# CURRENT MARITIME ISSUES

May 4, 2022

1. **TOWING VESSEL INSPECTION**
2. **Issue:** Section 415 of the Coast Guard and Maritime Transportation Act, 2004 (P.L. 108-293) added towing vessels to the list of vessels subject to inspection and authorized the Coast Guard to draft regulations to implement the law. On June 20, 2016, the Coast Guard published a final towing vessel inspection rule, establishing Subchapter M of Title 46 of the Code of Federal Regulations.
3. **Status:** As of July 2022, all towing vessels must obtain a Certificate of Inspection certifying compliance either by implementing a Coast Guard accepted Towing Safety Management System (TSMS) audited by an approved third-party organization or an annual Coast Guard inspection. Under Coast Guard Policy Letter 20-01, operators who do not meet phase-in requirements will be issued Form CG-835Vs for non-compliance.
4. **Industry Perspective:** This development will bring about a welcomed round of increased safety culture for the tug and barge industry.
5. **MARITIME CREWING REQUIREMENTS ON THE OUTER CONTINENTAL SHELF.**
6. **Issue:** Under current law, the Jones Act requires U.S. Flag, U.S. ownership, U.S. crewing and coastwise registry for transportation of cargo between two U.S. ports. Under the Outer Continental Shelf Lands Act, 43 U.S.C. Sec. 1356, foreign construction vessels on the Outer Continental Shelf are not covered by this requirement. Under an amendment to the Don Young Coast Guard Authorization Act of 2022, H.R. 6865, crewing requirements would be modified to require vessels exploring, developing, or producing resources in offshore areas to meet increased crewing requirements, effectively requiring that these vessels operate under the U.S. Flag.
7. **Status:** Numerous industry participants have taken differing positions on this amendment. Very few U.S. Flag vessels capable of performing offshore construction work exist, particularly on the scale required for offshore wind development. The Senate received H.R. 6865 on March 30, 2022.
8. **Industry Perspective:** The offshore wind farm industry is seriously concerned that the current language in the Maritime Crewing amendment has great potential to at best, delay and at worst derail offshore wind development in the US. Separate position papers on the issue have been loaded onto the MLA website.
9. **VESSEL DISCHARGES/INVASIVE SPECIES**
10. **History**
    1. In 2008, following litigation in the Ninth Circuit, the EPA began regulating vessel discharges through a Vessel General Permit program. Northwest Envtl. Advocates et al v. United States EPA, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005); affirmed Northwest Envtl. Advocates et al v. United States EPA, 537 F.3d 1006 (9th Cir. 2008); on remand Northwest Envtl. Advocates et al v. United States EPA, 2008 U.S. Dist. LEXIS 66738 (N.D. Cal. August 31, 2008). Pursuant to the Northwest Environmental Advocates case, the EPA promulgated a Vessel General Permit (“VGP”) under the Clean Water Act. In 2013, the EPA VGP adopted the International Maritime Organization (“IMO”) ballast water discharge standard, but exempted barges and self-propelled vessels under 1,600 gross registered tons. A number of Native American Tribes and 26 States added conditions to the permit.
    2. Separately from this process, a number of jurisdictions have promulgated different ballast water or discharge regulations. In some cases, the standards set are not achievable, presenting significant compliance and enforcement problems, notably in California and New York.
    3. In a separate development, pursuant to the Clean Water Act, Section 312(f)(3), 33 U.S.C. 1322(f)(3), states may petition the US EPA for a determination that adequate facilities exist for the landside removal and treatment of sewage so that the state may prohibit the discharge of sewage from vessels into those waters, whether it is treated or not. No Discharge Zones (“NDZ”) have been proliferating throughout the country, though discharge facilities are often inadequate to handle commercial vessel discharge. In May 2018, the State of Washington and USEPA designated all of Puget Sound an NDZ. Similar NDZ designations are proceeding in Chesapeake Bay and New Jersey.
    4. In another separate development, there has been a great amount of regulatory attention to methods that might be used to stop the spread of Asian carp and other aquatic invasive species in the Mississippi River and Ohio River systems, specifically with reference to separation from the Great Lakes. Alternatives include physical barriers, lock closures, electrical barriers, and other technological barriers.
11. **Current Status**
    1. The Coast Guard currently requires certain seagoing vessels that discharge non-potable ballast water into the waters of the US to install ballast water treatment systems that meet the International Maritime Organization’s D-2 standard for ballast water treatment. The standards apply to seagoing vessels that (1) take on ballast taken on outside the EEZ Zone or (2) are over 1,600 GRT and take on and discharge ballast in more than one Captain of the Port Zone. There are now fifteen USCG type-approved ballast systems that can be used to meet the federal requirements, but these do not meet the state requirements in California or New York.
    2. In 2018, the Vessel Incidental Discharge Act amended the CWA to require the EPA and Coast Guard to jointly establish discharge performance standards, grandfathering certain ballast water management systems, replacing the VGP standards and preempting separate state regulations. The U.S. EPA was required to establish practical, science based discharge performance standards. National standards were published as a proposed rule 85 F.R. 67818 on October 26, 2020. EPA is still reviewing comments received. With the change in administration, nothing final has been issued.
    3. In Puget Sound, industry groups asserted that the EPA finding of adequate pump out facilities was arbitrary and capricious, however the NDZ was upheld. AWO v. Regan, U.S. Dist. Ct. D.C. Case No.18-cv-02933, 2022 WL 444096, Feb. 14, 2022.
    4. With regard to Great Lakes invasive issues, in 2018, the U.S. Army Corps of Engineers proposed a Brandon Road Recommended Plan. This plan presents some structural and technological issues which are still under review. It is still undergoing review and amendment involving the states of Illinois and Michigan.

**3. Industry Perspective**. Commerce calls for uniform, practical and consistent

legislation. To remain sustainable, the maritime industry further seeks invasive species mitigation solutions that maintain and enhance navigation with minimal impacts to pollution, efficiency and mariner safety.

1. **RENEWABLE ENERGY PROJECTS**
2. **Issue:** The U.S. Department of Interior Bureau of Ocean Energy Management (BOEM) and the Federal Energy Regulatory Commission (FERC) have been developing numerous renewable energy projects, which raise navigational concerns for industry. Numerous commercial wind energy leases have been awarded, and plans are moving forward for projects in Massachusetts, Rhode Island, New York, New Jersey, Maryland, Virginia, North Carolina, and South Carolina.
3. **Status:** In 2010, President Obama issued an executive order establishing a National Ocean Policy for management of the maritime domain through marine special planning. While the Administration researched these issues, the Coast Guard published an Atlantic Coast Port Access Route Study (ACPARS) in 2017, and in 2020 announced a proposed rulemaking to establish an Atlantic Coast safety fairway based on the ACPARS recommendations. The report acknowledges the potential for conflict between coastwise maritime transportation routes and proposed offshore wind energy projects.
4. **Industry Perspective:** Various industry groups have advocated 9-mile, 5-mile, or 2-mile setbacks from traditional trade lanes, lighting consistent with navigation lights, contingency plans, AIS transponders, “Cut Through” passages for coastwise vessels, cell phone repeaters, and vigilance about compliance with the Jones Act. While renewable energy projects promise job creation and will potentially increase maritime activity, due consideration must be given to safe navigation and preservation of infrastructure for maritime commerce.

1. **LOCAL EFFORTS THAT INFRINGE ON INTERSTATE COMMERCE**
2. **Issue.** In 2000, the Supreme Court ruled in U.S. v. Locke, that federal laws preempt state regulations on maritime oil transportation.
   1. In the area of the Hudson River, there have been numerous state and local efforts to block anchorages for tank vessels using this waterway. A recent amendment to the House Coast Guard Authorization Bill (H.R. 6865, Sec 502) would appear to direct the Coast Guard to prohibit anchoring in the vicinity of an undersea pipeline or cable. There is some concern that this could impede anchoring in the Hudson River or those areas being developed for offshore wind farms.
   2. Since the 1940s, Portland, Maine has been an important import point for crude oil, which is then delivered by pipeline to Montreal, Canada. Recent changes in oil markets have caused the Portland Pipeline Corporation to explore reversal of this pipeline, to permit export of oil using the same infrastructure. In 2014, the City of Portland Maine passed a Clear Skies Ordinance, which prohibited the bulk loading of crude oil onto marine tank vessels in Portland Harbor. The pipeline challenged the ordinance on the basis of the Pipeline Safety Act, the Commerce Clause, the Maine Coastal Conveyance Act and preemption. The municipal ordinance was upheld on appeal. Portland Pipeline Corporation v. the City of South Portland. 947 F.3d 11 (1st Cir. 2022).
3. **Status.** While federal regulatory authorities would appear to have undertaken a program of regulatory reform, a patchwork of new state and local regulatory initiatives have emerged.
4. **Industry Perspective.** While industry generally supports strong regulation, efficient transportation requires uniform preemptive national standards governing vessel operations.