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BLANKROME maritime

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Note from the Editor

BY THOMAS H. BELKNAP, JR.

COVID, COVID, COVID … Sometimes it feels like that is all anyone is talking about these days (especially now that the election is behind us). So, in this issue of *Mainbrace,* we (mostly) take a break from that topic and try to focus on some other things.

Use of new technology in the maritime industry is one subject that always interests us, and there is no shortage of pertinent topics in this space. In this issue, we present articles discussing the legal and practical issues relating to the use of facial recognition technology on cruise ships, developments in the use of blockchain in global logistics arrangements, and new regulatory developments relating to electronic recordkeeping onboard vessels.

Meanwhile, as the 116th Congress moves towards its close at the end of the year, we take a look at pending maritime-related legislation and make a few guesses as to what we might expect from the 117th Congress, which convenes in January 2021. Of particular interest to the budding offshore wind industry is a separate article looking at recent developments on proposed legislation to clarify the application of the Jones Act to offshore wind development. We also look at ongoing efforts to pass legislation to tackle the serious and expanding problem of plastics in the oceans, as well as provide an update on regulatory developments relating to the Vessel Incidental Discharge Act.

The year 2020 has become a punchline of sorts for all the things that can go wrong. There's no question that it has been a year like no other in memory, and I am sure many of us are ready to turn a new leaf in 2021. With disruption comes opportunity, however, and it is not so difficult to envision the many ways that the hurdles of this year will jumpstart innovation and progress in the coming years. Indeed, it seems clear that we are already heading down this path.

So, let this be our New Year's wish to all our clients and friends: may you stay ahead of the curve and figure out how to turn problems into solutions. We look forward to being there to help you do just that in 2021 and beyond. Happy Holidays to all.

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Maritime Legislative Update

BY JONATHAN K. WALDRON, JOAN M. BONDAREFF, AND STEFANOS N. ROULAKIS

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THE END OF 2020 HAS SEEN significant developments in legislation with implications for the maritime industry as we move from the Trump administration to the new Biden administration. This article provides an update on the status of several key maritime-related bills in the 116th Congress as of December 7, 2020.

The incoming Biden administration has not developed specific bills yet, but we anticipate infrastructure being at the top of the list. This will provide a number of opportunities for the maritime industry—from expanding title XI loan guarantees to funding for port infrastructure projects, new vessels for new offshore wind projects, and an expansion of cargo preference to support the Jones Act. Of import, Biden's campaign voiced his support for the Jones Act.

Key Maritime Bills Expected to Be Enacted in the 116th Congress

NATIONAL DEFENSE AUTHORIZATION ACT ("NDAA")

The NDAA is roundly considered to be an annual "must-pass" bill, having passed every year since the Kennedy administration. In recent years, many maritime provisions have been included in the NDAA. The reason for this is that, as an essential bill that is enacted every year, the NDAA creates opportunity for the advancement of policy priorities in the maritime industry if they are included. The House and Senate have agreed to a conference report for the NDAA and the final bill will include significant maritime provisions, including U.S. Maritime Administration ("MARAD") reauthorization, U.S. Coast Guard ("USCG") reauthorization, extension of the Jones Act and other federal laws to offshore renewable energy, and funding for ports to address COVID-related emergencies. A few of these bills are summarized below and more details will be addressed in a follow-up maritime advisory.

H.R. 3409 – COAST GUARD AUTHORIZATION ACT OF 2019 ("CGAA 2019")

CGAA 2019 has been pending for quite some time due to inaction in the Senate regarding particular provisions of the bill. The CGAA was initially introduced in 2019, and House passage in the summer of 2020 raised hopes that Congress could pass a USCG bill in 2020.

As far as substance, in addition to reauthorizing USCG programs and activities, the CGAA 2019 makes key policy reforms for the maritime industry and addresses numerous policies, including promotion authority for USCG personnel, the USCG's use of unmanned maritime and aircraft systems, Great Lakes icebreaking, and the use of engine cut-off switches on recreational vessels. Additionally, notable amendments to existing maritime statutes—either in the bill or under discussion—would address requirements relating to "non-operating individuals" embarked on U.S.-flag commercial vessels; requests for the determination of available Jones Act coastwise-qualified installation vessels; reports on polar security cutter acquisitions; the feasibility of using liquefied natural gas to fuel USCG vessels; and waivers of navigation and vessel inspection laws.

The CGAA 2019 has been included in the final NDAA. As of this writing, Congress is expected to vote on the NDAA during the week of December 7, 2020. We expect a bill that has passed 59 times will be passed a 60th time, despite a veto threat from the White House over renaming bases named for confederate officers as well as no action on curbing media sites if they discriminate against politically conservative postings.

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Maritime Legislative Update (continued from page 2)

MARAD TITLE OF THE NDAA

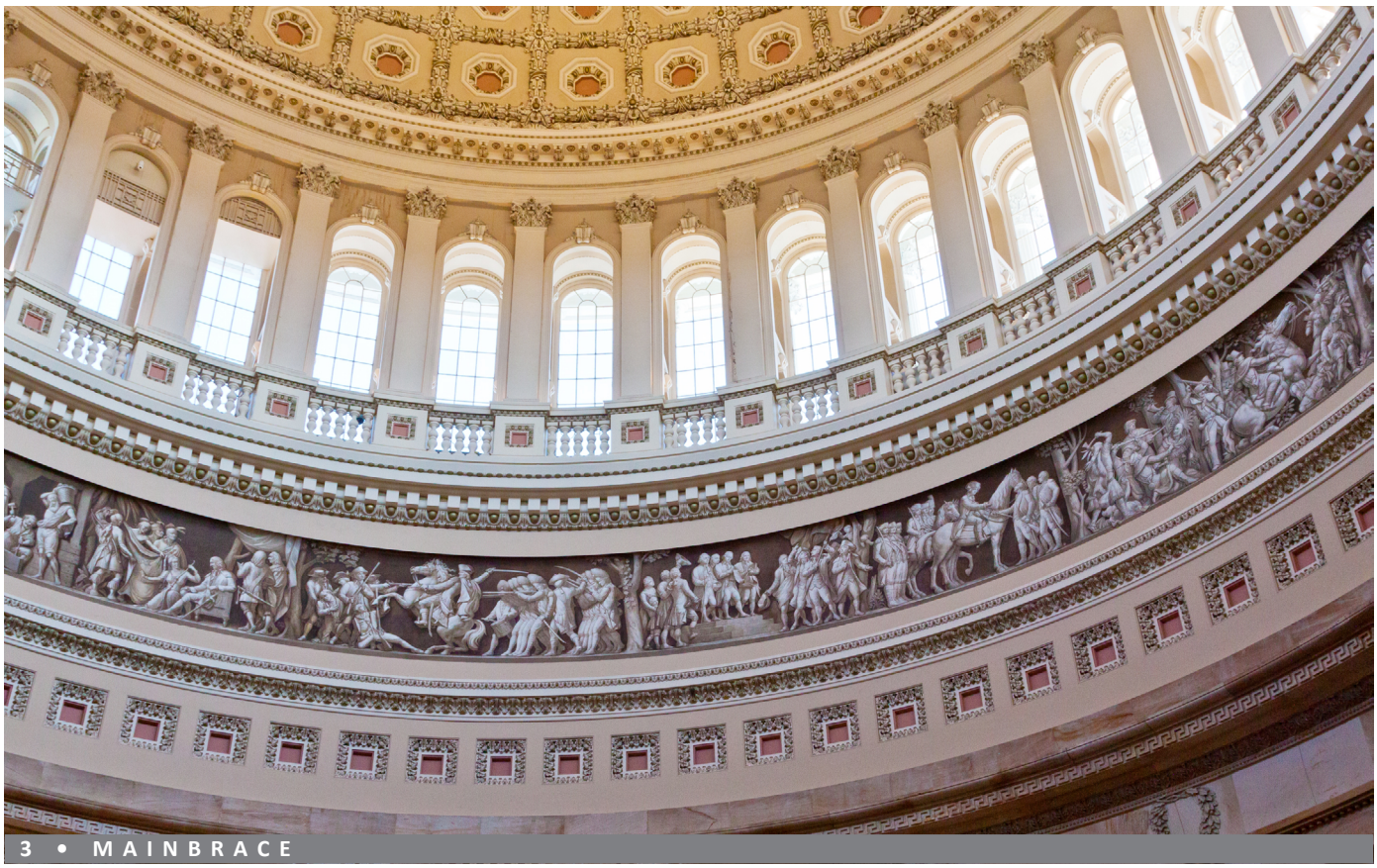
As is the norm, the conferees included authorizations for existing and new MARAD programs in the final NDAA conference report. The key provisions include:

- The establishment of a new, privately owned product tanker security fleet program, to be funded at six million dollars a year per vessel for each vessel in the program;
- New priority for grants to be awarded to small coastal ports and terminals;
- Additional funding in the amount of $388 million for the National Security Multi-Mission Vessel;
- $30 million for the title XI loan guarantee program;
- A new strategic program focused on merchant mariner recruitment, training, and retention;
- The Maritime Transportation System Emergency Relief Act, described further below; and
- A "sense of Congress" resolution to support the U.S. coastwise laws.

H.R. 4447—EXPANDING ACCESS TO SUSTAINABLE ENERGY ACT OF 2019: "GARAMENDI AMENDMENT 33"

The Expanding Access to Sustainable Energy Act of 2019 included a provision (referred to as the "Garamendi Amendment 33") to amend the Outer Continental Shelf Lands Act, which would confirm that all federal laws, including the Jones Act, would be extended to all offshore energy development on the Outer Continental Shelf, including wind energy.

The Garamendi Amendment 33 would extend federal law to "all installations and other devices permanently or temporarily attached to the seabed [for the purposes of]…producing or supporting the production of energy from sources other than oil and gas." U.S. Customs and Border Protection would have to conclude, if this language is enacted, that the Jones Act applies to renewable energy projects, such as offshore wind, in the same way it applies to oil and gas. This legislation would be a positive development for vessel operators and renewable energy developers because it will bring clarity and ensure a level playing field for all stakeholders. A version of this amendment has now been included in the NDAA for this year. For further details on this bill, please see the *Mainbrace* article, "New Legislation to Apply the Jones Act to Offshore Renewables" on page 11.



H.R. 7515—MARITIME TRANSPORTATION SYSTEM EMERGENCY RELIEF ACT ("MTSERA")

The chairman of the Transportation and Infrastructure committee, Rep. Peter DeFazio (D-OR-4), introduced this bill in the summer of 2020 as a response to the COVID-19 pandemic. Provisions in this bill have been subsequently added to the FY2021 NDAA that has already passed the House of Representatives. The new relief program for ports and terminal operators affected by COVID-19 has now been included in the final NDAA.

MTSERA is designed to provide relief to those in the maritime industry during a national emergency, increase training opportunities for merchant mariners, authorize a new competitive grant program for projects at smaller ports and terminals, and establish a National Shipper Advisory Committee to give U.S. importers and exporters a formal process to interact with the Federal Maritime Commission.

Specifically, the bill allows MARAD to provide grants for operating costs involved with an emergency response operation, including costs for cleaning, sanitizing, janitorial services, staffing, paid leave, and procuring personal protective equipment; and the costs of capital projects to protect, repair, reconstruct, or replace equipment and facilities of the U.S. maritime transportation system that are in danger of suffering serious damage, or have suffered serious damage, as a result of an emergency.

FY2021 APPROPRIATIONS

Negotiations regarding funding the government in FY2021 are currently underway. The Senate Appropriations Committee recently released their appropriations bills. The House Appropriations Committee marked up their appropriations bills over the summer. On a macro level, to avoid a government shutdown, Congress must enact another spending measure before the current continuing resolution ("CR") expires on December 11, 2020. As of this writing, Congress intends to extend the CR for one week to give more time for final negotiations on a FY2021 appropriations bill. Speaker Nancy Pelosi is also working to conclude negotiations with the Senate on a $900-billion stimulus package, which she wants to attach to the omnibus funding bill. Stay tuned for more news on these important packages.

To align with the maritime authorization bills, described above, we anticipate that actual funding for these programs will occur in any end-of-year omnibus appropriations bill. This will include funding for port infrastructure development grants, small shipyard grants, title XI funding and administrative expenses, and the new MTSERA program.

H.R. 5845/S. 3263—BREAK FREE FROM PLASTIC POLLUTION ACT OF 2020 AND THE PLASTICS ACT

Plastics legislation is on the menu this year. In addition to the Break Free from Plastic Pollution Act, Congressman Michael McCaul (Ranking Member) and Eliot Engel (outgoing Chairman) of the House Foreign Affairs Committee have introduced H.R. 4636, the PLASTICS Act. This act would leverage U.S. assistance to support reduction of plastics in developing countries and is supported by the American Chemistry Council. H.R. 4636 recently passed the House on the Suspension Calendar. The Break Free from Plastic Pollution Act was introduced by Rep. Alan Lowenthal (D-CA-47) in the House of Representatives and Sen. Tom Udall (D-NM) in the Senate. Neither bill has progressed, and neither is expected to pass.

The incoming Biden administration has not developed specific bills yet, but we anticipate infrastructure being at the top of the list. This will provide a number of opportunities for the maritime industry—from expanding title XI loan guarantees to funding for port infrastructure projects, new vessels for new offshore wind projects, and an expansion of cargo preference to support the Jones Act.

As far as substance, the Break Free from Plastic Pollution Act would make certain producers of products (*e.g.,* packaging, paper, single-use products, beverage containers, or food service products) fiscally responsible for collecting, managing, and recycling or composting the products after consumer use. In addition, the bill establishes 1) minimum percentages of products that must be reused, recycled, or composted; and 2) an increasing percentage of recycled content that must be contained in beverage containers.

Additionally, beginning January 1, 2022, the bill would phase out a variety of single-use products, such as plastic utensils. The bill also sets forth provisions to encourage the reduction of single-use products, including by establishing

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programs to refund consumers for returning beverage containers and by establishing a tax on carryout bags. The bill would create a temporary moratorium on new or expanded permits for facilities that manufacture plastics as well, to remain in place until regulations are updated to address pollution from the facilities. Lastly, the bill would establish limitations on the export of plastic waste to other countries.

For a specific bill affecting marine plastic debris, please see "Marine Plastic Pollution" on page 26.

H.R. 8632—OCEAN-BASED CLIMATE SOLUTIONS ACT

Rep. Raul Grijalva (D-AZ-3) introduced the Ocean-Based Climate Solutions Act in October 2020. The bill has not progressed and is not expected to become law this Congress. The bill and a number of other ocean bills were the subject of a recent hearing in the House Natural Resources Committee, which Congressman Grijalva chairs and is expected to chair again in the 117th Congress.

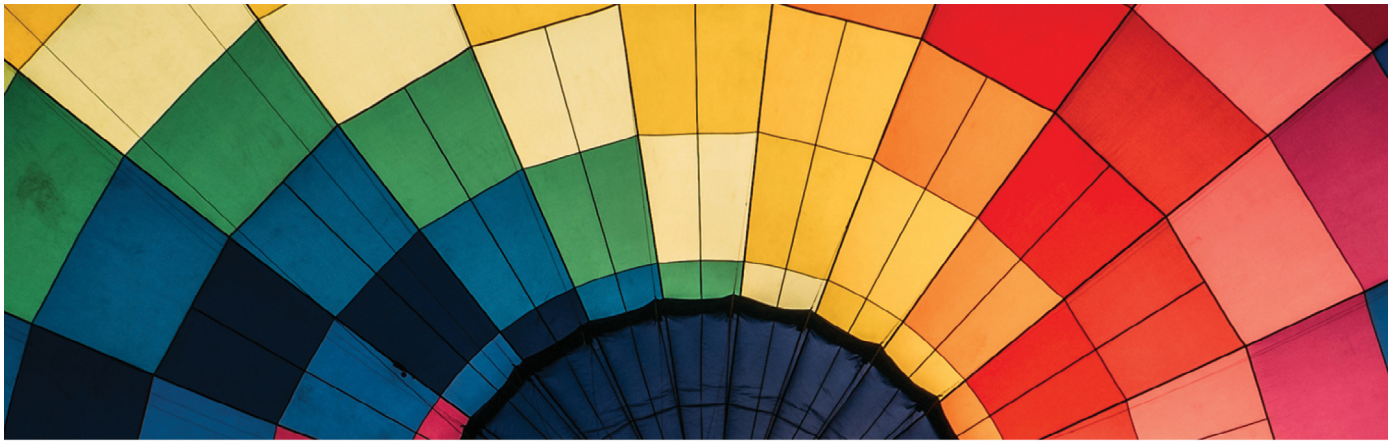
This bill would aim to end the federal offshore oil-leasing program and pursue other ocean-related solutions to the climate change crisis in an effort to restore coastal ecosystems, strengthen marine mammal conservation, reduce carbon emissions from shipping vessels, improve international ocean governance, and protect 30 percent of ocean habitats by 2030. The bill would also create new policies around what it calls the "blue carbon" ecosystems that help sequester our greenhouse gas emissions. That includes protecting salt marshes, sea grasses, and mangroves that pull carbon dioxide out of the atmosphere, as well as protecting ocean habitats for the recovery of whales, which store tons of carbon. Lastly, the bill would provide three billion dollars for coastal restoration projects, with priority given to projects that provide jobs for those affected by COVID-19 and assistance to low-income communities of color affected by environmental racism.

We expect this bill to be a marker for the 117th Congress as well as new bills to address climate change, a subject that is important to the incoming Biden administration.

Conclusions and Recommendations

The 116th Congress faced innumerable challenges during the last year, from a presidential impeachment to fashioning a response to the novel coronavirus pandemic that took away valuable time from enacting substantive legislation. But, as the 116th Congress draws to a close, we see that substantive maritime legislation will be included in the end-of-year defense and funding bills. We believe these bills will withstand a threatened veto by President Trump.

The 117th Congress will have its own set of challenges, including the potential for a divided government. But, we anticipate that it will more likely address climate change and the impact of infrastructure and maritime programs on climate change, including reductions of carbon dioxide emissions from shipping. We will report further when the new Congress starts in January 2021. □ – 2020 BLANK ROME LLP



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PRO BONO REPORT

2019–2020

Welcome to Blank Rome's Pro Bono Report (2019–2020), which highlights various pro bono cases, clinics, and projects that our attorneys worked on last year and in recent months to provide equal access to justice in our communities.

In particular, we discuss our significant work on behalf of **immigrants, LGBTQ+ individuals, persons facing homelessness, veterans, senior citizens, and small business owners and nonprofits.**

Also featured in this report:

- Blank Rome's 2019 Pro Bono Year in Review
- Summary of pro bono awards presented to our firm and attorneys
- Blank Rome's pro bono corporate and community partners
- Overview of pro bono initiatives and priorities for 2020 and beyond

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Pro Bono Report

The Impact of COVID-19 on Blockchain Advancement

BY KEITH B. LETOURNEAU AND VANESSA DIDOMENICO*

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BLOCKCHAIN TECHNOLOGY ENSURES security and transparency within transactions. The endless possibilities and solutions that blockchain can provide to a multitude of industries and consumers created a surge of interest over the past several years. Recently, the need for blockchain technology was amplified when a single microbe showed just how interconnected the world is and how fragile supply-chain networks and logistics providers are when unexpected demand for critical goods (personal protective equipment and testing kits) arose due to the COVID-19 pandemic.

Global Supply-Chain Disruption

The various levels of regulations imposed by national and local governments throughout the world because of COVID-19 concerns delayed and disrupted virtually all supply-chain networks. For example, customs clearance processes have become more laborious and many factories have converted into producers of essential equipment, resulting in the delayed assembly of integral components relied upon by other manufacturers.

Before the global pandemic, companies were racing to become as lean as possible, cutting costs and sourcing multiple components from a variety of manufacturers in different countries. Reducing the costs of making a product would allow for more profit. Producers and manufacturers used complex supply-chain networks to maximize comparative advantage strategies. Often, products would be shipped to another country merely to perform a certain task, or to simply add a singular component, and then the item would be returned to origin for sale to a consumer.

For example, Alaska exports approximately three-quarters of its freshly caught salmon to China—some of which is sold to Asia, but the majority is processed in China and then returned to the United States. "Because foreign labor is so cheap, many Alaskan salmon are caught in American waters, frozen, defrosted in Asia, filleted and boned, refrozen and sent back to us."[1] Many textiles, electronics, and other types of goods make this round trip journey as well, complicating supply chains and logistics networks if stressors are encountered along the way. An Apple iPhone is a prime example of how one item, comprised of hundreds of pieces, travels 500,000 miles before the finished product ultimately ends up in the consumer's pocket.[2]

The world has relied on globalization to achieve the benefits of these complex supply chains; however, countries and companies worldwide have been forced to take a closer look at their sourcing strategies during this pandemic because of serious bottlenecks, halted assembly lines, and the unavailability of critical supplies. Also, engaged citizens have started movements to "source locally" due to the delays and disruption from foreign suppliers crippled by COVID-19 demands. A *Logistics Management* article summed up the impact:

> The recent debate between onshoring and offshoring is more than just the trade-off between price versus speed (and quality). The debate has proven to be about nationalism. In the post-COVID world, there will be a strong desire to bring the supply chain onshore or nearshore in the name of resiliency, reduced risk, faster delivery and, for many governments, national security.[3]

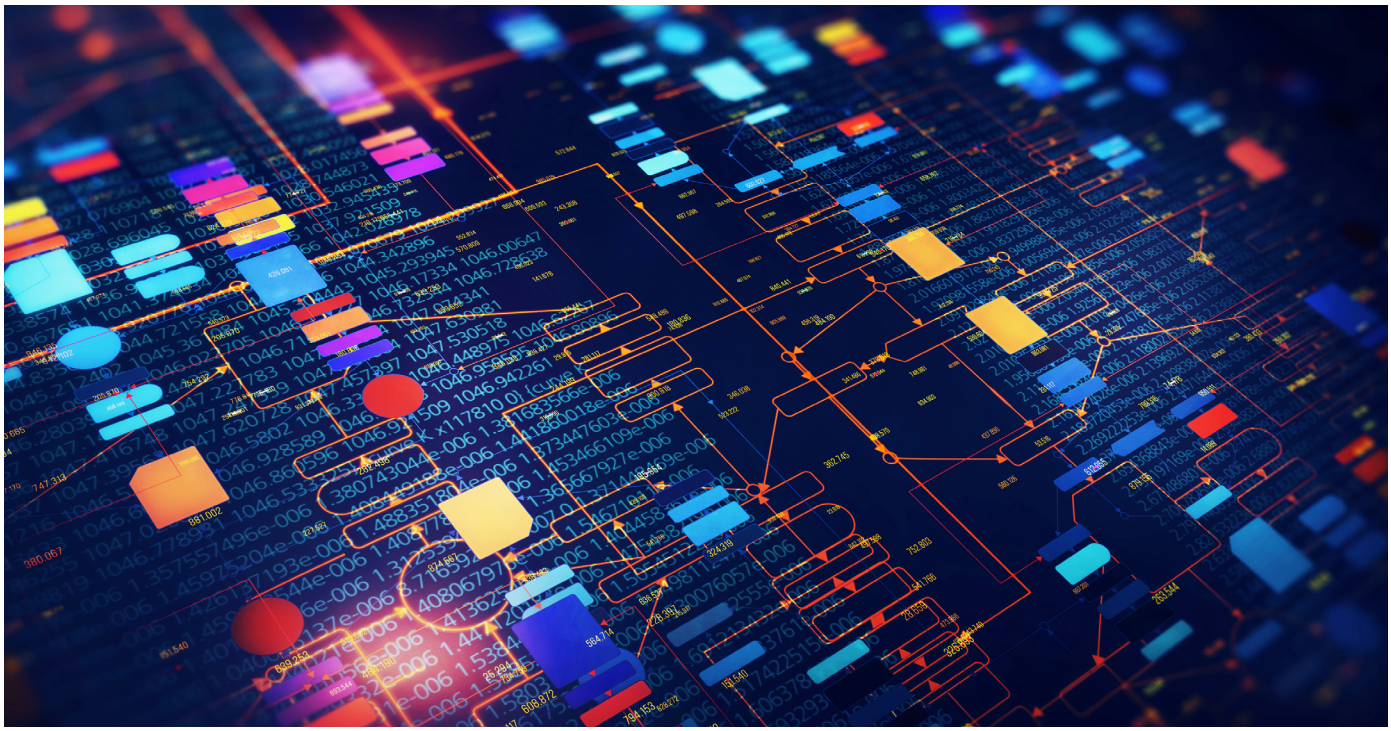
Blockchain Disruption and Delays

COVID-19 not only hindered the movement of goods and people, it also slowed the advancement of blockchain technology itself. One blockchain developer, ChinaNet, shared that the company experienced setbacks due to the virus. The CEO of ChinaNet, Handong Cheng, recently said:

> [t]he outbreak of COVID-19 and related policies implemented by local governments significantly impacted both our business schedules as well as our suppliers' and customers' business schedules in the first fiscal quarter of 2020…[n]evertheless, despite this momentary setback, we continued to lay the groundwork for our initiatives in healthcare industry advertising, blockchain technology development, and the integration of artificial intelligence with data analytics.[4]

In addition to a downturn in blockchain investments and delays in project developments, major blockchain and cryptocurrency conventions had to be postponed and even cancelled because of the pandemic. These events aid in the education and marketing of blockchain technology. However, this "temporary slowdown" should wane and blockchain investments recover when the pandemic subsides.[5] "While the current disruption may present challenges to the blockchain industry in the short term, it will also unlock new opportunities in the mid and longer-term."[6] As supply chains, companies, and governments work to combat the pandemic and jumpstart economies, blockchain could aid in government contract procurements of vital medical goods, as well as securing elections and voting processes, and cross-border financial transactions. Specifically relating to the pandemic, blockchain technology developers are working to create solutions to track drug-supply chains, medical-supply chains to reduce counterfeit masks, donations, and medical-insurance claims.[7]

Specifically, because more people are remaining at home during the pandemic, the use of blockchain as a digital currency in online gaming will increase.[9] Another "significant breakthrough in this area that we'll see is the application of blockchain's fundamental technology to sovereign currencies."[10] China and Sweden are two countries interested in this possibility.[11] In the United States, the Federal Reserve is investigating the potential of a central bank digital currency as the backbone for a new, secure, real-time payments and settlements system, but the legal framework and regulations have not been enacted yet.[12] Further, there will be greater consolidation among blockchain developers because many startups weren't prepared financially for the coronavirus crisis.[13]



Technology Moves Forward

While there may have been delays due to office closings and cashflow constraints from potential blockchain technology customers, blockchain technology is moving forward. "During 2020, blockchain will continue to grow in the finance sector, ahead of other industries. Applications such as food tracking, goods authentication, and storage of sensitive data involve significant regulatory work to tie real-world objects to their tokenized equivalents."[8]

A New Normal in the Maritime Industry

Blockchain promotes exactly what is needed in the "new normal" world: trust, resilience, and transparency to supply chains, producers, and consumers. Global supply chains require open borders and marketplaces. "Blockchain technology will play a critical role in the digital transformation of supply chains emerging in a post-COVID-19 world."[14] In particular, "the coronavirus lockdown has accelerated a digitalization drive in a global shipping and logistics sector that still routinely delivers many documents by bike messenger in some countries, according to industry leaders."[15] In 2019, Maersk partnered with IBM to create a blockchain shipping tool called TradeLens, which is currently operating in more than 200 ports.[16] Recently, the Dubai-based ports operator,

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DP World, announced its plan for its 82 container terminals to join APM Terminals and other shipping conglomerates, Hapag-Lloyd, Ocean Network Express ("ONE"), CMA CGM, and Mediterranean Shipping Company ("MSC"), on the blockchain platform.[17] "'The situation around the coronavirus is a very good catalyst for making sure everyone in the supply chain can communicate with each other digitally,' Mike Bhaskaran, DP World's chief operating officer for logistics and technology, told Reuters."[18]

While Maersk is calling on other maritime companies, freight forwarders, ports and terminals, and customs authorities to join the blockchain platform, TradeLens "has yet to reach a 'critical mass' to make a significant impact."[19] For all stakeholders to obtain the benefits of the ecosystem, more actors are needed to contribute data and transactions to the platform. Blockchain can also aid in supply-chain audits, facilitate accurate shipping data, assist in transaction settlements, reduce human error, automate purchasing, enforce tariffs and trade policies, reduce counterfeit goods, and provide food safety information.[20]

Final Thoughts

The pandemic highlighted the weaknesses in global supply chains, dangerous dependence on individual producers, and underscored the need for the transparent, uninterrupted movement of goods from trusted suppliers. The pandemic is not a call to close borders and cut ties with global supply chains; instead, it is an opportunity to integrate processes, link data, and share information. Blockchain technology is rich with potential and the delays caused by COVID-19 will not stop its momentum to create secure ecosystems. As the world reemerges, blockchain developers are working to breakdown informational silos, help construct impervious supply-chain networks, and encourage everyone to contribute to society's betterment. Blockchain's true potential remains ahead of us, but its need in creating secure supply chains is now. □ – 2020 BLANK ROME LLP*

***Vanessa DiDomenico served as a Blank Rome 2020 summer associate.**

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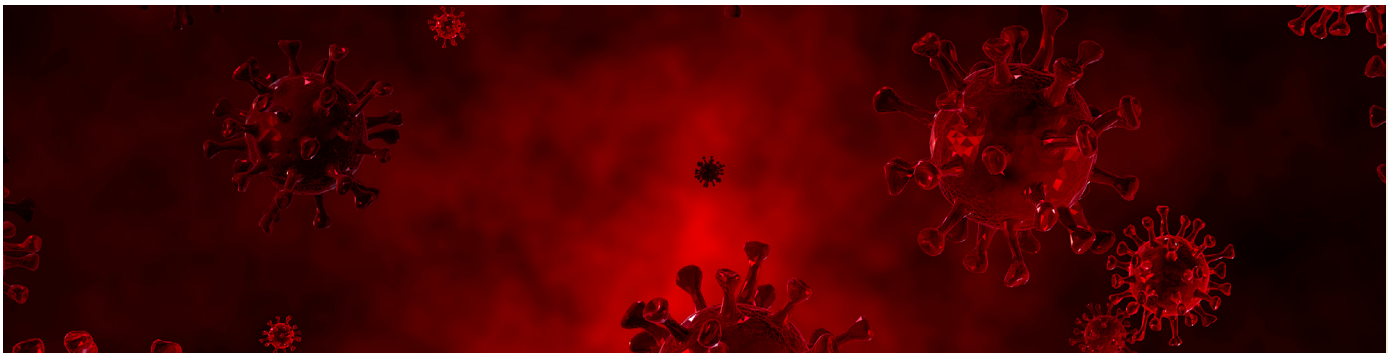
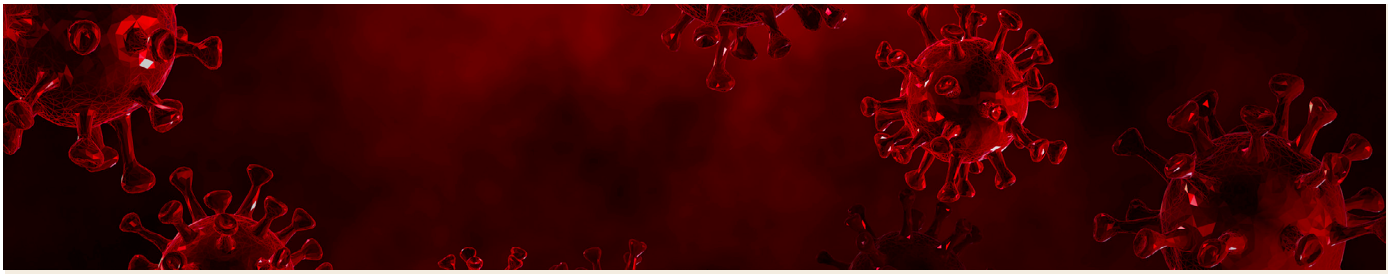
14. Nish Kotecha & Shawn Muma, *supra* Note 3.
15. Jacob Gronholt-Pedersen, *From bikes to blockchain: Shipping industry goes digital in lockdown,* Reuters (May 28, 2020), reuters.com/article/us-shipping-blockchain/from-bikes-to-blockchain-shipping-industry-goes-digital-in-lockdown-idUSKBN2340YW (stating that "[i]n many African countries, Maersk relies on fleets of motorcycles known as 'boda bodas' to deliver documents between ports and shipping agents.").
16. *See generally* tradelens.com.
17. *Id.*
18. *Id.*
19. *Id.*
20. Chirag Bhardwaj, 12 *Tell-Tale Signs of Blockchain Adoption Amidst COVID-19,* Appinventiv (June 3, 2020), https://appinventiv.com/blog/blockchain-adoption-amidst-coronavirus/.



Coronavirus ("Covid-19") Task Force



The outbreak of the novel coronavirus ("COVID-19") is impacting businesses and public life around the world. From supply chain disruption, government-ordered closures, and event cancellations to employee safety concerns and social distancing recommendations, every company is facing its own unique challenges in the face of the uncertainties surrounding this global pandemic.

Blank Rome's Coronavirus Task Force is monitoring this ever-changing situation and is here to help. The Task Force is an interdisciplinary group of our firm's attorneys with decades of experience helping companies and individuals respond to the legal fallout from disruptive crises and disasters. Our multifaceted team includes insurance recovery, labor & employment, maritime, litigation, corporate, real estate, and cybersecurity & data privacy attorneys prepared to analyze your issues from every conceivable angle to ensure a holistic, complete, and comprehensive approach to your specific needs and issues. With offices across the United States and in China, we are ready to assist businesses that must respond and prepare for an evolving public health emergency.

Learn more: **blankrome.com/coronavirus-covid-19-task-force**

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New Legislation to Apply the Jones Act to Offshore Renewables

BY JONATHAN K. WALDRON AND STEFANOS N. ROULAKIS

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THE HOUSE OF REPRESENTATIVES passed legislation, H.R. 4447, the Expanding Access to Sustainable Energy Act of 2019, on September 24, 2020, that included a provision from Representatives Garamendi and Lowenthal ("Amendment 33") to amend the Outer Continental Shelf Lands Act ("OCSLA") that would confirm the Jones Act applies to all offshore energy development on the Outer Continental Shelf ("OCS"), including wind energy. Passage of this provision now appears imminent, as it has been recently included in the National Defense Authorization Act ("NDAA"). From an operational standpoint, while most offshore projects are planned with Jones Act compliance in mind, enactment of this provision would be a welcome development to stakeholders and bring needed clarity to renewable energy development offshore.

Background

The Coastwise Merchandise Statute, commonly known as the Jones Act, has evolved over time. The U.S. cabotage laws date back to the founding of the Republic and were enshrined in their current form in the Merchant Marine Act of 1920. These were originally laws that dealt with transportation issues for domestic voyages. However, as time progressed and production of marine resources became feasible, the U.S. Congress passed OCSLA, which extended federal law to installations on the OCS.

U.S. Customs and Border Protection ("CBP") has historically interpreted OCSLA to apply the Jones Act to oil and gas-related activities on the OCS. However, there is some ambiguity about whether the Jones Act applies to offshore wind projects. Arguably, under current law, the coastwise laws should not apply to a wind farm project located on the OCS because the resource is the wind above the ocean, not from the seabed itself. While most companies have conservatively assumed that the Jones Act will apply to offshore wind construction, CBP has yet to rule on this issue. In addition, other agencies, such as the U.S. Coast Guard, take the position that OCSLA does not apply to an offshore wind project.

Both chambers of Congress have been working on parallel energy bills, and whether Congress passes a new energy bill before the final recess of the 116th Congress in December remains to be seen. As previously noted, the House of Representatives has passed an energy bill containing Amendment 33. The current version of the Senate energy bill, the "American Energy Innovation Act," currently does not contain a version of Amendment 33. However, in a recent development, this provision was included in the NDAA. As such, this provision will likely become law this year because the NDAA is one of the few bills that inevitably is enacted into law each year.

> **Amendment 33 would extend federal law to "all installations and other devices permanently or temporarily attached to the seabed [for the purposes of]…*producing or supporting the production of energy from sources other than oil and gas."***

Analysis

Amendment 33 would extend federal law to "all installations and other devices permanently or temporarily attached to the seabed [for the purposes of]…*producing or supporting the production of energy from sources other than oil and gas."* (Amendment text in italics.) The drafters of this provision have publicly declared that the purpose of this amendment is to extend the Jones Act to offshore renewables. While there have been some articles in the media questioning whether this language is flawed, we

believe those articles are in error. The operative language in the use of the words "supporting the production" is extremely broad, and thus would clearly extend the Jones Act to offshore renewables, including the placement of wind structures on the seabed.

As such, we believe CBP would have to conclude, if this language is enacted, that the Jones Act applies to renewable energy projects such as offshore wind in the same way it applies to oil and gas. This legislation would be a positive development for vessel operators and renewable energy developers because it will bring clarity and ensure a level playing field for all stakeholders.

As of this writing, the NDAA is scheduled for a vote during the week of December 7, 2020, although President Trump is threatening a veto. Even if the president vetoes the bill, there is a good chance that Congress will take action to override the veto before adjourning at the end of the year.

Looking ahead, if passage of Amendment 33 does not occur in the current Congress, it is entirely possible that passage could occur in the 117th Congress. The power dynamics in both the House and Senate will likely remain largely unchanged, and the Biden administration will likely be a proponent of renewable energy sources. As such, even if passage does not occur this year, Amendment 33 could become law in the near future.

Conclusion

Enactment of Amendment 33 would bring welcome certainty to the application of the Jones Act to offshore renewable work. While timing may be an issue for passage in the current Congress, members have shown a sense of urgency in prioritizing this legislation. Nonetheless, the results of the recent election portend the possibility of passage in the near future, which would give CBP the needed clarity to adequately rule on offshore wind issues related to Jones Act compliance.

In addition, other federal agencies would have to align their positions on offshore wind with the new legislation. Passage of Amendment 33 would assist the burgeoning offshore wind industry, which in its nascent years in the United States has shown tremendous promise for energy production as well as exciting opportunities for domestic and international vessel owners and operators and shipyards. □

This article was first published as a Blank Rome Maritime client advisory on October 7, 2020, but has been updated to reflect recent developments.

Blank Rome Highly Ranked in *U.S. News–Best Lawyers®* 2021 "Best Law Firms"

NOVEMBER 5, 2020

BLANK ROME LLP IS PLEASED TO ANNOUNCE that our firm was nationally ranked in 29 practice areas and regionally ranked in 79 practice areas in the 2021 "Best Law Firms" survey by *U.S. News & World Report—Best Lawyers.®*

Earlier this year, Blank Rome was also recognized in the 2021 Best Lawyers in America survey, which ranked 114 of our attorneys in the annual categories of "Lawyers of the Year" and "Best Lawyers," as well as the inaugural "Ones to Watch" category, in 49 practice areas across 10 regions.

NATIONAL 2021 RANKINGS

TIER 1

- Admiralty & Maritime Law
- Banking and Finance Law
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Corporate Law
- Criminal Defense: White-Collar
- Employee Benefits (ERISA) Law
- Insurance Law
- Litigation–Bankruptcy
- Mergers & Acquisitions Law
- Real Estate Law
- Tax Law
- Trusts & Estates Law

TIER 2

- Employment Law–Management
- Energy Law
- Equipment Finance Law
- Labor Law–Management
- Litigation–Banking & Finance
- Litigation–Environmental
- Litigation–Patent
- Patent Law
- Securities / Capital Markets Law
- Securities Regulation

TIER 3

- Copyright Law
- Litigation–Intellectual Property
- Litigation–Labor & Employment
- Litigation–Securities
- Litigation–Tax
- Securitization and Structured Finance Law

REGIONAL 2021 RANKINGS

TIER 1

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- Litigation–Municipal
- Litigation–Patent
- Patent Law

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- Family Law
- Insurance Law

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- Family Law
- Trusts & Estates Law

PHILADELPHIA

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- Corporate Law
- Criminal Defense: White-Collar
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- Equipment Finance Law
- Gaming Law
- Labor Law–Management
- Litigation–Banking & Finance
- Litigation–Bankruptcy
- Litigation–Environmental
- Mediation
- Real Estate Law
- Trusts & Estates Law

PITTSBURGH
- Corporate Law
- Mergers & Acquisitions Law

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- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Criminal Defense: White-Collar
- Energy Law
- Insurance Law
- Litigation–Insurance
- Tax Law

TIER 2

CINCINNATI
- Commercial Litigation

HOUSTON
- Commercial Litigation
- Employment Law–Management

LOS ANGELES
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- Litigation–Insurance
- Mergers & Acquisitions Law
- Securities / Capital Markets Law
- Trusts & Estates Law

NEW JERSEY
- Criminal Defense: White-Collar
- Insurance Law
- Litigation–Environmental

NEW YORK CITY
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- Real Estate Law

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- Litigation–Labor & Employment
- Securities Regulation
- Tax Law

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- Litigation–Bankruptcy
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TIER 3

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EPA Publishes Its Long-Anticipated VIDA Proposed Rule

BY JEANNE M. GRASSO AND DANA S. MERKEL

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ON OCTOBER 26, 2020, the U.S. Environmental Protection Agency ("EPA") formally published in the Federal Register its long-anticipated standards for discharges incidental to the normal operation of vessels pursuant to the Vessel Incidental Discharge Act ("VIDA"). Signed into law on December 4, 2018, as part of the Frank LoBiondo Coast Guard Authorization Act of 2018, VIDA established a new framework for the regulation of discharges incidental to the normal operation of vessels in an attempt to bring uniformity, consistency, and certainty to the regulation of discharges from U.S.-flag and foreign-flag vessels. Comments were due November 25, 2020, and the comment period is now closed.

The first step in implementing VIDA requires the EPA to develop federal performance standards for "marine pollution control devices," which includes any equipment or management practice (or combination thereof) to manage incidental discharges from vessels. The EPA's proposal sets standards for 20 types of vessel discharges incidental to normal operations. The program implemented under VIDA will replace the EPA's Vessel General Permit and certain U.S. Coast Guard ("USCG") regulations for ballast water a few years from now, after the USCG finalizes regulations to implement the EPA's standards, including compliance, monitoring, inspections, and enforcement.

Background

VIDA was the culmination of years of discussion, debate, and litigation concerning discharges incidental to the normal operation of vessels. Although back in the 1970s, the EPA initially exempted these discharges from the Clean Water Act's National Pollutant Discharge Elimination System permitting program due to the burden of permitting every vessel entering U.S. waters, a federal court held in 2006 that the EPA must issue permits for vessel discharges. In response, the EPA developed the 2008 Vessel General Permit ("VGP"). The 2008 VGP was eventually replaced by the 2013 VGP, which contained some more stringent requirements, such as numeric limits on ballast water discharges, a requirement to use environmentally acceptable lubricants, and new monitoring requirements for ballast water, bilge water, and graywater.

The 2013 VGP was due to expire in December 2018, but it was extended indefinitely by VIDA. The 2013 VGP thus will remain in effect until VIDA is fully implemented, likely two or three years from now at best. In addition to creating uniform federal standards for incidental vessel discharges, VIDA included a number of other key provisions of which the maritime industry should be aware. For example, regulations under VIDA will preempt state and local laws, though some existing state provisions are incorporated into VIDA. States will also have the ability to petition for stricter discharge provisions and will have inspection and enforcement authority for the federal standards. In a significant departure from the VGP, VIDA also extended jurisdiction for regulating incidental discharges from three nautical miles out to 12 nautical miles, possibly having a significant impact on vessel operations.

Following finalization of the EPA's proposed standards, the USCG will develop regulations implementing the standards, including compliance, monitoring, inspections, and enforcement, within two years.

The first step in implementing VIDA is the EPA's development of federal performance standards for management of incidental discharges in consultation with the USCG and states. VIDA requires these standards to be at least as stringent as the existing requirements in the 2013 VGP and USCG regulations, unless information becomes available that was not reasonably available when the initial standard of performance was issued, and that information would have justified a less stringent standard.

Proposed Rule

OVERVIEW

The proposed rule would establish both general and specific discharge standards. The general discharge standards are preventative in nature and apply to all incidental discharges. They are organized into three categories: 1) general operation and maintenance; 2) biofouling management; and 3) oil management. These general standards mandate overall minimization of discharges and prescribe best management practices toward achieving this goal. No training or education requirements are included, as these will be set by the USCG in its rulemaking once the EPA's standards are finalized.

SPECIFIC DISCHARGES

With respect to specific discharge standards, the EPA's proposal covers 20 incidental discharges from vessels, down from 27 covered by the 2013 VGP. Importantly, the EPA did not significantly reduce the number of discharges covered, rather combined several discharges into one, taking a more systematic approach to managing the discharges. The standards for 13 of the 20 discharge categories remain largely the same as the 2013 VGP requirements, including discharges related to (i) boilers, (ii) cathodic protection, (iii) chain lockers, (iv) decks, (v) elevator pits, (vi) fire protection equipment (including AFFF and fire main systems), (vii) gas turbines, (viii) inert gas systems, (ix) motor gasoline and compensating systems, (x) non-oily machinery, (xi) pools and spas, (xii) refrigeration and air conditioning, and (xiii) sonar domes. The discharge standards for (xiv) bilge water and (xv) desalination and purification system discharges are consistent with the VGP, though somewhat modified.

Importantly, five types of discharges were significantly modified from the 2013 VGP standards, including discharges from: (xvi) ballast tanks, (xvii) exhaust gas emission control systems, (xviii) graywater systems, (xix) hull and associated niche areas, and (xx) seawater piping.

The most anticipated discharge standards were those relating to exhaust gas cleaning systems ("EGCS") and ballast

(continued on page 17)

water. The EPA incorporated discharge standards applicable to EGCS and exhaust gas recirculation system discharges based substantially on applicable International Maritime Organization ("IMO") guidelines, which better harmonized the VGP and IMO requirements.

With respect to ballast water, the EPA largely maintained the standards included in the VGP, which dovetails more with the IMO standard, though many of the best management practices have been modified. For example, the numeric discharge standards for ballast water remain the same as the 2013 VGP. Also, vessels operating exclusively on the Great Lakes, regardless of build date, will not be required to comply with the ballast water numeric discharge standards. Further, additional ballast water exchange requirements apply to vessels operating in the Pacific Region, including the entire exclusive economic zone adjacent to Alaska, California, Hawaii, Oregon, and Washington.

OTHER KEY PROVISIONS

- Each vessel would be required to develop and follow a biofouling management plan to prevent macrofouling and minimize potential spread of aquatic nuisance species.
- Additional limitations are proposed related to graywater discharges, though applicable numeric discharge standards remain the same.
  - Discharges of graywater are prohibited within 3 nm for vessels that travel at least 3 nm from shore and have the storage capacity to hold, unless the discharge meets the numeric discharge standards.
  - Discharges of graywater are prohibited within 1 nm for vessels that voyage at least 1 nm, but not more than 3 nm, from shore and have the storage capacity to hold, unless the discharge meets the numeric discharge standards.
  - All new vessels of 400 GT and above, and any new ferry that will carry 250 or more people, must meet numeric discharge standards.
- The EPA proposes to require all vessels with a seawater piping system that accumulates biofouling exceeding a rating of FR-20 to be fitted with a Marine Growth Prevention System.
- Fish hold effluent and small boat engine wet exhaust will no longer be regulated as discharges incidental to the operation of the vessel.
- Requirements related to discharges in federally protected waters remain largely the same, though some modifications were made with respect to discharges from chain lockers, decks, hulls and associated niche areas, pools and spas, and seawater piping when operating in these areas.

Following finalization of the EPA's proposed standards, the USCG will develop regulations implementing the standards, including compliance, monitoring, inspections, and enforcement, within two years. Like the EPA's standards, the USCG regulations must be at least as stringent as current requirements under the VGP.

Conclusion

The EPA's proposal is significant and sweeping—it is imperative that the industry take time to closely read the proposal and consider how it impacts operations of their vessels. The EPA received numerous comments requesting that the comment period be extended, but the EPA, on November 20, made the decision not to extend the comment period based on several factors, including that the EPA had a statutory deadline of December 4 to finalize the rule, which has already passed. In light of the change in administration, it is possible that finalization of the proposed rule will be delayed by several months. As of December 7, 179 comments were posted to the docket, which the EPA must take into consideration before finalizing its rule. The EPA's proposed standards will become the framework for regulation of vessel discharges for the foreseeable future. □

This article was first published as a Blank Rome Maritime client advisory on October 7, 2020.

PRESS RELEASE

Blank Rome Launches Biometric Privacy Team

BLANK ROME LLP IS PLEASED TO ANNOUNCE the formal launch of our Biometric Privacy Team. Composed of multidisciplinary attorneys from across our firm's offices, this dedicated team draws talent from our Cybersecurity & Data Privacy, Privacy Class Action Defense, Artificial Intelligence Technology, and Labor & Employment groups to help clients address and minimize the risks associated with biometric privacy regulatory compliance, enforcement, and litigation.

"We are thrilled to launch this important and timely initiative," said Jeffrey N. Rosenthal, who leads the firm's Biometric Privacy Team. "Our team includes both highly experienced compliance counsel and seasoned privacy class action defense litigators. Collectively, we are well positioned to help clients navigate today's myriad biometric privacy laws. Whether proactively developing comprehensive compliance/risk management programs or aggressively defending clients in state and federal courts across the country, our Biometric Privacy Team possesses the technological savvy, industry knowledge, and battle-forged litigation skills needed to counsel and defend our clients as consumer privacy laws continue to expand and evolve."

Recent advancements in technology and artificial intelligence have led companies to utilize biometric data—such as fingerprint scans, facial recognition, voice prints, and DNA scans—in an ever-increasingly broad number of ways to improve the efficiency and effectiveness of their operations. This, in turn, has brought about significant legal risk as legislatures across the country implement laws to tightly regulate the use of this technology, such as the now well-known Illinois Biometric Information Privacy Act and California Consumer Privacy Act of 2018. The commercial use of biometric data has also led to a wave of bet-the-company class action litigation for alleged technical statutory violations, often involving hundreds of millions of dollars in potential exposure.

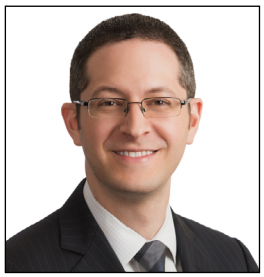
"Our biometric privacy trial attorneys are frequently retained to litigate high-exposure, high-profile disputes. Due to this demand, we have developed reputations for achieving superior results against challenging odds using novel and creative strategies," stated Ana Tagvoryan, Vice Chair of the firm's Corporate Litigation group and Co-Chair of Blank Rome's Class Action Defense Team. "Our multidisciplinary team develops winning litigation strategies and formidable defenses against all manner of claims involving allegedly improper biometric data practices."

Blank Rome's biometric privacy attorneys are also thought leaders in this space, having extensively published and presented on compliance best practices, emerging legal trends involving biometric laws and technology around the country and the world, risk mitigation, and litigation strategy.

Learn more: Biometric Privacy Team

Cruise Industry Compliance Tips: Enhancing the Traveler Experience with Facial Recognition

BY JEFFREY N. ROSENTHAL, DAVID J. OBERLY, JEANNE M. GRASSO, AND DOUGLAS J. SHOEMAKER



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IN THE PAST FEW YEARS, the commercial use of facial recognition technology has advanced at an explosive rate, expanding into numerous industries and trades. For instance, facial biometrics is increasingly relied on by airlines and airports across the globe; a similar trend is starting to take hold in the maritime industry, particularly in the cruise sector.

While this expansion is occurring, states and cities across the country—as well as the federal government—are attempting to enact strict laws regulating the use of facial recognition technology by commercial entities. Facial recognition has also recently emerged as an increasingly popular target for bet-the-company privacy class action litigation.

As the cruise industry moves toward the widespread adoption of facial recognition technology, companies should implement robust, adaptable biometric privacy programs to ensure compliance with today's growing body of law to reap the benefits of this exciting technology while mitigating liability exposure.

Overview Facial Recognition Technology

Facial recognition technology involves the use of facial "biometrics"—*i.e.,* the individual physical characteristics of a person's face—to digitally map one's facial "geometry." These measurements are then used to create a mathematical formula known as a "facial template" or "facial signature." This stored template/signature is then used to compare the physical structure of an individual's face to identify that individual.

Current and Future Uses of Facial Recognition Technology by the Cruise Industry

To understand facial recognition's potential to fundamentally transform the cruise experience, one need only look to similar enhancements made in air travel.

According to *The Washington Post,* 14 airports were using the technology as of August 2018. American Airlines has been trialing the technology at the Dallas/Fort Worth International Airport and Los Angeles' LAX airport on a voluntary, opt-in basis since August 2019.

Today, facial recognition offers air passengers a seamless, frictionless curb-to-gate experience—reportedly providing a significant boost in overall customer satisfaction as well as to the airlines' and airports' bottom line.

The airlines see a lot of benefits to facial recognition technology. For example, starting with the check-in counter, a simple face scan can provide travelers with a streamlined check-in process with less waiting time. At security checkpoints, travelers' identities can be verified swiftly and accurately, significantly reducing travel stress and allowing more time to dine, shop, and relax before boarding. Similarly, customers can be identified and permitted access to airport lounges, while also receiving a more personalized experience as a result of airlines' ability to monitor customer preferences. Finally, at boarding, travelers can experience a simple, expedited boarding process that gets them to their seats quicker and, in turn, allows for a higher percentage of on-time departures.

Facial recognition has also started to have an equally noteworthy impact on the cruise industry. In 2019, one of the major cruise lines deployed facial recognition boarding technology to offer passengers a frictionless boarding process; boarding times were cut in half. The company also deployed this technology to assist in debarkation, enhancing both the security and efficiency of one of the traditional pain points of the cruise experience.

As facial recognition becomes more widespread, cruise lines will be able to further improve the overall traveler experience. This includes providing passengers with faster and more personalized experiences in onboard shops and restaurants as this technology can also be integrated with payment systems.

While this expansion is occurring, states and cities across the country—as well as the federal government—are attempting to enact strict laws regulating the use of facial recognition technology by commercial entities.

And as travelers return to cruising as the COVID-19 pandemic subsides, facial recognition can be deployed to minimize person-to-person contact, and thus, the health risks associated with the virus. As a result, facial recognition will likely play an important role for cruise lines in the areas of access control and COVID-19 temperature/health-screening programs.

Legal Landscape

In response to concerns about companies' use of facial recognition biometrics in a safe and responsible manner, lawmakers across the country have sought to closely regulate this technology.

First, lawmakers have enacted targeted biometric privacy laws that address the collection and use of facial template data by business entities. Currently, three states—Illinois, Texas, and Washington—have such laws on the books.

Overall, Illinois' Biometric Information Privacy Act ("BIPA") is considered the most stringent. Under BIPA, a private entity cannot collect or store facial template data without first providing notice, obtaining written consent, and making certain disclosures. BIPA also contains a private right of action provision that permits recovery of statutory damages between $1,000 and $5,000 by any "aggrieved" person, which has generated a tremendous amount of class litigation from consumers alleging mere technical violations.

Texas' Capture or Use of Biometric Identifier Act ("CUBI"), while somewhat different than BIPA, also imposes similar requirements relating to notice, consent, prohibitions on disclosures, and mandatory data security measures. And while CUBI lacks a private right of action, it poses substantial potential civil exposure for noncompliance—including penalties of up to $25,000 per violation, with no maximum cap.

Second, new state consumer laws include facial template data (and other forms of biometric data) within their definition of covered "personal information." State legislators have also amended their data breach notification laws to add facial template data to the types of "personal information" that, if compromised, triggers breach notification obligations by impacted entities. Other states are currently attempting to enact new legislation of their own directly targeting facial recognition technology.

Federal lawmakers have also targeted facial recognition. In August 2020, Senators Jeff Merkley (D-OR) and Bernie Sanders (I-VT) introduced the National Biometric Information Privacy Act of 2020 (S.4400), which would impose requirements similar to BIPA from coast to coast.

Compliance Tips: What Cruise Lines Can Do to Get a Step Ahead of Impending Biometric Privacy Laws

Cruise lines have already been the target of class actions under other consumer protection laws, such as the Telephone Consumer Protection Act. These cases have resulted in settlements in the tens of millions of dollars.

Due to the rapidly expanding liability associated with facial biometrics, it is imperative that cruise lines utilizing this technology—or that intend to do so—devote the necessary time, effort, and resources to put in place flexible, adaptable compliance programs to help ensure compliance with state and federal requirements.

Cruise lines that take proactive measures now to build out their biometric privacy compliance programs—especially those that may not currently be subject to a state-specific biometric privacy law—can get a step ahead on the anticipated facial recognition laws that will likely be enacted in more parts of the country.

(continued on page 21)

Cruise Industry Compliance Tips: Enhancing the Traveler Experience with Facial Recognition (continued from page 20)

Cruise lines should consider the following:

- **Early Involvement of Biometric Privacy Counsel:** Consult with experienced biometric privacy counsel well before any type of facial recognition technology is implemented to ensure compliance with today's constantly evolving biometric privacy legal landscape.

- **Privacy Policy:** Develop a publicly available, detailed facial recognition-specific privacy policy that includes, at a minimum, clear notice that facial template data is being collected, as well as additional information regarding the purposes for which facial template data is used and the cruise line's schedule and guidelines for the retention and destruction of this data.

- **Written Notice:** Provide written notice—prior to the time any facial template data is collected—that clearly informs individuals that facial template data is being collected, used, and/or stored by the company; how that data will be used and/or shared; and the length of time over which the cruise line will retain the data until it is destroyed.

- **Written Release:** Obtain a signed written release from all individuals prior to the time that any facial template data is collected that permits the cruise line to collect/use the individual's biometric data and disclose this data to third parties for business purposes.

- **Opt-Out:** Permit travelers to opt out of the collection of their facial template data.

- **Data Security:** Maintain data security measures to safeguard facial template data that satisfies the reasonable standard of care applicable to the cruise industry and which protects facial template data in a manner that is the same as or more protective than the manner in which the cruise line protects other forms of sensitive personal information.

- **Arbitration Provisions in Ticket Contracts:** Include mandatory arbitration provisions and class action waivers in all ticket contracts requiring traveler disputes or claims that may arise under biometric privacy or similar laws must be resolved through binding, individual arbitration, and not in court, to limit biometric privacy class action litigation risk.

Conclusion

Facial recognition technology has fundamentally transformed the operations of businesses across several industries; it is poised to do the same for the cruise industry in the immediate future.

At the same time, liability stemming from the use of this technology is also rapidly expanding as cities, states, and Congress look to impose strict requirements and limitations on the use of facial biometrics.

Companies operating in the cruise industry contemplating the use of this next-generation technology—even those whose operations are located in jurisdictions where no biometric privacy regulation currently exists—are encouraged to take proactive measures to develop and implement facial recognition biometrics compliance programs that encompass the practices/principles described above. □ – 2020 BLANK ROME LLP

This article was first published in Marine Link on October 21, 2020. Reprinted with permission.

We invite our readers to dive into our archive of *Mainbrace* newsletters and maritime development advisories, as well as keep abeam with all of our current and upcoming analyses on trending maritime topics and legislation, in our ***Safe Passage*** blog.

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MARPOL Electronic Recordkeeping—Finally a Reality

BY JEANNE M. GRASSO AND DANA S. MERKEL

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LONG-AWAITED AMENDMENTS to the International Convention for the Prevention of Pollution from Ships ("MARPOL") entered into force on October 1, 2020, which expressly permit the use of electronic record books for certain MARPOL-required logs. Although the United States reserved its decision regarding adoption of the amendments when they were approved by the International Maritime Organization ("IMO") in May 2019, the United States ultimately accepted their adoption in accordance with the tacit acceptance procedure. This is a significant and welcomed development.

Background

Electronic record books have been the subject of much debate and consideration at the IMO and within the United States for a number of years. During MEPC 74 in May 2019, amendments were approved, revising MARPOL Annexes I, II, V, and VI to allow the use of electronic record books approved by the vessels' Administration for the Oil Record Book ("ORB"), Cargo Record Book, Garbage Record Book, and Annex VI air pollution prevention recordkeeping requirements. In adopting the amendments, the IMO stated the use of electronic record books "should be encouraged as it may have many benefits for the retention of records by companies, crew, and officers." These amendments entered into force on October 1, 2020, although a number of flag States believed the previous MARPOL language provided them with the discretion to allow the use of electronic record books and had already approved their use on vessels for some years. Even so, the permissibility of using electronic record books to meet MARPOL requirements is now clear.

Along with the MARPOL amendments, Guidelines for the Use of Electronic Record Books under MARPOL ("Guidelines"), MEPC.312(74), were also adopted, which flag States are required to take into account in approving electronic recordkeeping systems. The Guidelines specify software system standards, such as ability to automatically record revisions and attempts to manipulate data, role-based access control, and data recovery and power source standards that must be considered. To accommodate port State inspections, the Guidelines also state that systems should be capable of printing out entries, pages, or the entire log, along with the name of the person that made each entry, a record of amendments, date and time of printing, page counts, and the name and version of the system.

Although the United States has moved toward electronic recordkeeping in a number of areas, such as with the U.S. Environmental Protection Agency's ("EPA") Vessel General Permit, the United States had not been supportive of transitioning MARPOL records to electronic systems. When the MARPOL amendments to allow electronic recordkeeping were approved, the United States reserved its position on their adoption and stridently spoke against electronic record books. The United States asserted that *"the use of electronic record books should only be permitted after mandatory standards for electronic record books are adopted and incorporated into the text of MARPOL…without doing so, we would be reducing the level of care and environmental protection currently provided in MARPOL."*

Analysis

In the days preceding the amendments taking effect, discussion was still ongoing in the United States with respect to whether the amendments should be allowed to take effect or whether the United States would file a formal objection. We speculate that the U.S. Department of Justice, which relies heavily on errors and omissions in handwritten paper record books for criminal enforcement actions, remained concerned about the prosecutorial value of and challenges associated with electronic records. Meanwhile, the U.S. Coast Guard ("USCG"), the EPA, and numerous

other federal agencies have been moving towards electronic recordkeeping for many years, valuing the improved efficiency and ability for vessel owners and operators to maintain real-time oversight of vessel operations. It was not until the last hours prior to entry into force that the United States determined it would accept the amendments.

Shortly thereafter, the USCG published guidance indicating that Port State Control Officers and Marine Inspectors would begin examining electronic records books in a similar manner as written record books to ensure compliance with MARPOL and the Guidelines. As such, vessel owners/operators must be prepared to provide the Port State Control Officers and Marine Inspectors with written confirmation from the flag State that the electronic system meets the criteria provided in the Guidelines.

We anticipate that more detailed Port State Control guidance may be forthcoming, including in connection with approving electronic record keeping systems for U.S.-flag vessels. Additionally, some amendments to U.S. Coast Guard regulations may also be required to remove requirements for paper records and set new requirements related to electronic recordkeeping, but this is not envisioned to occur anywhere in the near term.

Conclusion

The United States' acceptance of the MARPOL amendments regarding electronic recordkeeping is a significant and positive development and will allow shipowners and operators the opportunity for improved efficiency and oversight. However, because the USCG is likely to scrutinize electronic records, owners and operators must be vigilant and should thus strictly comply with their flag States' and IMO's guidance on electronic record keeping, train their crew members, and closely monitor the implementation of an electronic record keeping program to help avoid MARPOL missteps. □ – 2020 BLANK ROME LLP

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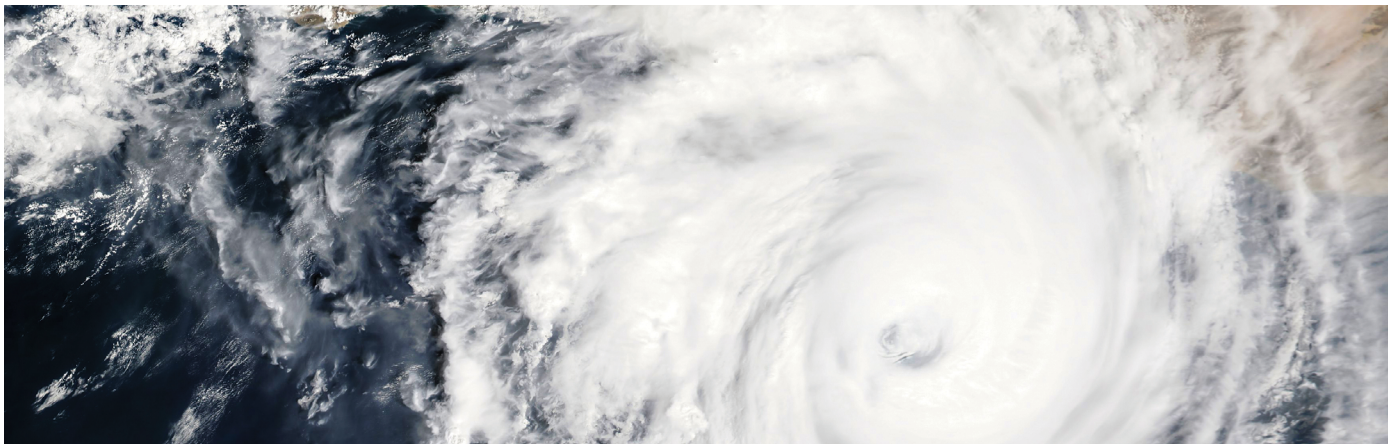
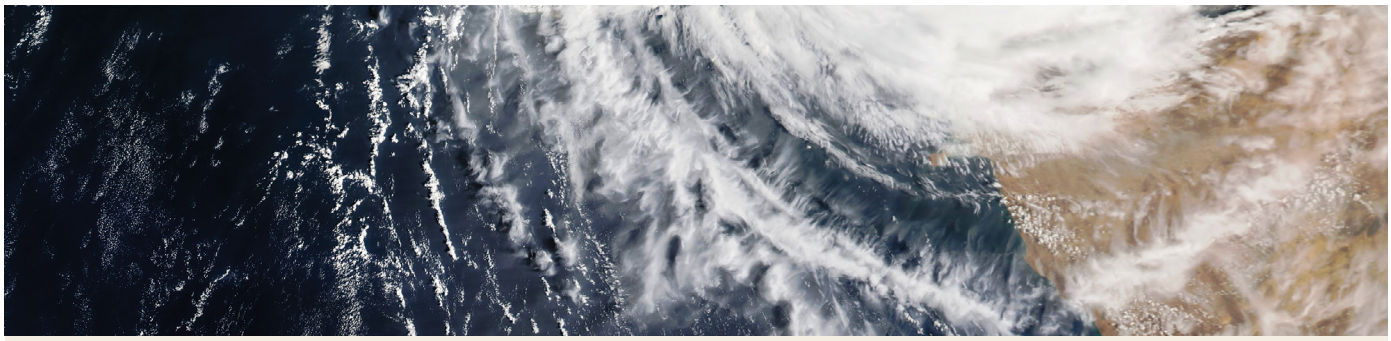


Severe Weather Emergency Recovery Team



Blank Rome's Severe Weather Emergency Recovery Team ("SWERT") helps those impacted by natural disasters like recent powerful hurricanes in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico, and by wildfires and mudslides in California and Colorado. We are an interdisciplinary group with decades of experience helping companies and individuals recover from severe weather events. Our team includes insurance recovery, labor and employment, government contracts, environmental, and energy attorneys, as well as government relations professionals with extensive experience in disaster recovery.

Learn more: blankrome.com/SWERT

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Marine Plastic Pollution

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AS THE INVETERATE PUNDIT POGO ONCE SAID, "We have met the enemy and he is us." This could very well be said for our disposable society, which uses and disposes tons of plastic in ways that are not wise and negatively impact the health of our oceans and sea life within. Although many reports focus on larger plastics, microplastics, which go largely unnoticed, are also wreaking havoc on our oceans. Microplastics are small pieces of plastic that come from a variety of sources, both from degradation of larger plastics and from tiny manufactured plastics that are added to many health and beauty products as exfoliants. Recent surveys by Australian scientists estimate that there are at least 14 million tons of microplastics on the ocean floor, with higher concentrations where plastics accumulate at the surface of the water.

As Rep. Young explained, "[e]very minute, the equivalent of a garbage truck full of plastic is dumped into our ocean. According to the United Nations, that is more than eight million metric tons a year."

Finding a Solution

Scientists are working hard to find a solution to the plastic problem—particularly the fact that plastic never completely breaks down, but rather only breaks into smaller and smaller pieces. A number of new and interesting ideas have been proposed, such as plastic-eating caterpillars and super enzymes. However, until we have a better system for breaking up plastics harmlessly, we need to develop plans for reducing and recovering marine plastic waste.

Internationally, many countries have begun to take action to address the mounting problem of plastic pollution in the world's oceans. Single-use plastics are banned in varying degrees in a host of countries worldwide in an effort to reduce plastic waste. A number of efforts have been underway for years now to find a way to effectively collect floating garbage in the world's oceans.

The Marine Debris Act established the Interagency Marine Debris Coordinating Committee in 2006, which coordinates marine debris research and related activities among U.S. federal agencies and is chaired by the National Oceanic and Atmospheric Administration ("NOAA"). Separately, the U.S. Environmental Protection Agency ("EPA") encourages and provides technical and financial support for efforts to educate and prevent or recover trash from U.S. waters via its Trash-Free Waters Projects. The EPA also participates in several international forums on marine debris prevention and reduction, and has partnered with countries in the Caribbean region to extend its Trash-Free Waters program. Environmental associations, such as the North American Marine Environment Protection Association, have also been working to organize beach cleanups and educate the public about the importance of reducing plastic use and recycling or otherwise disposing of plastic properly.

Some U.S. ports are taking measures to clean up or prevent garbage from reaching U.S. waterways. Flotsam and Jetsam, two manned 26-foot boats, cruise the Cleveland Harbor and Cuyahoga River removing trash and debris from the water daily. The Port of Baltimore's trash interceptors, affectionately known as Mr. Trash Wheel, Professor Trash Wheel, and Captain Trash Wheel, use containment booms to funnel garbage flowing from outfalls to the interceptor, where the trash is collected.

Legislative Efforts

Congress has also taken notice of the exponentially growing problem of plastics in the world's oceans and the public's increasing concern on the issue. A bipartisan group of members of Congress, leaders of the Oceans Caucus, recently passed legislation called Save Our Seas Act 2.0 (S.1982). The House of Representatives passed S.1982, with an

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amendment, on October 1, 2020. On December 1, 2020, the Senate passed the House version by unanimous consent—clearing the bill for President Trump's signature.

The bipartisan House and Senate co-chairs of the Oceans Caucus have been working on marine debris legislation for the last two years. The House co-chairs are Don Young (R-AK) and Suzanne Bonamici (D-OR). The Senate co-chairs and principal sponsors are Senators Sheldon Whitehouse (D-RI), Lisa Murkowski (R-AK), Dan Sullivan (R-AK), and Tammy Baldwin (D-WI). Save Our Seas 2.0 builds on legislation enacted in the prior Congress, Save Our Seas 1.0 (Pub.L. 115-265), and expands its scope to include the following key provisions, as reported by its House sponsor, Rep. Don Young:

1. Establishing a Marine Debris Trust Fund for the NOAA to use in responding to marine debris events;

2. Creating a Marine Debris Foundation to encourage, accept, and administer private gifts to help with the NOAA Marine Debris Program;

3. Authorizing a prize competition—the "Genius Prize for Save Our Seas Innovations"—to advance innovation in the removal and prevention of plastic waste;

4. Directing federal agencies to work with foreign governments to improve waste management systems;

5. Requiring the secretary of state to report to Congress on the potential for a new international agreement focused on marine debris and including the topic of marine debris in all international agreements;

6. Directing the EPA to develop a strategy to improve waste management and recycling infrastructure, harmonize waste collection and recycling protocols, strengthen markets for recycled plastic, and identify barriers to increasing the collection of recyclable materials; and

7. Creating under the EPA a Post-Consumer Materials Management Infrastructure Grant Program, Drinking Water Infrastructure Grant Program, Wastewater Infrastructure Grant Program, and Trash-Free Waters Grant Program to assist local waste management authorities.

Microplastics are small pieces of plastic that come from a variety of sources, both from degradation of larger plastics and from tiny manufactured plastics that are added to many health and beauty products as exfoliants. Recent surveys by Australian scientists estimate that there are at least 14 million tons of microplastics on the ocean floor, with higher concentrations where plastics accumulate at the surface of the water.

As Rep. Young explained, "[e]very minute, the equivalent of a garbage truck full of plastic is dumped into our ocean. According to the United Nations, that is more than eight million metric tons a year. The bipartisan Save Our Seas Act 2.0 will address the staggering amount of plastic in the ocean by improving the domestic cleanup and response to marine debris, incentivizing international engagement on the issue, and strengthening domestic infrastructure to responsibly dispose waste materials."

Rep. Bonamici further stressed that a single bill cannot solve the problem. Rather, we have to "fundamentally change our reliance on plastic." The Senate co-sponsors applauded the House action and promised to get the bill passed in the Senate and onto President Trump's desk for signature. Notably, Sen. Sullivan stated on House passage of S.1982, "I look forward to Save Our Seas Act 2.0 passing the Senate and moving onto the President's desk for his signature, and continuing work on this important issue." The Senate took up the charge and passed the bill on December 1, 2020.

The next steps for Save Our Seas Act 2.0 will be President Trump's signature of the bill into law, enacting appropriations and agency implementation. Finally, one small step for cleaning up our oceans from marine debris. □

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