

Jennifer Casler-Goncalves
Direct Dial: 619.238.2810
jennifer.casler-goncalves@lw.com

600 West Broadway, Suite 1800
San Diego, California 92101-3375
Tel: +1.619.236.1234 Fax: +1.619.696.7419
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

April 26, 2012

VIA EMAIL AND U.S. MAIL

Shuka Rastegarpour, Environmental Scientist
Ocean Standards Unit
Division of Water Quality
State Water Resources Control Board
Fax: 916.341.5808
E-mail: srastegarpour@waterboards.ca.gov

File No. 048876-0001

Re: State's Water Quality Certification Process for USEPA Vessel General Permits

Dear Ms. Rastegarpour:

We are writing in regards to the State Water Resources Control Board's ("State Board") Public Notice regarding Water Quality Certification for USEPA Vessel General Permits, dated March 28, 2012, and attached hereto for your convenience as Exhibit 1 ("Notice"). The Notice indicates that the State Board is proposing to regulate the U.S. Environmental Protection Agency's 2013 Vessel General Permit and Small Vessel General Permit pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) and the Porter-Cologne Water Quality Control Act (Cal. Wat. Code § 13000 *et seq.*), and sets forth a 45-day comment period on this action, which expires Saturday, May 12, 2012. See Ex. 1, Notice, at 4. However, neither the Notice nor the referenced State Board webpage (http://www.waterboards.ca.gov/water_issues/programs/beaches) provides any information concerning the substance of the State Board's proposed certification, such as, for example, what (if any) standard, additional, or other conditions the State Board intends to require as part of the certification.

Beginning as early as last fall, we contacted various persons at the State Board to request information regarding the certification process for the 2013 vessel general permits (including multiple requests for all documents related to the certification, and information concerning what, if any, proposed conditions that the State Board intends to require as part of the certification), but we have not received any substantive response to date. We also signed up for the State Board's "CWA401 – Certification and Wetlands Program" e-mail subscription list, but have not received any relevant documentation.


Because we have not been afforded access to the information concerning the State Board's proposed certification (including any proposed conditions), we have been deprived of a

LATHAM & WATKINS^{LLP}

know, the comment deadline is approaching rapidly; accordingly, we would appreciate it if you could forward us all documents pertaining to the State Board's certification of EPA's 2013 Vessel General Permit and Small General Vessel Permit—including the draft certification, any conditions the State Board intends to impose, and all supporting documents for the same—as soon as possible, but no later than April 30, 2012. We also request that the deadline for public comment be extended until at least 45 days after such documents are made public in order to allow sufficient time for interested persons, including our clients, to comment meaningfully on the proposed certification.

Thank you in advance for your prompt attention to this important matter, and please feel free to contact me at (619) 238-2810 should you have any questions or concerns regarding the above.

Very truly yours,


Jennifer P. Casler-Goncalves
of LATHAM & WATKINS LLP



State Water Resources Control Board
Division of Water Quality
Water Quality Certification Program

Public Notice
Water Quality Certification for USEPA Vessel General Permits

Pursuant to federal law (33 U.S.C § 1341; Clean Water Act section 401), applicants for a federal license or permit for activities that may result in any discharge to waters of the United States must seek a Water Quality Certification (Certification) from the state in which the discharge originates. Such Certification is based on a finding that the discharge will meet water quality standards and other appropriate requirements of state law. In California, Regional Water Quality Control Boards (Regional Water Boards) issue or deny certification for discharges within their jurisdiction. The State Water Resources Control Board (State Water Board) has this responsibility where projects or activities affect waters in more than one Regional Water Board jurisdiction. The following information is provided in satisfaction of the public notice requirements of section 3861, title 23, of the California Code of Regulations.

Applicant: United States Environmental Protection Agency (USEPA)

Applicant Contact: Mr. David Smith
USEPA, Region 9
75 Hawthorne Street
Mail Code: WTR-5
San Francisco, CA 94105

Project Names: Vessel General Permit (VGP) and Small Vessel General Permit (sVGP)

Date of Application: 12/8/2011

Project Description

On December 8, 2011, the State Water Board received a letter from Mr. David Smith, on behalf of USEPA (applicant), requesting Certification for two (2) General Permits for discharges incidental to the normal operation of commercial and recreational vessels (General Permits). These 2 permits are the Vessel General Permit (VGP) and the Small Vessel General Permit (sVGP).

Background

Less than one year after the Clean Water Act (CWA) was enacted, USEPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from National Pollutant Discharge Elimination System (NPDES) permitting. That regulation identifies several types of vessel discharges as being subject to NPDES permitting, but specifically excludes discharges incidental to the normal operation of a vessel.

In January 1999, a number of interested parties submitted a rulemaking petition to USEPA asking the Agency to repeal its long-standing regulation cited in 40 C.F.R. section 122.3(a) that excludes certain discharges incidental to the normal operation of

vessels, including ballast water, from the requirement to obtain an NPDES permit under the CWA. The petition seeking repeal expressed concern over discharges of ships' ballast water containing invasive species and other matter. In September 2003, USEPA denied the petition. Following USEPA's denial decision, several groups filed a lawsuit in December 2003 in the U.S. District Court for the Northern District of California. On March 30, 2005, the District Court ruled that the USEPA regulation excluding vessel discharges exceeded the Agency's authority under the CWA. Therefore, on September 18, 2006, the Court issued an order revoking the regulation (40 C.F.R. § 122.3(a)) as of September 30, 2008. In response to this Court order, USEPA developed a Vessel General Permit (2008 VGP) to regulate discharges from all commercial vessels and certain recreational vessels (those longer or equal to 79 feet). The 2008 VGP was issued in December 2008.

When USEPA requested certification of the 2008 VGP, California informed USEPA that USEPA lacked authority to issue NPDES permits applicable within California. However, to provide regulatory certainty and to avoid potentially conflicting state and federal law requirements for the regulated community, California issued a Certification for the 2008 VGP. The Certification included, among other things, the requirement for vessels operating under the 2008 VGP to comply with the applicable requirements of the California State Lands Commission with regard to ballast water and hull fouling/maintenance related discharges. The 2013 draft VGP being proposed would replace the current 2008 VGP, which expires on December 19, 2013. California maintains that USEPA lacks the authority to issue NPDES permits for discharges into California waters and the State Water Board reserves its rights to pursue appropriate challenges. For more information on the 2013 draft VGP see: http://www.waterboards.ca.gov/water_issues/programs/beaches/.

Vessel General Permit Description

The 2013 draft VGP incorporates the Coast Guard mandatory ballast water management and exchange standards and adds some additional requirements for ballast water management. The proposed VGP covers the original 26 potential vessel discharge streams plus one new potential discharge. The discharge streams eligible for coverage under this 2013 draft VGP are: ballast water, deck washdown and runoff, bilge water, anti-fouling leachate from anti-fouling hull coatings, aqueous film forming foam, boiler/economizer blowdown, cathodic protection, chain locker effluent, controllable pitch propeller hydraulic fluid, distillation and reverse osmosis brine, elevator pit effluent, firemain systems, freshwater layup, gas turbine water wash, graywater, motor gasoline and compensating discharge, non-oily machinery wastewater, refrigeration and air condensate discharge, rudder bearing lubrication discharge, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, stern tube oily discharge, sonar dome discharge, underwater ship husbandry, welldeck discharges, graywater mixed with sewage from vessels, exhaust gas scrubber wash water discharge, and fish hold effluent (which was previously exempt by Public Law 111-215).

For each discharge type, the 2013 draft VGP establishes effluent limits pertaining to the constituents found in the effluent and BMPs designed to decrease the amount of constituents entering the waste stream. A vessel might not produce all of these discharges, but a vessel owner or operator is responsible for meeting the applicable effluent limits and complying with all the effluent limits for every listed discharge that the

vessel produces. The 2013 draft VGP now contains numeric ballast water discharge limits for most vessels. The effluent limitations control a variety of materials, which have been classified into 7 major groups: Aquatic Nuisance Species (ANS) also known as invasive species, most conventional pollutants (Biochemical Oxygen Demand, oil and grease, pH, Total Suspended Solids), metals, nutrients (including nitrogen and phosphorus), pathogens (including E. Coli & fecal coliform), and other toxic and non-conventional pollutants with toxic effects (i.e. phthalates, phenol, tetrachloroethylene, chlorine residual, chlorides, etc). The 2013 draft VGP effluent limitations controls these materials, because, depending on the particular vessel, such materials are constituents in the industrial waste, chemical waste and/or garbage "pollutant" discharge resulting from the activities of these vessels.

The 2013 draft VGP also establishes additional technology-based requirements for certain discharges from eight (8) specific classes of vessels, such as cruise ships, research vessels, and large ferries and water quality-based effluent limits that incorporate requirements for impaired waterbodies. Under the 2013 draft VGP, certain discharge types would be limited or prohibited in waters protected for conservation purposes (i.e. national marine sanctuaries and national parks). The 2013 draft VGP also establishes specific corrective actions, inspections and monitoring requirements, as well as record keeping and reporting requirements.

The 2013 draft VGP also requires submission of a Notice of Intent (NOI) for a subset of permittees if the vessel is greater or equal to 300 tons or has a ballast water capacity of at least 8 cubic meters. USEPA estimates that this requirement would affect 44,363 domestic and 7,834 foreign flagged vessels. All other vessels covered by the VGP would not have to submit an NOI. The proposed general permit will cover vessel discharges in the waters of the U.S. in all states and territories.

USEPA currently estimates that there will be approximately 91,000 U.S. flagged vessels that may be eligible for coverage under this permit. Additionally, USEPA estimates that there are up to 7,000 additional foreign flagged vessels that may need coverage under this permit.

Small Vessel General Permit Description

The 2013 draft sVGP would authorize discharges incidental to the normal operation of non-military and non-recreational vessels less than 79 feet in length. Currently, a Congressional moratorium (initiated by Public Law 110-299 and then extended by Public Law 111-215) exempts all incidental discharges, with the exception of ballast water, from commercial fishing vessels and non-recreational, non-military vessels less than 79 feet in length from having to obtain a Clean Water Act permit until December 18, 2013. The 2013 draft sVGP would provide permit coverage for vessels that fall into this category after that date. All vessel owner/operators must read and sign the Permit Authorization and Record of Inspection (PARI) Form which must be kept on board the vessel at all times to maintain valid sVGP coverage.

In the limits in the 2013 draft sVGP the term "minimize" means reduce and/or eliminate to the extent achievable using control measures and best management practices that are technologically available, economically practicable and achievable. The 2013 draft sVGP is organized by the following discharge management categories: fuel

management, engine and oil control, solid and liquid maintenance, graywater management, fish hold effluent management, and ballast water management.

Vessels with 8 cubic meters or greater of ballast water capacity that discharge ballast water will not be authorized to discharge under the 2013 draft sVGP, and will need to seek coverage under the 2013 draft VGP instead. Vessel owner/operators must conduct a quarterly visual inspection of each vessel covered by this permit. The inspection must cover all discharges, all applicable areas which impact discharges covered by the permit, and the visible portions of the hull.

Proposed Water Quality Certification

The State Water Board staff is proposing to regulate the VGP and sVGP pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) and the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.)

Public Comments

Staff will consider all comments submitted in writing and received at this office by mail during a 45 day comment period that begins on the first date of issuance of this notice (Wednesday, March 28, 2012) and ends at 5:00 p.m. on the last day of the comment period (Saturday, May 12, 2012).

Comments on this action are due within 45 days of the posting of this notice. Send comments in electronic format (MS Word or PDF) to Ms. Shuka Rastegarpour at srastegarpour@waterboards.ca.gov.

Note: No regulatory decision on the application is implied or intended in this public notice.

If you have any questions, please contact Ms. Shuka Rastegarpour at (916) 341-5576, or Mr. Bill Orme at (916) 341-5464.

State Water Board Staff Contacts

Shuka Rastegarpour, Environmental Scientist
Ocean Standards Unit
Division of Water Quality
State Water Resources Control Board
Phone (916) 341-5576
Fax (916) 341-5808
srastegarpour@waterboards.ca.gov

Bill Orme, Senior Environmental Scientist
Chief, 401 Certification Unit
Division of Water Quality
State Water Resources Control Board
Phone (916) 341-5464
Fax (916) 341-5808
borme@waterboards.ca.gov

