



MARCH 2011

New Tools in the U.S. Coast Guard's Vessel Pollution Prevention Initiative

The U.S. Coast Guard's (USCG) efforts to combat vessel pollution have been aided by two recent developments. First, the USCG and the U.S. Environmental Protection Agency (EPA) announced a partnering agreement that broadens the scope of enforcement of the Vessel General Permit (VGP) program, including potential enforcement by the EPA for violations. In addition, earlier this year, the Sixth Circuit Court of Appeals determined that the failure of a vessel to report certain dangerous conditions, as required by the Ports and Waterways Safety Act (PWSA), is not a singular offense but is a continuing violation of the statute, which can be prosecuted in any venue in which the violation began, continued, or was completed. While arising out of a PWSA violation, the ruling has potential implications for government prosecutions under the Act to Prevent Pollution from Ships (APPS) as well. These recent developments pose implications for U.S. and foreign vessel owners and operators alike.

VGP INSPECTIONS AND ENFORCEMENT

After months of collaboration, in February the USCG and EPA announced specific guidelines for flag state inspections of U.S. vessels and port state inspections of foreign flag ships in connection with the EPA's VGP program. Beginning on March 13, 2011, the USCG will supplement its routine vessel compliance inspections with a new set of protocols designed to ascertain compliance with VGP requirements. Most significantly, while the USCG remains the lead agency with respect to vessel inspections, any deficiencies with VGP compliance will be made available to the EPA for evaluation and potential enforcement action. Historically, the USCG has balanced its enforcement mission with an appreciation for the unique commercial interests of the shipping industry and, whenever possible, has worked cooperatively with owners and managers to resolve issues. The EPA, more accustomed to regulating land-based facilities, may not demonstrate a similar attitude. The involvement of the EPA, with its well-developed and more robust enforcement framework, may therefore signal an important evolution of the Department of Justice's (DOJ) vessel pollution prevention initiative.

The EPA's VGP program took effect in February 2009. The VGP, which incorporates the USCG's ballast water program, covers 26 types of routine discharges incidental to normal vessel operations. As was widely reported at the time, the VGP program contains a number of training, monitoring, inspection, record keeping and reporting requirements. While the program has been in effect for more than two years, there has been little or no enforcement to date, primarily due to the disparate roles of the EPA, which administers the permit program, and the USCG, which is responsible for inspecting domestic and foreign flag ships in U.S. ports. These

two functions will now be coordinated between the agencies.

On February 11, 2011, the USCG and the EPA entered into a Memorandum of Understanding (MOU) addressing how the two agencies will implement and enforce the VGP program. Under the MOU, the USCG adds elements of the VGP program into its routine inspection protocols. These elements are reflected in a Job Aid that explains applicable VGP requirements and describes how USCG personnel are to verify compliance. Beginning on March 13, USCG inspectors will begin following the Job Aid protocol during their inspections. To ensure past compliance, those inspections may also include a review of records dating back to the VGP's initial implementation in February 2009.

In the event that nonconformities are identified, inspectors will first address deficiencies with vessel personnel. In addition, within 24 hours inspectors will log deficiencies with USCG's Marine Information for Safety and Law Enforcement database (MISLE), which will be made available to the EPA for further review and potential enforcement action.

Because the VGP is part of the EPA's National Pollutant Discharge Elimination System (NPDES), it is subject to enforcement under the Clean Water Act (CWA), which provides for both civil and criminal penalties for violations. Thus, in the event of an unpermitted discharge, a company could be prosecuted under the CWA. Much like the APPS, the VGP program also potentially gives rise to a host of record keeping violations, which could be prosecuted separately as false statements under the False Statements Act. As demonstrated by the DOJ's vigorous prosecution of the APPS and associated false statement violations, the VGP program could give rise to another wave of enforcement activity.

For more information, read: [The USCG/EPA MOU](#)

To view the letter and job aid, view: [The USCG Policy Letter 11-01 and the Job Aid](#)

SIXTH CIRCUIT BROADLY CONSTRUES "CONTINUING VIOLATIONS" UNDER THE PWSA

In a PWSA case that could have broader implications for vessel pollution enforcement generally, the Sixth Circuit Court of Appeals ruled that a vessel's failure to immediately report a dangerous condition can be prosecuted as a "continuing" violation in any jurisdiction in which the violation began, continued, or was completed. While the Court's ruling in *U.S. v. Canal Barge Co.*, Nos. 09-5388/5421/5422/5423/5424 (6th Cir., Jan. 7, 2011) addressed the specific question of venue (where the Government's case against the defendant can be brought), the Court's analysis promoted the view that the ship's violation was a continuing offense that persisted even as the vessel moved from port to port. The ruling only pertains to violations of the PWSA, but the decision could further support the Government's prosecution of APPS violations as well.

USCG regulations, promulgated under the PWSA, require that vessel owners or agents notify the Coast Guard immediately after the vessel becomes aware of a hazardous condition. The Government may bring criminal charges against the barge owner or its agents who willfully and knowingly violate the Act.

In *U.S. v. Canal Barge Co.*, a barge carrying 400,000 gallons of benzene developed a leak while traveling down the Mississippi River. At the time, the barge was owned by Canal Barge Company and was being operated under a contract with Conoco Phillips. The USCG was not notified of the leak and the vessel sealed the crack with an epoxy patch. The barge was subsequently transferred to a different company and towed onto the Ohio River. On June 20, 2005, while the barge was traveling on the Ohio River, the epoxy patch failed. The leak was

immediately reported to the USCG, and the barge was towed for repairs.

Two years after the incident, the DOJ filed a criminal complaint against the company in the Western District of Kentucky, where the barge had been towed, alleging, among other things, a knowing and willful violation of the PWSA. At trial, a jury found the defendants guilty of violating the PWSA. The defendants moved for a judgment of acquittal, arguing that the U.S. failed to prove that venue was proper. On November 25, 2008, the District Court granted the defendants' motion, holding that the PWSA violation was a "point-in-time" offense that "was complete at the time the Defendants failed to immediately notify the Coast Guard of the hazardous condition [the leak] which occurred on the Mississippi River prior to entry into the Western District of Kentucky." *United States v. Canal Barge Co.*, 2009 U.S. Dist. LEXIS 17490 (W.D. Ky. Mar. 3, 2009).

On appeal, the Government argued that the District Court erred in granting the defendants' motion because the defendants' PWSA violation is a continuing offense that persisted even after the Company's initial failure to notify the USCG. See 18 U.S.C. § 3237(a). The Sixth Circuit agreed, holding that "[t]he defendants' failure to immediately report a hazardous condition aboard the barge was a continuing offense because the duty to report continued from the time the leak was discovered . . . until the Coast Guard was notified . . ." Because the PWSA violation continued as the vessel moved from one jurisdiction to the other, the Sixth Circuit found that venue was not limited only to the district the vessel was in when the leak occurred but also included those other districts the vessel had passed through.

While the *Canal Barge* decision is an important PWSA case, it may also have implications for other aspects of the DOJ's vessel enforcement initiative. Like violations of the PWSA, violations of the APPS, specifically the failure to maintain an accurate oil record book (ORB) on board, are continuing in nature. In the APPS context, where a false ORB gives rise to the offense, there has been a debate as to the temporality of the violation: whether the crime occurs when the false entry is made or as the vessel calls on U.S. ports. While not directly on point, the *Canal Barge* ruling supports the Government's view that even a single act, the failure to notify the USCG of a dangerous condition, or the failure to maintain an accurate ORB, can result in multiple charges, and those charges may be prosecuted in any, or all, of the jurisdictions in which the vessel transited.

The Sixth Circuit decision is available here: [U.S. v. Canal Barge Co.](#)

FOR MORE INFORMATION

Robinson & Cole LLP has represented vessel owners and managers and coastal businesses on a wide variety of regulatory and compliance matters. For more information, please contact one of the following attorneys:

[Ronald W. Zdrojeski](#)
Hartford Office
(860) 275-8240

[Peter R. Knight](#)
Hartford Office
(860) 275-8387

© 2011 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson & Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson & Cole or any other individual attorney of Robinson & Cole. The contents of this communication may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.