

District Court Requires EPA to Regulate Vessel Discharges in U.S. Ports

September 22, 2006

On September 18, the United States District Court for the Northern District of California issued a permanent injunction which will, on September 30, 2008, vacate the federal rule exempting from regulation vessel discharges from marine vessels visiting United States ports. By September 2008, the Environmental Protection Agency (EPA) is required to have in place a program to regulate the ballast water discharge under the Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permitting program.

The Case

In 1973, shortly after the United States enacted the CWA, the EPA issued a regulation excluding, from NPDES permit requirements, “any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel” (40 C.F.R. § 122.3(a)). This exemption includes, along with ballast water, a vessel’s gray water, bilge water, deck runoff, and blackwater. However, as acknowledged by the Court, the main issue in this case was ballast water.

In 2003, this rule was challenged by two environmental advocacy groups in *Northwest Environmental Advocates v. EPA*, who claimed the rule was not authorized by the CWA. In March 2005, the United States District Court for the Northern District of California granted summary judgment in favor of the plaintiffs. The Court ruled that the EPA had acted outside its statutory authority in exempting the ballast water discharges, declared that the rule was invalid, and asked the parties to file briefs explaining what remedy should be imposed. Proposed remedies were submitted by the environmental advocacy plaintiffs, several states who had intervened in the case, the EPA, and the Shipping Industry Ballast Water Coalition, who also had intervened.

As noted by the Court, the remedy applies to *all discharges* from vessels, not just ballast water. The exact regulatory requirement for the different discharges was left up to the EPA. The Court found that a permanent injunctive relief was warranted due to the harm caused by invasive species introduced via ballast water. The significant effects of invasive species, and the cost of removal once they become established, met the requirement for irreparable injury necessary for a permanent injunction. Additionally, the Court did not believe that existing regulations were adequate to address the threat of invasive species. As such, the Court’s order provided that in two years (by September 30, 2008), the existing regulation will be vacated. The Court determined this time frame would allow the EPA the flexibility necessary to find a solution to the issue of regulating vessel discharges and responding to the threat presented by invasive species. The Court will not supervise how the EPA responds to its Order, or require monitoring of the agency’s activities. The Shipping Coalition’s request for a stay of the remedy pending appeal was denied by the Court, without prejudice, thereby allowing the Shipping Coalition to raise the issue again once final judgment has been issued and an appeal taken in the case.

Implications

The District Court’s decision in *Northwest Environmental Advocates v. EPA* marks the beginning of a change in EPA’s regulation of the shipping industry. A new administrative permit system will govern all vessel discharges, including ballast water. This could have significant impact on the shipping industry and everyone who relies on that industry. At this time it is not known if the Court’s decision will be appealed. Provided the decision is not appealed, EPA will begin work on the new regulations addressing vessel discharges under the CWA. Interested parties should monitor this process and be prepared to provide EPA with comments regarding their concern with any new regulation and permitting system.

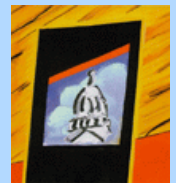
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For Additional Information

For additional information on this case and EPA's response to the Court's Order, please contact Sam Kalen or John Buchovecky in our Washington, DC office at (202) 298-1800, or Ivy Anderson in our Seattle office at (206) 623-9372, or any member of the firm's Environmental practice.

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