/24/17
- Generally preempts states from regulating incidental ballast water discharges into navigable U.S. waters
- Requires the USCG to use the MPN method for type approvals via a Policy Letter
- 10 Attorneys General have objected (CA, IL, ME, MA, MI, NY, OR, RI, VT, and WA)

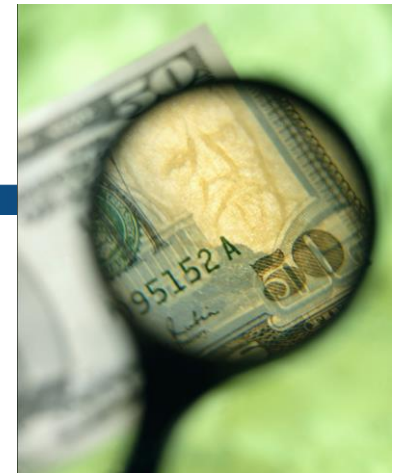


U.S. Coast Guard and EPA Coordination on the VGP

- **US Coast Guard inspects / EPA enforces**
 - *Coast Guard Job Aid for VGP Inspections on July 15, 2014*
- **When deficiencies discovered:**
 - Focus will be on record keeping
 - Encourage immediate corrective action
 - Entered into MISLE, which is available to EPA for review and enforcement
 - Penalties issued by EPA



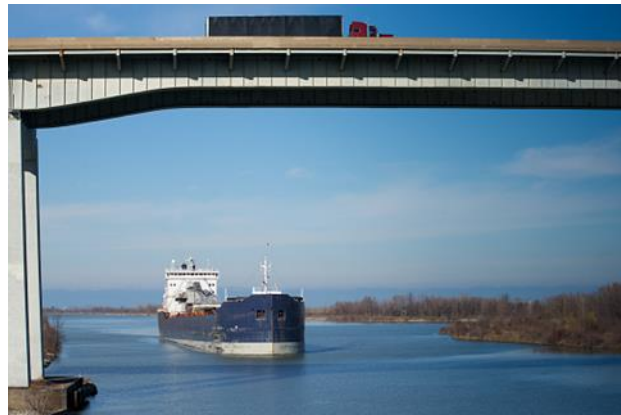
VGP Enforcement



- *Failure to conduct inspections required by the VGP*
 - \$6,600
- *Accidental discharge of pool water (reported to EPA)*
 - \$20,000 penalty
- *Excessive underwater ship husbandry discharges reported to EPA, not USCG*
 - Development of SOPs and training materials and \$37,500 penalty assessed
- *Discharges exceeding water quality limits for mercury*
 - \$25,000
- *Failure to submit NOIs or PARIs*
 - \$38,397
- *Discharging without a permit*
 - \$1,500
- *Warnings for smaller companies*

Coast Guard – Ballast Water Management

- Mandatory ballast water management and reporting
 - Applies to vessels operating in U.S. waters with ballast tanks
- Require compliance with treatment standard
- Same as IMO's but a different testing protocol for type-approvals
- Compliance with ballast water requirements is a port state control priority – civil and criminal penalties → separate and distinct from VGP



Coast Guard – Final Rule (March 2012)

- **Options:**

- USCG Type-Approved Treatment System
- Use only water from the U.S. public water system
- Do not discharge ballast water in U.S. waters
- Discharge to a shore-based treatment facility
- Alternate Management System or Extension



U.S. Coast Guard BWMS type-approval

- **USCG Type-Approvals**

- ***Optimarin*** – ultraviolet system

- Operational Challenge: Requires 72-hour hold time and hazardous area restrictions

- ***Alfa Laval*** – ultraviolet system

- Operational Challenge: Requires 72-hour hold time

- ***OceanSaver*** – electro-chlorination system

- Safety Challenge: Hydrogen by-product must be vented; hazardous area restrictions

- **Current Development**: USCG reviewing fourth BWMS

- *BalClor* electrolysis system (SunRui)
- Three more expected this year?

U.S. Coast Guard Extensions – Evolution

- **USCG Extension Policy Letter: CG-OES 13-01, Rev. 2 (November 16, 2015)**
- **MSIB 14-16 (December 2, 2016)**
- **MSIB 03-17 (March 6, 2017)**
 - 12-16 months in advance
 - Statements/proof that alternatives not possible
 - Certification of compliance with Ballast Water Management Plan
 - Decoupling with drydocks
 - Justification why compliance not possible with any of the options
 - If you have an AMS, you must use it
 - Strategy and Timeline



U.S. Coast Guard Extensions – Evolution (cont.)

- **What do I need? When and how to install?**
 - Footprint, flow, power, capacity, safety
 - **Operations/Training**
 - **Must go beyond just the type-approvals**
-

- **Flow rate not adequate? *Consider two...three...***
- **72 hours not good enough? *Consider changing operations***
- ***“There’s an engineering fix for everything...”***
- **Drydock early? “Think about it....”**
- **Not practical? *What is...***

BWM Requirements Comparison

Coast Guard & EPA

Requirement	USCG (per National Invasive Species Act)	EPA (per Clean Water Act/VGP)
Discharge Standard	IMO	IMO
BWMS Approval	USCG Type approval	None (Best Available Technology)
BWMS Installation – New Vessels	Keel laid after 1 Dec 2013: Upon Delivery	Same as USCG
BWMS Installation – Existing Vessels	First drydocking after: <1,500 m ³2016 1,500 -5,000 m ³ ...2014 >5,000 m ³2016	Same as USCG
Extensions	Yes	No

Ballast Water Challenge

- **Extension from U.S. Coast Guard does not equal VGP compliance**
 - EPA “Low Enforcement Priority” Letter
 - Compliance with USCG extension
 - Compliance with VGP
 - Non enforcement \neq Compliance
 - Risks, however, are probably low
- **Some Implications**
 - Enforcement
 - Vetting / Charter Terms
 - *Reporting violations (discharges) in the VGP Annual Report*



EPA “Low Enforcement Priority” Letter

- Enforcement Response Policy for EPA’s 2013 Vessel General Permit: Ballast Water Discharges and U.S. Coast Guard Extensions (December 27, 2013)
 - Acknowledges the major difference is that the USCG requirements specify particular technology and EPA’s do not
 - Applies only:
 - Vessel received USCG extension and is in compliance with it
 - Vessel is in compliance with all other requirements of the 2013 VGP
- → If yes, EPA will consider the VGP violations to be a “low enforcement priority”

EPA “Low Enforcement Priority” Letter

- Policy does not apply:
 - “Grossly excessive ballast water discharges”
 - “Discharges that may present an imminent and substantial endangerment”
- And:
 - Policy intended solely for guidance of enforcement personnel and cannot be relied on to create any rights enforceable against EPA
 - EPA reserves the right to vary from the Policy and change it at any time

U.S. Coast Guard Ballast Water Enforcement

“Coast Guard completes ballast water violation investigation, initiates civil penalty”

- SEATTLE — The Coast Guard, after an investigation of ballast water discharge violations, initiated civil penalty proceedings against the operator, Vega Reederei GmbH & Co. KG, of the bulk carrier Vega Mars (max penalty for National Invasive Species Act violation: \$38,175).

- Coast Guard News (Feb. 13, 2017)



Enforcement Risks and Avoiding the Trends



Prosecutions – Liability Theories

- Centerpieces of criminal prosecutions
 - APPS – Annex I and Annex V
 - Clean Water Act
 - Failure to report hazardous conditions
 - Ballast water?
- Other problems – post-incident conduct
 - False Statements/False Documents
 - Obstruction of Justice

Coast Guard's Main Focus for Inspections

- **Annex I**
 - Examination of ORBs and comparing 'remaining on board' volumes to actual soundings
- **Annex V**
 - Multiple garbage-related detentions and prosecutions for discharges in prohibited areas, *e.g.*, Wider Caribbean Region, with inaccurate Garbage Record Book
- **Annex VI**
 - Use of and sampling fuel to ensure compliance
- **Ballast Water**
 - Verification of salinity to determine if exchanged
 - Compliance with 5 options
- **Vessel General Permit / Emissions Control Areas**

How Do Investigations Start?

- Port State Control inspections
- “Red flags”
- Whistleblowers
- Remote sensing
- International cooperation
- Casualties / Oil Spills



Port State Control Trends

- Cases will continue
- Penalties higher
- More whistleblower awards
- Increased international cooperation
- Expanding theories of liability
- VGP? Annex VI? Ballast Water?

→ *It's all about the documents.*



A Few Criminal Prosecutions with Ballast Water Components

- **Drillship (2014)** – NISA violation, among others, for potentially contaminated ballast water
- **Cargo Ship (2012)** – NISA violation, among others, for failure to report to the National Ballast Information Clearinghouse
- **Cargo Ship (2009)** – NISA violation, among others, for failure to maintain accurate ballast records
- **RISKS** – False records, false statements, obstruction of justice, misleading information



Avoiding This Trend

- Comprehensive Environmental Compliance Program
- Positive Company Culture
- Transparency with regulators
- Enhanced Compliance Training
- Open Reporting System
- Internal Investigations
- Audit Program



Questions?

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