BLANK ROME LLP
COUNSELORS AT LAW

OCTOBER 2015 ■ NO. 9

Maritime

Second Circuit: EPA Acted "Arbitrarily and Capriciously" regarding Ballast Water in the VGP

Action Item: The Second Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency ("EPA") acted arbitrarily and capriciously in issuing the ballast water provisions included in the 2013 Vessel General Permit ("VGP"), and remanded the issue to the EPA to redraft the ballast water sections of the VGP. The differences between the VGP ballast water provisions, International Maritime Organization ("IMO") Ballast Water Management Convention, and U.S. Coast Guard's ballast water regulations have posed a number of compliance challenges thus far, which may be further exacerbated by possible new VGP requirements. While substantive changes to the VGP ballast provisions, if any, are likely years away, ship owners and operators should be aware, closely monitor, and be prepared to comment on a new draft VGP in the future.

New Development

On October 5, 2015, the U.S. Court of Appeals for the Second Circuit unanimously ruled that the EPA acted arbitrarily and capriciously in drafting the ballast water discharge provisions of its 2013 VGP. Most notably, the court stated that the EPA failed to adequately explain why stricter technology-based effluent standards should not be applied, failed to give fair and thorough consideration to onshore treatment options, and failed to adequately explain why pre-2009 Lakers were exempted. The court instructed the EPA to reconsider the VGP ballast water provisions in accordance with its ruling. In the meantime, the 2013 VGP will remain in effect. The full decision is available here.

Background

In 2006, after years of litigation, a federal court ordered the EPA to discontinue exempting vessels from the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") permitting program, which regulates discharges of pollutants into U.S. navigable waters (generally within 3 miles from shore), for discharges incidental to the normal operations of a vessel. As a result, the EPA developed the VGP program in 2008, which was revised in 2013, and which currently covers 27 types of discharges incidental to normal vessel operations, including ballast water. Further litigation over the 2008 VGP ended in a settlement that required the EPA to: (1) include numeric effluent limits in organisms per unit volume to control the release of non-indigenous invasive species in ballast water discharges; (2) set numeric limits in accordance with available technology; and (3) include water quality- based effluent limitations, if needed, to meet applicable water quality standards.

In preparing the ballast water provisions of the 2013 VGP, the EPA tasked its own Science Advisory Board ("SAB") and the National Research Council/National Academy of Sciences Committee on Assessing Numeric Limits for Living Organisms in Ballast Water ("NAS Committee") with researching issues related to the VGP ballast water requirements. Based on the reports and comments received from the SAB and NAS Committee, the EPA drafted and issued the 2013 VGP on March 28, 2013. Following the issuance of the 2013 VGP, four environmental groups petitioned for review of the VGP under the Clean Water Act alleging that the EPA acted arbitrarily and capriciously in issuing the ballast water provisions of the 2013 VGP.

As the proceedings moved forward, the 2013 VGP went into effect on December 19, 2013.

Second Circuit Ruling

The court addressed six allegedly arbitrary and capricious aspects of the 2013 VGP ballast water provisions, and found that:

1. *The EPA acted arbitrarily and capriciously by failing to adequately explain why stricter technology-based effluent limitations ("TBELs") should not be applied in accordance with best available technology ("BAT").*

The CWA requires the application of the best available technology economically achievable in setting ballast water TBELs, which set measureable effluent limitations for ballast water discharges based on how effectively technology is capable of removing pollutants. The court found that the EPA acted arbitrarily and capriciously when it failed to adequately explain why the IMO standards were adopted instead of stricter TBELs given available technology. The court noted that SAB had identified technologies capable of achieving standards higher than those set by the IMO. As such, the EPA was required to either adopt a stricter standard or provide an explanation as to why it would not. It should be noted that the court does not require the EPA to adopt stricter TBELs in the next version of the VGP. Rather, it requires the EPA to provide a better record regarding its reasoning for the TBELs it adopts.

2. *The EPA acted arbitrarily and capriciously by failing to give fair and thorough consideration to onshore treatment systems.*

The EPA directed SAB to research shipboard treatment systems and did not investigate onshore treatment because no onshore treatment facilities existed. The court stated that the term "available" in the context of the CWA means only that technologies *could* be used for a particular discharge, even if they are not currently being used by that industry. SAB stated in its report that onshore treatment of ballast water had a number of advantages, and suggested that the EPA further review the possibilities of onshore treatment. The EPA did not pursue further analysis due to time constraints. Because the EPA did not properly consider whether onshore technology was available for the purposes of the CWA, the court found that the TBELs were based on an incomplete record and instructed the EPA to give full consideration to the issue. Again, the court did not require the EPA to alter its current TBELs, only to provide a better record to support its failure to consider onshore treatment options.

3. *It was not arbitrary and capricious for the EPA to decline to set TBELs for viruses and protists.*

Because there are no suitable standardized tests for viruses and protists, the court agreed with the EPA that it did not act arbitrarily and capriciously in declining to set limits for these organisms.

4. *The EPA acted arbitrarily and capriciously by exempting pre-2009 Lakers.*

The EPA exempted vessels that sail exclusively on the Great Lakes ("Lakers") built before 2009 from the numeric effluent limits based on its finding that there was no treatment technology available for these vessels shipboard or onshore. The court found that this decision was arbitrary and capricious because the EPA failed to properly consider onshore treatment. The court also noted that post-2009 Lakers face the same operational challenges with respect to ballast water treatment as pre-2009 Lakers, and found no support for distinguishing between the two.

5. *The EPA's water quality-based effluent limitations ("WQBELs") are arbitrary and capricious.*

If the best available technology economically feasible does not result in TBELs that meet desired water quality standards, WQBELs must be created to achieve the desired water quality standards. The EPA concluded in drafting the VGP that the TBELs set are insufficient to meet desired water quality standards. As such, it was required to set WQBELs to bridge the gap. Because the EPA believed numeric WQBELs were infeasible to calculate, the VGP included a narrative WQBEL requiring that discharges be "controlled as necessary to meet applicable water quality standards in the receiving water body or another water body impacted by [the] discharges." The court found the EPA's narrative WQBEL insufficient because it provides no guidance for shipowners to comply or permitting authorities to ensure compliance. At a minimum, the court stated that the EPA must create a narrative that includes actual practices and procedures, similar to the best management practices listed elsewhere in the VGP.

6. *The EPA's monitoring requirements for WQBELs are arbitrary and capricious.*

The court found that the EPA's monitoring requirements for TBELs were not arbitrary and capricious. However, the court found the EPA's failure to include monitoring requirements for WQBELs was arbitrary and capricious. With respect to WQBELs, the 2013 VGP requires reporting of the expected date, location, volume, and salinity of ballast water to be discharged. As there is no way to assure compliance based on this information and there are no other monitoring requirements that assure compliance with the WQBELs, the court found such requirements arbitrary and capricious. The court noted that solutions to this issue could include a requirement as simple as reporting the actual time, place, and volume of water discharged.

Effect of Ruling

The court remanded the matter to the EPA to better justify its approach in the 2013 VGP or draft new VGP ballast water provisions in accordance with its ruling. In the meantime, the court mandated that the 2013 VGP remain in effect. The EPA has 14 days from the date of the decision to request an *en banc* review in the Second Circuit, and 90 days to petition for *certiorari* to the Supreme Court. Even if the EPA decides not to seek further review, it will be quite some time before a new VGP is drafted. The EPA was already scheduled to begin working on the 2018 VGP in early 2016. As the ruling will require extensive analysis and further study, the changes required by this ruling will more than likely be integrated in the research and development process for the 2018 VGP.

In terms of changes to expect in the next VGP, the ruling does not actually require specific changes, but more developed WQBELs must be included, which will likely take the form of specific best management practices. Otherwise, the ruling requires the EPA to further analyze shipboard and onshore ballast water treatment options and provide a more developed record to support every aspect of the VGP ballast water management requirements.

The possibility that the EPA may alter its VGP ballast water provisions does, however, create uncertainty for those striving to comply with both the VGP and U.S. Coast Guard ballast water requirements. The U.S. Coast Guard's ballast water regulations, like the current VGP ballast water requirements, for the most part mirror the IMO Ballast Water Management Convention, though there are some differences. Ship owners and operators have struggled to understand and comply with these overlapping requirements. Any changes to the EPA's ballast water requirements will require extensive discussion with the U.S. Coast Guard to ensure any new VGP ballast water requirements can co-exist with the U.S. Coast Guard and IMO regimes.

The ruling does not impact the U.S. Coast Guard's ballast water management system type approval process. That said, should the EPA create stricter TBELs than the U.S. Coast Guard and IMO standards, it will be even more challenging for vessels to comply with both the U.S. Coast Guard and EPA standards because the systems approved by the U.S. Coast Guard and required to be installed may or may not meet the stricter VGP TBELs. It is also unclear how the EPA would enforce stricter TBELs as the Coast Guard generally conducts the vessel inspections and passes information on possible violations to the EPA.

One possible solution to the ongoing tension between the EPA and U.S. Coast Guard ballast water requirements is a bill introduced in Congress that would create nationally uniform standards for discharges incidental to the normal operation of a vessel, including ballast water. The bill, the Vessel Incidental Discharge Act, would eliminate the need for a VGP and prohibit any permitting or regulation of incidental discharges under any other law. The bill calls for the U.S. Coast Guard, in consultation with the EPA, to establish and implement regulations for discharges incidental to the operation of vessels.

With respect to ballast water, the bill mandates that the U.S. Coast Guard's Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters remain in effect and calls for a feasibility determination and final rule implementing the U.S. Coast Guard's Phase 2 standards if found feasible by January 1, 2022. By centralizing all regulation of ballast water and other incidental discharges into one agency, the U.S. Coast Guard, the bill would eliminate the varied federal and state regulation of these discharges and provide one comprehensive framework for vessels operating throughout the United States. With the Second Circuit's recent ruling calling for the EPA to again consider stricter ballast water provisions in the VGP, the passing of this bill has become even more important. However, varying versions of this bill have been introduced in Congress for many years and enactment has been, and continues to be controversial, in large part due to state law preemption implications. The bill is being considered by the House and Senate for inclusion in the Coast Guard Authorization Act of 2015, which is pending final approval by Congress, though there is still much debate as to whether the bill will be included in any final version of the Act. The bill is available here.

Conclusion and Recommendations

Changes to the VGP ballast water management requirements mandated by the Second Circuit's ruling likely will not be seen until the 2018 VGP. Owners and operators are encouraged to follow the development of the next version of the VGP closely and provide comments as appropriate. In addition, owners and operators are encouraged to review the Vessel Incidental Discharge Act and consider voicing their support of the bill to their Congressmen and the authorizing committees as a solution to the varied and sometimes inconsistent ballast water discharge requirements that currently apply.

For additional information, please contact:

Jeanne M. Grasso
202.772.5927 | Grasso@BlankRome.com

Jonathan K. Waldron
202.772.5964 | Waldron@BlankRome.com

Dana S. Merkel
202.772.5973 | DMerkel@BlankRome.com