

**UK P&I CLUB**



# LP Bulletin

Friday 18<sup>th</sup> June 2010

## Bulletin 700 - 06/10 - Compliance extension request under the Vessel General Permit (VGP) - New York State, USA

The State of New York, USA, has issued stringent requirements regarding ballast water discharge technology under the Vessel General Permit (VGP) system that are due to come into force in January 2012.

It is possible to request a compliance extension but the request must be submitted no later than 30 June 2010. The American Chamber of Shipping has developed a template letter to be used when requesting an extension. This can be found by clicking [here](#).

The letter should be copied into a standard company format and completed with individual company and ship information. If the letter is sent by email, the original should be signed and scanned before being sent as all letters must contain an original signature. All email applications should be sent to the following address: [fgzagors@gw.dec.state.ny.us](mailto:fgzagors@gw.dec.state.ny.us)

Source of information: ECM Maritime Services & Gallagher Marine Systems LLC  
<http://www.ecmmaritime.com>  
<http://www.gallaghermarine.com/>

[Company Letterhead with contact information including address, phone number]

[Date]

Via Email to:[fgzagors@gw.dec.state.ny.us](mailto:fgzagors@gw.dec.state.ny.us)

Mr. Francis G. Zagorski  
New York State Department of Environmental Conservation  
Division of Water, 4<sup>th</sup> Floor  
625 Broadway  
Albany, New York 12233-3505

RE: Request for Extension of Implementation Date for Condition 2 of DEC's Clean Water Act 401 Certification for Commercial Vessel and Large Recreational Vessel General Permit

Dear Mr. Zagorski:

I am writing on behalf of [Company Name] of which I am [Title of Person Signing the Request]. This letter formally requests a two year extension (to 19 December 2013) of the application date of ballast water treatment technology requirements for our vessels that currently operate in New York waters and which are covered under the EPA Vessel General Permit ("VGP") as amended by the New York State Clean Water Act Section 401 Certification for Commercial Vessel and Large Recreational Vessel General Permit ("NYS Certification") dated December 17, 2008 and as incorporated in the final VGP effective December 19, 2009 as well as those which might operate in New York waters in the future. This request is consistent with the provisions of Condition 2 of the Certification, which are set to take effect on January 1, 2012 for all existing vessels. The information which follows meets the three criteria contained in the Certification on which an extension may be issued.

#### **VESSELS COVERED BY THIS EXTENSION REQUEST**

The composition of our fleet serving any particular port or region changes over time. Because of changes in demand, drydocking schedules, maintenance issues and port schedules, it is likely that the specific vessels that we use to provide our marine transportation services within the State of New York will change over the next three years. Because we cannot today identify with certainty the vessels that we might deploy for service in New York waters between now and the end of 2013, we expressly intend this extension request to cover three types of vessels:

- (1) vessels that currently provide services in New York waters and to New York ports,
- (2) vessels that may be transferred into such service between now and the expiration of the VGP from our existing fleet, and
- (3) vessels constructed before January 1, 2013 which may, during the term of the requested extension, be purchased, chartered, operated or otherwise be controlled by our company such

vessels which we respectfully reserve the right to timely notify the State of New York under the terms of the NYS Certification and request a similar extension as noted above to these newly acquired vessels which are not, at the time of this filing, under our control. Please note that this portion of the extension request pertains only to existing vessels e.g. those constructed before January 1, 2013 for which we would otherwise be eligible to request this extension if they were currently under our control.

A list of our vessels covered by the VGP including state certifications is attached as an Appendix I to this document and this request for extension is made on behalf of each of these vessels. Because we cannot by definition identify the second and third group of vessels at this time, they are not listed in Appendix I; however, such vessels are either already included in the master Notice of Intent (NOI) list maintained by the US EPA, or they will be added to that list if they begin service to US waters during the term of the VGP.

### **STANDARDS FOR GRANTING AN EXTENSION FOR CONDITION 2**

This request is made pursuant to the provisions of the NYS certification section "Certification Conditions for the VGP", Condition 2 which would require the application of ballast water treatment system requirements meeting the specified discharge standards found in sections 2(A), 2(B) and 2(C) subject to the final paragraph of Condition 2 which permits an entity to make a request for an extension to the Department with sufficient justification. Sufficient justification is defined as "an ability to state and demonstrate that (1) there is a shortage in supply of the technology necessary to meet the limits set forth in this certification, or a vessel-specific engineering constraint, or other factor related to the availability and installation of technology beyond the vessel owner/operator's control, that delays the technology being available and installed in time to comply with this standard; (2) the unavailability of supply or installation constraint is the only reason the January 1, 2012 date cannot be met; and (3) the vessel has exhausted all other options to comply with this standard." Such an extension request must be made no later than June 30, 2010 and requires the request to indicate when the vessel(s) will come into compliance with this deadline. The extension criteria cover a wide range of potential situations and technical obstacles, including issues that might vary on a vessel-specific basis. With respect to the present extension request, however, the three related criteria effectively merge into one. Simply put, the basis for this extension request is the lack of **ANY** available technology that is commercially available for installation by the Condition 2 deadline of January 1, 2012. The question is not one of shortage of supply, adaptability to particular vessel types, available installation resources, or drydock space. Instead the problem is that technology meeting the enumerated standards simply does not exist nor is there even a scientifically defensible testing protocol to which ballast water technology systems may be tested to determine compliance with the Condition 2 provisions.

**(1) THERE ARE NO BALLAST WATER TREATMENT TECHNOLOGIES THAT CAN MEET THE DISCHARGE STANDARDS CONTAINED IN THE NEW YORK STATE CERTIFICATION, CONDITION 2.**

There is a total absence of available ballast water treatment technologies that can meet the NYS Certification discharge standards and thus no treatment systems are available for purchase and installation on our vessels which would allow us to meet the January 1, 2012 compliance date. To support this position requires a brief historical review of ballast water technology development over the past several years and its impact on the current state of technology development and approval for use aboard vessels.

**The IMO and National Approval Processes**

In 2004, the United Nation's International Maritime Organization ("IMO") adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("the Convention"). Regulation D-2 of the Convention entitled "Ballast Water Performance Standard" states that ships conducting ballast water management shall discharge less than 10 viable organisms per cubic meter greater than or equal to 50 micrometers in minimum dimension and less than 10 viable organisms per milliliter less than 50 micrometers in minimum dimension and greater than or equal to 10 micrometers in minimum dimension; and discharge of three indicator microbes (toxicogenic Vibrio cholera, Escherichia coli and Intestinal Enterococci) shall not exceed specified limits.

In developing its implementation plan for the Convention, IMO created a number of guidelines to assist national governments. Of particular note here are two guidelines. First, any ballast water management systems utilizing Active Substances ("a substance or organism, including a virus or a fungus that has a general or specific action on or against harmful aquatic organisms and pathogens") must be approved by IMO under the G-9 Guidelines prior to use aboard any vessel. Second, ballast water management systems must be approved by national governments taking into account the IMO approved G-8 Guidelines for approval of ballast water management systems. In this respect it is important to note that the G-9 approval must be completed prior to any national government approval under G-8 for system using active substances.

It also important to note that the G-8 Guidelines were finally adopted by Resolution MEPC.174(58) on 10 October 2008, 4 years after the Convention was finalized. This delay in finalization of these Guidelines was a result of the challenges presented in developing a scientifically defensible process by which the efficacy of all ballast water treatment systems could be measured in a standardized way which provided replicable and comparable results.

Moving to the present, a number of ballast water treatment systems are at varying stages of the G-8 and G-9 approval processes. A comprehensive lists of these systems and their status can be found in the Lloyd's Register February 2010 edition of the "Ballast Water Treatment Technology Guide", page 17 which may be downloaded at <http://www.lr.org/sectors/marine/documents/>. We urge the Department to review this entire document as it provides valuable insights into the ballast water treatment technologies under development and in the international and national approval processes.

**Ballast water treatment technologies meeting the IMO standard cannot be assumed to meet the more stringent NYS certification standard.**

As noted above, the NYS certification standard is 100 times more stringent than the standard contained in the IMO Convention. While a number of technologies are being tested under the G-8 guidelines which are based on the IMO standard, the results of these tests cannot be extrapolated to assess compliance with the significantly more stringent standard in the NYS Certification. Of relevance here are questions contained in and the comments received by the US Coast Guard in response to its notice of proposed rulemaking entitled "Standards for Living Organisms in Ships' Ballast Water Discharged in US Waters" (Docket Number USCG-2001-10486), Federal Register, August 28, 2009, pgs. 44632 - 44672. In response to questions posed by the Coast Guard in the notice of proposed rulemaking, a number of the over 700 comments received have been submitted by prominent experts in the scientific community as well as ballast water technology developers addressing the challenges in measuring the ability of ballast water systems (existing and future) to meet standards beyond those established in the IMO Convention. Summarizing these comments, there is absolutely no scientific basis on which to assess compliance with more stringent standards for systems which have been tested under the G-8 guidelines which were carefully calibrated to the IMO discharge standard. Furthermore, there are no test protocols which exist that are calibrated to assess compliance with more stringent standards and none are expected in the near to medium future. While it is recognized that the proposed USCG Phase 2 standard is 1000 times more stringent than the IMO standard as compared to the 100 times more stringent standard proposed in the NYS certification, the leap from testing to the IMO standard to either of these more stringent standards is fraught with the same challenges.

**(2) There are no ballast water technologies that have received either type certifications under the G-8 guidelines (deemed compliant with the IMO discharge standards) by the United States or type certifications under any other testing protocols for more stringent standards.**

International shipping is ideally regulated by the imposition of requirements agreed to by the IMO since they represent a consistent set of requirements that must be met by vessels world-wide regardless of port of call. In the case of ballast water subject to the IMO Convention's D-2 standard, ballast water treatment systems must necessarily go through extensive testing and certification prior to being placed aboard any vessel regardless of flag or trading patterns.

While a number of systems have received either their basic or final approval under the active substance review process and some systems have received their G-8 certification from other nations, no systems have received a type certification from the United States government. Furthermore, the United States government has not established a process by which systems which had received type certifications from other nations would be formally

recognized as being compliant with the IMO Convention's D-2 standard. Thus, even if New York State were simply trying to apply the IMO D-2 standard, there is no federal mechanism in place to certify systems aboard either US flag or foreign flag ships. In this case, the State is attempting to impose a discharge standard 100 times more stringent than the IMO standard in the absence of any standardized and scientifically valid test protocols which would certify that a system could meet these more stringent standards.

Thus imposition of these NYS certification standards places vessel owners in a position where compliance is impossible. There are no systems which can meet the standard and no test protocols to even assess the performance of existing systems relative to the NYS certification. With these facts in mind, an extension of two years is fair and reasonable.

**The California State Lands Commission Report Does Not Establish  
that the Condition 2 Standard Can be Met.**

In October 2009, the California State Lands Commission (CSLC) report on Ballast Water Treatment Technologies provided a list of treatment technologies and claimed that seven technologies have "demonstrated the capability to comply with California's (1000 times IMO) performance standard". We highlight the CSLC's statement because the DEC's Certification made reference to these CSLC standards and claims regarding the availability of ballast water treatment technologies.

The CSLC statement does not demonstrate that 100 times IMO (or 1000 times IMO) treatment technologies are available. Of the treatment technologies named in the CSLC report, none have been verifiably tested to a higher standard (than the IMO standard), no test protocols are identified by which these tests could be accomplished and no facilities were identified which are currently capable of conducting this testing.

**(3) THE DATE ON WHICH BALLAST WATER TREATMENT  
TECHNOLOGIES THAT CAN MEET THE DISCHARGE STANDARDS  
CONTAINED IN THE NYS CERTIFICATION (PARAGRAPH 2) IS  
UNCERTAIN BUT WILL MOST CERTAINLY NOT BE AVAILABLE  
UNTIL JANUARY 1, 2014.**

Having addressed criteria (1) and (2) above, we turn to the remaining provisions of paragraph 2. Criteria (3) requires a showing that the vessel/owner has exhausted all other options to comply with this standard. Our company and the trade associations to which we belong have been in continual contact with ballast water technology vendors and to date, no vendor can state with any scientific certainty that its system can or could, with future modifications, meet the NYS certification standard for existing vessels. As indicated in the comments submitted by various ballast water technology vendors as well as members of the scientific community to the US Coast Guard Notice of Proposed Rulemaking, there are significant challenges to creating a scientifically valid testing protocol to these more stringent discharge standards and until such time as these testing protocols are created, no ballast water treatments, current or future, can be assessed with any degree of scientific certainty relative to these more stringent standards.

While this extension request is only for a 2 year period to 1 January 2014, assuming that the test protocols for more stringent standards will take at least as long, it is expected that such test protocols would not be finalized until 2014 at the earliest, assuming work to develop these testing protocols is begun post haste. Once these test protocols are completed, ballast water technology developers could then begin testing their systems and making the necessary changes to those systems that would result in compliant discharges with the more stringent standards. Based on the developmental timeline for the IMO D-2 standard, the earliest date on which systems could be commercially available would be 2018. Thus it is unlikely that any vessel could comply with the NYS certification existing ship discharge standards until 2018 and that date is assuming that test protocol development and system testing would proceed with no delays.

## **SUMMARY**

Therefore, we hereby submit this extension request to DEC because there currently is no ballast water treatment technology that would enable us to comply with DEC Condition 2 standards and there is no realistic expectation that such technology will be available in the foreseeable future. For the reasons set forth above, [Company Name] respectfully request a two year extension to the NYS certification discharge standards for existing ships for those ships listed in the Annex attached as well as for any other existing vessels we purchase or otherwise control for the term of this extension request, such extension to be granted until January 1, 2014.

Respectfully submitted,

[Insert Name and Title of Signing Official including phone number and email address.  
Note: This request should be executed by the individual in the position which served as the certifying official for the ENOI submission.]

## **APPENDIX I**

### **LIST OF VESSELS OWNED OR OTHERWISE UNDER THE CONTROL OF [LIST COMPANY NAME]**

**[Insert a list of all vessels operated by the company, even if they do not currently operate in US waters. Ensure that the eNOI Tracking Number is used for all vessels currently registered with the US EPA]**

**Vessel Name**

**Vessel ID # (IMO No otherwise Registered No if no IMO number)**

**Country of Registry**

**Vessel Type**

**eNOI Tracking Number:**