

## CURRENT MARITIME ISSUES

May 1, 2019

### 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. For those opting for TSMS compliance, 25% of their fleets are required to be inspected by a third-party inspector to verify compliance by July 20, 2019.
- c. **Industry Perspective:** This development will bring about a new round of welcome increased safety culture for the inland industry.

### II. VESSEL DISCHARGES/INVASIVE SPECIES

#### 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. 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.
- b. The Coast Guard began mandating ballast water management and reporting under the National Invasive Species Act in 2004. Currently, the Coast Guard has identified 15 type-approved ballast systems that meet the federal ballast water discharge standard.
- c. In 2005, the Ninth Circuit overturned the exclusion of vessels from application of NPDES permitting requirements. *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 (9<sup>th</sup> 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).
- d. 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.

- e. 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.
- f. 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. Efforts are underway for an NDZ designation for all or part of Chesapeake Bay in Maryland. There is considerable concern about retrofitting requirements and pumpout capacity in all NDZ areas.
- g. 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. A Great Lakes Restoration Initiative has been funded to study further methods to prevent the spread and eradicate invasive species in the area.

## 2. Current Status

- a. 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.***
- b. ***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.***  
<https://www.epa.gov/npdes/vessels>.

- 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.

### **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 cyber events. Numerous publications are being distributed by various federal agencies urging voluntary adoption of the National Institute of Standards and Technology Cybersecurity Framework. For further information, see <https://www.nist.gov/topics/cybersecurity>.
- 3. Industry Perspective.** Responsible operators are adopting cyber risk management procedures as part of their safety management systems.

### **IV. RENEWABLE ENRENEWABLE 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. 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.
- 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. The Maritime Association of New York and New Jersey has advocated a 5-mile setback 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.

## **V. LOCAL EFFORTS THAT INFRINGE ON INTERSTATE COMMERCE**

- 1. Issue.** In 2000, the Supreme Court ruled in *U.S. v. Locke*, that federal laws preempt state regulations on maritime oil transportation.
  - a. 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. *Portland Pipeline Corporation v. the City of South Portland, U.S. Dist. of Maine Case 2:15-cv-00054-JAW* was filed on preemption and other grounds. The trial court upheld the local ordinance, and the trial court's decision is currently on appeal to the First Circuit.
  - b. In Washington State, the 2018 Oil Spill Transportation Act (E2SSB 6269) calls for an international forum on oil spill risk and calls for development of a Vessel Traffic Safety Report for the Strait of Juan de Fuca and Puget Sound. In January 2019, HB 1578 and SB 5578 were introduced to impose various tug escort, state pilotage, and emergency response requirements on Puget Sound.
  - c. Massachusetts has passed a number of laws known as the Massachusetts Oil Spill Prevention Act, imposing various requirements on tank vessels transiting Buzzards Bay, including escort tugs, which differ from the requirements of a Coast Guard promulgation of a Regulated Navigation Area regulation for the same operations in the same waterway. A number of separate suits have been filed relating to this matter, resulting most significantly in a finding that the Coast Guard did not comply with NEPA in promulgating its RNA. *U.S. et al v. Massachusetts*, 493 F.3d 1 (1st Cir. 2007). The Coast Guard is working on an environmental assessment and other regulatory actions relating to this area.
- 2. 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.
- 3. Industry Perspective.** While industry generally supports strong regulation, efficient transportation requires uniform preemptive national standards governing vessel operations.