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When Rule B Attachment Will Not Help

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Since 2008, the shipping market (in particular, the bulker market) has been badly affected by a decreased demand for shipping, largely due to the global financial crisis. To date, the shipping market is struggling, and claims for unpaid charter hire continue to surface along with the traditional assortment of other claims that arise between contracting parties.

Claimants frequently look to admiralty counsel in the United States to secure their claims and/or to assist in enforcing foreign awards and judgments. Many shipping personnel around the world have at least a basic working knowledge of the attachment and arrest procedures in the U.S. and typically request their attorney to take immediate steps to affect those measures. Rule B attachment and Rule C arrest procedures typically provide the admiralty claimant with an effective tool to obtain security for their claim and to bring a recalcitrant defendant into court.

Clients must, however, be wary of three scenarios where attaching and/or arresting a vessel may expose them to additional losses. Those situations include when the attachment is "futile"; where bankruptcy looms over the vessel owner; or where the vessel itself, while in good condition, has no value because it has no market—the proverbial "white elephant."

Futility

When a vessel is attached or arrested, the dispute often mushrooms to include competing claims by various creditors of the owner and the vessel that can be broken down, usually, into two categories of competing interest. The first group is the "Rule B" attaching plaintiffs, which consists of claimants who have maritime claims against the owner that do not specifically relate to the attached vessel. The second group is the "Rule C" arresting plaintiffs, which consists of claimants who seek to enforce maritime liens in the arrested vessel itself, *e.g.*, cargo interests, charterers, and the bank that holds a mortgage on the vessel.

Whenever property is attached under Rule B, Supplemental Rule E(4)(f) allows any party claiming an interest in the property to obtain a prompt hearing at which the attaching plaintiff must bear the burden of showing that the attachment is proper. When numerous competing interests appear, a "prompt hearing" usually results in discovery orders being issued, motion practice, and hearings being scheduled, all while the vessel remains under attachment and/or arrest.

The paramount disagreement between competing Rule B and Rule C interests is whether the vessel should be released. Unless they wish to foreclose on the vessel, a Rule C arresting party often wants the ship to be released so it can conclude

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a voyage, deliver cargo, and earn revenue, while the Rule B claimants want the vessel to stay under attachment and, if necessary, be sold at interlocutory sale to generate funds to pay their claims.

The Second Circuit in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.,* 460 F.3d 434 (2d Cir. 2006), confirmed that a district court possessed authority in certain circumstances to vacate attachments on equitable grounds even if the attachments were properly obtained under Rule B. As noted by the Second Circuit in *Aqua Stoli,* the precise scope of the district court's authority was not well defined, but did allow a district court, at the very least, to vacate otherwise valid attachments when: (1) the defendant is subject to a suit in a convenient

adjacent jurisdiction; (2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or, (3) the plaintiff has already obtained sufficient security for the potential judgment. For a period of time, the only authority to vacate a Rule B attachment was said to be the three *Aqua Stoli* criteria.

There is a fourth potential criteria, however, not specifically addressed by *Aqua Stoli.* At least two cases have introduced "futility" as a basis to vacate an otherwise valid Rule B attachment. The decision in *A. Coker & Company Limited vs. The National Shipping Agency Corporation,* 1999 WL 311941 (ED. LA 1999), pre-*Aqua Stoli,* is instructive because it demonstrates that even a party with a legitimate claim can be prevented from obtaining relief under Rule B where its attachment is futile because it is primed by substantial superior interests in the seized property.

In *Coker,* where the court focused on the general rule of "first attachment—first in right," the vessel charterer entered into a settlement with a sub-charterer for $900,000 after a London Arbitration Panel issued an interim final award in favor of the charterer. The charterer then obtained a Rule B writ of attachment against the sub-charterer's property aboard a vessel in the Eastern District of Louisiana valued at nearly $100,000. Another claimant moved for leave to intervene in the action to serve its own Rule B claim against the same property. Because the value of the seized property was not enough to fully secure the first attaching creditor's claim, however, the court denied the second attaching creditor's request to intervene.

The *Coker* court explicitly recognized that a party with a right to proceed under Rule B can be prevented from forcing the judicial sale of the defendant's property where a superior claim in the property renders the party's attachment proceeding futile.

In the recent case of *Evridiki Navigation, Inc. v. Sanko Steamship Company,* JKB-12-1382 (D.C. MD 2012), the total value of the Rule C claims of the charterer, the cargo interests, mortgagee bank, and related transshipment costs far exceeded the potential judicial sale value of the attached vessel, and thus, the issue of futility was raised by the Rule C claimants. It was clear from the submissions made by Rule C claimants that the Rule B claimants would never benefit from a judicial sale, and thus, any sale would have been futile. The dispute regarding whether the Rule B attachments were futile required extensive briefing and several hearings, all while the vessel was under attachment incurring substantial custodial costs. The vessel remained in port for nearly 50 days. Expert opinions were required regarding: (1) the potential sale value of the vessel; (2) transshipment costs to get cargo to its final destination; and (3) whether the foreign mortgage was valid, etc., all at substantial cost.

Although a Rule B claimant may be the first to attach a vessel, charterers, banks, and cargo interests, all of whom may want the voyage to be completed, may have Rule C claims that are priority liens over the Rule B claims. Futility arises where it would be inequitable to continue to detain a vessel when doing so would not provide the attaching Rule B plaintiffs with any security for their claims. For this reason, the cases discussed above indicate that a court may exercise its equitable powers and its discretion and release the vessel to avoid further losses to innocent parties such as cargo interests and the bank. Vacating a Rule B attachment on the grounds of futility is no longer a radical departure from the narrow allowances for equitable vacatur set forth in *Aqua Stoli.*

Bankruptcy

There have been numerous instances where the attachment and/or arrest of a vessel becomes the financial tipping point resulting in a vessel owner's filing for bankruptcy. In that instance, the automatic stay by the bankruptcy court will, unless a specific carve-out is made under a stipulation of all interested parties, result in the Rule B attachment being stayed and/or vacated. In *Evridiki,* discussed above, the court held that the detention of the vessel could not possibly achieve the objectives of the Rule B attachment and that any power that the Rule B attachment once had almost certainly will be eviscerated by the bankruptcy. The *Evridiki* court stated that the owner's "interest in regaining the use of its vessel to generate revenue to be distributed to creditors in a reorganization proceeding carries an equitable weight that is even greater than the average defendant's interest in the free use of his property."

Thus, in the situation that was presented to the *Evridiki* court, the attaching Rule B plaintiff's interest in maintaining the attachment in the face of the bankruptcy filing was not only futile, but as the court noted, "Less than the defendant's interest in vacating them, greater than in the situations where *Aqua Stoli* found equitable vacatur to be appropriate."

The "White Elephant"

Lastly, admiralty litigants must be wary when attaching a vessel that has no market value. Regardless of the physical condition of the vessel, if a vessel has no market to trade in, it has little or no value, other than scrap, in a judicial sale. Be wary—attaching a single purpose or specially configured vessel may result in a large *custodia legis* cost that will far exceed any market sale of the vessel. ■

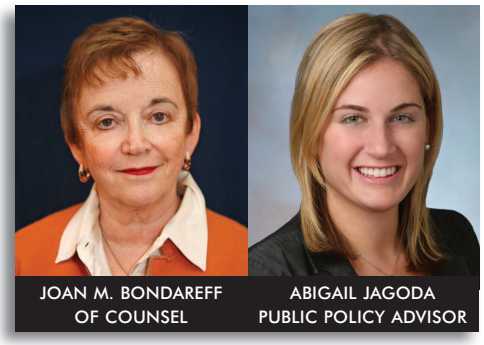
Queen Sonja Receives Nora Award

Queen Sonja receiving the first Nora Award for Women of Achievement, at a luncheon at the Bryant Park Grill in New York. To the Queen's right is NACC treasurer and Blank Rome partner, Cameron Beard. To the Queen's left is NACC executive director Craig Dykers, a partner in the architectural firm, Snoehetta.

On April 25, 2013, the Norwegian American Chamber of Commerce ("NACC") presented Her Majesty Queen Sonja of Norway with the Nora Award for Women of Achievement. The newly created award, named after the strong-willed character, Nora, in Henrik Ibsen's play, *A Doll's House,* honors women who have reached high levels of achievement in their chosen fields and whose efforts have promoted the bonds between the United States and Norway. Queen Sonja received the award in recognition of her deep involvement in a number of important social causes, as well as her tireless support and promotion of Norwegian art and culture.

The Budget Outlook for Maritime Programs for FY2014

BY: JOAN M. BONDAREFF AND ABIGAIL GOLDSTEIN JAGODA*



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We are halfway through Fiscal Year 2013 ("FY2013") and some of the budget details and spending plans for federal maritime agencies are still unresolved. In the meantime, the President has submitted his budget request for FY2014 and Congress is debating its outcome. Sequester cuts and fights over whether the sequester should continue into 2014 are continuing. The outlook for a grand bargain over the budget between the President and Congress does not look positive at the time of this writing. This article describes what budgets the agencies do have to spend for the rest of FY2013 and what the outlook looks like for FY2014.

Discussion

The fight over the FY2013 budget was quite intense, but on March 26, 2013, the President signed into law the most recent Continuing Resolution ("CR"), keeping the government open and running for FY2013 or through September 30, 2013 (Pub. L. 113-6). Some of the agencies were fortunate to have specific appropriation bills passed and included in the CR. This gave greater flexibility and spending authority to these agencies, and included, for purposes of this article, the Department of Homeland Security ("DHS"), which houses the Coast Guard, Federal Emergency Management Agency ("FEMA"), and Customs and Border Protection ("CBP"), and the Department of Commerce, which houses the National Oceanic and Atmospheric Administration ("NOAA"). The Department of Transportation was not given any flexibility in its 2013 spending, leading to the Federal Aviation Administration ("FAA") debacle, discussed below.

2013 FUNDING FOR MARITIME PROGRAMS

Programs funded for the rest of 2013 of interest to the maritime community include:

- $10.4 billion for the Coast Guard—an increase of $79 million over 2012 funding—allowing the Coast Guard to continue its ship and airplane replacement program;
- $2.5 billion for FEMA's State and Local and First Responder Grants, including approximately $92 million for port security grants—to be announced shortly;
- $10.4 billion for CBP—an increase of $215 million over 2012 funding levels;
- $352 million for the Maritime Administration, including $9 million for the popular Small Shipyard Grant Program (applications were due on May 28, 2013);
- $5 billion for NOAA, which is $111 million over the FY2012 level, and includes full funding for weather satellites and critical weather predictions;
- $474 million for the also-popular TIGER grant program managed by the Department of Transportation, which allows ports to apply for grants for intermodal, infrastructure construction projects (applications were due on June 3, 2013); and
- $9 million in EPA's Clean Diesel or DERA grants program, allowing ship owners to replace/upgrade marine and port operators to upgrade equipment affecting air emissions (applications are due on June 25, 2013).

Some spending plans have to be approved by Congressional appropriators before agencies can begin to spend even appropriated 2013 funds. This is the case with NOAA, which at press time was still waiting for the House to approve its spend plan.

Since the White House and Congress could not reach an agreement to offset the sequester or across-the-board cuts from the Budget Control Act of 2011, these sequester cuts (of between 5 and 10%) did occur and have to be taken from all agency budgets, including defense and nondefense agencies.

Notably, the President's budget request for FY2014 does not include the sequester cuts as a starting point. As crises occur, as it did with the FAA furloughs of air traffic controllers, Congress will act to resolve the crisis on a case-by-case basis, as it did by quickly passing remedial legislation, the Reducing Flight Delays Act of 2013, signed into law on May 1, 2013 (Pub. L. 113-9). Whether this becomes a precedent for other sequester crises (if they occur) remains to be seen.

FY2014 BUDGET REQUEST AND CHALLENGES

The President's budget request for FY2014, usually delivered in February of the year prior to the beginning of a fiscal year, was delivered late this year. The President's budget arrived in Congress in the midst of two very different views of the budget passed by the House of Representatives and the Senate in the form of budget resolutions. These resolutions, while non-binding, provide guidance to their respective appropriation committees. The House passed its budget resolution on March 14, 2013. The House resolution calls for cuts in high-speed and intercity rail projects and would balance the budget in approximately ten years. The Senate Budget Resolution, passed on March 23, 2013, includes $100 billion for infrastructure and job creation and is much closer to the President's vision for the budget.

Prior to the release of his budget request, in the State of the Union Address on February 12, 2013, President Obama proposed a "Fix-It-First Program to put people to work as soon as possible on our most urgent [infrastructure] repairs, like the nearly 70,000 structurally deficient bridges across the country."

He also proposed a Partnership to Rebuild America to attract private capital to upgrade infrastructure, including "modern ports to move our goods."

The President amplified on these remarks in his FY2014 request for the **Department of Transportation**, which contains a new request for $50 billion to provide immediate transportation investments in key areas, including ports, to spur job growth and enhance our nation's infrastructure. Of this amount, $4 billion is to be allocated to a TIGER-like grant program for infrastructure construction grants.

For the **Maritime Administration** ("MARAD"), the President has requested a total of $365 million in budget authority, or 3.8% over the enacted 2013 level. The MARAD budget includes $208 million for the Maritime Security Program; $81 million for the U.S. Merchant Marine Academy; $25 million "for a new initiative aimed at mitigating the impact on sealift capacity and mariner jobs resulting from food aid program reform" (caused by last year's sudden cut to the cargo preference requirements for food aid shipments on U.S. flag ships from 75 to 50%); $2 million for a new Port Infrastructure Development Program; and $2.7 million for administrative costs of managing the Title XI loan guarantee program. The President's budget continues to zero out funding for new loan guarantees. In the meantime, Congress is considering legislation to restore the cargo preference cuts. (See H.R. 1678: Saving Essential American Sailors Act, introduced by Congressmen Elijah Cummings (D-MD) and Scott Rigell (R-VA).)

For the **Coast Guard**, the President has requested a total of $9.79 billion, or 5.6% less than the FY2013 enacted level. This request includes $743 million for the continued purchase of surface assets, including funding for the seventh National Security Cutter, procurement of two Fast Response Cutters, and pre-acquisition activities for a new Coast Guard polar icebreaker for Arctic and Antarctic missions, expected to replace the POLAR STAR at the end of its life (projected to be 2022).

Also funded under the DHS budget are FEMA and CBP. These agencies would receive $13.45 billion and $12.9 billion, respectively. As part of the FEMA budget, the President has proposed $2.1 billion for a new consolidated National Preparedness Grant Program, which merges all state and local and port security grants into one discretionary pot. Last year, Congress did not agree to this request for consolidating the grants into one block grant. We expect the CBP budget for border security will remain steady or increase if comprehensive immigration reform legislation is passed this year.

For **NOAA**, the President has requested a total of $5.4 billion, an increase of $541 million over the 2012 spending plan. The budget includes $929 million for the National Marine Fisheries Service; $529 million for the National Ocean Service, of which the Marine Debris Program has increased by $1 million (total $6 million), and the Regional Ocean Partnership Grants, which have been increased by $1.5 million; a total of $2.186 million for the National Environmental Satellite, Data and Information Service, including $954 million for two new GOES weather satellites; and an increase of $21 million to support an additional 1,627 days-at-sea for NOAA's oceanographic research fleet.

Summary

The House and Senate are currently holding a series of hearings featuring Administration witnesses to delve into the President's budget requests. The House of Representatives is likely to pass appropriation bills that are vastly different from the White House's request. In fact, Members of the House Appropriations Committee, such as Congressman Frank Wolf (R-VA), Chair of the Commerce, Justice, Science Appropriation Subcommittee, have already questioned whether full funding can be provided for the Commerce/NOAA budgets. It also remains to be seen whether Congress can revert to regular order, i.e., by passing the individual appropriation bills to keep

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CHAMBERS 2013 HONORS

SHIPPING REGULATORY (OUTSIDE NEW YORK)

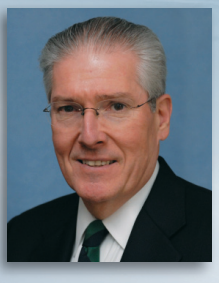
BAND 1 — BLANK ROME LLP

Chambers 2013 says: Blank Rome is recognized for its strong lobbying and legislative talents and its authoritative regulatory advice in the shipping arena. Interviewees speak of the group's impressive maritime background and breadth of practice.

Commercial Awareness: "We have found it to be very strong on maritime issues, with good contacts and relationships with the U.S. Coast Guard and Congress."

Key Individuals for Shipping Regulatory

Jonathan K. Waldron ranked as a **band one** attorney. *Chambers 2013* says: Jonathan Waldron chairs the maritime, international trade and public contracts practice group. He had a lead role in the Furie Operating Alaska matter. One client reports that, "We chose the firm because of the specialized expertise and reputation of one of their partners, Jon Waldron."



T. Michael Dyer ranked as a **band two** attorney. *Chambers 2013* says: Michael Dyer wins plaudits from market observers as "a great lawyer's lawyer." He has advised on an array of matters, including federal criminal enforcement actions and False Claims Act work.

Jeanne M. Grasso ranked as a **band three** attorney. *Chambers 2013* says: Jeanne Grasso receives strong praise from the market, with one source reporting: "She doesn't just provide the legal review—rather, she works with us to identify the operational options that either meet or exceed regulatory requirements."

SHIPPING FINANCE (NEW YORK)

BAND 3 — BLANK ROME LLP

Chambers 2013 says: The Blank Rome maritime commercial and transactions team regularly handles matters pertaining to ship financing, M&A, ship mortgages, and lease financings.

BLANK ROME MARITIME ATTORNEYS

SHIPPING LITIGATION (NEW YORK)

BAND 1 — BLANK ROME LLP

Chambers 2013 says: Blank Rome has an excellent reputation for contentious work in the shipping arena.

Sources say: "Great shipping litigation capabilities."

Key Individuals for Shipping Litigation

John D. Kimball ranked as a **band one** attorney. *Chambers 2013* says: John Kimball chairs the Firm's international and maritime litigation and ADR practice. He is described as "a high-quality individual" by sources. He played a lead role in the *M/V Angeln* matter.

Thomas H. Belknap, Jr. ranked as a **band three** attorney. *Chambers 2013* says: Thomas Belknap is vice chair of the department. He enjoys a sound reputation in the market for charter party and attachment work. He took the lead for the Clipper Group on an arbitration concerning alleged engine damage and nonpayment of hire.

Lauren B. Wilgus listed as an **associate to watch**. *Chambers 2013* says: Lauren Wilgus is a highly-rated associate who recently acted for Pearl Sea Cruises on the arbitration of a shipbuilding contract dispute.

The quotes, commentary, and rankings referenced in this document are published in Chambers 2013.

The Budget Outlook for Maritime Programs for FY2014 (continued from page 5)

the government operational in 2014, or whether another CR will be adopted. Senate Appropriations Committee Chair Barbara Mikulski (D-MD) has a desire to return to regular order, but this is not likely to happen in the near term except for defense agencies where bipartisan agreement is more likely to be reached.

The government keeps limping along with cuts from sequester, delays in Congressional approval for spending plans, and uncertainties in the outcome for 2014. These challenges will also have a significant effect on their constituents as contracts and grants are delayed. The House and Senate will once again have to debate their respective visions for the 2014 budget and come to some agreement on funding levels for 2014. In the meantime, Congress will have to raise the debt ceiling once again and decide whether to do so without a fight over offsetting budget cuts. Given the current revenue situation, a fight over the debt ceiling is expected to be postponed to the fall. ■

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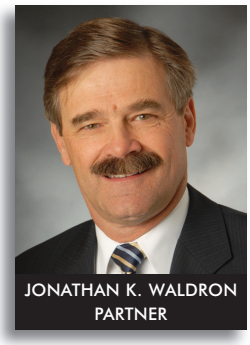
Are You Prepared for the Phase II Vessel General Permit Regime?

BY JONATHAN K. WALDRON



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On April 12, 2013, the Environmental Protection Agency ("EPA") published its formal Notice of Final Permit Issuance in the Federal Register announcing that the Vessel General Permit ("VGP") currently in force ("2008 VGP"), which regulates discharges incidental to the normal operation of commercial vessels, will be replaced by a Phase II VGP Regime ("2013 VGP") effective on December 19, 2013. The 2013 VGP will regulate discharges from commercial vessels greater than or equal to 79 feet in length, excluding military and recreational vessels (and commercial fishing vessels that do not have ballast water discharges until 2014 due to a Congressional extension of a previously enacted moratorium). The 2013 VGP, Fact Sheet, and Economic Analysis can be found at the following link: http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm. The following is an analysis of the key changes in the new Phase II VGP Regime.

Background

In 2006, after years of litigation, a federal court ordered the EPA to discontinue exempting vessels from the CWA's National Pollutant Discharge Elimination System ("NPDES") permitting program, which regulates discharges of pollutants into U.S.-navigable waters (generally within 3 miles from shore), for discharges incidental to the normal operations of a vessel. As a result, the EPA developed the VGP program, in effect since February 2009, which covers 26 types of discharges incidental to normal vessel operations. Further litigation over the 2008 VGP ended in a settlement that required the EPA to: (1) include more stringent numeric effluent limits to control the release of non-indigenous invasive species in ballast water discharges; (2) publish a draft VGP by November 30, 2011 and issue the final VGP by November 30, 2012, which was later extended until March 15, 2013 so that the industry had enough time to become familiar with the new VGP requirements; and (3) allow states six months after the publication of the new VGP to accept, accept with conditions, or deny/waive certification under Section 401 of the CWA.

Currently, the EPA estimates that approximately 50,000 vessels have submitted a Notice of Intent ("NOI") to be regulated under the 2008 VGP. In addition, the EPA estimates that the 2013 VGP will apply to approximately 70,000 existing VGP vessels plus another 2,200 commercial fishing vessels greater than 79 feet in 2014 unless the moratorium is once again extended. For more information regarding the 2008 VGP, please see our previous advisories and articles at: http://www.blankrome.com/index.cfm?contentID=14&itemID=50&viewType=3&viewFlag=3.

The Phase II VGP Regime

The 2013 VGP covers the same 26 incidental discharges as the current 2008 VGP. The 2013 VGP will apply to commercial fishing vessels starting on December 18, 2014. In order to comply with the upcoming 2013 VGP, the 26 incidental discharges must be managed and operators must employ Best Management Practices ("BMPs") to minimize pollutants getting into U.S. waters. The following is a summary of some of the key changes.

Ballast Water

Numeric Technology-Based Effluent Limitations: The 2008 VGP requirements for ballast water were minimal, largely requiring what current Coast Guard requirements require—primarily the use of ballast water exchange. The 2013 VGP implements numeric technology-based effluent limitations, which over time will replace the current non-numeric-based best management practice requirements. The purpose of these limitations is to reduce the number of living organisms discharged via ballast water into waters regulated by the 2013 VGP. There are four possible options to meet these limits as follows:

- treat the ballast water to achieve the numeric limits;
- transfer the ballast water to a third-party for treatment;
- use municipal or potable water for ballast; and
- do not discharge ballast water.

Implementation Dates: For existing vessels, the implementation of the ballast water numeric limitations requires compliance by the first drydocking after January 1, 2014 or January 1, 2016, depending on vessel ballast capacity. With

regard to new vessels, the EPA has changed the definition of "new vessel" from the proposed rule in the 2013 VGP by adjusting the date of the vessel's construction from January 1, 2012 to December 1, 2013. This means that new vessels constructed after December 1, 2013 will be required to meet the limits upon the effective date of the 2013 VGP. This date is consistent with the new ballast water requirements for new vessels under the Coast Guard's ballast water requirements.

Exceptions for Lakers and Inland and Seagoing Vessels: The effluent limits do not apply to some vessels, such as inland and certain seagoing vessels less than 1,600 gross tons; vessels operating exclusively within a limited area on short voyages; unmanned, unpowered barges; and vessels built before January 1, 2009 that operate exclusively in the Laurentian Great Lakes (referred to as ''Lakers''). The draft VGP would have required most vessels with greater than eight cubic meters of ballast water capacity to meet the numeric ballast effluent limitations for ballast water. The EPA concluded that though technologies are promising for future development, numeric ballast water treatment limits for these vessels do not represent Best Available Technology ("BAT") at this time or over the life of the permit, because, among other things, most ballast water treatment systems have been designed for larger vessels and/or vessels that only uptake or discharge ballast water.

With respect to Lakers, the EPA has expanded the scope of the term to include vessels that operate exclusively in all of the Great Lakes. However, the EPA established three management measures specific to Lakers that it believes reflect BAT, as well as represents common sense approaches to managing ballast water discharges for vessels when they have not installed ballast water treatment systems. Additionally, as proposed, the 2013 VGP requires vessels entering the Great Lakes utilizing a ballast water treatment system to conduct ballast water exchange or saltwater flushing (as applicable) in addition to meeting the numeric limits for ballast water in certain circumstances.

More Stringent Best Management Practices

The 2013 VGP also imposes more strict technology-based limits in the form of BMPs for discharges related to oil-to-sea interfaces. In cases where BMP is technically impossible, the 2013 VGP has revised applicable requirements. Accordingly, the 2013 VGP addresses the reduction of oil and other pollutants that enter U.S. waters by including conditions for mechanical systems that could leak lubricants into the water and exhaust gas scrubber washwater. The EPA proposed in the draft 2013 VGP that exhaust gas scrubber washwater discharges must have a pH limit no less than 6.5. This was changed to a pH of no less than 6.0 measured at the ship's overboard discharge.

The proposed VGP also included a provision prohibiting the discard of unused bait overboard. In the 2013 VGP, it is now clarified that this does not include unused live bait that is discharged into the same waterbody or watershed from which it was caught.

Monitoring and Recordkeeping

Like the 2008 VGP, the 2013 VGP will require routine inspections, monitoring, reporting, and recordkeeping. In addition, the 2013 VGP will require certain larger vessels to monitor ballast water, graywater, bilgewater, and exhaust gas scrubber effluent if discharged into U.S. waters. However, the 2013 VGP has reduced the frequency of monitoring for some or all parameters for every discharge type and/or applicability thresholds for vessels that must conduct monitoring. Additionally,

the proposed 5ppm bilgewater oil and grease discharge limits for new build vessels has been changed back to the original 15ppm. New build vessels greater than 400 gross tons discharging bilgewater into waters subject to the VGP are now also required to annually conduct a sample of the bilgewater and record the reading on the oil content meter. Other inspection requirements previously included in the 2008 VGP remain in the 2013 VGP.

The 2013 VGP also provides for administrative improvements. It clarifies that electronic recordkeeping is allowed, and streamlines the one-time report and annual compliance report into one annual report if they meet certain criteria. In addition to these requirements, a permit may not be issued until the owners and operators of the vessel have met state-specific conditions according to the CWA section 401, or the state has waived its right to certify.

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Are You Prepared for the Phase II Vessel General Permit Regime? (continued from page 9)

Submittal of NOI

For smaller vessels less than 300 tons that do not have the capacity to hold or discharge more than eight cubic meters of ballast water, no NOI will be required. However, permittees not required to submit a NOI are required to complete and keep a Permit Authorization and Record of Inspection ("PARI") form onboard their vessel at all times. The 2013 VGP contains the PARI form requirement because the Agency believes it is an efficient way for the owner/operator to certify that they have read and agreed to comply with the terms of the permit, and demonstrate basic understanding of the permit's terms and conditions. In addition, the form will provide regulators with a standardized foundation for conducting inspections.

Challenges to the 2013 VGP

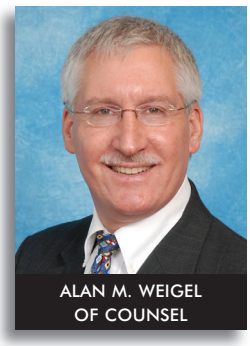
Judicial review of the 2013 VGP can be sought by a party under the CWA by the filing of a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued for purposes of judicial review. As of the writing of this article, the Northwest Environmental Advocates, Center for Biological Diversity, and the National Wildlife Federation have filed suits challenging the implementation of the 2013 VGP. Stay tuned for further developments.

Conclusion

Regardless of the continuing legal challenges, it is inevitable that some form of the 2013 VGP will be implemented on December 19, 2013 or shortly thereafter. It behooves owners and operators to become fully versed on the revised requirements and to ensure that company managers and vessel crews are adequately trained to comply with Phase II of the VGP. ■

Is Your Oil Spill Response Contractor Classified by the USCG? Does It Matter?

BY ALAN M. WEIGEL



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In response to the Exxon Valdez oil spill, Congress enacted the Oil Pollution Act of 1990 ("OPA90"). OPA90 imposed various requirements to prevent and respond to future disastrous oil spills. Among those requirements is the preparation and submission of oil spill response plans for all tank vessels and for certain oil-handling facilities.

An owner or operator who is required to submit a response plan must, among other things, identify the personnel and equipment necessary to remove, to the maximum extent practicable, a worst case discharge and to mitigate or prevent a substantial threat of such a discharge. The magnitude of the investment, however, in oil recovery equipment, storage and disposal capacity, and training personnel to remove discharges, in all foreseeable locations and operating environments, can be enormous. And the system for assembling, mobilizing, and controlling these resources is extremely complex. But to meet OPA90's statutory requirements, each response plan must identify the means for accomplishing these tasks.

There is, however, an important tool an owner or operator can use to help meet these costly and time-consuming statutory requirements. In response to the regulatory requirements established by OPA 90, the Oil Spill Removal Organization ("OSRO") classification process was developed to facilitate the preparation of vessel and facility response plans. If an oil spill removal contractor has been evaluated by the U.S. Coast Guard, and its capability is equal to or exceeds the response capability needed by the owner or operator, the response plan may identify only the OSRO, and need not list all of the information about response personnel and equipment. By listing a Coast Guard classified OSRO in a response plan, the plan holder is exempted from providing and updating extensive lists of response resources.

The OSRO classification process provides standard guidelines by which the Coast Guard and plan developers can evaluate an OSRO's potential to respond to and recover oil spills of various sizes. OSROs may receive classifications for different spill sizes occurring in different types of operating areas (e.g., rivers/canals, near shore, offshore, or open ocean). Classifications are based upon minimum equipment amounts and response time standards outlined in the Coast Guard's OSRO Classification Guidelines. The Coast Guard's National Strike Force maintains the OPA90 mandated Response Resource Inventory, a centralized database listing national and international spill response capabilities and each OSRO's classification information along with its other response resource data.

The use of an OSRO, either classified or not classified, does not relieve an owner or operator of its statutory responsibility to effectively and promptly remove spilled oil from the environment. Moreover, use of the OSRO classification program is completely voluntary and does not relieve a plan holder of its responsibility to determine whether an OSRO will meet specific planned response needs as required by federal regulations. Its purpose is to assist oil-handling facilities and vessels in writing spill response plans. Although the classification program is only a planning tool and does not guarantee the performance of an OSRO, it does provide a helpful measurement of the OSRO's capability using such variables as the amount and type of the OSRO's equipment, its geographic location, and the OSRO's degree of control over its response resources (whether the resources are owned or contracted).

An OSRO that does not have a Coast Guard classification may still be employed by a plan holder and may be listed in the response plan, but it must be listed along with its entire

emergency response resource inventory. Thus, the regulatory benefit of the classification program is lost when using a non-classified OSRO. Also, in many cases, it is probably fair to presume that where an OSRO does not have a classification, it is because its containment, recovery, or storage resources are insufficient to meet the requirements for responding to oil spills of certain sizes or in certain locations.

A plan holder that cannot demonstrate that its OSRO can meet the planning standards for its specific operating sites may be subject to Coast Guard enforcement action, which can include civil penalties or a suspension of operations until the plan is in compliance. In such cases, a plan holder may be required to contract in advance with more than one OSRO to meet its specific response plan requirements. Thus, in preparing its response plan, an owner or operator must carefully consider potential oil volumes and response times and ensure its designated response resources are adequate. ■

The Obama Administration Releases Its Ocean Policy Implementation Plan—Some Highlights

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On April 16, 2013, Nancy Sutley, Chair of the Council on Environmental Quality, and John Holdren, Director of the White House Office of Science and Technology Policy, and Co-Chairs of the President's National Ocean Council, released the Administration's action plan (the "Plan") for implementing the National Ocean Policy established under E.O. 13547. A copy of the Plan can be found at: www.whitehouse.gov/administration/eop/oceans/implementationplan.

The E.O. was issued in 2010, and the Administration has taken the past two or more years to develop a plan taking into account the views of multiple stakeholders. The final Plan does include responses to some of the major criticisms of the draft plan, e.g., who will regulate fishing? Does marine spatial planning entail any new regulations of ocean uses? Whether the responses satisfy the critics remains to be seen.

The Plan is very wide-ranging and addresses the interests of the following maritime sectors: commercial fishing; recreational fishing and boating; the ports and shipping community; coastal communities; aquaculture development; offshore oil and gas; offshore renewable energy; regional marine planning; and research and development of the Arctic. Most of the Plan addresses how the 27 interested federal agencies will work better together, and collect and disseminate a lot more oceanographic data. But, there are also a number of action items that are worth paying attention to.

Sector Highlights

Following are some of the important Plan highlights that the maritime community should be aware of.

In the **commercial fishing sector**, the Plan makes clear that regulation of commercial fishing will continue to be managed exclusively by the state and federal fisheries managers and the Regional Fishery Management Councils. (This had been a bone of contention in the draft implementation plan and the final Plan attempts to clarify this situation.) On specific action items, Federal agencies have committed in the Plan to protect, restore, or enhance 100,000 acres of wetlands, and conduct research on stressors on the coast such as climate change. (The Plan acknowledges the existence of climate change and its potential serious impact on coastal communities.)

In the **aquaculture sector**, federal agencies have committed to streamline and reduce duplication of permitting efforts, establish an interagency aquaculture initiative to support jobs and innovation, and develop pilot projects through the National Shellfish Initiative to maximize the commercial value of shellfish aquaculture.

For the **offshore oil and gas sector**, the Plan focuses on providing more accurate charts for safe and efficient navigation, collecting data and information to identify suitable sites for development, and conducting further port access route studies ("PARS"). The Plan also addresses steps the Administration will take in the Arctic, described below.

In the **offshore renewable energy sector**, the Administration commits to improving access to data on climate, water, wind, and weather; providing models of seasonal and extreme weather conditions; and developing analyses of how new ocean uses can contribute to the economies of the local communities and regions. Unfortunately, the Plan makes no mention of streamlining the rather cumbersome process for leasing offshore wind farms.

For the **shipping and ports sector**, the Plan also intends to provide more accurate charts for navigation; undertake more PARS studies; improve predictions about sea level rise; and provide better weather forecasting for the Arctic.

For **coastal communities**, such as those hard hit by Hurricane Sandy, the Administration commits to sharing more and better data about severe storms and sea-level rise; working on improving flood insurance maps; and providing guidance to waterfront property owners on responsible management options for shoreline erosion. In this area, the National Oceanic and Atmospheric Administration seems up to the task of providing better, more timely information to coastal communities, recognizing that Sandy may not be the last of these mega-storms to hit our coasts.

Another area of contention in the Ocean Policy and draft plan was the concept of marine spatial planning. Many conservative critics objected to the term and decreed that it would only

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The Obama Administration Releases Its Ocean Policy Implementation Plan—Some Highlights (continued from page 11)

add layers of new regulations to existing regulations affecting the maritime industry. As a result, the final Plan softens the term to "marine planning", while announcing that the entire planning process is voluntary and only those regions that choose to participate will have to do so. The Plan also states definitively that "[n]either the National Ocean Policy nor marine planning creates or changes [existing] regulations or authorities." At the same time, the Plan cites several examples where marine planning has been effective, e.g., the State of Rhode Island has identified key resources and uses, such as fishing and military needs, so that offshore wind energy can be sited in the best places with the least conflict.

Another important area of focus in the Plan that is addressed in several sections is the Arctic. Several federal interests and objectives are identified for the Arctic, including establishing and strengthening partnerships with industry (e.g., oil companies and ship operators), other governments, and Alaska Native organizations to develop new Arctic communications capabilities; improving oil spill prevention, containment, and response plans and technology for use in ice-covered Arctic areas; completing an integrated dataset to populate an Arctic oil spill planning, coordination, and response tool; and identifying options to minimize and/or mitigate the risks associated with vessel use and carriage of heavy-grade fuel in the Arctic.

From a policy perspective, the Plan also proposes the development of materials to support a U.S. submission on the Extended Continental Shelf delimitation in Arctic waters. The Plan does not address how the U.S. will manage this submission when it only has an observer seat at the Commission on the Limits of the Continental Shelf, established under Article 76 of the UN Convention on the Law of the Sea, to which the U.S. is not a party.

A cross-cutting objective in the Plan is to share data and information among federal agencies and with users on its ocean data portal: www.data.gov/ocean/community/ocean. Another stated objective is to improve the federal permitting process to save time and money for ocean-based industries and taxpayers. Improved permitting for aquaculture is specifically highlighted, but it is not discussed in other uses of the ocean and coastal waters, such as the energy sectors.

Summary

In sum, the Plan is quite comprehensive in that it touches upon all sectors that occupy a place in our maritime world. It is also accompanied by an Appendix with a calendar of all the action items, as well as a list of the various federal agencies, that will implement the Plan between now and 2017. A budget line item for implementing the recommendations has not been submitted by the Administration in its FY2014 budget request, so it remains to be seen how successfully the coordinated action items can be carried out and whether Congress will provide the necessary funding in this time of budget constraint. (See "The Budget Outlook for Maritime Programs for FY2014" on page 4.) ■