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EPA's Long-Anticipated VIDA Proposed Rule Now Available

NEW DEVELOPMENT

The U.S. Environmental Protection Agency (“EPA”) made available its long-anticipated standards for discharges incidental to the normal operation of vessels pursuant to the Vessel Incidental Discharge Act (“VIDA”) on October 6, 2020. Signed into law on December 4, 2018 as part of the Frank LoBiondo Coast Guard Authorization Act of 2018, VIDA established a new framework for the regulation of discharges incidental to the normal operation of vessels in an attempt to bring consistency and certainty to the regulation of discharges from U.S.- and foreign-flag vessels.

The first step in implementing VIDA requires EPA to develop federal performance standards for “marine pollution control devices,” which includes any equipment or management practice (or combination thereof) to manage incidental discharges from vessels. After some delays, EPA posted its notice of proposed rulemaking on October 6, available [here](#), to set standards for 20 types of vessel discharges incidental to normal operations. The program implemented under VIDA will replace EPA’s Vessel General Permit and certain U.S. Coast Guard (“USCG”) regulations for ballast water a few years from now, after the USCG finalizes regulations to implement EPA’s standards, including compliance, monitoring, inspections, and enforcement.

BACKGROUND

VIDA was the culmination of years of discussion, debate, and litigation concerning discharges incidental to the normal operation of vessels. Although back in the 1970s EPA initially exempted these discharges from the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) permitting program due to the burden of permitting every vessel entering U.S. waters, a federal court ruled in 2006 that EPA must issue permits for vessel discharges. In response, EPA developed the 2008 Vessel General Permit (“VGP”). The 2008 VGP was eventually replaced by the 2013 VGP, which contained some more stringent requirements, such as numeric limits on ballast water discharges, a requirement to use environmentally acceptable lubricants, and new monitoring requirements for ballast water, bilge water, and graywater.

The 2013 VGP was due to expire in December 2018, but it was extended indefinitely by VIDA. The 2013 VGP thus will remain in effect until VIDA is fully implemented, likely two or three years from now at best. In addition to creating uniform federal standards for incidental vessel discharges, VIDA included a number of other key provisions of which the maritime industry should be aware. For example, regulations under VIDA will preempt state and local laws, though some existing state provisions are incorporated into VIDA. States will also have the ability to petition for

stricter discharge provisions and will have inspection and enforcement authority for the federal standards. In a significant departure from the VGP, VIDA also extended jurisdiction for regulating incidental discharges from three nautical miles out to 12 nautical miles, possibly having a significant impact on vessel operations.

The first step in implementing VIDA is EPA's development of federal performance standards for management of incidental discharges in consultation with the USCG and states. VIDA requires these standards to be at least as stringent as the existing requirements in the 2013 VGP and USCG regulations, unless information becomes available that was not reasonably available when the initial standard of performance was issued, and that information would have justified a less stringent standard.

EPA's proposal, as anticipated, also addressed a 2015 federal court ruling that found EPA acted arbitrarily and capriciously in drafting the ballast water discharge provisions of the 2013 VGP, specifically in failing to explain why stricter technology-based effluent standards should not be applied, failing to consider onshore treatment options, and failing to explain the exemption for pre-2009 Lakers. These issues are all addressed in detail in EPA's proposed rule.

ANALYSIS

Overview

The proposed rule would establish both general and specific discharge standards. The general discharge standards are preventative in nature and apply to all incidental discharges. They are organized into three categories: (1) general operation and maintenance; (2) biofouling management; and (3) oil management. These general standards mandate overall minimization of discharges and prescribe best management practices toward achieving this goal. No training or education requirements are included, as these will be set by the USCG in its rulemaking once EPA's standards are finalized.

Specific Discharges

With respect to specific discharge standards, EPA's proposal covers 20 incidental discharges from vessels, down from 27 covered by the 2013 VGP. Importantly, EPA did not significantly reduce the number of discharges covered,

rather combined several discharges into one, taking a more systematic approach to managing the discharges. The standards for 13 of the 20 discharge categories remain largely the same as the 2013 VGP requirements, including discharges related to (i) boilers, (ii) cathodic protection, (iii) chain lockers, (iv) decks, (v) elevator pits, (vi) fire protection equipment (including AFFF and firemain systems), (vii) gas turbines, (viii) inert gas systems, (ix) motor gasoline and compensating systems, (x) non-oily machinery, (xi) pools and spas, (xii) refrigeration and air conditioning, and (xiii) sonar domes.

The discharge standards for (xiv) bilgewater and (xv) desalination and purification system discharges are consistent with the VGP, though somewhat modified.

Importantly, five types of discharges were significantly modified from the 2013 VGP standards, including discharges from: (xvi) ballast tanks, (xvii) exhaust gas emission control systems, (xviii) graywater systems, (xix) hull and associated niche areas, and (xx) seawater piping.

The most anticipated discharge standards were those relating to exhaust gas cleaning systems ("EGCS") and ballast water. EPA incorporated discharge standards applicable to EGCS and exhaust gas recirculation system discharges based substantially on applicable International Maritime Organization ("IMO") guidelines, which better harmonized the VGP and IMO requirements. Notably, the pH limit for EGCS washwater discharges has been changed to 6.5 and no longer needs to be measured at the hull.

With respect to ballast water, EPA largely maintained the standards included in the VGP, which dovetails more with the IMO standard, though many of the best management practices have been modified. For example, the numeric discharge standards for ballast water remain the same as the 2013 VGP. Also, vessels operating exclusively on the Great Lakes, regardless of build date, will not be required to comply with the ballast water numeric discharge standards. Further, additional ballast water exchange requirements apply to vessels operating in the Pacific Region, including the entire exclusive economic zone adjacent to Alaska, California, Hawaii, Oregon, and Washington.

Other Key Takeaways

- Each vessel would be required to develop and follow a biofouling management plan to prevent macrofouling and minimize potential spread of aquatic nuisance species.
- Additional limitations are proposed related to graywater discharges, though applicable numeric discharge standards remain the same.
 - Discharges of graywater are prohibited within 3 nm for vessels that travel at least 3 nm from shore and have the storage capacity to hold, unless the discharge meets the numeric discharge standards.
 - Discharges of graywater are prohibited within 1 nm for vessels that voyage at least 1 nm, but not more than 3 nm, from shore and have the storage capacity to hold, unless the discharge meets the numeric discharge standards.
 - All new vessels of 400 GT and above, and any new ferry that will carry 250 or more people, must meet numeric discharge standards.
- EPA proposes to require all vessels with a seawater piping system that accumulates biofouling exceeding a rating of FR-20 to be fitted with a Marine Growth Prevention System.
- Fish hold effluent and small boat engine wet exhaust will no longer be regulated as discharges incidental to the operation of the vessel.
- Requirements related to discharges in federally-protected waters remain largely the same, though some modifications were made with respect to discharges from chain lockers, decks, hulls and associated niche areas, pools and spas, and seawater piping when operating in these areas.

Following finalization of EPA's proposed standards, the USCG will develop regulations implementing the standards, including compliance, monitoring, inspections, and enforcement, within two years. Like EPA's standards, the USCG regulations must be at least as stringent as current requirements under the VGP.

CONCLUSION

EPA's proposal is significant and sweeping—it is imperative that the industry take time to closely read the proposal, consider how it impacts operations of their vessels, and provide detailed comments to EPA. Industry should also closely review how EPA's proposed standards dovetail with international requirements, such as for ballast water, bilge water, and exhaust gas cleaning systems. As such, it will also be important to participate in the virtual public meetings and webinars. EPA's proposed standards will become the framework for regulation of vessel discharges for the foreseeable future. Once the proposal is published in the Federal Register, likely in a few weeks, the 30-day comment period clock begins ticking, prompt attention is needed now to ensure timely submission.

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