

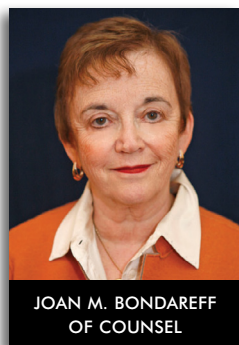


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Whither Offshore Wind?

BY JOAN M. BONDAREFF



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In November 2010, Interior Secretary Ken Salazar rolled out the Administration's "Smart from the Start" Program to develop wind off the Eastern Seaboard of the United States. Nearly two years later, on October 23, 2012, Interior awarded the first lease under the Program to NRG Bluewater Wind Delaware LLC for a lease off the coast of Delaware. Slow but steady progress is being made under the Program.

Whether this progress will continue depends, in part, on whether the Production Tax Credit (PTC), which supports all wind projects in the U.S., is renewed. The PTC expires at the end of this year.

This article briefly describes the status of the federal leasing program and adjacent state activities. Unlike the oil and gas program, where lessees know that refineries will purchase the oil they find, offshore wind developers are left largely to their own devices to identify the companies who will purchase their resource. The lack of extensive coordination between state and federal laws and policies has been one factor that has stymied the development of offshore wind. The other is the price point at which offshore wind can be delivered compared to the decreasing cost of natural gas.

Two recent studies have once again touted the potential benefits of offshore wind. A report prepared by IHS Global Insight for the Atlantic Wind Connection (the developer of the backbone to connect all offshore wind farms with one transmission link), and released at the October 9 American Wind Energy Association's (AWEA) Conference in Virginia Beach, Virginia, predicted that developing 7 GW of wind off the Atlantic coast would lead to: 1) a total of 173,000 new jobs; and 2) an increase of \$4.6 billion in federal, state, and local government

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revenues. A similar and recent report prepared by the National Wildlife Federation (NWF) confirmed that we are at a "Turning Point for Atlantic Offshore Wind Energy." The NWF report concluded that developing offshore wind (52 GW) could generate \$200 billion in new economic activity, create 300,000 jobs, and sustain power for about 14 million homes while still protecting marine wildlife. Whichever study you rely on, the potential for renewable energy and job creation is great.

Authority for offshore wind leasing beyond state waters is in the hands of the Bureau of Ocean Energy Management (BOEM) of the Department of the Interior. However, BOEM cannot dictate to states and consumers whether to accept or buy the power generated by the wind farms. This is left strictly in state hands. And the policies for purchasing and encouraging offshore wind have varied greatly among the Atlantic States.

Following is an update on what each state is doing and the related federal leasing program adjacent to each state, beginning with Maine and proceeding to South Carolina.¹ The update begins to tell the story of how important it is for the U.S.

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to have a single coordinated policy for federal leasing and state offtake (or power purchase) agreements if wind development in the U.S. is to catch up with that in Europe.

Maine

BOEM has issued a notice of intent to lease offshore Maine and conducted two information sessions in Maine on October 23 and 24, 2012 to explain the next step in the leasing process. Statoil North America, Inc. (Statoil) submitted an unsolicited proposal to BOEM in October 2011 for a commercial lease. Recently, the Maine Public Utility Commission (PUC) rejected a proposed term sheet from Statoil for utilities to purchase power from the wind farm because of the high costs. However, the PUC will reconsider the proposal if Statoil improves its offer.

Massachusetts

In May 2012, BOEM announced the Wind Energy Area (WEA) to be developed off the coast of Massachusetts and adjacent to Rhode Island. Ten developers expressed an interest in building farms off the coast of Massachusetts. On November 2, 2012, BOEM released its draft Environmental Assessment for the Massachusetts WEA, which will be located some fourteen miles south of Martha's Vineyard. This location may avoid the view shed issues that plagued the Cape Wind project for so long.

In the meantime, the long-planned and controversial Cape Wind project, which began in 2001, has completed its significant permitting hurdles. In August, Cape Wind received its final permit when the Federal Aviation Administration (FAA) determined that the project would not pose a hazard to navigation. Interior had previously awarded a lease to the project consisting



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Note from the Editor

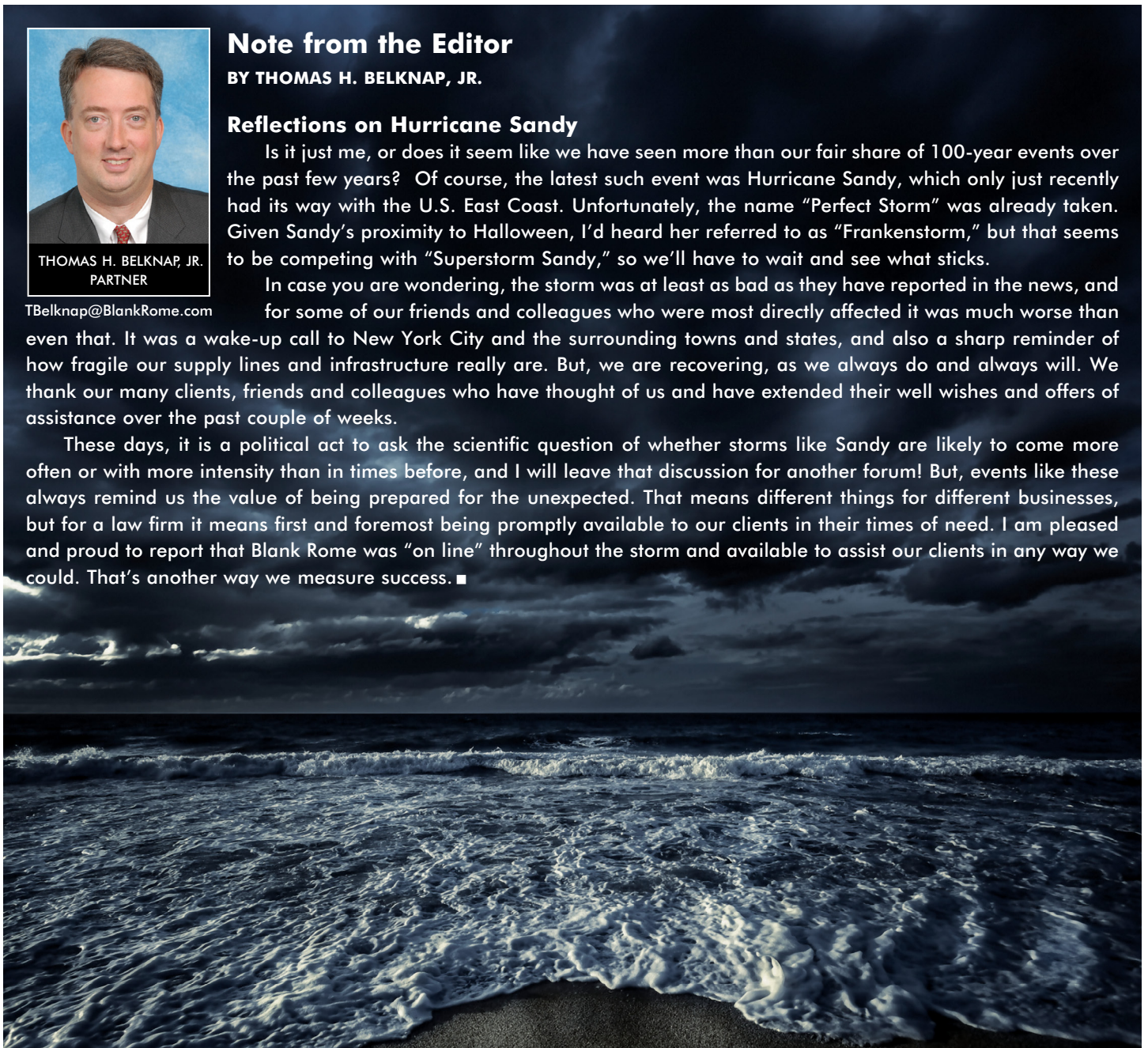
BY THOMAS H. BELKNAP, JR.

Reflections on Hurricane Sandy

Is it just me, or does it seem like we have seen more than our fair share of 100-year events over the past few years? Of course, the latest such event was Hurricane Sandy, which only just recently had its way with the U.S. East Coast. Unfortunately, the name "Perfect Storm" was already taken. Given Sandy's proximity to Halloween, I'd heard her referred to as "Frankenstorm," but that seems to be competing with "Superstorm Sandy," so we'll have to wait and see what sticks.

In case you are wondering, the storm was at least as bad as they have reported in the news, and for some of our friends and colleagues who were most directly affected it was much worse than even that. It was a wake-up call to New York City and the surrounding towns and states, and also a sharp reminder of how fragile our supply lines and infrastructure really are. But, we are recovering, as we always do and always will. We thank our many clients, friends and colleagues who have thought of us and have extended their well wishes and offers of assistance over the past couple of weeks.

These days, it is a political act to ask the scientific question of whether storms like Sandy are likely to come more often or with more intensity than in times before, and I will leave that discussion for another forum! But, events like these always remind us the value of being prepared for the unexpected. That means different things for different businesses, but for a law firm it means first and foremost being promptly available to our clients in their times of need. I am pleased and proud to report that Blank Rome was "on line" throughout the storm and available to assist our clients in any way we could. That's another way we measure success. ■



of a 130-turbine, 486 MW farm in Nantucket Sound. Cape Wind aims to complete financing for its wind farm in 2013, begin cable work in 2013, and start construction in 2014. Cape Wind signed a 15-year contract with NSTAR Electric for 129 MW of the project and has a contract with National Grid for 50% of its output.

Rhode Island

BOEM identified the WEA off the coast of Rhode Island earlier this year, received eight expressions of interest, and has conducted an Environmental Assessment (EA) for both Massachusetts and Rhode Island.

In the meantime, Deepwater Wind has proposed a small wind farm to be built three miles southeast of Block Island consisting of five turbines. The wind farm is expected to generate 125,000 MW hours annually and supply the power needs of the majority of the residents of Block Island. Excess power will be shipped to the mainland via the bi-directional Block Island Transmission System. In August 2010, the Public Utilities Commission agreed to a 20-year Power Purchase Agreement (PPA) with National Grid to buy energy from Deepwater at 24.4.cents/kWh for the first year, with 3.5% annual increases. Deepwater Wind plans to begin construction as early as 2014. On October 2, 2012, Deepwater Wind announced that it had submitted its final state and federal permit applications for the project. Permits are required from BOEM, the U.S. Army Corps of Engineers, and the Rhode Island Coastal Resources Management Council for this project intersecting state and federal waters. This pilot project could be the first operating wind farm off the Atlantic Coast if Cape Wind doesn't beat them to the punch.

New York

BOEM launched a Task Force for New York in 2010 and is holding public meetings in the State. In September 2011, a lease application was filed for the Long Island-New York City Offshore Wind Project, a 350-700 MW project off the Rockaway Peninsula. This Project is a collaboration of the New York Power Authority, Consolidated Edison of New York, and the Long Island Power Authority. Deepwater Wind has also proposed two projects in and around New York. One is a project to sell power to the Long Island Power Authority from a 150-wind turbine project in Rhode Island Sound that would be connected by a transmission line to Long Island. The other is a proposal to sell power from a 1,000 MW wind farm off of New York City south of Long Beach Island into the New York power grid.

New Jersey

Governor Christie has been a supporter of offshore wind but the State Board of Public Utilities (BPU) has yet to issue final regulations for a financing mechanism called ORECs or Ocean Renewable Energy Certificates that would allow offshore wind developers to sell their wind into the New Jersey marketplace at a higher price provided the benefits outweigh the costs. In August 2012, the BPU issued proposed final rules governing the OREC process and the comment period closed on October

20, 2012. In the meantime, BOEM identified the WEA for New Jersey, completed its EA for the lease sale, and received eleven expressions of interest from developers. Leases could be issued in early 2013.

A separate wind project has been proposed by Fishermen's Energy. Fishermen's has proposed a 25 MW, five-turbine pilot project located 2.8 miles off Atlantic City, i.e., in state waters. The U.S. Army Corps of Engineers has issued a construction permit for the near-shore project but the BPU has delayed approval of the project until the company proves that it can deliver a net economic benefit to the State.

Delaware

BOEM identified a 122 sq.mi. WEA off of Delaware, finalized its EA, and announced, in April 2012, that NRG Bluewater Wind was the only qualified company interested in the DE WEA so there was no competitive interest in the site. NRG Bluewater had proposed a 200 MW wind farm thirteen miles off the Delaware Coast and had secured a PPA with Delmarva Power. In December 2011, the project was put on hold when the PPA was terminated due to lack of financing for the project. But, on October 23, 2012, BOEM awarded the lease to NRG Bluewater. Whether NRG Bluewater holds the lease or sells it to another developer remains to be seen. Regulated utilities in Delaware can receive 3.5 Renewable Energy Credits for each MW of offshore wind energy purchased from a project sited off the Delaware coast before May 31, 2017.

Maryland

BOEM has identified a WEA for Maryland covering about 79,000 acres and located 10 miles from Ocean City, Maryland. BOEM has completed its EA for Maryland and has received six expressions of interest from developers for the Maryland WEA. Maryland has a renewable portfolio standard requiring that 20% of the State's electricity be generated by renewable sources by 2022. In addition, Governor O'Malley has proposed legislation, the Maryland Offshore Wind Energy Act of 2012 (HB 441), to encourage the development of 200 MW of offshore wind energy off the Eastern Shore. The bill required utilities to source 2.5% of their electricity from offshore wind, starting in 2017. Utilities could satisfy the standard by buying offshore wind renewable energy credits from developers or developing qualifying projects themselves. The House amended the bill to cap cost increases at \$1.50 per month for residential customers, but it stalled in the Senate Finance Committee. Governor O'Malley has another year in his term to try and get this bill passed.

Virginia

On February 3, 2012, BOEM identified the Virginia WEA and issued the Call for Interest in leases off Virginia. Eight companies responded with expressions of interest. In 2012, BOEM finished its EA for the entire Mid-Atlantic WEA (including Virginia, Maryland, Delaware, and New Jersey) and found

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no significant environmental impacts from the first step in the process of conducting site assessments. BOEM has tentatively decided to award the entire Virginia WEA, consisting of approximately 113,000 acres, to one developer for ease of leasing. In 2010, Governor McDonnell established the Virginia Offshore Wind Development Authority to promote offshore wind and bring high-tech jobs to the Commonwealth. The State also has a voluntary goal of generating 15% of its electricity from renewable energy sources by 2025. A final sale notice for the Virginia WEA lease could be issued by BOEM before the end of the year.

North Carolina

BOEM has conducted a series of Task Force meetings in North Carolina and is in the process of identifying the WEA for North Carolina. North Carolina has a requirement that utilities generate 12.5% of their electricity from renewable energy sources by 2021.

South Carolina

The BOEM South Carolina Task Force was launched in 2012, but there is no designated WEA for South Carolina yet. A 2008 study prepared for the General Assembly recommended that the State establish a policy to support 1,000 MW of offshore wind by 2018, create a state renewable energy standard, a state leasing process, and a one-stop shop to coordinate developers' permitting and regulatory needs.

Atlantic Wind Connection

Bringing the wind power to shore presents its own challenges. Some developers, especially utilities with power stations located close to shore, are proposing direct transmission cables between the offshore wind farms and the local power stations. In contrast, the Atlantic Wind Connection (AWC), a consortium of Trans-Elect and Atlantic Grid Development, sponsored by Good Energies, Google, and Marubeni Corporation, has proposed to construct a single transmission line or backbone to connect all of the offshore wind farms and bring up to 7,000 MW of offshore wind into the electric grid. AWC estimates their link will enable the supply of power to 1.9 million households. In May of this year, BOEM found there was no competitive interest in such a backbone and has begun an environmental

review of the project. The backbone also has to be permitted by the Federal Energy Regulatory Commission (FERC).

Other Federal Permitting Issues Remain

While BOEM is the principal federal leasing authority for offshore wind on the outer continental shelf of the U.S., other agencies may weigh in with regard to their specific concerns, e.g., shipping, wildlife protection, aviation, etc. For instance, a year ago the Coast Guard began a Port Access Routes Study to identify potential conflicts between offshore wind development and shipping lanes, but has not completed it. The

Department of Defense has reserved the final say on whether offshore wind farms interfere with their missions especially off the coast of Virginia. None of these issues will be resolved until the final leases are awarded and specific terms incorporated.

Conclusions

This year and next are critical years for the development of offshore wind farms. As the recent studies indicate, the potential for offshore wind and its attendant job creation, including for new construction of offshore supply vessels, is huge. But, the threat of changing policies and lack of a level playing field with other sources of energy makes it challenging to compete. The possible end of the PTC this year also does not bode well for this

renewable energy source. As detailed above, the development of offshore wind, and attendant transmission lines, entails a complicated multi-tier, multi-step process of federal leasing and permitting, on the one hand, and state energy policies and incentives on the other. There is no single one-stop shop of federal permitting and financial incentives that crosses state lines and simplifies the application and approval process. Only the well-heeled developer can afford to pursue the process to completion, and only the patient consumer can expect one day to benefit from this clean source of abundant energy off our Eastern Seaboard. ■

1. The information in this article is derived from the NWF report, referenced above, the BOEM website, www.boem.gov, and the Annual Report of the Virginia Offshore Wind Development Authority.



Marine Casualty Investigations: Problems and Pitfalls

BY JEFFREY S. MOLLER



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When a vessel-related accident occurs on the navigable waters of the United States, the investigation machinery starts up almost immediately. The operator, owner, or person in charge of a vessel involved in such a casualty is obliged to give the soonest practicable notification, often followed by a written report, to the local Coast Guard Sector or office. This begins a process in which livelihoods, liberty, and civil liability might all be at stake. Careful thought is required when the Coast Guard investigating officer calls to request an interview.

The requirements to notify the Coast Guard of the occurrence of an incident are laid out in Subpart 4 of Title 46 of the Code of Federal Regulations. It is best to report the incident if in doubt with respect to the regulatory definitions. For example, the federal regulations require reporting a casualty resulting in property damage in excess of \$25,000. (46 CFR 4.05-2(a)7). Unless little more than scratching of paint occurred, it would be wise to immediately notify the Coast Guard rather than wait for the estimate of a marine surveyor. Giving the Coast Guard an immediate notification of the basic facts of the occurrence and the extent to which the marine environment or personnel remain at risk is the best policy. There is little if any downside to simply reporting the incident, except perhaps some amount of operational delay. Even if a written CG-2692 needs to be submitted, there is no need to give a detailed self-incriminating statement. And, except to the extent that the vessel owner determines that people directly involved in the incident had used alcohol or drugs, there is no binding requirement to make any admission or to draw any conclusions as to fault for the accident.

Once the Coast Guard's investigation begins, however, the decision as to whether or not to give a full statement is not so simple. Traditional wisdom had been that refusing to cooperate with the Coast Guard would be tantamount to an admission of fault and that the best way to convince the Coast Guard that the mariner's actions were reasonable and lawful would be to accept the opportunity to tell his or her side of the story. This instinct is strongest in a situation where the Coast Guard is investigating the matter informally, because the investigating officer will often have interviewed other witnesses or interested parties without allowing the mariner or his/her counsel an opportunity to participate. The inclination in those circumstances would be to give the Coast Guard a full statement because of the need to rebut statements made by others, which presumably pointed the finger at the mariner.

At the root of the traditional wisdom was the Coast Guard regulation stating that the purpose of the investigation is not to

affix criminal or civil liability, but to merely ascertain the cause of the incident in order to prevent future occurrence. (46 CFR 4.07-1(b)). The regulations also contain a form of limitation with respect to the admissibility of the mariner's statement: "In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation...may be used against that person in a [license suspension and revocation] proceeding, except for impeachment". (46 CFR 5.101(d)). This provision seems to assure mariners that their statements would not come back to haunt them in subsequent proceedings against their licenses. It was also thought that cooperation with the Coast Guard is relatively harmless because the final report of the Coast Guard's investigation cannot be used in a civil lawsuit to affix liability. (46 USC §6308; but see L. Lambert, *The Use of Coast Guard Casualty Investigation Reports in Civil Litigation*, 34 J. Mar. L. Comm. 75 (2003)).

The protections that these regulations and statutes seem to afford are flimsy, however. First of all, neither of these protections comes into play if evidence of criminal behavior is uncovered. The Coast Guard is duty-bound to notify the local U.S. Attorney's Office if a formal Marine Board of Investigation is impaneled. Moreover, the Coast Guard is legally required to present any evidence of criminal conduct uncovered in its investigation to the U.S. Attorney General. Therefore, even if a statement made to the Coast Guard might not be directly useable as evidence in a suspension and revocation proceeding or as evidence in a civil trial, such statements or evidence might be directly used in a criminal prosecution. Coast Guard investigating officers are fully familiar with the Miranda rule, but an investigation interview setting would not be considered to be an arrest or apprehension situation such as to make the Miranda warning necessary.

And one should not underestimate the imagination or willingness of the U.S. Attorney General or the local U.S. Attorney's Office to craft a criminal indictment out of the facts of a marine casualty. Certainly when a death occurs, the federal law known as the "Seaman's Manslaughter" statute (18 USC §1115) can come into play because a conviction requires proof of only simple negligence, rather than intent or recklessness.

Oil pollution incidents can readily lead to federal criminal indictments, also. An oil pollution incident is likely to be well publicized, which will bring pressure upon the U.S. Attorney to take action. The Migratory Bird Treaty Act, passed almost 100 years ago in order to prevent hunting, has been used in one oil spill case after another against the individual mariners or their employers because the statute requires only a showing of the killing of a bird without proof of intent or even negligence. (16 USC §703). Even in the "run-of-the-mill" collision, allision, or personal injury case, the operator or person in charge of the vessel could potentially be subject to criminal punishment. Title 46 of the United States Code contains a provision that makes it a Class A misdemeanor to "operate a vessel in a

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grossly negligent manner that endangers the life, limb or property of a person.” (46 U.S.C. § 2302(b)).

The line of separation between gross negligence and simple negligence is a matter of degree and is not always easy to define. Ultimately, it could be left to a jury to decide whether or not the mariner’s behavior was so negligent as to constitute the “willful, wanton disregard of a known risk”. Therefore, the possibility always exists that a statement voluntarily made to the Coast Guard could be used in a criminal trial.

This is not the only potential pitfall associated with cooperating in an investigation, however. The regulation that bars the use of admissions in a suspension and revocation hearing contains an exception for purposes of “impeachment.” If the mariner decides to make a statement to the Coast Guard but then changes his/her story in front of the presiding Administrative Law Judge (ALJ), the Coast Guard will be able to point out the inconsistency of a statement made during the investigation. Moreover, the word “admission” is subject to a narrow definition. The Coast Guard could well argue that a statement with respect to the facts of the event is not necessarily a direct admission of fault and therefore can be utilized as evidence. The mariner may not have directly admitted fault for the casualty, but that will not stop the Coast Guard from arguing that the facts of the event, as evidenced by the mariner’s own statement, should lead the ALJ to conclude that the mariner was negligent.

Any statements made to an investigating officer, whether amounting to an admission or not, can be used to assess liability for civil penalties. The federal statutes allow for imposition of a civil penalty of \$5,000 for every proven breach of the Inland Navigational Rules (33 USC §2072 (a)) and \$25,000 for every instance of negligent navigation (46 USC §2302(a)). There is nothing in the law or the regulations to prevent the Coast Guard from using any statement given in an interview to support its assessment of those civil penalties.

Finally, there are certain licensed mariners, specifically state-licensed pilots, who might not worry about their licenses in the context of a Coast Guard investigation. If the pilot was operating under the authority of his state license rather than his federal license at the time of the incident, the Coast Guard cannot suspend or revoke his federal license. However, there is no specific regulation or statute that prohibits Coast Guard cooperation with state licensing authorities. In other words, any statement made to the Coast Guard could very well be transmitted to the state licensing authority. The administrative procedures in place under state law would then be the only possible protection from the use of those statements by the Board of Pilot Commissioners to suspend or revoke the pilot’s license.

All of the above having been said, the decision whether or not to cooperate with the Coast Guard should be made on a case-by-case basis. There may very well be instances in which



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a full exposition by the mariner may convince the Coast Guard that no further inquiry or investigation is needed and/or that no negligence or breach of the rules of the road took place. Being human, Coast Guard investigating officers and their superiors in the chain of command may be highly suspicious of a mariner who absolutely refuses to cooperate. But the mariner's decision must be made with the presumption in mind that any statement given to the Coast Guard will be fully admissible in suspension and revocation hearings, civil penalty hearings, and criminal trials. ■

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Just When You Thought You Fully Understood MARPOL Annex V Garbage Regulations

BY JONATHAN K. WALDRON AND DANA S. MERKEL



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For years, the focus with regard to MARPOL Annex V has been the continued expansion of special areas and stricter enforcement. Recent media coverage and attention at the International Maritime Organization (IMO) has been on greenhouse gas issues, emission control areas, and ballast water. However, the Marine Environment Protection Committee (MEPC) has been quietly working on sweeping revisions to MARPOL Annex V garbage requirements. In short, the new regulations reverse the presumption that garbage may generally be discharged within certain parameters and severely limit the types of garbage that can be discharged.

There has been little official notification of these sweeping changes, but these new requirements are almost upon us and go into effect on January 1, 2013. The new regulations were approved by MEPC at its 62nd session in July 2011 and impose stricter garbage management procedures and documentation requirements for all vessels and fixed and floating platforms. The revised MARPOL Annex V, contained in MEPC.201(62), is available on the IMO's website for MEPC's, 55th session at www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Documents/201%2862%29.pdf.



As noted above, the most significant change in the new regulations is its general approach to garbage management. Under the current regulations, discharge of garbage into the sea was generally allowed unless specifically prohibited or limited. This concept is reversed in the new regulations, which impose a general prohibition on the discharge of all garbage unless the discharge is expressly provided for under the regulations.

To aid in identifying the categories of garbage that may be discharged, the new regulations include a host of new definitions, such as for "animal carcasses," "cargo residues," "cooking oil," "domestic wastes," "fishing gear," "food wastes," "incinerator ashes," and "operational wastes." The new regulations allow the limited discharge of only four of these categories: food waste, cargo residues and certain operational wastes not harmful to the marine environment, and carcasses of animals carried as cargo. Combined with the general prohibition on the discharge of garbage outside these limited categories, the new regulations greatly reduce the amount of garbage that vessels will be able to dispose of at sea. Rather than reinvent the wheel, the chart on page 8 is a summary of the new discharge provisions that IMO posted on its website.

Any garbage permitted to be disposed of at sea must be discharged while the vessel is "en route." Per the definitions, "en route" means that "the ship is underway at sea on a course or courses, including deviation from the shortest direct route, which as far as practicable for navigational purposes, will cause any discharge to be spread over as great an area of the sea as is reasonable and practicable."

Stricter regulations will pose a number of operational challenges. The increase in the quantity of garbage required to be retained onboard and disposed of ashore is likely to create

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TYPE OF GARBAGE	SHIPS OUTSIDE SPECIAL AREAS	SHIPS WITHIN SPECIAL AREAS	OFFSHORE PLATFORMS (MORE THAN 12 NM FROM LAND) AND ALL SHIPS WITHIN 500 M OF SUCH PLATFORMS
Food waste comminuted or ground	Discharge permitted ≥ 3 nm from the nearest land, en route and as far as practicable	Discharge permitted ≥ 12 nm from the nearest land, en route and as far as practicable	Discharge permitted
Food waste not comminuted or ground	Discharge permitted ≥ 12 nm from the nearest land, en route and as far as practicable	Discharge prohibited	Discharge prohibited
Cargo residues ¹ not contained in wash water		Discharge prohibited	Discharge prohibited
Cargo residues ¹ contained in wash water	Discharge permitted ≥ 12 nm from the nearest land, en route and as far as practicable	Discharge permitted ≥ 12 nm from the nearest land, en route, and as far as practicable and subject to two additional conditions ²	Discharge prohibited
Cleaning agents and additives ¹ contained in cargo hold wash water	Discharge permitted	Discharge permitted ≥ 12 nm from the nearest land, en route, as far as practicable and subject to two additional conditions ²	Discharge prohibited
Cleaning agents and additives ¹ in deck and external surfaces wash water		Discharge permitted	Discharge prohibited
Carcasses of animals carried on board as cargo and which died during the voyage	Discharge permitted as far from the nearest land as possible and en route	Discharge prohibited	Discharge prohibited
All other garbage including plastics, synthetic ropes, fishing gear, plastic garbage bags, incinerator ashes, clinkers, cooking oil, floating dunnage, lining and packing materials, paper, rags, glass, metal, bottles, crockery and similar refuse	Discharge prohibited	Discharge prohibited	Discharge prohibited
Mixed garbage	When garbage is mixed with or contaminated by other substances prohibited from discharge or having different discharge requirements, the more stringent requirements shall apply		

1. These substances must not be harmful to the marine environment.

2. According to regulation 6.1.2 of MARPOL Annex V, the discharge shall only be allowed if: (a) both the port of departure and the next port of destination are within the special area and the ship will not transit outside the special area between these ports (regulation 6.1.2.2); and (b) if no adequate reception facilities are available at those ports (regulation 6.1.2.3).

*Chart courtesy of IMO website.

Just When You Thought You Fully Understood MARPOL (continued from page 7)

a host of logistical problems for vessels and port authorities with regard to storage, equipment, and sanitation. Indeed, many existing ships will not be able to handle the amount of garbage requiring storage or incineration, and many port authorities will not be able to handle the larger amounts of garbage without substantial investment and planning. Vessels will incur higher port garbage service charges, which will have to be taken into account in chartering agreements. In addition, greater limitations on the discharge of cargo residue and wash water will affect if, how, and where the cleaning of holds and external surfaces may be conducted. For example, any cleaning agents used to wash exterior surfaces may be discharged only outside special areas and the vessel must have evidence

from the producer of the product that it meets certain criteria for not being harmful to the marine environment.

The new regulations also expand documentation requirements for vessels and offshore platforms. Garbage management plans must be revised to reflect the new regulations. The IMO published guidelines for the drafting of new garbage management plans, MEPC.220(63), available at www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Documents/220%2863%29.pdf, which outlines items that should be covered by the plans. The requirement to have a garbage management plan is expanded to include all vessels of 100 gross tons or greater, whereas under the current regulations garbage management plans are required for vessels 400 gross

tons or greater. Fixed and floating platforms must also have a garbage management plan under the new regulations. In addition, the Garbage Record Book on all vessels must be replaced. The new version of the Garbage Record Book includes revised categories and requires entries to be itemized by category, if possible. Fixed and floating platforms must also maintain a Garbage Record Book under the new regulations. Finally, the requirement to post placards is extended to offshore platforms. Placards currently in place on all vessels must be replaced as well.

The IMO published "2012 Guidelines for the Implementation of MARPOL Annex V" to aid governments, ports and terminal operators, ship owners and operators, vessels' crews, and equipment manufacturers in complying with the new regulations. The guidelines outline a number of recommended waste minimization and handling techniques, including that vessels minimize taking on material that could become garbage. A number of tactics are suggested in the guidelines, such as ordering supplies that come in bulk packaging as much as possible, avoiding the use of disposable dinnerware and towels, and utilizing reusable cargo coverings, dunnage, and packing materials. The guidelines also suggest multiple garbage sorting practices, emphasizing the need for careful planning of garbage handling under the new regulations as more garbage will need to be stored onboard until it can be properly disposed of ashore. An analysis as to the advantages, disadvantages, and effectiveness of grinders, compactors, incinerators, and other garbage handling equipment is provided to aid in garbage management decisions. As the new regulations will increase the quantities of garbage offloaded to shore based reception facilities, the guidelines further provide suggestions for garbage management decisions for port reception facilities and encourages consideration of alternative reception facility methods, such as the use of barges or self-propelled vessels as floating plants for garbage collection. Revised sample placards targeting crew, offshore platforms, and passengers are located at the end of the guidelines. The guidelines, MEPC.219(63), are available at www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Documents/219%2863%29.pdf.

Vessels operating in the United States have experienced increasingly heightened enforcement of, and penalties under, oil pollution prevention requirements under MARPOL Annex I and, more recently, air pollution prevention requirements under MARPOL Annex VI. It is unclear, however, at this time when the Coast Guard will publish enforcement guidance on what to expect when the revised MARPOL Annex V goes into effect shortly.

If you are a vessel owner/operator or otherwise involved in vessel operations and you are not sure how your company is prepared to handle the new garbage regulations, you should drop what you are doing and take action now to ensure future compliance and prepare for possible logistical issues for transfer of garbage ashore. ■

Update on the Implementation of the North American Emission Control Area

BY JEANNE M. GRASSO



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The North American Emission Control Area (ECA) was established in 2009 pursuant to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), which is implemented domestically through the Act to Prevent Pollution from Ships (APPS). The ECA encompasses most of the United States and Canada's coastal waters out to 200 nautical miles from the coastline, though it does not include the Pacific U.S. territories, smaller Hawaiian Islands, Puerto Rico, the U.S. Virgin Islands, the Aleutian Islands and Western Alaska, and the U.S. and Canadian Arctic.

Enforcement of the ECA began on August 1, 2012 and vessels subject to MARPOL, with limited exceptions, will be required to use fuel with a sulfur content not exceeding 1.00% or install and use an equivalent compliance method approved by the flag state, such as exhaust gas scrubbers or a fuel averaging system like that just recently approved by the U.S. Coast Guard, Environmental Protection Agency (EPA), Transport Canada, and The Bahamas for Royal Caribbean Cruises Limited. Beginning in 2015, the ECA sulfur limit will be further reduced to 0.10%. Recent EPA and Coast Guard guidance provides insight on how to deal with ECA-compliant fuel availability and enforcement issues. The Coast Guard has also published a Question & Answer policy document that addresses ambiguities that have arisen since the August 1 enforcement date. Vessels operating in the ECA will be required to demonstrate compliance through bunker delivery notes, representative fuel oil samples, written fuel changeover procedures, and a fuel changeover logbook.

Just how ECA requirements will be enforced remains unclear even though the Coast Guard and EPA entered into a Memorandum of Understanding (MOU) setting forth the terms by which the agencies would cooperate in connection with MARPOL Annex VI. The MOU provides that EPA will verify compliance with fuel oil availability and maintain a register of local fuel oil suppliers. The Coast Guard will examine bunker delivery notes and records during its routine port state control inspections. In addition, EPA may, either on its own or at the Coast Guard's request, attend or assist with flag state and port state control inspections. The agencies intend to share information about inspections, examinations, and investigations. When a violation is suspected, the agency with the relevant expertise will investigate and initiate enforcement action as appropriate, which may include civil and criminal penalties.

EPA expects ECA-compliant fuel to be widely available, but it recognizes there may be availability issues in some regions. If a vessel is unable to get ECA-compliant fuel, it should use

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North American Emission Control Area (continued from page 9)

the lowest sulfur fuel available and obtain compliant fuel at the first U.S. port at which it is available. Although EPA stated that it expects distillate fuels to be used as blending agents to produce ECA-compliant fuel, it will not require vessels to blend fuel onboard, purchase distillate fuel to meet the ECA requirements, or deviate from their intended voyage to obtain compliant fuel. However, EPA expects that when a vessel enters the North American ECA, the vessel owners and operators will have taken care in voyage planning to ensure that reasonable efforts are made to obtain ECA compliant fuel oil at every port along the intended voyage.

Vessels must notify the EPA and their flag state if they are unable to obtain ECA-compliant fuel prior to entering the ECA. EPA published "Interim Guidance on the Non-Availability of Compliant Fuel Oil for the North American Emission Control Area" in June describing how vessels should make notifications. EPA also recommends that Fuel Oil Non-Availability Reports be submitted once the vessel becomes aware that it will not be able to obtain compliant fuel and no later than 96 hours prior to entering the ECA. It is important to note that the filing of a Fuel Oil Non-Availability Report is not required, and the filing of one does not mean a vessel is in compliance with Annex VI. Rather, it simply means that the owner or operator wants EPA to consider its efforts to obtain ECA-compliant because EPA will review the information provided and determine whether "best efforts" were made to obtain compliant fuel when deciding what enforcement action, if any, to take in response to the violation. Thus, submission of these reports will help mitigate the non-compliance.

In addition to the factors mentioned previously, EPA will consider how many Fuel Oil Non-Availability Reports have been previously filed and whether owners or operators of other vessels on similar voyages submitted Fuel Oil Non-Availability Reports. EPA is in the process of creating an electronic system to receive Fuel Oil Non-Availability Reports.

The U.S. government takes MARPOL compliance seriously and has been aggressive in enforcing compliance with Annex I and Annex V over the years, commonly imposing criminal penalties for companies and imprisonment for engineers. Most of these prosecutions have related to inaccurate recordkeeping, not necessarily pollution, e.g., for maintaining an Oil Record Book and/or Garbage Record Book that have false entries or omit entries.

We expect the government will take compliance with MARPOL Annex VI just as seriously, and Annex VI compliance may thus present new challenges in terms of criminal enforcement for inaccurate records. As such, it is extremely important to keep accurate MARPOL Annex VI records—all required entries must be accurately and completely recorded, even if the entry may indicate that a violation may have occurred. The Coast Guard will be focusing on the Annex VI record keeping requirements as part of its port state control program and has provided guidance to field inspectors on how to handle such potential criminal violations. ■

Shipper's Liability for Dangerous Cargo

BY THOMAS H. BELKNAP, JR.



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In this day and age, with containers pervasive and new and ever-developing chemicals, compounds, and materials being developed and shipped at a rapid pace, the risk is ever-increasing of significant or even catastrophic loss or damage resulting from the carriage of dangerous goods. But when is the shipper liable for loss or damage resulting from such an incident?

The Shipper's Obligations Under the General Maritime Law

A number of early court decisions held that the shipper had a duty to advise the carrier of any dangers in the cargo of which it is or ought to be aware and which the carrier is not and cannot reasonably be expected to be aware. *Wm Quillan*, 180 F. 681 (2d Cir. 1910). Other cases held that a shipper gave an implied warranty that a shipment is reasonably fit and safe for carriage and thus is strictly liable for damage resulting from breach of the warranty. *Pierce v. Winsor*, F. Cas. Nos 11,150 and 11,151 (D.C.D. Mass., C.C.D. Mass 1861).

Ironically, both lines of cases referred back to the English case *Brass v. Maitland*, [1856] 6 El. & Bl. 470 (Q.B. 1856)—then the leading decision on this issue—and expressed the aim of bringing U.S. law into harmony with English law. In 1998, however, the English House of Lords decided *Effort Shipping v. Linden Mgmt*, [1998] A.C. 605 (H.L. 1998), clarifying that both the decision in *Brass* and in Section 4(6) of the Hague Rules impose strict liability on a shipper of dangerous goods where the carrier did not give informed consent to the shipment, whether or not the shipper knew of the danger posed by the cargo.

What Are Dangerous Goods?

The International Maritime Organization (IMO) maintains a schedule of dangerous materials known as the International Maritime Dangerous Goods Code, or IMDG Code. It is incorporated into the Safety of Life at Sea Convention (SOLAS), which has been widely adopted among maritime states, including the United States. The stated goal of the IMDG Code is to regulate the transport of dangerous goods by sea, "in order reasonably to prevent injury to persons, or damage to the ship or the marine environment." On the other hand, the IMDG Code expressly acknowledges that "any regulation should be so framed as not to impede unnecessarily the movement of such goods."

The IMDG Code classifies thousands of substances into different categories of dangerousness—such as explosive, flammable, or poisonous, etc.—and provides details about how such cargos should be packaged and handled. In essence, they

present the collective public knowledge about the characteristics of different cargos and how they can be safely transported.

Additionally, the United States has its own laws and regulations governing the transportation of dangerous cargos, most notably the Hazardous Materials Transportation Act, amended by Hazardous Materials Transportation Authorization Act of 1994. Under that Act, the U.S. Department of Transportation has promulgated U.S. Regulations relating to the safe handling and transportation of dangerous cargos, 49 C.F.R. § 105-180, including creating its own Hazardous Materials Table, 49 C.F.R. § 172.101. These Regulations have a similar aim to the IMDG Code, but they extend to domestic shipments, as well. Fortunately for international shippers, however, the IMDG Code is expressly incorporated into the U.S. Regulations such that cargo that complies with the IMDG Code may be offered and accepted for transportation within the U.S.

COGSA/Hague Rules

The United States Carriage of Goods by Sea Act (COGSA) is the 1936 U.S. enactment of the Hague Rules, and commentators have often observed that COGSA was enacted with the specific goal of establishing uniformity in the legal regime governing the international transportation of goods. In 2002—a mere 65 or so years after its enactment—the Second Circuit Court of Appeals held that COGSA preempted pre-1936 maritime law on the subject of shipper liability and established the standards for when a shipper would be liable for shipment of dangerous cargo. *Senator Linie v. Sunway Line*, 291 F.3d 145 (2d Cir. 2002). Still, COGSA only applies by force of law from ship's rail to ship's rail on international carriage by sea evidenced by a bill of lading, and the *Senator Linie* court left open the question of where the general maritime law stood on these issues for other carriages of goods, such as in domestic trade or under charter parties which are not governed by COGSA.

There are two sections in the Hague Rules/COGSA relevant to shipper's liability:

- a) **Section 4(3):** "A shipper shall not be responsible for loss or damage sustained by the carrier or the ship... without the act, fault, or neglect of the shipper, his agents, or servants."
- b) **Section 4(6):** Inflammable, explosive, or dangerous goods which the carrier has not consented, with knowledge of their nature and character, to carry, may be landed or destroyed or rendered innocuous by the carrier, without compensation, and the shipper shall be liable for all damages and expenses arising out of such shipment.

Shipper's Liability Under COGSA

WHERE DANGEROUS NATURE OF CARGO IS UNKNOWN

It will come as no surprise to learn that the IMDG Code is not perfect, and it has happened in a number of cases where injury or damage results from a cause that neither the shipper nor the carrier anticipated or reasonably could have been expected to anticipate. Who bears the risk in these circumstances? This very question was addressed in *Senator*

Linie. There, the shipper loaded a container with 300 drums of thiourea dioxide (TDO) in China, bound for Norfolk, Virginia. At the time of the shipment, TDO was not listed as a dangerous cargo in the IMDG Code, and the published literature about TDO gave no indication that it was subject to exothermic reaction as a result of decomposition.

During the voyage, the crew observed smoke coming from the hold where the container was stored. The TDO container was found to be emitting heat, smoke, and chemical residue. The fire was suppressed, and the proof at trial was that the fire had originated in the TDO container and had resulted from an exothermic (heat releasing) reaction in the TDO.

Thus, the court was faced with the dilemma of who should be liable for the damage to the vessel and surrounding cargo when neither the shipper nor the carrier was at fault. The shipper pointed to Article 4(3) of COGSA—which corresponds to the same provision of the Hague Rules—and provides that the shipper will not be liable for damage to the vessel without proof of fault or neglect. The vessel owner contended, on the other hand, that Section 4(6) governed and imposed strict liability on the shipper for damage caused by dangerous cargo.

The *Senator Linie* court conducted an exhaustive review of COGSA, pre-COGSA maritime law, and the leading English cases construing these two provisions of the Hague Rules, particularly including the House of Lords' decision in *Effort Shipping* mentioned above. Ultimately, the court held that Section 4(6) carves out a specific exception to the fault/neglect require-



ment of Section 4(3) and imposes strict liability for a shipper of inherently dangerous cargo where neither the shipper nor the carrier had actual or constructive knowledge of the cargo's dangerous nature.

Apart from interpreting the wording and intent of the statute, the court noted that such a rule is "just and expedient" in that it recognizes that whereas carriers are tasked with handling a large quantity of different kinds of cargos under pressures of complex logistics and short time, the shipper can be expected to have greater access to and familiarity with the goods it is

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Dangerous Cargo (continued from page 11)

shipping before they are placed into maritime commerce. “If an unwitting party must suffer, it should be the one that is in a better position to ascertain ahead of time the dangerous nature of shipped goods.”

WHERE CARGO IS KNOWN DANGEROUS IN CERTAIN CIRCUMSTANCES

But what about the case where the cargo is known to have potentially dangerous characteristics, but the precise nature of the risk is unknown? A U.S. Appeals Court considered this issue in *Contship Containerlines v. PPG Industries*, 442 F.3d 74 (2d Cir. 2006), which involved a cargo of calcium hypochlorite (cal-hypo) stored in drums loaded in containers. At the time of the shipment, cal-hypo was listed on the IMDG Code as an oxidizing substance, meaning that although it was not itself considered combustible, it was known to increase the risk and intensity of fire in other materials because it tended to yield oxygen when heated. The IMDG Code required that cal-hypo be stored away from sources of heat where temperatures in excess of 55°C will be encountered for periods of 24 hours or longer, and recommends generally that cargos be stored in conditions at least 10°C cooler than their critical temperature.

In the event, the cargo was stowed in a hold directly above the bottom center fuel tank, which was a heated tank. Moreover, the court found that during the voyage the crew heated the fuel to abnormally high temperatures. These two factors exposed the cargo to temperatures in excess of 47°C for a period of 18 days. The court found that this caused the cal-hypo to suffer thermal runaway, which occurs when the cargo generates heat more quickly than it can dissipate. As a result, the cargo spontaneously combusted, causing a major fire.

The court framed the legal question this way: “Is a strict liability claim available to a carrier that knew the cargo was flammable but had reason to think that it was safe enough under the conditions of stowage?” The court ruled no, finding that a carrier cannot invoke strict liability if it “knows that a cargo poses a danger and requires gingerly handling or stowage, and nevertheless exposes the cargo to the general condition that triggers the known danger, regardless of whether the carrier is aware of the precise characteristics of the cargo.”

WHERE DANGEROUS NATURE OF CARGO IS KNOWN ONLY TO THE SHIPPER

Working from the rule that the shipper is strictly liable where neither the shipper nor the carrier is aware of the dangerous nature of the cargo, it is no stretch to conclude that the shipper is also strictly liable where it alone knows the dangerous nature of the cargo but fails to give proper notice to the carrier. Indeed, this would be the outcome whether considered under Section 4(6) or 4(3) of the Hague Rules.

But what about the case where the generally dangerous nature of the cargo is known to both parties, but the shipper is uniquely aware of some additional factor that would render the cargo even more dangerous than normal? This was the ques-

tion posed in the case of the *DG HARMONY*, 533 F.3d 83 (2d Cir. 2008), which also involved a cargo of cal-hypo, on similar facts to those in *Contship*.

The particular cargo of cal-hypo at issue in *DG HARMONY*, however, had been packaged in drums within 36 hours after manufacture in a way that inhibited the ventilation of the cargo, thereby preventing the cargo from cooling down. Thus, the evidence was that the safe storage temperature for this particular cargo was closer to 40°C, rather than the 55°C listed in the IMDG Code. On the other hand, as in *Contship*, the cargo was stowed in close proximity to the vessel’s heated bunker tanks, though the evidence was that the temperature never exceeded 40°C.

On these facts, the court found that—as in *Contship*—the carrier was on general notice that cal-hypo had dangerous qualities, even if it did not know of the specific risk that led to the fire. Consequently, the shipper could not be strictly liable under Section 4(6).

Because of the manner in which the cal-hypo had been packaged, however, the shipper had created an additional danger about which the carrier could not reasonably be expected to know. Consequently, the shipper had a duty to warn the carrier of this heightened risk. By failing to give proper warning, the shipper had breached its duty to the carrier.

The court had to consider the further issue of causation because the shipper contended that the actual cause of the casualty was the proximity of the cargo to the heated bunker tanks. The court rejected this argument, however, finding that the temperature in the hold had never exceeded 40°C, which was well within the requirements and recommendations of the IMDG Code.

CONSIGNEE’S LIABILITY UNDER BILL OF LADING

In the scenario where cargo damages the carrying vessel due to a dangerous condition known to neither the shipper nor the carrier, can the consignee be strictly liable under the bill of lading? A New York court had occasion recently to consider this question in *M/V RIKMERS GENOA*, 622 F. Supp. 2d 56 (S.D.N.Y. 2009). The court considered various theories of liability, including negligent failure to warn, common law strict liability, and COGSA strict liability under section 4(6). Ultimately, the court concluded that even though the consignee was technically a party to—and had rights under—the bill of lading, it did not contract with the shipper and had not packaged, handled, or controlled the cargo. Thus, the court declined to extend the shipper’s liability to the consignee in those circumstances. This analysis should hinge on the facts of any given case, however, and particularly on the role that the consignee played in the specific shipment at issue.

Conclusion

In the end, liability for damage caused by dangerous cargo will turn on who knew—or should have known—what at the time of shipment. The shipper is obliged to know its cargo, but equally the carrier cannot stick its head in the sand. Given the potentially calamitous consequences of a casualty, both parties must take their responsibilities in this regard equally seriously. ■