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# ENERGY LAW

## REPORT



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**EDITOR'S NOTE: LET US ENERGIZE YOU**

Victoria Prussen Spears

**SECURITIES LITIGATION IN THE ENERGY SECTOR**

Michael J. Biles, Frances Fink, Cheri A. Grosvenor and Tyler W. Highful

**AS FEDERAL GOVERNMENT SIDESTEPS SITING DECISIONS FOR ELECTRIC VEHICLE CHARGING, WILL CHAOS ENSUE?**

John B. (Jack) Lyman

**COMPLIANCE, ENFORCEMENT RISKS AND EMERGING ISSUES REGARDING THE ENVIRONMENTAL PROTECTION AGENCY'S VESSEL GENERAL PERMIT**

Jeanne M. Grasso and Dana S. Merkel

**NEW REMOVABILITY AND REPLACEABILITY REQUIREMENTS FOR BATTERIES MARKETED IN THE EUROPEAN UNION**

Cándido García Molyneux

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**Editor's Note: Let Us Energize You**

Victoria Prussen Spears

147

**Securities Litigation in the Energy Sector**

Michael J. Biles, Frances Fink, Cheri A. Grosvenor and Tyler W. Highful

149

**As Federal Government Sidesteps Siting Decisions for Electric Vehicle Charging, Will Chaos Ensue?**

John B. (Jack) Lyman

167

**Compliance, Enforcement Risks and Emerging Issues Regarding the Environmental Protection Agency's Vessel General Permit**

Jeanne M. Grasso and Dana S. Merkel

175

**New Removability and Replaceability Requirements for Batteries Marketed in the European Union**

Cándido García Molyneux

179

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# Compliance, Enforcement Risks and Emerging Issues Regarding the Environmental Protection Agency's Vessel General Permit

*By Jeanne M. Grasso and Dana S. Merkel\**

*In this article, the authors explain that, with the U.S. Environmental Protection Agency's focus on Vessel General Permit (VGP) compliance and enforcement, it is critical for companies to closely review VGP compliance for the vessels in their fleet and implement strict oversight and quality control, including audits, to ensure VGP requirements are complied with, crew are trained, and any deficiencies are promptly corrected.*

For the past couple years, there has been an increase in inspections and enforcement of the U.S. Environmental Protection Agency's (EPA) Vessel General Permit (VGP) in several EPA regions around the country.

When the trend began, one EPA attorney indicated that it was "just the beginning," and we have continued to see more aggressive reviews of VGP compliance and penalty demands, particularly on the U.S. West Coast.

More recently, the EPA has continued demanding significant penalties for alleged violations, sometimes citing interpretations of the VGP that are not outlined in any guidance documents. Additionally, in January 2023, the EPA published an Enforcement Alert, titled the EPA Reminder About Clean Water Act Vessel General Permit Requirements,<sup>1</sup> reminding the maritime industry of the VGP requirements and impacts of non-compliance, and citing recent enforcement examples.

## **THE VGP AND VIDA IMPLEMENTATION**

The VGP was issued under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) program and provides permit coverage nationwide for discharges incidental to the normal operation of commercial vessels more than 79 feet in length. The EPA issued the first version of the VGP in 2008 and then another, more stringent version in 2013. The VGP set effluent limits and mandated Best Management Practices to control certain types of incidental discharges. It also required vessels to conduct routine and annual inspections and imposed numerous recordkeeping obligations, as well as monitoring and reporting requirements.

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<sup>1</sup> <https://www.epa.gov/system/files/documents/2023-01/vgpcwaenfalert11023.pdf>.

The 2013 VGP was set to expire in December 2018 and a new VGP was to be issued. However, in December 2018, the Vessel Incidental Discharge Act (VIDA) was signed into law, with the intent of replacing the VGP and bringing uniformity, consistency, and certainty to the regulation of incidental discharges throughout the United States from U.S.-flag and foreign-flag vessels alike. VIDA amended the CWA and will substantially alter how the EPA and the United States Coast Guard (USCG) regulate vessel discharges. VIDA required the EPA to finalize uniform performance standards for each type of incidental discharge by December 2020, a deadline that the EPA has missed by more than two years already, and required the USCG to implement the EPA's final standards within two years.

Significantly, on January 19, 2023, the EPA announced plans to issue a Supplemental Notice in Fall 2023 to its Vessel Incidental Discharge National Standards of Performance proposed rule, originally issued in October 2020 but never finalized. The EPA indicated that the Supplemental Notice is intended to clarify its proposed rule, share ballast water data compiled by the USCG, and propose additional regulatory options that the EPA is considering. The EPA plans to request comments on the issues identified in the Supplemental Notice prior to finalizing its performance standards in Fall 2024 – nearly four years after the deadline mandated by Congress. Once the EPA finalizes its performance standards, VIDA requires the USCG to promulgate regulations implementing the EPA's standards, including equipment, compliance, monitoring, inspections, and enforcement, within two years. Until such time as VIDA is fully implemented, likely in late 2026, the VGP will remain in effect.

## **LITIGATION BY ENVIRONMENTAL GROUPS**

The EPA's delay in finalizing its performance standards prompted the Center for Biological Diversity and Friends of the Earth to file a lawsuit in February 2023 to force the EPA to finalize its standards. The plaintiffs seek a declaration by the court that the EPA's failure to finalize the incidental discharge standards violates the Clean Water Act and ask the court to order the EPA to implement final standards within 60 days.

The premise of the environmental groups' complaint is that the EPA's inaction harms aquatic ecosystems, with the principal allegations focused on ballast water discharges. The environmental groups allege that vessel pollution contributes to a range of environmental and public health problems, and that pollutants from vessels include aquatic invasive species, oil and grease, toxic chemicals, metals, plastics, and pathogens.

## VGP ENFORCEMENT

Up until about two years ago, the EPA had brought only a handful of enforcement actions for VGP violations. The penalties for these violations ranged from letters of warning and de minimis monetary penalties for minor violations, to fines between \$20,000 and \$40,000 for more serious discharge violations.

In recent years, however, the EPA has begun a targeted VGP enforcement campaign, particularly in Regions 6, 9, and 10.<sup>2</sup> Although the EPA has conducted vessel inspections for VGP compliance with the USCG during port State control inspections, enforcement actions generally seem to begin with a close review of vessels' Notices of Intent, Annual Reports, and National Ballast Information Clearinghouse (NBIC) reports. Findings of self-reported violations in Annual Reports or conflicting information in Annual Reports and NBIC reports inevitably trigger the EPA to informally request additional information on VGP compliance issues, which in turn may lead to demands for significant penalties. The EPA's enforcement method has largely consisted of informal allegations followed by settlement negotiations regarding the alleged violations.

Some key areas where the EPA has focused:

- Annual Comprehensive and Routine Inspections – Failures to conduct annual comprehensive or routine inspections must be included in each vessel's Annual Report so they are easy for the EPA to identify and assess penalties. The fact that the violations were self-reported has not resulted in a significant mitigation of penalties.
- Ballast Water Monitoring – This is of great interest to the EPA. Failure to conduct the required monitoring for ballast water management systems is a common omission and must be reported. Key issues include annual calibration, functionality monitoring, and analytical sampling.
- Ballast Water Exchange – The EPA has begun focusing on vessels managing ballast water by exchange in accordance with a compliance date extension issued by the USCG, considering this to be a VGP violation if any other VGP violations are present, seemingly disregarding the intent and history behind USCG extensions and the EPA's Enforcement Response Policy.

The EPA is applying its penalty calculation policies very aggressively, resulting in high penalty demands for every violation type, substantially higher

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<sup>2</sup> Region 6 serves Arkansas, Louisiana, New Mexico, Oklahoma, and Texas; Region 9 serves Arizona, California, Hawaii, Nevada, and the Pacific Islands; and Region 10 serves Alaska, Idaho, Oregon, Washington, and 271 Native Tribes.



than in the first 10+ years of VGP enforcement. Every violation, even paperwork violations, is considered to have presented a risk to the marine environment.

## **CONCLUSION**

With the EPA's focus on VGP compliance and enforcement, as evidenced by its January Enforcement Alert, it is critical for companies to closely review VGP compliance for the vessels in their fleet and implement strict oversight and quality control, including audits, to ensure VGP requirements are complied with, crew are trained, and any deficiencies are promptly corrected. It is also important to ensure that all filings are accurate, including the annual reports filed in February for calendar year 2022.