**RECENT DEVELOPMENTS**

**General News**

* EPA Terminates Temporary COVID-19 Enforcement Policies for MARPOL and APPS
  + On August 31, 2020, the EPA announced that it will not continue to exercise enforcement discretion for noncompliance with the International Convention for the Prevention of Pollution from Ships (“MARPOL”) or the United States Act to Prevent Pollution from Ships (“APPS”). Due to the COVID-19 pandemic, EPA had previously implemented temporary policies outlining enforcement discretion based on noncompliance, including, with respect to, the new global sulphur limit reductions under MARPOL Annex VI. Going forward, the agency is expected to resume strict enforcement of MARPOL and APPS.
* California’s Updated Ocean-Going Vessel At-Berth Regulation Takes Effect
  + California’s updated Ocean-Going Vessel At-Berth Regulation took effect on January 1, 2021. The new regulation, approved by the California Air Resources Board (“CARB”) in August 2020, expands California’s existing rule, which requires containers, refrigerated cargo, and cruise ships to use pollution suppression systems or plug into electricity rather than use auxiliary engines when at berth in certain ports. The new rule expands these requirements to tankers and roll-on roll-off auto carriers and adds additional ports, including independent marine terminals. Auto carriers must comply with the new rule beginning in 2025, and tankers by 2025 or 2027 depending on the port. Ship owners, terminals and ports will be able to petition for more time to comply. CARB estimates the new rule will cost terminal and vessel operations US$2.23 billion.
* Ore Liquefaction
  + Numerous bulk carriers and the lives of several hundred sailors have been lost due to capsizing caused by cargo liquefaction. Solid cargos including iron and nickel ore can liquefy as a result of stresses during transport, particularly during heavy weather. When this occurs on bulk carriers with large open cargo holds, the ships are subject to listing and can quickly capsize. Skuld recently noted that since 2010, the liquefaction of nickel ore cargoes caused the capsize of seven vessels. The IMO’s International Maritime Solid Bulk Cargoes Code (IMSBC Code) regulates the moisture content (MC) and transportable moisture limit (TML) of bulk cargoes, but critics argue that the IMSBC Code does not sufficiently protect against liquefaction because MC and TML certifications are left to the shippers.

**Cases**

* *Taylor Energy Co. LLC v. Luttrell*, No. CV 18-14046, 2020 WL 4923628, at \*1 (E.D. La. Aug. 21, 2020)
  + Couvillion Group LLC, a contractor hired by the US Coast Guard to help clean up Taylor Energy Co. LLC’s undersea oil spill off the coast of Louisiana, is shielded from Taylor’s legal claims under a theory of “derivative immunity.” In 2018, the Coast Guard hired Couvillion to install a temporary system to contain oil leaking from the site of a Taylor oil rig that was destroyed in 2004’s Hurricane Ivan. Taylor sued to block Couvillion from performing the work and to obtain any monetary damages that may arise from Couvillion’s activities. Applying the US Supreme Court’s 1940 holding in *Yearsley v. W.A. Ross Construction Co*., a Louisiana federal judge held that Couvillion was entitled to “derivative immunity” because it performed acts “pursuant to a valid authorization of Congress,” in this case directed by the Coast Guard. Key to this finding was the fact that Couvillion conducted all of its operations pursuant to contracts with the Coast Guard and did not exceed the scope of its authority.
* *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2020 WL 6381138 (E.D. La. Oct. 26, 2020)
  + In multidistrict litigation arising from oil spill, Mexican fishermen and fishing cooperatives brought claims under Oil Pollution Act of 1990 (OPA) and general maritime law against majority owner of drilling rig and others. After defendants' motions to dismiss were denied in part, defendants filed dispositive motions on grounds that plaintiffs failed to satisfy “foreign claimants” requirements of OPA and that OPA displaced plaintiffs' claims under general maritime law. The District Court held that:
    - United States-Mexico-Canada Agreement (USMCA) did not authorize fishermen's recovery as foreign claimants under OPA;
    - North American Agreement on Environmental Cooperation (NAAEC) did not authorize fishermen's recovery as foreign claimants under OPA;
    - OPA displaced fishermen's tort claims under general maritime law; and
    - fishing cooperatives' complaints constituted mass joinders in violation of pretrial order.
* *Lincoln Harbor Enterprises, LLC v. Hartz Mountain Indus., Inc*., No. CV1912520KMMAH, 2021 WL 406464, at \*1 (D.N.J. Feb. 5, 2021)
  + In the 1980's, Hartz Mountain Industries, Inc. began developing an area in Weehawken, New Jersey, that would become Lincoln Harbor, a mixed-use waterfront development. In 1988, Hartz obtained a permit from the United States Army Corps of Engineers to build two ferry slips in Lincoln Harbor. Hartz represented to the Corps, and the Corps likewise found, that ferry operation would be minimal and significant environmental impacts were not expected.
  + In the years since construction, both Lincoln Harbor and the ferry service have grown. Now, NY Waterway operates ferries on weekdays every 15–20 minutes.
  + The busy ferry traffic creates noise and frequent wakes. Hartz left the Marina largely unprotected by any wake mitigation. Besides the noise and property damage, the ferries have also increased turbidity in the harbor, stirred up contaminated sediments that usually rest at the river bottom, and diminished the quality of habitats for fish and birds.
  + Lincoln sued Hartz and NY Waterway, bringing a myriad of environmental and tort claims seeking damages and equitable relief for torts and environmental violations arising from the ferry operations.
  + On Lincoln’s motion to dismiss the FAC, the Court held that “noise, erosion, and contaminant dispersal are “factual allegation[s], not legal one[s],” that were sufficient to support Lincoln’s claims, and that the FAC sufficiently alleged environmental harm for purposes of stating claims under the New Jersey Environmental Rights Act.
  + Lincoln also alleged that Coastal Zone Management Rules require mitigating measures for any development interfering with certain fish migratory patterns, and Hartz has never performed such measures. The Court found that although Lincoln alleged that ferry operations disturb fish migratory pathways by increasing turbidity and stirring up sediment, the FAC did not plausibly allege a violation of this CZM rule. Rather, it “only parrot[ed] the Rule language” without providing any factual allegations.
  + The Court granted in part and denied in part the motion to dismiss.
* *Am. Waterways Operators v. Wheeler*, No. 18-CV-02933 (APM), 2020 WL 7024195 (D.D.C. Nov. 30, 2020)
  + National trade association for tugboat, towboat, and barge industry brought action challenging EPA determination, in authorizing State of Washington to prohibit sewage discharge in Puget Sound, that adequate facilities for sewage treatment and removal were reasonably available for waters of Puget Sound. Association moved for summary judgment. Environmental organizations Washington State Department of Ecology, which filed initial petition for EPA determination, intervened and cross-moved for summary judgment.
  + The District Court held, in relevant part, that:
    - EPA finding that adequate facilities for sewage treatment were reasonably available for waters of Puget Sound was arbitrary and capricious in violation of Administrative Procedure Act (APA);
    - EPA failed to adequately explain how 11:1 ratio of commercial vessels to pumpout facilities in Puget Sound supported determination that pumpout facilities were reasonably available;
    - any deficiencies in Department of Ecology's petition to prohibit sewage discharge did not require EPA to relax its procedures to point that association suffered substantial prejudice;
    - vacatur, on remand, of EPA decision would create potential environmental harm that would befall Puget Sound that outweighed any additional costs of compliance during remand period, as would support remand without vacatur of decision.
  + The cross-summary judgment motions were granted in part and denied in part.
* $3 Million Criminal Fine for APPS violations in Guam
  + On February 19, 2021, a District Court of Guam ordered Pacific International Lines Ltd. to pay a US$3 million criminal fine and implement a rigorous four-year environmental compliance program after the company illegally dumped oily bilge into the Port of Guam from the vessel Kota Harum.