

## EPA REGULATION UPDATE: SUPPLEMENTAL NOTICE TO VESSEL INCIDENTAL DISCHARGE NATIONAL STANDARDS OF PERFORMANCE

Newsletter on 02 March 2023

### Introduction

On December 4, 2018, the President of the United States of America signed into law the "Vessel Incidental Discharge Act" (VIDA). The VIDA restructures how Environmental Protection Agency (EPA) and the U.S. Coast Guard (USCG) regulate incidental discharges, primarily from commercial vessels, into waters of the United States and the contiguous zone. Specifically, the VIDA requires EPA to develop new national standards of performance for commercial vessel discharges and the USCG to develop corresponding implementing regulations.

### New Supplemental Notice and the New Timeline Update

EPA is currently developing a *Supplemental Notice* to the Vessel Incidental Discharge National Standards of Performance proposed rule, to provide clarification, share new ballast water data from the USCG, and discuss additional regulatory options EPA is considering for the final rule.

EPA intends to sign the Supplemental Notice in the Fall of 2023 and make it available for public comment. EPA anticipates that the final rule addressing public comments received on both the proposed rule and the Supplemental Notice will be signed for publication in the Fall of 2024. This schedule will be reflected in the 2023 Spring Semi-Annual Regulatory Agenda.

#### What does this mean?

This means that the new rule will be introduced by the USCG, after their 2-year review, which is likely to be before the Fall of 2026. However, one can state that further delays can be anticipated, for EPA to meet the above mentioned 2024 signing deadline depending on the work needed to 'address public comments', and for USCG to meet their 2-year deadline on implementation.

#### What are the Interim Requirements?

The following interim requirements continue to apply until EPA publishes final standards and the USCG publishes corresponding implementing regulations (anticipated in 2022):

- For large commercial vessels ( $\geq 79$  feet in length), except fishing vessels: The existing vessel discharge requirements established through the EPA 2013 Vessel General Permit (VGP) and the USCG ballast water regulations, and any applicable state and local government requirements.
- For small vessels (<79 feet in length) and fishing vessels of any size: The existing discharge requirements for ballast water only established through the EPA 2013 VGP and the USCG ballast water regulations, and any applicable state and local government requirements.

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## Latest procedures to ensure compliance with VGP

Under the VGP scheme, ship operators and masters are required to self-assess and self-report, which is somewhat different from the traditional port state control regimes where an inspector comes onboard to verify regulatory compliance.

It is therefore important that procedures for conducting the required routine and annual inspections, as well as completing the required monitoring and sampling, are available onboard and easy for crews to follow.

Onboard procedures must also stress the importance of documenting when there is non-compliance and the corrective actions taken. By not reporting a non-compliance, ship operators will effectively double their non-compliance status. First there is the initial incident of not complying with requirements, and in addition, there is the failure to report that non-compliance.

And don't forget that annual reports, including monitoring data, for a given calendar year must be submitted to the EPA no later than 28 February of the following year.

## Is the EPA Regulation on VGP Compliance a concern at this present time?

If it has not already been made clear, the simple answer to this is Yes!

A recent article published in February 2023 by Gard ([Click Here](#) to read the full publication), emphasizes that EPA has seemingly strengthened its inspection and enforcement efforts to ensure compliance with the extended Vessel General Permit scheme and warns that non-compliance can result in significant penalties. The article also mentions *"Not long ago, a Gard member was notified by the EPA that three of its vessels had violated the inspection and reporting requirements under the VGP scheme. The EPA claimed that the named vessels had not completed their annual reports nor recorded non-compliances and corrective actions as required in order to maintain their permits. While the consequence for our member in this particular case is not yet clear, we are aware that significant financial penalties have been issued in the recent past for similar violations of the VGP scheme."*

Also as stated by Kate Kelly, Compliance Director with Witt O'Brien's, in a Newsletter published in March 2022 ([Click Here](#) to read the full publication), *"the EPA has been taking a very close look at the electronic notices of intent (eNOIs), Annual Reports, and Ballast Water Management Reports to identify inconsistencies or missing information."*

She also goes on to mention, *"they are aware of several ongoing investigations that allege non-compliance dating back five years, which cover a wide range of issues from failure to conduct analytical monitoring to missing routine visual inspections. These cases have involved a detailed investigation of discharge, sampling, and inspection records for vessels operating throughout the US and have the potential to result in significant monetary penalties."*

Furthermore, in another article published in March 2022 by BLANKROME ([Click Here](#) to read the full

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publication), it states that *“the EPA has seemingly increased the frequency with which it reviews vessel records and conducts vessel inspections. It has also begun to use its ability to issue Section 308 information requests under the Clean Water Act as an investigative tool to look into potential VGP violations. These efforts seem concentrated in EPA Regions VI, IX, and X, which all brought fairly significant enforcement actions in 2020–2021.*

The article also goes on to state that *“An EPA official emphasised that, “Vessels that do not comply with their CWA permits can have significant environmental impacts to our waterways, including the introduction of invasive species. . . Failure to comply with the Vessel General Permit requirements can result in significant penalties.” The EPA also has informally signaled that this enforcement aggressiveness is “just the beginning.”*

*Companies should promptly review their VGP compliance programs and address any vulnerabilities that may exist. This evaluation should include an assessment of whether the current policies and procedures comply with VGP requirements and verification that vessels are conducting routine and annual inspections as well as completing required monitoring and sampling, particularly in connection with BWMSs. Compliance programs should be practical and easy for crewmembers to follow, require robust internal auditing, and contain procedures for and training on internally reporting non-compliances.”*

#### **What could be the consequences?**

Vessels that fail to report are in violation of the Clean Water Act for which penalties may be assessed as described in the Federal Register notice from early 2022: The Federal Register of Civil Monetary Penalty Inflation Adjustment shows that penalties can be as high as \$59,973 per violation for any penalties assessed on or after 1/12/2022.

To view more information on the interim requirements, go to [EPA 2013 VGP](#) or [USCG Ballast Water Regulations](#)

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