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EMISSIONS CONTROL AREA / AIR EMISSIONS

Update

The reduction of air pollutant emissions remains a dominant issue in both the domestic and international arena. As a result there are several new regulations which limit exhaust and other atmospheric emissions from ships.

Most all of these regulations stem from the International Maritime Organization (IMO) ship pollution rules, which are contained in the “International Convention on the Prevention of Pollution from Ships,” known as MARPOL 73/78. In 1997, the MARPOL Convention was amended by the “1997 Protocol,” which includes Annex VI entitled “Regulations for the Prevention of Air Pollution from Ships.” Annex VI places limits on sulphur oxide (SO_x), particulate matter (PM) and nitrogen oxide (NO_x) emissions from ship exhausts, and prohibits deliberate emissions of ozone depleting substances. Emission Control Areas (ECAs) were established pursuant to Annex VI. The adoption of special mandatory measures for emissions from ships in these areas is required to prevent, reduce and control air pollution.

Since 2010, MARPOL Annex VI has required ships operating in ECAs to use fuels with one per cent sulphur content, with the limit dropping to 0.1 percent or less in 2015. The IMO has designated waters off the North American Coast as an ECA, as well as US waters off the coast of Puerto Rico and US Virgin Islands (US Caribbean ECA). These two ECAs – North American and the United States Caribbean – are more stringently regulated as there are limits on sulphur content of fuel oil and NO_x emissions from marine diesel engines.

In the United States, MARPOL is implemented domestically through the Act to Prevent Pollution from Ships (“APPS”). On or after January 1, 2015, the sulphur limit of fuel oil used by vessels within the ECA will be reduced to 0.10%. The United States Coast Guard (“USCG”) and the United States Environmental Protection Agency (“EPA”) have agreed to jointly enforce these requirements and have given no indication that the 2015 compliance date will be extended or ignored. Indeed, federal officials have noted the importance of the fuel standards to air quality control issues that continue to plague U.S. ports. Thus, enforcement of the standards on vessel air pollution is seen as a priority. Both the USCG and EPA will perform inspections and investigations, and will take appropriate enforcement actions if a violation is detected.

According to the UK P&I Club, the EPA, in cooperation with the USCG, announced this August that officials have boarded vessels to collect bunker samples to determine whether the vessels’ fuel sources meet the 1.0% fuel oil sulphur limit. The EPA also stated that it has been “experimenting” with vessel flyovers to assess vessel smokestack plumes for the same purpose.

The state of California has its own rules concerning air emissions contained in the California Air Resources Board’s (CARB) Ocean Going Vessels (OGV) fuel rule. These regulations require vessels to use distillate fuel oil (MDO or MGO) with a sulphur content not exceeding 0.1%. The regulation includes a fee provision by which ships that are unable to achieve the fuel compliance can pay a fee instead. Any person who commits a violation of any provision is subject to penalties specified in the Health and Safety Code.

According to CARB, the OGV fuel rule includes a sunset provision which states that the requirements of the OGV fuel regulations will cease to apply if the US adopts and enforces requirements that will achieve equivalent emissions reductions to the OGV fuel regulations within California waters. In light of this provision, CARB is conducting a sunset review which will extend beyond January 2015. Thus the OGV fuel regulation will remain in effect and continue to be enforced. Thus vessel operators must comply with both the California Ocean-Going Vessel Regulation and the North American Emission Control Area requirements.

For more information on the North American ECA, please use this link <http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf>

For more information on the California regulations, please use this link <http://www.arb.ca.gov/ports/marinevess/ogv.htm>

For more information regarding air emission regulations as applied to the maritime industry, please use this link <http://www.ukpandi.com/knowledge/article/legal-briefing-strict-air-pollution-regulations-on-the-horizon-130163/>

Rebecca Hamra

Claims Executive, Charles Taylor P&I Management (Americas), Inc , on behalf of the managers of The Standard Club Europe Ltd

MARAD –LNG as Marine Fuel

The Maritime Administration (MARAD) released its [LNG life cycle emissions study](#). The study finds that use of natural gas fuels substantially reduced air pollutant emissions compared to conventional marine fuels (low-

sulfur and high-sulfur petroleum). Continued improvements to minimize emissions of methane during vessel-engine operations will contribute to lower greenhouse gas (GHG) emissions from marine applications. (Bryant's Maritime Blog – August 22, 2014).

BALLAST WATER

Update

As reported in previous bulletins, the US Coast Guard (USCG) has produced regulations to bring ballast water discharge standards in-line with the IMO's. The USCG's Ballast Water Discharge Standard Regulation came into effect on June 21, 2012 and requires vessels to install Coast Guard approved ballast water management (BWM) systems for those vessels that will discharge ballast water into US waters. The regulations are based on a phase-in schedule with three phases. The first phase of installation began on December 1, 2013, for all vessels constructed on/after that date. The second phase begins after January 1, 2014, for older vessels with a ballast water capacity between 1500 M3 and 5000M3, which are required to install a BWM system by their first scheduled drydocking after that date. The third phase of installation begins after January 1, 2016, when all other vessels are required to install a BWM system by their first scheduled drydocking after that date.

To date, there are no BWM systems that have received full type approval from the USCG and none expected until sometime in 2015. Alternative Management Systems (AMSs) do exist and may be used for up to 5 years. However, there is no guarantee that these systems will ultimately be approved by the Coast Guard. Thus, an operator who installs an AMS risks that the system will have to be replaced in 5 years.

The USCG provides extensions for operators who have requested to delay BWM system implementation but only if certain criteria have been met. The extension request must provide documentation that, despite all efforts to meet the ballast water discharge standard requirements, compliance by the date stipulated in the implementation schedule is not possible for the vessel. The extension request must be filed with the USCG no later than 12 months before the vessel's applicable implementation date.

The U.S. Environmental Protection Agency (EPA) has also enforced ballast water management requirements under the U.S. EPA Vessel General Permit (VGP) issued under the Clean Water Act. The 2013 EPA VGP went into effect in December 2013 and applies to non-recreational vessels 79 feet or greater. The 2013 EPA VGP regulates discharges from commercial vessels

including ballast water. The VGP requirements issued by the EPA generally aligned with the USCG ballast water requirements. However, the VGP contains some additional requirements to ensure BWM systems are functioning correctly.

The procedure for applying for an extension from the USCG requires the USCG to notify the EPA. However, the EPA does not automatically recognize an extension granted by the USCG. Due to the confusion created by the dueling regulations, the USCG and EPA released a joint letter in December 2013 to clarify the issue. The joint letter includes a sample letter of acknowledgment sent to operators who have received approval for their extension request. The joint letter refers to the EPA's memorandum which was released earlier in December 2013 and explains the EPA enforcement policy with regard to vessels that have obtained an extension from the USCG for BWM installation. The EPA also states that for vessels operating in accordance with the USCG extension, which are otherwise in full compliance with the 2013 EPA VGP requirements, non-compliance with the regulations will be considered a low enforcement priority. This has been interpreted to mean that penalties will not be imposed on operators as long as an extension has been properly obtained.

Due to the fact that a Coast Guard type-approved ballast water management system is not currently available, operators have been forced to obtain an extension from the USCG. Recently, ECM Maritime Services has reported that the USCG has clarified its position regarding extension applications for vessels with ballast capacity between 1500M3 and 5000M3. The USCG has said that extension applications are still acceptable, even when the time remaining until the next scheduled drydocking is less than 12 months. However, the USCG will require an explanation of the circumstances as to why the extension request was not previously submitted. These extensions have been granted until January 1, 2016 and not the first scheduled drydocking after January 1, 2016.

The USCG's memo regarding extensions for BWM systems can be found at the following link: http://www.brymar-consulting.com/wp-content/uploads/Misc/USCG_extension_policy_130925.pdf

The EPA's 2013 VGP can be found at the following link: <http://www.epa.gov/npdes/vessels>

The EPA/USCG joint letter can be found at the following link: http://www.brymar-consulting.com/wp-content/uploads/Misc/BWMS_USCG-EPA_policies_131224.pdf

The EPA's Enforcement Response Policy for the 2013 EPA VGP can be found at the following link:
http://www.brymar-consulting.com/wp-content/uploads/Misc/EPA_enforcement_policy_131227.pdf

For further information regarding US ballast water discharge regulations and their application to the maritime industry, please use the following link:
<http://www.ukpandi.com/knowledge/industry-developments/international-environmental-compliance/#c34407>

USCG – Ballast Water Management

The US Coast Guard provided [information and updates](#) [found at <http://mariners.coastguard.dodlive.mil/2014/10/02/1022014-coast-guard-remarks-3rd-annual-ballast-water-management-tech-north-america-conference/>] regarding ballast water management requirements. (Bryant's Maritime Blog – October 2, 2014).

-Rebecca Hamra
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VESSEL GENERAL PERMIT, NPDES

Final Small Vessel General Permit (sVGP) Issued

On September 10, 2014, the U.S. Environmental Protection Agency announced the issuance of the final sVGP. The sVGP is scheduled to come into effect on December 19, 2014 and will apply to non-military, commercial vessels that are less than 79 feet in length. The sVGP applies to “discharges incidental to the normal operation of a vessel” operating on inland waters and the U.S. territorial sea. Generally, the sVGP is less stringent than the VGP and prescribes Best Management Practices instead of numeric effluent limits. However, 23 states and one Indian tribe have provided additional state-specific conditions to the sVGP. For example, galley, bath, and shower water will be considered “sewage” for commercial vessels on the Great Lakes. Unlike the VGP, the sVGP does not require vessel owners or operators to submit Notices of Intent to be covered under the permit. Rather, vessel owners and operators should complete and maintain a Permit Authorizations and Record of Inspection (PARI) on board at all times, which may be in electronic or paper form.

USCG Updates VGP Job Aid

The U.S. Coast Guard issued an updated version of its VGP Job Aid. The Job Aid is intended to be used by Coast Guard Marine Inspectors and Port State Control Officers during inspections of U.S. flag vessels and

during Port State Control inspections to assist in verification that vessels are in compliance with the December 2013 VGP. (Bryant's Maritime Blog, August 6, 2014)

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WA DOE – Allowing Vessel Dismantling on Water

The Washington Department of Ecology issued a [news release](#) stating that it is developing a new water quality permit to allow vessel dismantling on the water. A public meeting regarding the proposed [Vessel Deconstruction General NPDES \(water quality permit\)](#) will be held on 19 August in Seattle. Written comments should be submitted by 22 August. (Bryant's Maritime Blog – July 16, 2014).

Chukchi Sea – General Permit for Surveys

The Environmental Protection Agency (EPA) issued a notice stating that it is re-proposing a National Pollutant Discharge Elimination System (NPDES) General Permit for oil and gas geotechnical surveying and related activities in federal waters of the Chukchi Sea. Comments must be received by 15 September. [79 Fed. Reg. 48147](#) (Bryant's Maritime Blog – August 15, 2014).

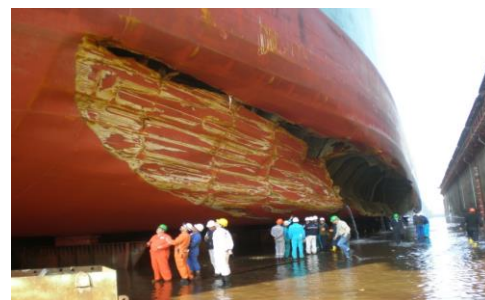
Beaufort & Chukchi Seas – NPDES permit

The Environmental Protection Agency (EPA) is extending, through 30 September, the period within which to submit comments on the National Pollutant Discharge Elimination System (NPDES) general permit for oil and gas surveying in federal waters of the Beaufort & Chukchi Seas. [79 Fed. Reg. 56577](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-22/pdf/2014-22475.pdf>] (Bryant's Maritime Blog – September 22, 2014).

VESSEL RESPONSE PLAN

Update

Projected demand for increased shipping tonnage and factors such as the Panama Canal



expansion project continue to incentivize the construction of larger ships. As a consequence, the maritime industry is challenged to find ways of ensuring

that vessels carrying large quantities of fuel are prepared to respond to disaster as they ply coastal waters in support of global trade. Incidents such as the M/V COSCO BUSAN's allision with the San Francisco-Oakland Bay Bridge and the resulting spill of approximately 53,000 gallons of fuel oil highlight the importance of developing a comprehensive disaster response framework for the maritime domain. The implementation of tank vessel and nontank vessel response plan requirements is one way the U.S. Coast Guard will protect U.S. waterways as vessel tonnage increases.¹

On October 30, 2013 the Coast Guard implemented a law requiring nontank vessels 400 gross tons or greater to submit a response plan certifying the vessel owner or operator's ability to respond to environmental threats including worst case discharges. The rule generally applies to vessels operating on navigable waters of the United States. A detailed explanation of its application, including a discussion of freedom of navigation implications, is contained in the August 31, 2009 Notice of Proposed Rulemaking (74 FR 44970, dated 31 August 2009).

In December 2013, the Coast Guard announced that three vessel operators were issued violations for noncompliance with tank vessel response plans when transiting Alaskan waters.² According to the announcement, the violations cited could penalize the operators as much as \$11,000 per violation per day. Thus, vessels not in compliance with an approved plan are subject to costly enforcement action.

While the U.S. Coast Guard is the implementing agency for this regulation, much of the vessel response plan framework, including implementation dates are established by statute. Accordingly, an Interim Operating Authorization process was developed to assist vessel owners and operators with compliance.

¹ Vessel response plans are just one component of the network of plans including the National Oil and Hazardous substance Contingency Plan, Regional Contingency Plan, and Area Contingency plan designed to ensure the availability of resources to adequately respond to environmental threats on U.S. waters.

² See

<http://www.uscgnews.com/go/doc/4007/2000598/Vessel-operators-issued-monetary-fines-for-non-compliance-with-tank-vessel-response-plan-regulations-in-Western-Alaska>.

The Chafee Amendment

Vessels operating in remote areas are encouraged to meet with the cognizant Captain of the Port to address ways they can meet response plan requirements or mitigate environmental threats in areas where resources are limited. The law provides limited opportunity to diverge from its requirements, but it does accommodate unique challenges by authorizing some flexibility. A provision in the 1996 Coast Guard Authorization Act known as the Chafee Amendment provides that a vessel "owner or operator may deviate from the applicable response plan if the President or the Federal On-scene Coordinator determines that deviation from the response plan would provide for a more expeditious or effective response to the spill or mitigation of its environmental effects." This provision authorizes vessel owners and operators to utilize a resource provider other than the one named in the Vessel Response Plan. The Chafee Amendment is an important tool for vessel operators and response organizations that may have conflicting demands or are charged with responding to disasters in areas where resources are limited.

On Board Compliance

A response plan is activated when a vessel's master determines the resources and personnel available onboard cannot meet the needs of an actual or potential incident. A vessel owner or operator can also activate a vessel response plan independent of such requests, but it is self-evident that good communication and proactive efforts by a vessel's master are critical to the implementation of the vessel's plan. Extensive time and effort has been exhausted to ensure that vessels transiting U.S. waters have the resources available to adequately respond to maritime disaster. However, a plan is only as good as its execution. Reduction of human error is key to the reduction of all maritime transportation threats. Therefore, the best way to ensure compliance with a vessel response plan is to make certain that on board personnel are prepared to activate the plan.

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The views expressed herein are solely those of the author and do not necessarily reflect those of the United States Coast Guard or the United States Department of Homeland Security.

Nontank Vessel Response Plan

In 1990, the United States Congress passed the Oil Pollution Act in response to the *EXXON-V ALDEZ* oil spill. One of the provision of OPA-90 is the requirement for vessels to develop a Vessel Response

Plan (VRP), a highly detailed and vessel specific manual used to prepare the vessel owner, operator, and crew to respond to a release of oil from their vessel. The VRP is used to identify response resources that may be called upon in the event of an oil spill incident, including a contracted resource for salvage, emergency lightering, or firefighting. Originally, the VRP requirement was only applicable to tank vessels carrying Class I through IV oils as cargo; however, in 2004, the President signed into law the Coast Guard and Maritime Transportation Act of 2004 (CGMTA), which in short, required non-tank vessels to prepare and submit a VRP. The plan is typically referred to as a Nontank Vessel Response Plan, or NTVRP.

The CGMTA defines a “nontank vessel” as a self-propelled vessel of 400 gross tons as measured under section 14302 of title 46 of the United States Code (the Convention measurement system), or greater, other than a tank vessel, that carries oil of any kind as fuel for main propulsion and that is a vessel of the United States or that operates on the navigable waters of the United States.

The CGMTA required that response plans be prepared and submitted by August 8, 2005. In addition, the CGMTA required the President and the Coast Guard to issue regulations requiring the submission of plans. Because of the need for additional time to receive and respond to public comments, regulations were not issued by August 8, 2005, and the Coast Guard was left without any mechanism to enforce the CGMTA.

Until regulations were in effect, the Coast Guard issued interim authorization letters authorizing nontank vessels that met certain compliance requirements to operate without an approved response plan for a limited time. See Navigation and Vessel Inspection Circular Number 01-05, CH-1, dated January 13, 2006.

On September 30, 2013, the Coast Guard issued its much anticipated Final Rule addressing nontank vessel response plans. 78 Fed. Reg. 60099 (Sept. 30, 2013). The Final Rule requires owners or operators of nontank vessels to prepare and submit oil spill response plans by January 30, 2014, and either have approval of the plan or have filed a plan containing sufficient elements to obtain Interim Operating Authorization. It is estimated that about 12,000 vessels are affected by the new regulations. Rich Miller, U.S. Now Requires Non-tank Vessels To Have Oil-Spill Response Plans (Oct. 13, 2014, 4:03 p.m.)

<http://www.professionalmariner.com/December-January-2014/oil-spill-response-plans/>.

The new regulations, which appear as 33 C.F.R. Part 155, Subpart J, specify the content of a response plan and addresses, among other issues, the requirement to plan for responding to a worst case discharge and a substantial threat of such a discharge. Additionally, the

Final Rule updates the international Shipboard Oil Pollution Emergency Plan requirements that apply to certain nontank vessels and tank vessels. Finally, the Final Rule requires vessel owners or operators to submit their VRP control number as part of already required notice of arrival information.

The NTVRP requirements are tailored to nontank vessels based on a risk assessment to minimize the burden on vessels that pose less risk to the environment should a casualty occur. Specifically, NTVRP requirements are scaled according to combined fuel and cargo oil capacity in three groups:

1. Less than 250 barrels;
2. Less than 2,500 barrels, but greater than or equal to 250 barrels; and
3. 2,500 barrels or greater.

Nontank vessels carrying 2,500 barrels or greater generally must meet the same functional planning requirements as tank vessels.

To obtain Coast Guard approval, the NTVRP must contain the following minimum information:

- (1) Identification of a qualified individual (QI) and alternate QI having full authorization to implement removal actions, and to identify and ensure by contract or other approved means the availability of personnel and equipment to respond to a discharge;
- (2) Identification of an Oil Spill Response Organization (OSRO) by contract or written consent as appropriate;
- (3) Identification of a salvage and marine firefighting provider and submission of a salvage contract and funding agreement or written consent agreement as appropriate; and
- (4) A signed certification statement as required by 33 C.F.R. 155.5023(b).

In January 2014, the Coast Guard advised vessel owners and operators that, as of January 31, 2014, old NTVRPs which were created under the interim provisions of NVIC 01-05, CH-1 would be deactivated regardless of their expiration dates. The only NTVRPs that will remain active will be those that have been updated, reviewed and either found to be in full compliance with Subpart J and approved for five years, or issued a new six-month Interim Operating Authorization (IOA) to allow time to review and address identified deficiencies.

On July 1, 2014, the Coast Guard issued a Marine Safety Information Bulletin stating that, due to numerous complexities, about 925 nontank vessels still have not received full plan approval and their IOAs will expire on July 31, 2014. Therefore, the Coast Guard intends to grant a 3-month extension of IOAs for nontank vessels that have submitted a VRP, which

includes a pre-fire plan approved by the identified salvage and marine fire fighting organization when required. See MSIB 10-14 (July 1, 2014).

Vessel owners and operators should not delay in addressing these important compliance issues. The Coast Guard is still working on a significant backlog of plan and plan revisions. Therefore, being proactive will ensure vessel compliance. After July 31, 2014, all IOA's expired; vessels will not be authorized to enter U.S. waters until a 5 year approved letter is issued.

*-Alexander T. Gruft
Wright, L'Estrange & Ergastolo*

DEEPWATER HORIZON

CSB – DWH Casualty Report

The Chemical Safety Board issued its two-volume draft report on the Deepwater Horizon casualty. The report finds that the blowout preventer failed to shut off the flow of high-pressure oil and gas because drill pipe buckled for reasons the offshore drilling industry remains largely unaware of. The report also discusses two instances of miswiring of the blowout preventer and two backup battery failures. Among other things, it recommends that the Bureau of Safety and Environmental Enforcement (BSEE) require drilling companies to more effectively manage technical, operational, and organizational safety-critical elements to further reduce the risk of major accidents. (Bryant's Maritime Blog, www.brymar-consulting.com, 6 June 2014.)

Rainey - House Subcommittee Investigation

The US Court of Appeals for the Fifth Circuit ruled that an investigation conducted by a subcommittee of the House of Representatives is included within the terms of a statute that criminalizes obstructing "the due and proper exercise of the power of inquiry under which any inquiry or investigation is being held by either House, or any committee of either House or any joint committee of the Congress." A federal grand jury indicted David Rainey for one count of obstructing Congress in violation of 18 U.S.C. § 1505, and one count of making false statements in violation of 18 U.S.C. § 1001 in conjunction with the subcommittee's investigation of issues related to the fire and explosion on the Deepwater Horizon. Rainey contended, among other things, that 18 U.S.C. § 1505 did not apply to subcommittee investigations. The district court agreed and dismissed that count. The government appealed. The appellate court vacated the district court order and remanded the

case. *United States v. Rainey*, No. 13-30770 (5th Cir., June 27, 2014). (Bryant's Maritime Blog, www.brymar-consulting.com, 1 July 2014.)

Following the remand, the grand jury filed a second superseding criminal indictment against Rainey, amending the obstruction charge. Among other changes, the second superseding criminal indictment changes the mention of "the Committee on Energy and Commerce" from the previous indictment to "the Subcommittee on Energy and Environment of the House's Committee on Energy and Commerce." The case is set to go to trial March 9.

Kaluza, Vidrine – Appeal of Dismissal of Seaman's Manslaughter Charges

In 2012, a federal grand jury in the Eastern District of Louisiana indicted Robert Kaluza and Donald Vidrine on charges of involuntary manslaughter, violations of the Clean Water Act, as well as 11 violations of the Seaman's Manslaughter Statute for the deaths of the 11 employees aboard the Deepwater Horizon. At the time of the blowout on April 20, 2010, Kaluza and Vidrine were well site leaders on board the Deepwater Horizon, responsible for supervising the implementation of BP's drilling plans and procedures. In December 2013, the District Court dismissed the charges under the Seaman's Manslaughter Statute concluding that the statute only applies to individuals who are involved in the "navigation" or "maritime operations" of a vessel and that therefore, it did not apply to Kaluza and Vidrine, who were part of a separate drilling crew. The United States filed an interlocutory appeal of the District Court's order of dismissal, and oral argument was held on July 8, 2014 before Judges Higginbotham, Jones, and Prado of the Fifth Circuit. To date, the appeal remains pending before the Fifth Circuit.

Court – OPA Test Case Proceedings

On June 3, 2014, the District Court entered a Scheduling Order for seven test cases regarding claims under the Oil Pollution Act of 1990. The so-called OPA Test Cases will address certain OPA 90 liability questions focusing on, among other issues, whether plaintiffs' alleged losses tied to the 2010 federal government moratoria on deepwater drilling "arise from" or are "due to" the Deepwater Horizon oil spill. The OPA Scheduling Order provides for fact and expert discovery up to March 2015, followed by summary judgment motions. If necessary, a trial will be scheduled to commence no earlier than the third quarter of 2015.

Court – State of Alabama Damages Case Proceedings

On July 16, 2014, the District Court issued a scheduling order for the State of Alabama's OPA economic damages claims against BP and other parties, with fact and expert discovery continuing into 2015 and a request by the District Court for the parties to set aside the month of November 2015 for a trial.

Court – Liability under Section 311(b)(7)(A) of the Clean Water Act

On February 22, 2012, the District Court held that the subsurface discharge which occurred during the Deepwater Horizon oil spill was from the Macondo well, rather than from the Deepwater Horizon, and that BPXP and Anadarko, and not Transocean, are strictly liable for civil penalties under Section 311 of the CWA as owners of the well. Anadarko, BPXP and the United States each appealed to the Fifth Circuit, and on June 4, 2014 the Fifth Circuit unanimously affirmed the District Court's February 22, 2012 decision. On July 21, 2014, Anadarko and BPXP filed petitions requesting en banc review of the June 4, 2014 decision.

Court – Trial Phases

On September 23, 2014, the District Court issued an amended scheduling order for the penalty phase in the liability, limitation and fault allocation trial in MDL 2179. Discovery in the penalty phase is currently in progress, and the penalty phase trial is expected to commence January 20, 2014 and last three weeks. In the penalty phase, the District Court will determine the amount of civil penalties owed to the United States under the Clean Water Act based on the court's rulings as to the presence of negligence, gross negligence or willful misconduct in Phases 1 and 2, the court's rulings as to quantification of discharge in Phase 2 and the application of the five penalty factors under the Clean Water Act.

Court – DWH Settlement Appeals on the Issue of Causation

On December 24, 2013, the District Court ruled on the two issues remanded to it in October 2013 by the business economic loss panel of the US Court of Appeals for the Fifth Circuit: (1) requiring the claims administrator, in administering business economic loss claims, to match revenue with corresponding variable expenses (the matching issue), and (2) determining whether the settlement agreement can properly be interpreted to permit payment to business economic loss claimants whose losses (if any) were not caused by the spill (the causation issue).

As to the causation issue, the District Court ruled that the Economic and Property Damages Settlement

Agreement contained no causation requirement beyond the revenue and related tests set forth in an exhibit to that agreement. The District Court also held that the absence of a further causation requirement does not defeat class certification or invalidate the settlement under the federal class certification rule or Article III of the US Constitution.

BP filed a motion with the Fifth Circuit requesting an injunction that would prevent the claims administrator from making awards to claimants whose alleged injuries are not fairly traceable to the spill. In a 2-to-1 decision on March 3, 2014, the business economic loss panel affirmed the District Court's ruling on causation and denied BP's motion for a permanent injunction. Over a vigorous dissenting opinion, the Fifth Circuit denied (in a 5-to-8 decision) BP's petition for rehearing en banc of the business economic loss panel's March 3, 2014 decision. The dissent noted that this decision permits payment for economic losses "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill." In re Deepwater Horizon, No. 13-30095 (5th Cir., May 19, 2014).

BP asked the Fifth Circuit to stay the issuance of the mandate transferring the case back to the District Court until the Supreme Court could decide whether to review the Fifth Circuit's decision. The Fifth Circuit denied BP's request for a stay and issued its mandate on May 28, 2014. On that same day, the District Court dissolved the injunction that had halted the processing and payment of business economic loss claims and instructed the claims administrator to resume the processing and payment of claims.

On May 28, 2014, BP filed an application with the Supreme Court seeking to recall and stay the Fifth Circuit's mandate in order to halt the processing and payment of business economic loss claims pending further review. The Supreme Court denied BP's application and the claims administrator has continued to process and pay business economic loss claims while BP seeks Supreme Court review of the Fifth Circuit's decision.

On August 1, 2014, BP filed a petition for certiorari seek review of the Fifth Circuit's decision, as well as a related decision by a different panel of the Fifth Circuit similarly interpreting the Economic and Property Damages Settlement Agreement to permit payment to business economic loss claimants whose losses (if any) were not caused by the spill.

Court – MODU as a Stationary Source

Over a vigorous dissent, a panel of the US Court of Appeals for the Fifth Circuit ruled that the US Chemical Safety and Hazard Investigation Board has jurisdiction to investigate the release of hazardous substances into the ambient air during the April 20, 2010 blowout, explosion, and fire on the mobile offshore drilling unit (MODU) Deepwater Horizon in the Gulf of Mexico. Defendant MODU owner argued that the MODU was a vessel and thus outside the jurisdiction of the Board, which was limited to emissions from stationary sources. The court found that the statute establishing the Board included its own definition of “stationary source.” The MODU Deepwater Horizon fell within that definition while it was engaged in drilling the Macondo well. *United States v. Transocean Deepwater Drilling*, No. 13-20243 (5th Cir. September 18, 2014). (Bryant’s Maritime Blog, www.brymar-consulting.com, 23 September 2014.)

Trial judge concludes the *DEEPWATER HORIZON* spill caused by BP’s gross negligence and willful misconduct

On September 4, 2014 the federal district judge overseeing the multidistrict litigation resulting from the *Deepwater Horizon* oil spill issued long-awaited rulings as to liability. The court concluded that BP is subject to enhanced civil penalties under the Clean Water Act (“CWA”) because the discharge of oil was the result of the company’s “gross negligence” and “willful misconduct.”

Background

Following the *Deepwater Horizon* oil spill on April 20, 2010, multidistrict litigation was consolidated in the district court in New Orleans, Louisiana. The current trial, which involves two key cases filed against BP and the other entities involved in the drilling of the Macondo well, is being heard by the court without a jury pursuant to the court’s admiralty jurisdiction.

The consolidated trial’s first phase in early 2013 was to determine the liability of BP, Transocean, Halliburton, and other companies, and to assess, for the purposes of penalty calculation, whether the companies acted with gross negligence and willful misconduct with respect to the loss of well control and the resulting explosion, fire, and sinking of the rig.

The trial’s second phase, which occurred during the fall of 2013, addressed the post-incident efforts to control the spill and the quantity of oil that spilled into the Gulf of Mexico. The judge has not yet issued a ruling with respect to the issues presented in the second phase. The third phase, which is scheduled to begin in January 2015, will focus on all other liability issues arising from the oil

spill cleanup, including containment issues and the use of dispersants.

CWA Liability

The court held that the complexities of drilling the Macondo well in deepwater and the potential magnitude of the harms of a blowout, explosion, and oil spill were so great that BP’s direction of the drilling operation was subject to an increased standard of care. The court further found that BP’s operational and engineering personnel were well aware the Macondo well had been particularly troublesome to drill and those difficulties continued throughout the efforts to isolate the well from the reservoir. Thus, the court held that the record of well control problems during the drilling of the Macondo well required an even higher standard of care during the preparations for the temporary abandonment of the well.

The Court found that BP’s team leader on the rig and its senior drilling engineer ashore in Houston had knowledge of these difficulties and their associated risks, and failed to exercise the “heightened” vigilance required by the circumstances when interpreting the results of the negative pressure test, the principal test used to determine if the well was properly isolated from the reservoir before proceeding to displace the well. Based on the results of the negative pressure test conducted on the Macondo well, the court determined a reasonable drilling engineer in that situation would have concluded that the test was a failure and should have required the test to be repeated. The court noted that conducting a second negative pressure test would have imposed an extremely light burden when compared to the severe and foreseeable consequences that could, and did, result from continuing the displacement procedures after a failed test. Consequently, the court held that BP’s engineers’ failure to order a new test before proceeding with the well displacement procedures constituted an extreme departure from the care required under the circumstances.

The court also found that BP’s engineers knew of facts that would have led a reasonable drilling engineer in the industry to realize that the failure to stop the well displacement would probably result in physical injuries, death, and severe property damage. However, even though the BP engineers had to briefly pause the displacement procedure just minutes before the blowout occurred to conduct a required sheen test, instead of directing that another negative pressure test be performed, they affirmatively ordered that the displacement procedure be resumed. The court held that this conduct amounted to recklessness.

The court further found that BP committed a separate series of negligent acts and omissions that resulted in the discharge of oil. Taken together, these additional acts of negligence amounted to gross negligence and willful misconduct under the CWA. Moreover, the court found that some of these acts and omissions resulted from profit-driven decisions. The court held that these instances of negligence, taken together, provide an independent basis for enhanced penalties under the CWA because they constituted an extreme deviation from the standard of care and a conscious disregard of known risks.

Based on these findings and conclusions, the court determined that BP was vicariously liable under the CWA's enhanced penalty provision for the gross negligence and/or willful misconduct of its employees. Accordingly, the court's ruling subjects BP to an enhanced civil penalty of \$4,300 per barrel under the CWA, which is nearly four times higher than the standard penalty for oil spills involving simple negligence under that statute. As a result of this decision, BP could be found liable for as much as \$18 billion in CWA penalties when phase three is completed with regard to making a determination on the amount of oil that was discharged.

Punitive Damages

Although the court indicated that BP's conduct warrants the imposition of punitive damages under general maritime law, under precedent in the U.S. Court of Appeals for the Fifth Circuit, operational recklessness or willful disregard of an employee is generally insufficient to visit punitive damages upon the employer. Accordingly, the court held that in the matter before it, BP could not be held liable for punitive damages in states within the Fifth Circuit (*e.g.*, for claims involving Texas and Louisiana). The court also ruled, however, that BP *could* be held liable for punitive damages for claims that are subject to standards set by other Circuit Courts. This decision is particularly important, for example, with regard to claims in Florida and Alabama, which are within the Eleventh Circuit. There already are reports that the state of Alabama is preparing its case against BP for compensatory and punitive damages.

General Maritime Law Liability

The court also concluded that BP and its drilling partners, Transocean, the owner of the *Deepwater Horizon*, and Halliburton, the cement contractor for the Macondo well, were each liable under general maritime law for the blowout, explosion and oil spill. However, while BP's conduct was reckless, the court held that Transocean's and Halliburton's conduct was simply negligent. For

purposes of determining comparative fault, BP was apportioned 67 percent of the fault, while Transocean was apportioned 30 percent and Halliburton was apportioned 3 percent. The court concluded that Transocean's share of liability was considerably less than BP's because, while BP's failures created the catastrophic situation, Transocean's failures, by contrast, concerned its inability to stop the catastrophe BP set in motion. Similarly, while the court found that Halliburton failed to properly monitor the well, its failure was relatively small when compared to others' failures, and it was a failure shared by Transocean's drill crew.

Related Liability Rulings

Indemnity & Release

Significantly, the court held that Transocean's and Halliburton's indemnity and release clauses in their respective contracts with BP were valid and enforceable against BP, including for any liability that Transocean may have to government entities for removal costs as an operator of the rig under the Oil Pollution Act of 1990.

Limitation of Liability

The court also ruled that Transocean was not entitled to limit its liability under the Limitation of Liability Act because certain negligent failures of the *Deepwater Horizon*'s crew, which were within Transocean's privity and knowledge, created unseaworthy conditions that caused or contributed to the explosion, fire, and oil spill.

Looking Forward

It should be noted that this decision will not affect those claims of businesses and individuals affected by the spill that were involved in the March 2, 2012 class action settlement with BP. It will likely affect the resolution of the claims that are still pending in the federal multidistrict litigation, as well as other claims that have been filed in various state courts.

In a future opinion to be issued concerning the second phase of the trial, the judge is expected to review BP's efforts to control the spill and render his determination of the total amount of oil that spilled into the Gulf of Mexico. Based on the present rulings, BP could face liability for as much as \$18 billion in Clean Water Acts penalties, depending on the court's findings and conclusions from the second phase of the trial.

In the third and final phase of the trial, the judge will determine damages resulting from the oil spill cleanup.

Following the conclusion of the trial, all of the district court's rulings for each phase of the trial may be appealed to the Fifth Circuit.

-Gregory F. Linsin and Alan Weigel, Blank Rome LLP, September 8, 2014.

DOI – DWH early restoration PEIS

The Department of the Interior (DOI) issued a notice announcing availability of the Final Programmatic and Phase III Early Restoration Plan and Final Early Restoration Programmatic Environmental Impact Statement relating to the Deepwater Horizon oil spill. [79 Fed. Reg. 36328](#) (Bryant's Maritime Blog - June 26, 2014).

ECOLOGY

Speed Reduction

NOAA – lowering ship speeds in protected areas

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) stating that a new [study](#) indicates that the agency's policy of notifying – but not necessarily citing – speeding vessels in protected areas along the East Coast has been effective in lowering their speeds and protecting the critically endangered North Atlantic right whale, while keeping punitive fines to a minimum. (Bryant's Maritime Blog – June 3, 2014).

Santa Barbara Channel – speed reduction program

The Santa Barbara County Air Pollution Control District issued a [news release](#) stating that a coalition of government, non-profit, and marine industry groups have launched a new trial incentive program in the Santa Barbara Channel to slow cargo ships in order to reduce air pollution and increase protection of endangered whales. Companies participating in the speed reduction program will receive \$2,500 per ship transit through the waterway. (Bryant's Maritime Blog – August 4, 2014).

NOAA – Humpback Whale

The National Oceanic and Atmospheric Administration (NOAA) issued a notice stating that it received a petition to identify the Central North Pacific population of the humpback whale as a distinct population segment (DPS) and delist the DPS under the Endangered Species Act. Information and comments relating to this petition must be received by 28 July. [79 Fed. Reg. 36281](#) (June 26, 2014).

FWS & NOAA – Loggerhead Sea Turtle

The Fish and Wildlife Service (FWS) issued a final rule designating critical terrestrial habitat for the Northwest Atlantic Ocean distinct population segment of the loggerhead sea turtle. The rule comes into effect on 11 August. [79 Fed. Reg. 39755](#) (July 9, 2014). The National Oceanic and Atmospheric Administration (NOAA) issued a final rule designating critical marine habitat for the Northwest Atlantic Ocean distinct population segment of the loggerhead sea turtle. No marine areas meeting the definition of critical habitat were identified within the jurisdiction of the United States for the North Pacific Ocean distinct population segment of the loggerhead sea turtle. The rule comes into effect on 11 August. [79 Fed. Reg. 39855](#) (Bryant's Maritime Blog - July 9, 2014). The two agencies issued a [joint news release](#) explaining the development.

National Marine Sanctuary

NOAA – marine sanctuary nomination

The National Oceanic and Atmospheric Administration (NOAA) issued a rule re-establishing the process for nomination of areas of the marine and Great Lakes environment as national marine sanctuaries. The rule comes into effect on 14 July. [79 Fed. Reg. 33851](#) (Bryant's Maritime Blog - June 13, 2014).

NOAA – Gray's Reef NMS Regulations

The National Oceanic and Atmospheric Administration (NOAA) promulgated a final rule updating the regulations and management plan for Gray's Reef National Marine Sanctuary (NMS). The amendments come into effect on 18 August. [79 Fed. Reg. 41879](#) (Bryant's Maritime Blog - July 18, 2014).

Lake Huron – Thunder Bay NMS

The National Oceanic and Atmospheric Administration (NOAA) promulgated a final rule expanding the boundary of the Thunder Bay National Marine Sanctuary (NMS) from 448 square miles to 4,300 square miles, extending protection to 47 additional known historic shipwrecks of national significance and making other changes. This rule will come into effect after the close of a review period of 45 days of continuous session of Congress. [79 Fed. Reg. 52960](#) (September 5, 2014).

Endangered Species Act

FWS & NOAA – critical habitat

The Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) have extended until 9 October the period within which to submit comments on their proposed changes to the

definitions and regulations for designating critical habitat under the Endangered Species Act (ESA). [79 Fed. Reg. 36284](#) (June 26, 2014).

FWS & NOAA – ESA policy

The Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) have extended until 9 October the period within which to submit comments on their draft policy regarding implementation of section 4(b)(2) of the Endangered Species Act (ESA). [79 Fed. Reg. 36330](#) (Bryant's Maritime Blog - June 26, 2014).

NOAA – Gulf of Mexico Dead Zone

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) stating that NOAA and EPA-supported scientists have mapped the Gulf of Mexico dead zone, an area with low oxygen in the water, and determined that it covers 5,052 square miles for the summer of 2014. This is smaller in size than recorded in 2013, but greater than the Mississippi River/Gulf of Mexico Watershed Nutrient (Hypoxia) Task Force target of less than 1,900 square miles, meaning nutrients from the Mississippi River watershed are continuing to affect the coastal resources and habitats in the Gulf. (Bryant's Maritime Blog – August 4, 2014).

NOAA – Marine Debris Economics Study

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) stating that its [Marine Debris Economics Study](#) shows that Southern California residents lose millions of dollars each year avoiding littered local beaches in favor of cleaner beaches that are further away and may cost more to reach. (Bryant's Maritime Blog – August 12, 2014).

Corals

Coral Reef Task Force – Meeting

The US Coral Reef Task Force, sponsored by the Department of the Interior, will meet in Maui on 8-13 September. [79 Fed. Reg. 42030](#) (Bryant's Maritime Blog - July 18, 2014).

NOAA – Coral Species Listed as Threatened

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) stating that it will afford Endangered Species Act (ESA) protections to twenty coral species found in the Indo-Pacific and the Caribbean determined under the ESA to be threatened. (Bryant's Maritime Blog – August 27, 2014).

NOAA – Coral Species Listed as Threatened

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) stating that it will afford Endangered Species Act (ESA) protections to twenty coral species found in the Indo-Pacific and the Caribbean determined under the ESA to be threatened. (Bryant's Maritime Blog – August 27, 2014).

NOAA – Elkhorn and Staghorn Coral

The National Oceanic and Atmospheric Administration (NOAA) issued a notice announcing the availability of the draft Recovery Plan for elkhorn coral and staghorn coral. Comments must be received by 20 October. [79 Fed. Reg. 53019](#) (Bryant's Maritime Blog - September 5, 2014).

NOAA – Coral

The National Oceanic and Atmospheric Administration (NOAA) promulgated a 273-page final rule designating twenty reef-building coral species as threatened and requesting information that may be relevant to the designation of critical habitat for these species. The designations enter into effect on 10 October. Information regarding critical habitat must be received by 10 November. [79 Fed. Reg. 53851](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-10/pdf/2014-20814.pdf>] (Bryant's Maritime Blog - September 10, 2014).

Washington – Aquatic Lands Habitat Conservation

The National Oceanic and Atmospheric Administration (NOAA) and the Fish and Wildlife Service (FWS) issued a notice announcing the availability of the draft environmental impact statement relating to the proposed Washington Department of Natural Resources Aquatic Lands Habitat Conservation Plan, covering 2.6 million acres of State-owned aquatic lands. Public meetings will be held in Mount Vernon (7 October); Longview (9 October); Tacoma (13 October); and Pasco (15 October). Written comments must be received by 4 December. [79 Fed. Reg. 53020](#) (September 5, 2014).

Aquatic Invasive Species

FWS – Preventing Introduction of AIS

The Fish & Wildlife Service (FWS) issued a notice announcing the availability of voluntary guidelines to prevent the introduction and spread of aquatic invasive species (AIS) by means of recreational activities and water gardening. [79 Fed. Reg. 32308](#) (Bryant's Maritime Blog - June 4, 2014).

FWS – preventing spread of AIS

The Fish and Wildlife Service (FWS) seeks comments on the [Classroom Guidelines for Preventing the Introduction and Spread of Aquatic Invasive Species](#) (AIS). Comments should be submitted by 16 July. [79 Fed. Reg. 34342](#) (Bryant's Maritime Blog - June 16, 2014).

ANSTF – meeting

The Aquatic Nuisance Species Task Force (ANSTF), chaired by the Fish and Wildlife Service (FWS), will meet on 5-6 November in Falls Church, Virginia. Topics on the agenda include: implementation of invasive species efforts for national Arctic strategy; Quagga Zebra Action Plan update; and the draft lionfish management plan. [79 Fed. Reg. 61094](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-09/pdf/2014-24067.pdf>] (Bryant's Maritime Blog – October 9, 2014).

NOAA, NASA & BOEM – Monitoring Marine Biodiversity

The National Oceanic and Atmospheric Administration (NOAA) issued a [news release](#) [found at http://www.noaanews.noaa.gov/stories2014/20141006_boem.html] stating that it, the National Aeronautics and Space Administration (NASA) and the Bureau of Ocean Energy Management (BOEM) have joined together to support three demonstration projects intended to lay the foundation for the first national network to monitor marine biodiversity at scales ranging from microbes to whales. The projects, to be funded at approximately \$17 million over the next five years, will demonstrate how a national operational marine biodiversity observation network could be developed. Such a network would serve as a marine resource management tool to conserve existing biodiversity and enhance U.S. biosecurity against threats such as invasive species and infectious agents. The three demonstration marine biological observation networks will be established in four locations: the Florida Keys; Monterey Bay and the Santa Barbara Channel in California; and on the continental shelf in the Chukchi Sea in Alaska. (Bryant's Maritime Blog – October 6, 2014).

ARCTIC

Update

In October Russia announced that it is substantially rebuilding Soviet era military bases in the Arctic. Most controversial is the base on Wrangle Island. The island is currently a nature preserve and world heritage site where many polar bears go to give birth. Russian President

Vladimir Putin has promised to protect endangered animals, but the bases will represent a significant expansion of military assets in the Arctic region. Moscow times.

<http://www.themoscowtimes.com/mobile/business/article/russia-starts-building-military-bases-in-the-arctic/506650.html>

The United States and Canada have canceled their annual training exercise with Russian Defense forces this fall due to the situation in the Ukraine. Despite prior hope of increased cooperation, the United States has also suspended joint naval exercises in the Arctic Ocean with the Russians and a bilateral meeting on Coast Guard related arctic issues, and search and rescue. United States lawmakers have expressed concern that our navel and Coast Guard forces are falling behind and that our influence in the Arctic is weakening at a time when the Russians are actively drilling in the Arctic. The National Journal Magazine. <http://www.nationaljournal.com/congress/russia-s-militarization-of-the-north-pole-has-u-s-lawmakers-on-edge-20140911>

On July 16, 2014 the United States appointed a Special Representative for the Arctic. The US State Department appointed Adm. Robert J. Papp, Jr., formerly Commandant of the Coast Guard, as the Special Representative. Adm. is experienced in Arctic affairs and will work on Arctic policy on behalf of the State Department. Press statement US Department of State July 16, 2014. <http://m.state.gov/md229317.htm>

In August Russia took major steps to expand hydrocarbon production in the arctic and to establish procedures for dealing with environmental issues. On August 7th, 2014 the Kremlin announced that Gazprom has been granted an additional license to explore in the Kheysovsky area of the Barents Sea and that Rosneft has been granted a license to drill in the Pritaymyrsky area of the Laptev Sea. On the same day both companies and Russian Defense forces conducted a drill to respond to an oil spill at the only active drilling rig in the arctic, the Pirazlomnaya Platform. Arctic Journal. <http://arcticjournal.com/oil-minerals/871/staking-claim>

Efforts to explore the vast hydrocarbon reserves in the arctic now face a new hurdle, the economic sanctions against Russia implemented by the United States and the European Union in response to Russia's role in the civil war in the Ukraine. Rosneft, in partnership with Exxon-Mobile announced the discovery of new hydrocarbon deposits in the Kara Sea in September. However, the discovery has been overshadowed by the sanctions against Russia, which likely will prohibit Exxon-Mobile from continuing operations related to the new discovery,

and as of September 26, Exxon-Mobile is no longer actively taking part in the exploration. Arctic Journal. <http://arcticjournal.com/oil-minerals/1042/editors-briefing-victory-arctic>

Following its recent failure to its efforts to explore for oil in the arctic in 2012 and a court decision halting its plans explore the Chukchi Sea, Royal Dutch Shell has filed a new exploration plan in August for the development of Alaska's Arctic oil fields. Criticism has been leveled against Shell due to its numerous failures to meet United States regulatory standards, but the company appears committed to pursuing exploration in arctic areas above Alaska. The Guardian. <http://www.theguardian.com/sustainable-business/2014/sep/02/shell-alaska-arctic-oil-safety-failings-investors>

In June, Russia released the Greenpeace icebreaker "Arctic Sunrise" after months of international protest, diplomacy, and litigation. The crew had been initially charged with piracy after allegedly attacking a Russian oil rig in the Arctic. The vessel was also arrested and held long after the crew was released. Greenpeace expressed concern as to the condition of the vessel after months in Russian hands but says it plans to return the ship to operations in the Arctic protesting drilling for hydrocarbons there. The Guardian. <http://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship>

*John C. Scarborough, Jr.
Perry & Neblett*

USCG – Polar Code meeting

The US Coast Guard issued a notice stating that it will hold a public meeting in Seattle on 14 August to receive comments on topics related to the development of a mandatory code for ships operating in polar waters ([draft Polar Code](#); [draft SOLAS amendments](#); and [draft MARPOL amendments](#)). Written comments should be submitted by 1 September. [79 Fed. Reg. 37339](#) (Bryant's Maritime Blog - July 1, 2014).

Arctic Council – Oil Pollution Prevention

The Arctic Council issued a [news release](#) stating that its Task Force on Arctic Marine Oil Pollution Prevention met in Ottawa on 12-13 June. The Task Force is developing the Arctic Council Action Plan for Oil Pollution Prevention. (Bryant's Maritime Blog – July 10, 14).

BOEM – Beaufort Sea Planning Area

The Bureau of Ocean Energy Management (BOEM) issued a Call for Information and Nominations for potential Oil and Gas Lease Sale 242, proposed for the Beaufort Sea Planning Area off Alaska in 2017. Responses to the Call must be received by 12 September. [79 Fed. Reg. 44060](#) (Bryant's Maritime Blog - July 29, 2014).

NAP – Oil Spill Response in US Arctic Waters

The National Academies Press (NAP) released the final edition of its book entitled "[Responding to Oil Spills in the U.S. Arctic Marine Environment](#)". As oil and gas, shipping, and tourism activities in these waters increase, the possibilities of an oil spill also increase, yet infrastructure in the region is minimal. (Bryant's Maritime Blog – August 4, 2014).

Arctic Council – Working Group Meeting

The Bureau of Safety and Environmental Enforcement (BSEE) issued a [press release](#) [found at <http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2014/BSEE-Attends-Arctic-Council-Working-Group-Meeting-in-Canada/>] stating that a meeting of the Arctic Council's Protection of the Arctic Marine Environment (PAME) was recently held in Whitehorse, Canada. The working group addresses policy and non-emergency pollution prevention and control measures related to the protection of the Arctic marine environment from both land and sea activities. The US delegation included representatives from BSEE, the Bureau of Ocean Energy Management (BOEM), the National Oceanic and Atmospheric Administration (NOAA), and the US Coast Guard. (Bryant's Maritime Blog – September 26, 2014).

U.S. Takes the Helm of Council Assigned to Deal with Fast-Changing Arctic

The Obama administration is pushing to make climate change a focal point as the United States becomes the new leader of the international Arctic Council, a move that is winning praise from environmentalists, even though it's unclear how it may translate into action.

This week, senior Arctic officials from multiple countries will meet in Yellowknife, Northwest Territories, to hear the United States present its agenda for its two-year chairmanship starting next year. The council is a forum for nations bordering on the Arctic.

Many environmentalists are cheering about recent remarks from U.S. Special Representative for the Arctic Adm. Robert Papp Jr., who indicated via speeches that climate change would be a main theme at the council,

with new efforts on things like controlling black carbon and reducing methane.

Greens say that opens the door for potential new actions to protect the pristine region and control emissions that are melting ice and spreading soot. "It really is a turning point," said Erika Rosenthal, a staff attorney at Earthjustice. But others caution that a too-aggressive stance could shift the council away from uncompleted priorities and possibly spur political tension.

"The admiral is barking up a slightly wrong tree," Charles Ebinger, director of the Energy Security Initiative at the Brookings Institution, said about the recent emphasis on climate change. The Arctic Council may not be the best place to address some issues like methane, considering the international nature of its emissions. And how to respond to emergencies and oil spills in the region still remains unfinished business, he noted.

Major shift looming?

What is clear is that the U.S. chairmanship is likely to be a major shift from the approach led by the Canadian chairmanship over the past two years, which emphasized economic development in the north. The leader of the council changes every two years among countries, with the State Department leading the U.S. delegation.

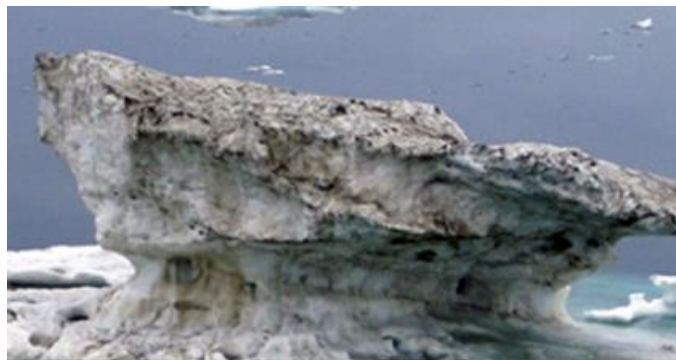
"Why do we need to act now? We need to act now because I've seen the drastic changes that have occurred in the Arctic," Papp said in a speech last month at the Center for Strategic and International Studies, describing how he visited the Bering Strait 30 years apart and was startled by the recent lack of ice. "We must take care that economic activity in the Arctic is sustainable and does not exacerbate the effects of climate change and environmental degradation."

In additional remarks at the Center for American Progress, Papp outlined an extensive list of potential U.S. actions on climate change at the council, including implementing any council recommendations on black carbon, pushing member countries to reduce methane emissions and pursuing a formal postponement or a ban on Arctic fishing.

He also called for implementing recommendations from a report to build resilience in local communities, an inventory of fresh water in vulnerable areas suffering from erosion and contamination, and a renewable pilot project in the far north to move areas away from soot-producing diesel.

At CSIS, he further outlined three broad principles for the U.S. chairmanship, including one directly about

climate change mitigation and adaption. The other two also touched on the issue: Arctic Ocean stewardship and improving living conditions for Arctic residents.



Soot helps accelerate melting ice in the Arctic. Photo by Mark Bennett, courtesy of the National Oceanic and Atmospheric Administration.

"Why would we not focus on black carbon? We are going to," said Papp, noting that an Arctic Council task force has been developing a set of recommendations for member countries on curbing and tracking the sooty substance produced from the incomplete combustion of fossil fuels, biofuels and biomass.

It's a concern for the Arctic because dark ice and snow absorb more heat and melt more easily. The council task force recommendations -- which have not been formally released yet -- are expected to outline new reporting requirements for black carbon emissions, among other things.

"We are going to work very hard to implement those. ... We will work with our seven partners as well to get them to do the same ... to inventory those activities that produce black carbon ... and to show actionable progress throughout the time we have the chairmanship," Papp said at the center.

Navigating through a sea of issues

He added that the United States would also work to implement binding agreements put in place in the past three years among countries at the council about search-and-rescue and oil spill response, and push for completion and adoption of the polar code at the International Maritime Organization, a set of proposed mandatory rules for ships operating in polar regions to protect the environment and prevent Titanic-like disasters. Arctic countries should "take the lead in making sure the [polar code] standards are adopted within countries," he said.

The Arctic Council can be a wonky body, with terminology about monitoring assessments and working groups. Formed in 1996, it consists of eight Arctic nations -- Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States -- and permanent participants representing indigenous peoples including the Inuit Circumpolar Council and the Aleut International Association. In addition, there are several observer countries that can participate in meetings as well, including China and India.

While the council wields little direct power, it is a forum for countries to work out agreements among themselves, such as the legally binding pact signed in 2013 on oil spill response. It also is a venue for scientific reports, such as a 2013 assessment of ocean acidification in the Arctic.

For those reasons, the current themes from Papp and other U.S. officials on climate change could translate into significant results on the ground, according to some analysts.

That could be in simpler ways, such as providing a platform for scientists to develop protocols for measuring emissions from melting permafrost. Or it could be more formal agreements between nations on implementing provisions early from other international bodies, analysts say.

The proposed polar code at the International Maritime Organization, for example, is aimed at reducing environmental catastrophes and disasters in polar regions (*ClimateWire*, April 1). "There's nothing stopping the eight Arctic states from implementing the code early," said Rosenthal of Earthjustice.

The Arctic Council task force working on black carbon has been developing a framework for years, so the United States will be the first chairing country with an opportunity to implement the coming recommendations, Rosenthal said. While that may involve simple advocacy, it also provides the United States an opportunity to use existing laws for Arctic purposes.



Adm. Robert Papp. Photo courtesy of the Coast Guard.

As one example, the 2005 Diesel Emissions Reduction Act could be used via the annual appropriation process to provide Arctic-specific funds for weaning northern Arctic communities off diesel -- their main fuel source, and a contributor to black carbon, she said. The retrofit equipment to reduce diesel emissions is well-established, so it's a matter of will and money, she said.

"If the U.S. showed some leadership, they could give the idea to the other eight" Arctic countries, she said.

With methane, there could be a similar push perhaps leading to additional assessments and an eventual agreed-on pot of money for demonstration projects, to repair gas leaks and capture the fossil fuel.

Yesterday, the Clean Air Task Force released a report on leveraging the Arctic Council to make progress on black carbon and methane (*see related story*). While not directly responding to Papp's remarks, the group makes formal recommendations on how to use the council to curb short-lived climate pollutants that have a disproportionate impact on ice.

One of the key things the council could do is work with oil and gas companies operating in the Arctic to deploy best practices, said Lindsey Griffith, author of the report and consultant to the Clean Air Task Force.

"There's a lot of flaring that goes on in Russia that is regulated but not enforced," she said as one example. Similarly, existing programs in Alaska could be leveraged more to shift communities reliant on polluting diesel to renewables, Griffith said. Another idea would be to push the International Maritime Organization to prohibit heavy fuel use in the Arctic Ocean, she said.

Meeting includes largest emitters

Other analysts said one of the biggest opportunities for the United States may be simply using the bully pulpit of the chairmanship more, to educate the global community about basic facts on the Arctic, such as a 14 percent decline in Arctic summer sea ice per decade since the late 1970s. Also, there is disappointment among the six permanent participants at the council that it is not looking more at carbon dioxide reductions, said Whit Sheard, director of the International Arctic Program at the Ocean Conservancy.

The six participants are sending a rare letter to officials at the Yellowknife meeting this week to urge greater consideration of CO₂, considering that the world's largest emitters are in the same room at the council, said Sheard, who works with one of the participants, the Inuit Circumpolar Council. The inclusion two years ago of

observer nations like China provides a rare opportunity to hash out differences on CO2 in a smaller forum than the United Nations and then take some sort of agreement, or similar mindset, to international climate negotiations, Sheard said.

"I think there's just hope it can be a parallel process that moves this global process along a little faster because of having countries feeling the changes more rapidly in the room with the biggest emitters," he added.

However, the Arctic Council can be a slow forum, and there's no guarantee that what is presented this week at the meeting will eventually be the U.S. agenda. The climate change theme is not entirely new at the council, as Norway emphasized it during its chairmanship, noted Heather Conley, director of the Europe program at the Center for Strategic & International Studies.

"The problem is, it's really hard to provide really pragmatic policy deliverables with such an overarching theme. ... Climate change and the policies around climate change have different meanings to each of the eight Arctic members," she said.

For Ebinger, methane and CO2 emission reductions are noble goals but perhaps more appropriate topics for the United Nations, considering the range of countries contributing to greenhouse gases. He noted that when Brookings put together a recent Arctic report, there was a discussion about bringing regulators together to share ideas, but some countries viewed that as a violation of sovereignty.

Papp emphasized the need to implement the existing search-and-rescue and oil spill response agreements in his speeches, but there's a risk of trying to do too much and diverting attention away from those council agreements, according to Ebinger. In his view, there's also a risk of overreach with something like a fishing ban, considering it is unknown exactly how climate change is driving fish migrations.

The nightmare scenario for a lot of people remains a major cruise or shipping accident, and there's not appropriate equipment in place -- from helicopters to life rafts -- to control the situation, Ebinger said.

While the council agreements have been signed, there has been little movement on the ground, outside of divisions of which country is responsible for swaths of the Arctic Ocean when it comes to search-and-rescue operations. A better focus than climate change would be to add teeth and commit resources to what's already out there, according to Ebinger. That is especially so, he said, considering the high costs of equipment.

"There's just so many things that need to be done with emergency response that I think we would do better in our chairmanship to pay attention to, and really start lobbying the Congress that serious money has to be spent if we want to pretend we are remotely a major player in the Arctic," he said.

Christa Marshall, E&E reporter (October 10, 2014)

PIRACY

Recent Incidents of Piracy in South East Asia.

On May 27, 2014, a Thailand-registered product tanker, *Orapin 4* departed Singapore for Pontianak, Indonesia with 3,377 metric tons of Automotive Diesel Fuel on board. The tanker, along with the fuel and its fourteen member crew, never made it to their final destination.

The Maritime Executive – "Tanker Goes Missing off Indonesia, Suspected Hijack"

<http://www.maritime-executive.com/article/Tanker-Goes-Missing-off-Indonesia-Suspected-Hijack-2014-05-30>

Access Date: 10/11/14

Publication Date: 5/30/14

On June 7, 2014, a tanker traveling from Singapore to Labuan was robbed by six pirates seventy-eight miles off the Tanjung Batu Bintulu coast of Malaysia. The pirates restrained the twenty-two member crew and transferred petroleum off the *MT Budi Mesra Dua* to a waiting barge. The pirates released the captain and crew unharmed.

The Maritime Executive – "Another Tanker Robbed off Malaysia"

<http://www.maritime-executive.com/article/Another-Tanker-Robbed-off-Malaysia-2014-06-12>

Access Date: 10/11/14

Publication Date: 6/12/14

On June 14, 2014, pirates attacked the tanker *Ai Maru*, which was carrying marine fuel oil in the South China Sea approximately thirty nautical miles south of Pulau Aur, Johor, Malaysia. Upon learning of the attack, the Republic of Singapore Navy and the Royal Malaysian Navy deployed the patrol vessels *RJS Gallant* and *Terengganu KD*. Their presence thwarted the attack and scared off the pirates.

The Maritime Executive – "Pirates Scared Off in South China Sea"

<http://www.maritime-executive.com/article/Pirates-Scared-Off-in-South-China-Sea-2014-06-16>

Access Date: 10/11/14

Publication Date: 6/16/14

On July 4, 2014, the *Moresby 9*, a Honduras flagged product tanker went missing thirty-four nautical miles from Anambas Islands, Indonesia in the South China Sea. The tanker was carrying two thousand two hundred metric tonnes of MGO at the time it tanker was boarded. As the *Moresby 9* was the seventh known case of coastal tankers coming prey to hijacking for the cargo of diesel or gas oil in the area over the last three months, a concern has developed as to the abnormal and increasing trend of attacks within the region.

The Maritime Executive – "Product Tanker Attacked in South China Sea"

<http://www.maritime-executive.com/article/Product-Tanker-Attacked-in-South-China-Sea-2014-07-07>

Access Date: 10/11/14

Publication Date: 7/4/14

On October 2, 2014, a Vietnamese oil tanker, *The Sunrise 689*, vanished from radar one hundred and fifteen miles from Singapore in route to the Quang Tri province in central Vietnam. The tanker had a crew of 18 people and was carrying over 5,000 tonnes of fuel oil. According to the International Maritime Bureau, at least eleven vessels prior to *The Sunrise 689* have been hijacked in the Strait of Malacca or South China Sea since April.

The Maritime Executive – "Pirates Attack Tanker off Ivory Coast"

<http://www.maritime-executive.com/article/Update-Authorities-Search-for-Tanker-Amid-Hijack-Fears-2014-10-08>

Access Date: 10/11/14

Publication Date: 10/8/14

Recent Incidents of Piracy in the Horn of Africa

On June 28, 2014, the *TORM Sofia* successfully deterred a pirate attack in the Gulf of Aden through activation of the maritime industry's Best Management Practices for Protection against Somalia based Piracy ("BMP 4") program. The pirates abandoned their approach and the crew was unharmed during the thwarted piracy attempt.

The Maritime Executive – "TORM Tanker Deters Pirate Approach"

<http://www.maritime-executive.com/article/TORM-Tanker-Deters-Pirate-Approach-2014-06-30>

Access Date: 10/11/14

Publication Date: 6/30/14

Recent Incidents of Piracy in West Africa.

On August 9, 2014, a product tanker encountered pirates two hundred nautical miles of the Nigerian shoreline. The crew mustered in the tanker's safe room, and the pirates failed to board the vessel. The pirates could not keep up with the tanker, and eventually gave up pursuit. The attack suggested a higher level of intelligence regarding the vessel's movement representing a shift towards a more sophisticated piracy operation in the Gulf of Guinea involving scouts monitoring the departure and destination ports of a vessel to coordinate the attack when the vessel is most vulnerable. The pirates involved in this incident are still at large.

The Maritime Executive – "Product Tanker Ambushed in Gulf of Guinea"

<http://www.maritime-executive.com/article/Product-Tanker-Ambushed-in-Gulf-of-Guinea-2014-08-10>

Access Date: 10/11/14

Publication Date: 8/10/14

On August 27, 2014, armed pirates robbed a petroleum products tanker and held the crew hostage forty-five nautical miles off the Ivory Coast's port of Abidjan. Pirate attacks in Gulf of Guinea have almost doubled since last year, which has caused a significant increase in insurance costs for shipping companies. Despite the piracy risk, West Africa's Gulf of Guinea remains an important location in international shipping as it is significant source of the world market's oil, cocoa, and metals. Unlike the Horn of Africa, the regional waters off of Nigeria, Benin, Togo, Ghana and Ivory Coast are not patrolled by international navies engaging in counter-piracy missions.

The Maritime Executive – "Pirates Attack Tanker off Ivory Coast"

<http://www.maritime-executive.com/article/Pirates-Attack-Tanker-off-Ivory-Coast-2014-09-03>

Access Date: 10/11/14

Publication Date: 9/3/14

-Christine M. Walker

Fowler White Burnett P.A.

BSEE/BOEM

BSEE Conducts Unannounced Drill

BSEE conducted an unannounced drill involving Murphy Exploration and Production Company the week of July 25, 2014. The drill tested Murphy's ability to

respond to a simulated spill event in accordance with its Oil Spill Response Plan. (Bryant's Maritime Blog, July 28, 2014)

BSEE Conducts Review of Oil Spill Response Equipment

BSEE issued a press release on August 29, 2014 stating that its Oil Spill Response Division (OSRD) conducted an onsite review of oil spill response equipment listed in DCOR, LLC's Oil Spill Response Plan. OSRD routinely verifies equipment listed in operators' plans. This review involved verification of equipment and response vessels maintained by the Marine Spill Response Corporation. (Bryant's Maritime Blog, September 2, 2014)

BSEE & USCG – MOA re fixed OCS facilities

The Bureau of Safety and Environmental Enforcement (BSEE) issued a [press release](http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2014/BSEE-and-Coast-Guard-Sign-Memorandum-of-Agreement-for-Regulating-Fixed-Outer-Continental-Shelf-Facilities/) [found at <http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2014/BSEE-and-Coast-Guard-Sign-Memorandum-of-Agreement-for-Regulating-Fixed-Outer-Continental-Shelf-Facilities/>] stating that a [Memorandum of Agreement](http://www.bsee.gov/uploadedFiles/BSEE/Newsroom/Publications_Library/MOA-OCS-09Signed19Sep2014.pdf) [found at http://www.bsee.gov/uploadedFiles/BSEE/Newsroom/Publications_Library/MOA-OCS-09Signed19Sep2014.pdf] has been signed with the US Coast Guard for regulating fixed outer continental shelf (OCS) facilities. (Bryant's Maritime Blog – September 19, 2014).

BSEE and USCG Issue DP Safety Alert

BSEE and the U.S. Coast Guard issued a Safety Alert on May 20, 2014 notifying owners and operators of vessels using dynamic positioning ("DP") of recent system failures resulting in a loss of position while conducting critical Outer Continental Shelf (OCS) activities. BSEE strongly recommended that leaseholders/operators consider Coast Guard recommendations for DP vessels when evaluating potential hazards and implementing contractor safe work practices. Coast Guard recommendations include ensuring a defined Critical Activity Mode of Operation (CAMO), proper equipment inspection, repair, and maintenance, and a structured competence assurance program, among others.

*Dana Merkel
Blank Rome LLP*

BOEM – Atlantic OCS G&G activities

The Bureau of Ocean Energy Management (BOEM) issued the official notice of availability of a [Record of Decision](#) (ROD) for the Atlantic outer continental shelf

(OCS) Proposed Geological and Geophysical Activities Mid-Atlantic and South Atlantic Planning Areas, Final Programmatic Environmental Impact Statement (PEIS). [79 Fed. Reg. 42815](#) (Bryant's Maritime Blog - July 23, 2014).

BOEM – Risk Management, Financial Assurance & Loss Prevention

The Bureau of Ocean Energy Management (BOEM) is extending, through 17 November, the period within which to submit comments on its advance notice of proposed rulemaking regarding risk management, financial assurance & loss prevention associated with industry activities on the US outer continental shelf (OCS). [79 Fed. Reg. 61041](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-09/pdf/2014-24165.pdf>] (Bryant's Maritime Blog October 9, 2014).

US DOJ

The Department of Justice (DOJ) issued a news release stating that Arab Ship Management Ltd, a ship management company based in Jordan, pleaded guilty in federal court to violating the Act to Prevent Pollution from Ships and to pay a criminal penalty of \$500,000. An illegal piping arrangement for overboard discharges was found on the livestock carrier vessel Neameh and the vessel's oil record book had various discrepancies. [Bryant's Maritime Blog May 21, 2014]

*-Adelaida J. Ferchmin
Chaffe McCall LLP*

USCG ENVIRONMENTAL

Liability Limit Increases – CPI

The US Coast Guard proposes to increase the limits of liability under the Oil Pollution Act of 1990 (OPA 90) to reflect increases in the Consumer Price Index. The liability limits for most covered entities is to be increased by about 9%, but the limit for offshore facilities is to be increased by 78%. Language is also proposed to clarify applicability of OPA 90 limits of liability to edible oil cargo tank vessels and to tank vessels designated as oil spill response vessels. Comments should be submitted by October 20. [79 Fed. Reg. 49205](#) (August 19, 2014). [Bryant's Maritime Blog August 19, 2014].

Reporting Pollutants

The US Coast Guard issued a news release [found at <http://www.uscgnews.com/go/doc/4007/2242262/>] stating that an oil spill reported in Buzzards Bay turned out to be a large concentration of jelly fish. Nonetheless, the Coast Guard emphasized the importance of reporting all suspected environmental pollution even if it later turns out to be a false alarm. [Bryant's Maritime Blog 9/16/14].

[Bryant's Maritime Blog October 10, 2014 citing to AMSB No: 001-14 dated 10/6/14].

USCG – Oil Record Book

The US Coast Guard is revising its Oil Record Book (ORB) to conform to the latest MARPOL Annex I amendments. It has posted a [draft ORB](#) [found at <http://www.regulations.gov/#!documentDetail;D=USCG-2010-0194-0015>], but this version has not been finalized. In the meantime, the Coast Guard has issued a [letter](#) [found at http://www.uscg.mil/hq/cgcv/cvc/marpol/sdoc/Serial756-Continued_use_of_the_2007_Oil_Record_Book-CG-4602A-Rev_01-07.pdf] to vessel masters and chief engineers regarding the continued use of the 2007 ORB. Additional guidance may be found in [MEPC.1/Circ.736/Rev.2](#) [found at http://www.uscg.mil/hq/cgcv/cvc/marpol/sdoc/MEPC_1_Circ_736_rev_2.pdf]. (9/24/14).

-Adelaida J. Ferchmin
Chaffe McCall LLP

Great Lakes – Dry Cargo Residue Discharges

The US Coast Guard issued a notice stating that the Office of Management and Budget (OMB) has approved the information collection request associated with the 31 January 2014 regulation concerning the discharge of bulk dry cargo residue in US waters of the Great Lakes. [79 Fed. Reg. 54907](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-15/pdf/2014-21893.pdf>] (Bryant's Maritime Blog - September 15, 2014). *Note: In other words, the Coast Guard can now enforce those recordkeeping requirements contained in its earlier rulemaking.*

NRDA

NOAA – Indirect Cost Rates

The National Oceanic and Atmospheric Administration (NOAA) issued a notice announcing its new indirect cost rates on the recovery of indirect costs for its component

organizations involved in natural resource damage assessment and restoration activities for FY 2013. [79 Fed. Reg. 61617](#) [found at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-14/pdf/2014-24112.pdf>] (Bryant's Maritime Blog - 10/14/14).

OIL SPILL LIABILITY TRUST FUND

Court – Spill Responders' Right to OSLTF Compensation

The US Court of Appeals for the Fifth Circuit ruled that the Oil Pollution Act of 1990 (OPA 90) provides the exclusive source of law for an action involving a responsible party's liability for removal costs governed by OPA. In the instant case, defendant barge owner was determined to be a responsible party with regard to the release of oil from the barge DM 932 following a collision with the MV Tintomara in the Mississippi River on 23 July 2008. When the defendant did not fully pay the claims of third party defendant spill responders within the required 90 days, they sought and obtained payment from the Oil Spill Liability Trust Fund (OSLTF), which then brought suit against defendant to recover the amounts paid. Defendant contended that the spill responders failed to provide adequate documentation for the amounts billed to and paid out of the OSLTF. The court held that the responsible party does not have a cause of action against spill responders who exercised their statutory right to file claims with the OSLTF after the responsible party failed to timely pay their claims. [US v American Commercial Lines](#), No. 13-30358 (Bryant's Maritime Blog - 5th Cir., July 16, 2014).

TEXAS CITY Y SPILL UPDATES

The Texas General Land Office (GLO) posted the June 2014 edition of [The Responder](#) newsletter. This edition has articles regarding the Texas City Y oil spill. (Bryant's Maritime Blog – June 23, 2014).

OPA PRESENTMENT

Commercial clammer brought putative class action on behalf of all members of the Boston Clamdiggers Association against the Massachusetts Port Authority and Swissport Fueling, Inc. alleging that as a result of a fuel spill which occurred at Boston Logan International Airport, several productive and profitable clam beds adjacent to the airport were severely impacted. The clammers alleged negligence under general maritime law and also sought recovery of damages pursuant to the Oil Pollution Act of 1990. Defendants filed a motions to dismiss all claims.

The Court held that it lacked jurisdiction to hear the general maritime claim because the action of the tortfeasor -- the fueling of jet aircraft adjacent to navigable waters, is not a traditional maritime activity. The Court discussed the evolution of the test for admiralty jurisdiction and also admiralty jurisdiction as applied to aviation activities. The Court cited to the Supreme Court decision in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.*, which held that the focus of the test for traditional maritime activity is on the activity of the tortfeasor, not the activities of the injured party. The Court concluded that fueling an aircraft is not a traditional maritime activity, therefore admiralty jurisdiction was not present.

OPA's presentment provision provides, that unless an exception applies, a claimant must present his claims to the Responsible Party and may only bring suit after, either the Responsible party denies liability, or the claim is not paid within ninety days from presentment. Notably, the presentment requirement is independent of OPA's three year statute of limitations provision. In order to satisfy both the presentment requirement and the statute's time bar, the claimant must present his claim to the Responsible Party at least ninety days before the end of the three year statute of limitations period.

The Clammers found themselves wedged between a clam bed and a hard spot. The Defendants were not designated as the Responsible Party until fifty-five days before the end of the three year statute of limitations. The Clammers could not have met both the threshold requirement of presentment, and filed their suit before the OPA three year statute of limitations had run. The Court looked to the plain meaning of OPA and determined that the best course of action would be to stay the OPA action for ninety days before permitting the suit to proceed. (*Denehy v. Mass. Port Authority & Swissport Fueling, Inc.*, 2014 U.S. Dist. Lexis 124627 (U.S. Dist. MA., September 5, 2014)).

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