

CURRENT MARITIME ISSUES

May 3, 2017

I. TOWING VESSEL INSPECTION

- a. **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.*
- b. **Status:** Towing vessel operators must comply either by implementing a Coast Guard accepted Towing Safety Management System (TSMS) audited by an approved third-party organization or submit to annual Coast Guard inspections by July 20, 2018.
- c. **Industry Perspective:** This development will bring about a new round of welcome increased safety culture for the inland industry.

II. VESSEL DISCHARGES

1. History

- a. 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.
- b. 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 Env'tl. Advocates et al v. United States EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005); affirmed *Northwest Env'tl. Advocates et al v. United States EPA*, 537 F.3d 1006 (9th Cir. 2008); on remand *Northwest Env'tl. Advocates et al v. United States EPA*, 2008 U.S. Dist. LEXIS 66738 (N.D. Cal. August 31, 2008).
- c. 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. 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 <https://www.epa.gov/npdes/vessels>.

- d. 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.
- e. 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.

2. Current Status

- a. 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:
<https://www.epa.gov/npdes/vessels-vgp>
- b. In November 2015, the Coast Guard amended its ballast water reporting and recordkeeping rule with reporting requirements that start in March 2016. The Coast Guard now also 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 three 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. Equipment installation requirements commence January 1, 2014. Further information is available at the following site:***
<https://homeport.uscg.mil/environmental>
- c. 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). ***The Second Circuit found that the EPA did not adequately assess the feasibility of more stringent ballast water standards in the 2013 VGP and ordered the EPA to reassess the standards in the 2018 rulemaking.***
- d. ***Following several other legislative efforts, in January 2017, the Senate Commerce Committee reported out the Commercial Vessel Incidental Discharge Act (CVIDA), S. 168, to establish a uniform and practical approach to the regulation of ballast water and other vessel discharges.***
- e. ***On January 20, 2017, the Trump Administration issued a memorandum to have any new regulations reviewed by the new administration. In February, EPA Region 10***

published a final determination indicating sufficient pumpout capacity existed to establish a No Discharge Zone in Puget Sound. The matter is now proceeding under state law.

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

III. CYBER RISK MANAGEMENT

1. **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.
2. **Status.** *In January 2017, the Coast Guard updated Policy Letter 08-16, which provides guidance for reporting suspicious activity and breaches of security, to include instructions for reporting cyber events. The Coast Guard is developing a Navigation and Vessel Inspection Circular (NVIC) on the issue of cybersecurity. It is expected that the Coast Guard will counsel consideration of internet or computer-related incidents and risks in safety, planning, and response plans that relate to conventional incidents and risks.*
3. **Industry Perspective.** Responsible operators are adopting cyber risk management procedures as part of their safety management systems.

IV. SEPARATION OF THE GREAT LAKES AND MISSISSIPPI RIVER BASINS

1. **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).
2. **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).
3. **Industry Position.** Industry is committed to protecting the ecosystems of both basins while preserving the continued safe and efficient movement of commercial traffic.

V. RENEWABLE ENERGY PROJECTS

- 1. 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.
- 2. 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) for comment on March 14, 2016. The report acknowledges the potential for conflict between coastwise maritime transportation routes and proposed offshore wind energy projects. The Trump Administration has not taken a position on marine special planning.
- 3. 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. 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 Portland Pipeline Corporation filed a motion for summary judgment on preemption and other grounds in 2016. The matter has been fully briefed and the parties are awaiting scheduling for oral argument or a determination by the Court.*

VII. JOINT PROCUREMENT AUTHORITY FOR ALLIANCES.

- 1. Issue:** Global consolidation among international shippers has escalated in recent years. Aside from actual mergers, alliances of shippers are further concentrating the marketplace. These alliances must file for exemption from antitrust laws with the Federal Maritime Commission. On January 19, 2017, the Federal Maritime Commission permitted an alliance of Ro/Ro carriers to engage in joint negotiation for the procurement of domestic services, such as tug services.
https://www.fmc.gov/ro-ro_carriers_limited_joint_procurement_authority/
- 2. Status:** In subsequent communications, it was clarified that this permission was of a limited nature. Other shipping alliances have made similar filings, which have been rejected by the FMC. Most recently, an application by the J3 alliance of K Line, MOL, and NYK Lines to procure domestic US services in advance of a formal merger anticipated next year.
<https://www.fmc.gov/NR17-09/>
- 3. Industry Position:** International ocean carrier alliances should not be granted improper extensions of antitrust immunity when procuring services of domestic service providers.