# CURRENT MARITIME ISSUES

May 5, 2016

1. **TOWING VESSEL REGULATIONS**
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. Once completed, the new towing vessel regulations will be codified at 46 C.F.R. Subchapter M. Further information is available from the Coast Guard Towing Vessel Nation Center of Expertise: <http://www.uscg.mil/hq/cg5/TVNCOE/SubM.asp>
3. **Status:** Publication of final Coast Guard regulations is imminent. A number of comments were made on the law as it relates to lifesaving, firefighting, machinery, electrical systems, hull design, and arrangements. One issue that drew particular comment was the inclusion of two compliance options, (1) implementation of a Towing Safety Management System audited by a Coast Guard-approved third party or (2) annual Coast Guard Inspection. The NPRM also sought comment on the traditional 6-on, 6-off two watch system followed by many towing vessels. These comments are now being reviewed by federal authorities. There is no official timetable for action on the proposed regulations.

In mid-February, 2016, Homeland Security Secretary Jeh Johnson signed the rule and submitted it to the White House Office of Management of Budget. Their review is expected to be complete within 90 days, so the rule should be published by June.

1. **Industry Perspective:** The Towing Safety Advisory Committee (TSAC) submitted comments on the Coast Guard’s draft regulation text in May 2007 and again in April 2008. These comments addressed a number of issues, including the nature and requirements for third-party audits that will be required under the new regulation. In December, 2011, the American Waterways Operators submitted comprehensive comments on the NPRM that can be found at the following website:

<http://www.americanwaterways.com/index/towing_vessel_inspection_nprm_comments_with_appendices_dec_2011.pdf>.

1. **VESSEL DISCHARGES**
2. **History**
   1. First passed in 1972, Section 301(a) of the Clean Water Act provides that the discharge of any pollutant by any person shall be unlawful unless the discharge is in compliance with other sections of the CWA. 33 U.S.C. 1311(a). Discharges of otherwise covered pollutants is permitted under a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. 1342.
   2. In 1973, by regulation, the EPA excluded discharges incidental to the normal operation of vessels from NPDES permitting. 40 C.F.R. 122.3(a), 38 FR 13528, May 22, 1973. The Ninth Circuit overturned the exclusion of vessels from the act. 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).
   3. Pursuant to the Northwest Environmental Advocates case, the EPA promulgated a Vessel General Permit, the most recent of which will be in place until 2018. A number of Native American Tribes and 26 States added conditions to the permit, which the EPA has no authority to alter or reject. Among other things, the latest version of the VGP, promulgated in 2013, sets ballast water treatment similar to those set by the International Maritime Organization, but exempts barges and self-propelled vessels under 1,600 gross registered tons. The EPA has made available a Vessel General Permit and Fact Sheet on the web at <http://cfpub.epa.gov/npdes/home.cfm?program_id=350>.
   4. 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. <http://www.slc.ca.gov/spec_pub/mfd/ballast_water/CSLCBWTechReport_26June2013_Final.pdf>; <http://www.dec.ny.gov/press/80495.html>.
   5. 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 into those waters, whether it is treated or not. “No Discharge Zones” have been proliferating throughout the country, though discharge facilities are often inadequate to handle commercial vessel discharge. Municipalities often cannot handle additional waste. Permitting of pumpout stations can be difficult. The most recent petition for a no discharge zone has been in Washington’s Puget Sound, which has started and stopped several times in the last couple of years. Further information is available at the following sites: <http://water.epa.gov/polwaste/vwd/vsdnozone.cfm>

<http://www.ecy.wa.gov/programs/wq/nonpoint/CleanBoating/ndzstatus.html>

1. **Current Status**
   1. On February 11, 2011, the EPA and US Coast Guard signed a Memorandum of Understanding regarding enforcement of current VGP requirements on vessels. The Coast Guard included protocols and procedures verifying vessel compliance with the VGP in its existing routine inspections of U.S. Flag inspected vessels.
   2. In March 28, 2013, the EPA issued the 2013 VGP. In the new VGP, the EPA also allowed for electronic recordkeeping and made other administrative changes to the program. Further information can be found at the following site:

<http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm>

* 1. In March 23, 2012, the Coast Guard published a final ballast water treatment rule. The rule 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. Equipment installation requirements commence January 1, 2014. Further information is available at the following site:

<http://www.uscg.mil/hq/cg5/cg522/cg5224/bwm.asp>

* 1. In 2015, the Second Circuit ordered the EPA to reconsider its VGP ballast water standards. NRDC v. EPA, 804 F.3d 149 (2d Cir. 2015).
  2. In 2016, the U.S. Senate and House are contemplating the Vessel Incidental Discharge Act, S.B. 373, H.R. 980. This bill would call for a consistent, practical federal framework for vessel discharge legislation.

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

legislation.

1. **CYBER RISK MANAGEMENT**
2. **Issue.** In February, 2013, President Obama issued Executive Order 13636 recognizing cyber intrusions into critical infrastructure as a national and economic security threat. The Executive Order directs the Department of Homeland Security to establish voluntary cybersecurity information sharing and risk assessment and management programs for the owners and operators of critical infrastructure.
3. **Status.** The Coast Guard is developing a Navigation and Vessel Inspection Circular (NVIC) on the issue of cybersecurity.
4. **Industry Perspective.** Responsible operators are adopting cyber risk management procedures as part of their safety management systems.
5. **SEPARATION OF THE GREAT LAKES AND MISSISSIPPI RIVER BASINS**
6. **Issue.** Based on concerns about spread of aquatic nuisance species from the Mississippi River System into the Great Lakes, there have been long running legal disputes over closure of the Chicago Area Waterway System. The conflict has been the subject of several legal actions filed between various Great Lakes states and interest groups, with the end result being that U.S. law does not mandate closure of the Chicago Area Waterway System. See, Michigan v. U.S. Army Corp. of Engineers, 132 S.Ct. 1635 (2012), on remand, 911 F. Supp. 2d 739 (2012).
7. **Status.** In January, 2014, the Army Corps of Engineers released a study to explore options to prevent aquatic nuisance species from spreading, four of which involve complete or partial physical separation of the Great Lakes and Mississippi Basins. Further information is available at: <http://glmris.anl.gov/>. Further studies of the issue are underway by the Army Corps of Engineers (relating to the Brandon Road Lock) and the U.S. Fish and Wildlife Service (relating to the Chicago Sanitary and Ship Canal).
8. **Industry Position**. Industry is committed to protecting the ecosystems of both basins while preserving the continued safe and efficient movement of commercial traffic.
9. **RENEWABLE ENERGY PROJECTS**
10. **Issue:** The newly reorganized 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. Nine 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.
11. **Status:** The Coast Guard published an Atlantic Coast Port Access Route Study (ACPARS) for comment on March 14, 2016. The report acknowledges the potential for conflict between coastwise maritime transportation routes and proposed offshore wind energy projects.
12. **Industry Perspective:** The National Ocean Policy Coalition is an organization that has become active on these issues. 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.

**VI. INTERNATIONAL MANNING REQUIREMENTS**

1. **Issue:** International manning and other requirements are increasing rapidly, making it difficult for domestic U.S. vessels to compete on international markets.
2. **Status:**
   1. In 1995 and 2010, the International Maritime Organization adopted amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). These rules apply to otherwise inland vessels on international voyages, on domestic voyages passing through international waters, and beyond the Boundary Line if over 200 GRT. The Coast Guard published a final rule on December 24, 2013, with new requirements for medical certification, training, assessment, and sea service credit. The new rule also expands the application of new work and rest hour rules to all personnel with safety, pollution prevention, and security duties. The Coast Guard is in the process of publishing a total of 26 Navigation and Vessel Inspection Circulars to clarify various aspects of the rulemaking. The final rules go into full effect January 1, 2017.
   2. The International Convention for the Safety of Life at Sea (SOLAS) Chapter V (Safety of Navigation), Regulation 14 requires flag state issued Safe Manning Documents (SMD) for certain vessels, including towing vessels of 500 gross international tons built or rebuilt after 1994. Non-regulated vessels may also carry a similar document called a Safe Manning Letter (SML). The implementation of these rules have increased the crewing requirements on U.S. Flag vessels on international voyages.
   3. In August, 2013, the Coast Guard published draft revisions to Chapters 20-26 of Volume III of the Marine Safety Manual. The revisions focus heavily on the impact of international regulations on US inspected and uninspected vessels. This draft document provides guidance to Officers in Charge of Marine Inspection in connection with issuance of SMDs and SMLs. On international voyages, the draft requirement may have the effect of increasing manning requirements, particularly in connection with the two-watch system that is traditional for towing vessels on near-coastal voyages.
   4. In October, 2013, Transport Canada began to enforce Canadian marine personnel regulations requiring a licensed chief engineer and an additional licensed engineer on all U.S. vessels trading to coastal Canadian waters, along with other requirements. Licensed engineers are not required domestically on most U.S. flag tugboats. Because of the limited number of licensed chief engineers working in the U.S. tug market, these requirements make it very difficult for U.S. tugs to work in Canada.
3. **Industry Perspective.** Traditional manning practices on U.S. Flag tugboats are not inconsistent with those of other flag states and should be reserved in order for U.S. flag vessels to be competitive on international markets.

**VIII.** **LOCAL EFFORTS TO PROHIBIT INTERSTATE COMMERCE**

1. **Issue.** 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.
2. **Issue.** In Washington State, two laws ESHB 1449 (2015) and SB 6418 (2016) have been passed into law imposing various tug escort, state pilotage, and oil spill liability requirements on relating to the Columbia River and Puget Sound.
3. **Status.** Various suits have been filed, including Portland Pipeline Corporation v. the City of South Portland, U.S.Dist. of Maine Case 2:15-cv-00054-JAW on preemption and other grounds. The City’s motion for summary judgment based on ripeness was dismissed. The matter is proceeding to determination on the merits.