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| **Navigation & Coast Guard** |
| **Source:** MLA **Doc. No.:** 754 **Date:** November 2, 2000 **Committee:** [REGULATION OF VESSEL OPERATIONS, SAFETY, SECURITY AND NAVIGATION](http://www.mlaus.org/committee-profile.ihtml?id=230)   **FORMAL REPORT OF THE COMMITTEE ON**  **NAVIGATION, COAST GUARD AND GOVERNMENT REGULATION**    The Committee met at 4:00 p.m. on November 1, 2000 at the offices of Haight, Gardner, Holland & Knight in New York. A substantial agenda had been circulated by the Chair some two months in advance. The regular membership of the Committee was joined by Captain Joseph Ahern, U.S.C.G., the new Chief of the Coast Guard's Office of Maritime and International Law. The discussion of the agenda items is summarized below.    **1. Ballast Water Management Programs**    There was extensive discussion of new Ballast Water Management Programs at the IMO, federal, state and local levels. The IMO Program is voluntary and open-ended, providing for exchange of ballast in mid-ocean. There is expected to be a diplomatic conference on the IMO effort in about 2004. The Coast Guard is also attempting to rationalize federal and IMO requirements. The federal program set up by the Coast Guard calls for mandatory reporting, but voluntary exchange, with certain exceptions. The voluntary federal program will become mandatory after three years if there is not sufficient participation, and the first annual report indicates that only 20.8% of vessels participated in this voluntary program, so it may be likely that this program will become mandatory.    The *INTERTANKO* decision did not specifically address ballast water management programs, and federal law allows state and local programs to exist. Certain states, including California, Washington, Alaska, Maryland and Hawaii have established ballast water exchange requirements.    Hawaii's programs applies to alien aquatic species as well as ballast water transfer and provide that the state can adopt regulations to ban vessels that have significant quantities of hull fouling organisms. Contact with a senior marine biologist in Hawaii indicates that the state has not yet decided how to proceed with regard to the alien aquatic species, particularly because the phasing out of TBT as an anti-fouling element for hull coatings was environmentally driven, to avoid toxic leeching into surrounding waters. The environmental lobby faces a Hobson's choice, as phasing out TBT may mean increased hull fouling organisms on vessels coming from overseas.    California has opted for mandatory exchange, turning all recommendations in the federal regulations into requirements under California regulations. In addition, certain ports, such as Oakland, have adopted their own ballast water management programs.    **2. Application of ADA and Other Federal Civil Rights Laws to Foreign Flag Vessels**    In a decision of June 22, 2000, the Eleventh Circuit has ruled that ADA applies to public places on foreign flag passenger vessels calling in U.S. ports. The analysis of the court was somewhat cursory and would be subject to challenge on appeal, but the defendant, Premier Cruise Line, has gone bankrupt and ceased operation. Thus, an appeal is unlikely.    **3. State Regulation of Ships after *United States v. Locke***    After the *INTERTANKO* decision, although routine operations of the vessel appear to be off-limits to state regulations, the states are continuing to regulate financial responsibility, response plans, ballast water management, air pollution and water pollution. Captain Ahern stated that the Coast Guard is coordinating with the states in an amicable way and is not acting in a heavy-handed fashion.    Various states have withdrawn or rolled back state regulatory schemes in the wake of the *INTERTANKO* decision. Air and water pollution remain areas where the EPA can choose to enforce standards even if the state chooses not to, and there are particular concerns for air pollution in areas such as Houston/Galveston and Alaska, since the state of the art for engines and fuels may not permit vessel owners to comply with new or existing regulations for air pollution.    **4. EPA**    EPA is becoming a more active player in the maritime industry, particularly in connection with the Ocean Dumping Act and in connection with air pollution issues. The EPA's Cruise Ship White Paper of August 27, 2000 may be read as a plan for how the EPA views environmental problems on cruise ships, and as an indication that pollution and dumping issues will be aggressively pursued by the EPA and will continue to be the subject of criminal enforcement.    Substantial fines have been imposed on RCCL in two cases ($9,000,000 for a bypass pipe around the oily water separator, and $18,000,000 for discharging toxic chemicals from dry cleaning, photo lab, etc.), and there appears to be follow-up in the subpoenaing of Carnival Cruise Lines. Captain Ahern emphasized that the Coast Guard has heard concerns of industry with regard to criminalization and heavy-handed enforcement, and that the Coast Guard is being careful in this regard. Larry Kiern stressed the concern for a disparate affect on the U.S. flag fleet and the concern for serious unintended consequences if acts not previously criminal become criminal on account of a change in regulatory policy.    The London Dumping Convention prohibits dumping of waste at sea, with an exception for dumping permitted by MARPOL. The U.S. Ocean Dumping Act does not exactly track the London Dumping Convention and does not specifically incorporate the MARPOL exception, and the EPA has not accepted the position that the MARPOL exception is recognized in U.S. law. The EPA's policy, if carried to the extreme, would prohibit dumping of dunnage and cargo sweepings generated in the U.S., not only in U.S. waters but also in the EEZ and on the high seas. There were indications that the EPA has been telling agents that such activity will lead to prosecution, and there was also anecdotal discussion of at least one case in which Coast Guard had advised an agent that discharge of dunnage would be permissible but the Master decided to play safe after asking others whether this would be a problem. Larry Kiern stressed that the issue of the reach of the Ocean Dumping Act has been around the Coast Guard for quite awhile, and that historically the Coast Guard did not press enforcement, but it appears that the EPA is beginning to proceed more actively in this area.    **5. Submarine Cables**    On August 23, 2000 there was published at 65 Fed. Reg. 51264 an advance notice of proposed rulemaking with regard to regulating submarine cables in national marine sanctuaries. Concerns were expressed at the meeting regarding the expansion of national marine sanctuaries and critical habitats. The Endangered Species Act requires NOAA and the FWS to identify critical habitats, and in January 2000, NOAA published regulations saying that harming the critical habitat is prohibited, even if the threatened or endangered species are not present and therefore are not themselves harmed. It appears from the Federal Register of 23 August that violators of the critical habitat and marine sanctuaries regulations could be facing criminal exposure. This is an area in which there is a division of responsibility within the federal government, as the Federal Communications Commission regulates landing rights for submarine cables, but issues of marine sanctuaries and critical habitats are vested in NOAA and FWS.    **6. Exclusive Tug Franchises**    The FMC has recently opened an investigation arising out of imposition by various marine terminals on the Mississippi River of requirements that vessels deal exclusively with one tugboat company. Fred Kuffler indicated that in the River Parrishes case about two years ago, the FMC asserted jurisdiction but decided there was no violation of the Shipping Act. On August 21, 2000, the FMC issued a Section 15 order requiring ocean common carriers to provide additional information. The FMC may decline ultimately to accept jurisdiction, and the issue of defining "common carrier" for purposes of these cases appears to be a matter of dispute within the FMC.    In a further development, at least one grain company was reported to now also require use of its exclusive designated shipping agent.    **7. Recent Legislation**    Larry Kiern mentioned that the Coast Guard Authorization Act did not pass on account of issues involving amendments to the Death on the High Seas Act and certain issues involving Alaska. Larry indicated that the authorization bill will be re-introduced in the next Congress. Uncontested provisions include extension of the Bridge- to-Bridge Radiotelephone Act to twelve miles, providing emergency borrowing authority to the Oil Spill Liability Trust Fund, increased penalty for negligent operations, limiting the liability of pilots acting at a Coast Guard VTS site to provide immunity from liability except for gross negligence or willful misconduct, amendment of the Ports and Waterways Safety Act with regard to hazardous condition reporting and directing vessels in hazardous circumstances, prohibition of the enactment of additional maritime user fees through the year 2006, and a provision with regard to the Jones Act requiring escort and towing tugs to be U.S. vessels.    Items in the act that might be subject to some degree of controversy included the provision permitting recording of a notice of lien on a vessel that is documented but on which there is no mortgage, and a provision prohibiting cargo vessels from loading or discharging in the United States if they are registered with a "substandard" flag state.    **8. Ocean Dumping Act & MARPOL**    See paragraph No. 4 above.    **9. Report of the Interagency Commission on Crime and Security in U.S. Seaports**    There is interest on Capitol Hill, led by Senator Gramm, in tightening security in U.S. seaports. The issue is complicated politically, not only because increased security efforts are likely to be expensive and may require a user fee but also because organized labor generally does not favor increased security efforts to the extent that they would involve background checks and other possible limitations on their members. The consensus of those who spoke at the meeting appeared to be that the government is likely to push for increased security on anti-terrorism grounds.    **10. Setting the Environmental Agenda of the Coast Guard for Oil Pollution Prevention, Preparedness and Response in the 21st Century**    The Coast Guard published a notice in August at 65 Fed. Reg. 62408 providing for public meeting on December 12 and closing of comments on December 30th. No one outside the Coast Guard has yet been able to divine the specific agenda of the Coast Guard , and agency spokesmen have disclaimed any purpose other than gathering information from the public. Non-partisan comments on behalf of the MLA are to be drafted by Dennis Bryant, Fred Kuffler, and perhaps others.    **11. Public Access to the U.S. Coast Guard**    This was felt to be an issue, particularly with the recent cancellation of a public meeting of the Shipping Coordinating Committee. Captain Ahern assured all concerned that the Coast Guard is reaching out and seeking input from the public.    After completion of discussion of items on the agenda, certain additional items were discussed.    A. Richard Corwin raised a concern that each Coast Guard district may be setting its own guidelines for times within which drug and alcohol tests must be administered. Captain Ahern indicated that he did not know how this was currently being handled.    B. Fred Kuffler recommended reading the State of Oregon's report on the New Carissa casualty with regard to that state's views on what the industry should be doing.    C. Dennis Bryant mentioned that there is a proposal to increase limits of liability for non-tank vessels, and that rulemaking on hazardous spill response plans should be expected soon.    D. Paul Kitchner of the subcommittee on pilotage was at the pilot's convention taking place at the same time as our meeting. Bucky McAllister reported on developments, including the new Maryland law requiring state licensing of docking pilots, and impending New Jersey regulations that would apply to federally-licensed docking masters in New York Harbor. There was a discussion generally of the docking master issue with regard to safety, numbers and training.    Respectfully submitted,    Dennis L. Bryant, Chair |