

Alerts & Publications

Maritime Environmental Law Update (July 2015 Edition)

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This will provide an update on significant developments in regard to international marine vessel air emissions and effluent discharges, regulation of spills and releases, and maritime enforcement cases. Our prior update was issued in January 2015, and can be found [here](#).

Foremost among recent developments is the continued focus on greenhouse gases (“GHG”) from the shipping sector, with forecasts suggesting significant GHG increases from vessels, and the European Union (“EU”) starting to track carbon dioxide emissions from ships docked at EU ports. China is also in the news, as it continues its press for improvements in control of air emissions. Hong Kong will be requiring that ships use cleaner fuels while in port, and new regulations will target inland marine applications.

International Developments

Polar Code Adopted

The International Maritime Organization (“IMO”) has adopted the environmental provisions of the Polar Code that will require new ships operating in Arctic and Antarctic waters to follow strict pollution-prevention rules beginning in 2017. The Polar Code will ban discharge of oil or oily mixtures, noxious liquid substances, and sewage and will restrict discharge of garbage into polar waters.

The code will apply to new ships constructed after January 1, 2017. Ships constructed before that date will be required to meet the relevant requirements of the Polar Code by the first intermediate or renewal survey, whichever occurs first, after January 1, 2018.

Large Ships Operating in EU Ports to Undertake Third Party Emissions Audits

Starting in 2019 for the 2018 operating year, shipping companies operating vessels of more than 5,000 gross tons that dock at European Union (“EU”) ports must report their carbon dioxide emissions to the European Commission under regulations the European Parliament approved April 28, 2015 and which entered into force as of July 1, 2015. The reporting obligation will apply to all journeys made to and from EU ports, regardless of a ship’s country of origin or registration.

While there will not be any emissions reductions required under the new law, the reporting obligation is generally viewed as a precursor to emissions reduction requirements.

By August 2017, companies will have to submit a monitoring plan indicating the methodologies chosen to monitor and report emissions along with other relevant information for each of their ships. By January 2018, companies will have to monitor fuel consumption, carbon dioxide emissions, and other cargo-related information for each ship on a per-voyage and an annual basis in accordance with the approved monitoring plan. Companies will have to submit a report by April 2019 which will include carbon dioxide emissions and other relevant information during the 2018 monitoring period. The report must be verified by an independent accredited verifier. Starting in June 2019, ships arriving at or departing from an EU port will have to carry on-board a valid document certifying the ship's compliance with the monitoring and reporting obligations for the 2018 period.

Wait And See On Installation of Ballast Water Management Systems

Much of the shipping industry appears to be waiting for the IMO regulations to finally come into force before taking action on installing ballast water management ("BWM") systems. It is expected that the IMO's regulations will come into force in 2016, when a sufficient number of countries ratify the convention. Many seem to be waiting for the U.S. Coast Guard to approve additional BWM systems and for the IMO to finish its review of testing protocols. Given the uncertainty in the industry, many owners are seeking extensions from the Coast Guard. Others are limiting BWMs to newbuilds, and obtaining builder guaranties that the system will meet Coast Guard and IMO standards once promulgated, with potential retrofit costs allocated between the parties should the system not meet standards.

Stricter rules could come into force once the so-called Ballast Water Convention is ratified by at least 30 countries that collectively represent 35 percent of the world's merchant shipping tonnage. The IMO has indicated that 44 countries, accounting for 32.8 percent of the global merchant shipping tonnage, have ratified the convention.

Meanwhile, investments in ballast water treatment are expected to surge on the IMO's ratification of the ballast water regulations. An estimated \$45.6 billion in investments is expected within the next five years, according to a report by Global Water Intelligence, an Oxford, U.K.-based water research publication.

Conventions To Examine Shipbreaking

Parties to the Basel, Rotterdam, and Stockholm Conventions on the control and management of hazardous chemicals held a joint meeting in May 2015 aimed at development and issuance of new technical guidelines, listing of new chemicals requiring control measures and evaluating additional requirements on dismantling ships.

The three Conventions address different aspects of hazardous material use and disposal: (1) The Basel Convention establishes controls on the cross-border movement of hazardous waste and its disposal; (2) The Rotterdam Convention requires a country that plans to export a chemical that is banned or severely restricted in the home country to inform the receiving country that such export will take place and to receive its consent before the shipment takes place; and (3) The Stockholm Convention requires parties to prohibit or eliminate the production and use, as well as the import and export, of certain intentionally produced persistent organic pollutants (“POPs”) covered by the convention, and to restrict the production and use of other listed POPs.

The May meetings, attended by about 1,200 participants from 169 countries, adopted 73 separate decisions aimed at strengthening protection against hazardous chemicals and waste. Key decisions involved international cooperation and coordination, implementation of the integrated approach to financing, enhancing cooperation and coordination among the Basel, Rotterdam, and Stockholm conventions, and establishing a clearinghouse mechanism for information exchange.

Carbon Dioxide Emissions From Shipping To Rise

The head of the International Transport Forum has stated that carbon dioxide and particulate emissions from international freight transport will nearly triple by midcentury unless sweeping policy changes are adopted. The Forum is an autonomous intergovernmental body under the OECD with 54 member countries. According to José Viegas, secretary-general of the Forum, shipping-related particulate matter, mainly from land vehicles operating in port cities, are responsible for some 60,000 cardiopulmonary and lung-cancer deaths annually and projected to grow and, without “radical action, big CO2 emissions growth from freight transport could undermine [international] climate change mitigation goals,” he said.

The Forum’s *Annual Transport Outlook Report For 2015* forecasts that global freight volume will more than quadruple by 2050 as average transport distances across all modes increase 12 percent. That would mean an increase of more than 290 percent in global carbon dioxide emissions from freight transport, as freight supplants passenger traffic as the main source of carbon dioxide emissions in surface transport, Viegas said.

Hong Kong Clean Fuel Requirements Take Effect

Ships berthing in Hong Kong will have to use cleaner fuel beginning July 1, 2015. The new law is aimed at sulfur in marine fuels, and will require ships to use fuel with sulfur content below 0.5 percent or owners will face fines of as much as HK\$200,000 (\$25,800). Lawmakers expect the law to cut sulfur dioxide emissions by 12 percent and reduce suspended particulate pollutants by 6 percent.

China Seeks To Regulate Vessels In Inland Waterways

China's Ministry of Environmental Protection released draft emissions standards for vessels operating on the country's rivers and lakes. The regulations would require all boats or boat engines sold after January 1, 2017 to limit emissions of carbon monoxide, hydrocarbons, nitrogen oxide and particulate matter. After three years, emission limits would be tightened for hydrocarbons, nitrogen oxide and particulate matter.

The government also indicated that it could begin regulating the sulfur content in diesel fuel used by inland boats by mid-2018, followed by new standards for gasoline-powered boats.

Environmental officials also are updating wastewater and solid waste discharge standards for ships in China's waters, and will be formulating emissions standards for the shipbuilding industry, primarily to control volatile organic compound emissions.

Maritime Piracy Decreases

Incidents of crimes and piracy against mariners have decreased recently, as reported by the Dryad Maritime survey. In southeast Asia, overall incidents are down, although attacks in the Singapore Straits, and theft of fuel from coastal tankers remain high. No recent incidents have been reported in the Indian Ocean, possibly as a result of monsoonal conditions and the increased use of security teams aboard ships.

Canada Increases Liability for Marine Spills

Canada has increased liability limits for ship owners and their insurers for oil spills and other marine accidents, to bring them in line with new international requirements. A 51 percent increase in liability for ship owners and insurers for incidents involving ships of 300 gross tons or greater. This would mean, for example, the maximum liability for property claims against an owner of a ship of 40,000 tons would increase to \$31.4 million from \$20.8 million. The increase is in response to amendments to the IMO's Convention on Limitation of Liability for Maritime Claims ("LLMC") adopted by the IMO's Legal Committee in 2012. The new limits were also needed because inflation had eroded the value of a ship owners' maximum liability by more than 50 percent since the convention was amended in 1996, according to Canadian officials.

The changes also affect the Marine Liability Act provisions related to the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage, which governs liability for pollution from bunker oil spills from non-tanker vessels, and requires ships of 1,000 gross tons and greater to maintain insurance against spill damage and a right of direct action against insurers. The amount of insurance required under that convention is based on the LLMC limits, and the 51 percent increase in the liability limit is expected by the government to improve the likelihood of payment of bunker pollution claims.

U.S. Judicial and Regulatory Developments

U.S. House Passes Coast Guard Funding Bill

The U.S. House of Representatives unanimously agreed to budget legislation for the U.S. Coast Guard and Federal Maritime Commission for 2016 and 2017, maintaining the Coast Guard's current \$8.7 billion budget. Among other priorities, the bill is intended to modernize the Coast Guard's aging fleets of both boats and aircraft, and replace other aging assets.

The bill includes requirements for the Coast Guard to improve its procurement process, and for the U.S. Government Accountability Office to review Coast Guard mission performance and make recommendations for regulatory improvements.

The bill also sets out a number of changes to maritime transportation law, such as strengthening enforcement of a requirement that cargo transportation funded by the federal government be shipped on U.S.-flagged vessels, and provides \$24.7 million in spending for the Federal Maritime Commission ("FMC") for each of the next two years.

The Senate Commerce Committee, which oversees the Coast Guard, is working on its version of Coast Guard legislation.

The FMC regulates ocean-based international transportation, including some activities of international shipping lines in the U.S. It also regulates and monitors passenger ship operators to ensure that they can meet their financial responsibilities, among other responsibilities.

Environmentalists Pursue Port of Miami Dredging Suit

The U.S. Army Corps of Engineers has been sued by environmentalists seeking greater protection of staghorn coral. The Miami-Dade Reef Guard Association, the Tropical Audubon Society, Biscayne Bay Waterkeeper and local resident Dan Kipnis accused the Corps of violations of the Endangered Species Act.

The Corps argues in a motion to dismiss that the litigation is precluded by a prior settlement it reached with Miami-Dade County, which included measures to preserve the coral population and provided a combined \$1.4 million dollars to environmental causes.

The environmental groups' suit, filed in October 2014, sought to stop dredging activities when the Corps allegedly refused to implement recommendations from the National Marine Fisheries Services after finding more colonies of staghorn coral than expected.

The environmental groups agreed in October to drop their bid to stop the dredging after the Corps said it would get its contractor, Great Lakes Dredge & Dock Company LLC, to adopt measures to reduce sediment on colonies near the coral, but they refused to dismiss claims that the Corps and Great Lakes violated the ESA and other permit restrictions.

Vessel Incidental Discharge Act Reintroduced

Sens. Marco Rubio (R-Fla.), Bill Nelson (D-Fla.) and John Thune (R-S.D.) have reintroduced the Vessel Incidental Discharge Act. The Act would make permanent a moratorium on Clean Water Act National Pollutant Discharge Elimination System permits for commercial vessels less than 79 feet. It would also establish ballast water treatment requirements set by the U.S. Coast Guard in 2012 as the uniform national standard governing ballast water discharges by vessels. By 2022, the U.S. Coast Guard and EPA would be required to issue a revised rule that, if viable, is 100 times more stringent than the initial ballast water treatment standard. If a more stringent state ballast water treatment standard is determined to be feasibly achievable, detectable, and commercially available, the more stringent standard would be adopted as the uniform national standard.

Because current federal legislation does not preempt state action, 25 states have established their own requirements for ballast water and other discharges.

Within two years of the bill's enactment, the U.S. Coast Guard and EPA would be required to develop best management practices to regulate incidental discharges, including deck runoff, fish water effluent and air conditioning condensate. The Act is still moving through the Senate, both as a stand-alone bill and in the Senate Coast Guard Authorization Act of 2015. The House does not have companion bill right now, but has passed similar legislation in the past.

Enforcement

EPA Establishes New Civil Penalty Policy

The EPA has established a new policy for assessing civil penalties for violations of fuel sulfur standards for ships operating in controlled areas in the waters off of North America and the Caribbean Sea.

The policy is intended to serve as guidance for EPA officials as they calculate the amount of civil penalties in negotiated settlements for violations of the fuel sulfur standards in emissions control areas ("ECAs") and is generally in line with the multi-factor analysis required for EPA penalties under its other programs.

ECAs are areas designated by the IMO that are subject to certain more stringent international emissions standards, including a requirement that vessels use low-sulfur fuel. Most of the waters off the U.S. coasts, as well as waters around Puerto Rico and the U.S. Virginia Islands, have been designated as ECAs.

The Act for the Prevention of Pollution from Ships provides authority to the EPA to assess civil penalties of \$25,000 per violation, per day; however, the act also requires the EPA to consider mitigating factors, including the nature of the violation, whether the party who violated the standard has a history of prior offenses, and whether that party has the ability to pay the civil penalty.

The new policy focuses on how the EPA is to calculate the "preliminary deterrence amount" of the penalty and how the agency should consider adjustment factors to ensure a "fair and equitable penalty" for the violation. The preliminary deterrence amount is a combination of the penalty component

designed to recover the “economic benefit” of not complying with the fuel standard and a component reflecting the seriousness of the violation, according to the policy.

Also described in the guidance are such factors as the degree of willfulness or negligence, the degree of cooperation in resolving the violation, the history of noncompliance, the litigation risk, the ability to pay, and any supplemental environmental projects that may be proposed by defendant.

Mississippi River Shipper Liable For \$23M Oil Spill Cleanup

American Commercial Lines LLC (“ACL”) was found liable to the U.S. government for \$23.1 million of cleanup costs from a 2008 oil barge collision that spilled nearly 300,000 gallons of oil into the Mississippi River. The federal court rejected ACL’s defense that a third-party tugboat operator, DRD Towing Co. LLC, was solely at fault for the accident. ACL had also argued that it is entitled to limit its liability under the Oil Pollution Act (“OPA”).

In July 2008, a collision between a Laurin Maritime Inc. tanker and an ACL oil barge being towed by a tugboat spilled 282,000 gallons of oil into the lower Mississippi River. Both DRD and its captain, John Bavaret, have pled guilty to criminal charges in connection with the spill.

In response to the government’s bid for summary judgment, ACL argued that it could invoke the OPA’s “complete sole-fault third-party defense,” pinning the blame for the spill entirely on DRD and its employees. While a responsible party can’t raise this defense for mistakes made by third parties pursuant to a contract, ACL argued that DRD’s use of unlicensed and overworked operators fell outside the shipping contracts or charters.

The judge rejected this and other arguments and found ACL liable.

Japanese Shipper Fined \$1.8M Over Illegal Oil Disposal

A Japanese shipper pled guilty and agreed to pay \$1.8 million over allegations that it deliberately discharged oil residue and bilge water overboard from a cargo vessel and failed to maintain an accurate oil record book. In addition to the fine, Hachiuma Steamship Co. Ltd. is to pay \$250,000 to an unnamed whistleblower onboard the *M/V Selene Leader*, a vessel operated and managed by the shipper, and \$450,000 to the National Fish and Wildlife Foundation to fund projects benefiting the Chesapeake Bay as part of the penalty for violating the Act to Prevent Pollution from Ships. The company was also sentenced to three years’ probation and ordered to develop an environmental compliance program, according to the Department of Justice.

Barge Captain Receives Six Month Sentence for Fatal Accident

An oil barge captain was sentenced to six months in prison for his role in a 2005 accident that killed a crew member and dumped thousands of gallons of oil into a Chicago canal. In addition, his company was ordered to reimburse the government for \$5.3 million in cleanup costs.

Dennis Michael Egan, 36, and Egan Marine Corp. were convicted on felony maritime negligence counts. The charges arose from the January 2005 explosion of a barge on the Chicago Sanitary and Ship Canal. A tugboat captained by Egan and owned by Egan Marine was pulling the barge, which exploded after a load of clarified slurry oil onboard caught fire. The explosion killed crew member Alexander Oliva and discharged more than 4,800 gallons of oil and 32 tons of oil solids into the canal.

The explosion was triggered when the captain allowed the crew to use a propane torch to heat up a cargo pump on the barge. Using an open flame on an oil barge is a violation of U.S. Coast Guard safety rules. The oil spill resulted in cleanup and other costs that topped out over \$12 million, according to the government.

Marine Infrastructure

Cuts to U.S. Army Corps of Engineers' Budget Means Less Money for Ports

Proposed cuts in the U.S. Army Corps of Engineers' budget for fiscal year 2016 have left commercial waterways users, labor groups, and port authorities disappointed.

The Obama administration budget request, issued Feb. 2, proposed a cut in Corps funding to \$4.732 billion from the \$5.454 billion appropriated for fiscal 2015, a reduction of more than 13 percent. The cuts are to be spread across construction, operations and maintenance, and project studies.

The cuts are proposed despite the fact that Congress in December approved an increase in the inland waterways user fee to increase funding of the Inland Waterways Trust Fund for construction and maintenance work.

The budget request provides funding for certain waterways projects, including the Olmsted dam and locks on the Ohio River between Illinois and Kentucky, and the Lower Mon 2, 3, and 4 project involving three sets of locks and dams on the Monongahela River in Pennsylvania.

But the request would provide no funding for Kentucky Lock in western Kentucky or Chickamauga Lock near Chattanooga, Tenn., both on the Tennessee River and high on the priority list for replacement.

EPA Pursues Port-Side Emission Reductions

Since 2011, the EPA's SmartWay initiative has attempted to reduce pollution at U.S. ports by limiting emissions from short haul trucks. Major retailers were enlisted to commit to emissions reductions, which led to trucking, rail companies and manufacturers to join in the effort. EPA required signatories to track and reduce fine particulate matter ("PM 2.5") emissions by 50 percent and nitrogen oxides ("NOx") by 25 percent below the industry average over a three-year period.

Now, the EPA is expanding the program with a Barge Freight component, which is intended to help shippers more effectively determine emissions from barge transport. The EPA estimates that inland marine freight movement accounts for more than 600 million tons of cargo each year.

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