

MAY 2018
VOL. 18-5

PRATT'S

ENERGY LAW

REPORT



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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

Ballast Water Management: The Conundrum Continues

*By Jeanne M. Grasso and Sean T. Pribyl**

Prior to embarking on a voyage to the United States, shipowners must ensure that they are able to properly manage their ballast water when operating in waters subject to U.S. jurisdiction, which includes utilizing one of the compliance options available or ensuring that the vessel has an extension to its compliance date. The authors of this article discuss the U.S. Coast Guard's ballast water management systems and the inconsistencies in the international and domestic regimes.

It has been about 15 months since the U.S. Coast Guard (“USCG”) type-approved the first three ballast water management systems (“BWMSs”) in December 2016; three more BWMSs have been type approved since. Yet, ballast water management remains one of the most challenging and frustrating regulatory issues of the past decade because of inconsistencies in the international and domestic regimes. This is largely because the United States is not party to the International Maritime Organization’s (“IMO”) Convention on the Control and Management of Ships’ Ballast Water and Sediments (the “Convention”). Rather, the United States regulates ballast water unilaterally under the National Invasive Species Act, which differs in certain ways from the Convention, especially when it comes to approving equipment to meet the standards set forth in the Convention and the USCG’s implementing regulations. As such, ballast water compliance challenges remain far from resolved. In some cases, for example, especially with respect to USCG compliance date extensions, the policies continue to evolve on an ad hoc basis, often causing confusion.

COMPLIANCE CONUNDRUM

The fact that the IMO and USCG testing protocols for BWMSs are not in sync, and that BWMSs can be type-approved under one regime and not the other, has created a conundrum for shipowners, especially now that the Convention entered into force in September 2017. Compliance with both regimes is on a phased-in schedule, and owners are striving to align these

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compliance dates so they can make capital investments that will allow them to comply with both regimes. This is because, for most owners, maintaining the ability to trade in the United States is imperative as it is unlikely that charterers will accept a charter if the vessel cannot trade to the United States because the BWMS is not compliant with USCG requirements. Thus, while an indemnity or guaranty between the owner and the maker of a BWMS that is not yet USCG type-approved may purport to solve some of the financial issues, it is unlikely to resolve operational issues if the BWMS is not compliant with USCG regulations when the vessel's compliance date arrives.

At present, there are six USCG type-approved BWMSs, with seven more under review. Even so, because the USCG ballast water regulations require owners to retrofit BWMSs on existing ships, there have been numerous technical challenges, since the BWMSs are all different. To illustrate, two of the systems treat ballast water with filtration and ultraviolet light, three via electro-chlorination, and one via chemical injection to reduce the number of living organisms to below the regulatory limits. All six of these systems are operationally complex, and technical specifications must be evaluated in depth to determine if these systems are appropriate for a particular vessel. Key issues include method of treatment, flow rates, hold times, power level/consumption, water temperature, salinity, turbidity, trade routes, and size requirements. And this is just the beginning; the expectation is that these systems will require extensive crew training and frequent ongoing maintenance to keep them functioning properly—they are not “plug and play.”

To recap, the trigger for compliance with the USCG's regulations is separate and distinct from the Convention because the United States is not party to the Convention and, understandably, this conflict in regulatory regimes still confuses some shipowners. Focusing on the U.S. regulations, the USCG trigger is the first drydock after January 1, 2014 or January 1, 2016, depending on the vessel's ballast water capacity. There are several compliance options under the USCG regulatory regime:

- 1) install and operate a USCG type-approved ballast water management system;
- 2) use water from a U.S. public water system (not practical, save for some domestic operators);
- 3) use an IMO-approved and USCG-authorized Alternate Management System (“AMS”) for up to five years from the vessel's compliance date (not practical, absent some guaranty of USCG type-approval);
- 4) do not discharge ballast water into U.S. waters (generally not practical); or

- 5) discharge ballast water to an onshore facility or to another vessel for purposes of treatment (not currently available).

So, in theory at least, an owner is not required to install a BWMS in order to comply with USCG regulations, though not having a BWMS might not be practical for most vessel owner/operators. Importantly, ballast water exchange is only allowed until a vessel reaches its compliance date.

COMPLIANCE DATE EXTENSIONS AND POLICY UPDATES

To make the compliance process more reasonable due to the lack of USCG type-approved BWMSs at the outset of the regulatory regime implementation, the USCG developed an extension policy under which it has issued compliance date extensions to nearly 15,000 vessels. Even so, there has been quite an evolution in the manner in which the extensions have, or have not, been granted as a result of more BWMSs achieving USCG type-approval. Essentially, extensions were easy to obtain at the outset, but now they are extremely difficult to secure, though not impossible.

Several policy changes and developments are worth noting, some formal and some informal, with three key issues highlighted here. More guidance, though, is expected in the near term.

Extensions

The USCG's policy currently allows for an extension of a vessel's compliance date. However, absent a detailed timeline and strategy, including the selection of a specific BWMS for installation on a particular vessel, an owner will almost certainly not receive an extension. Also, extensions will be shorter in duration—whereas at the outset they were tied to the vessel's next drydock, now they will likely only be for one year, absent extraordinary circumstances. And, if owners select a BWMS that is not yet type-approved, they bear the risk of not being in compliance or preparing for possible operational constraints should that BWMS not ultimately receive type-approval. As such, if their BWMS of choice does not get type-approval, owners better have a contingency plan, such as an alternative BWMS that can be installed before the extension expires.

Over the past several years, the USCG has been issuing guidance to the industry on extensions in the form of policy letters, Navigation and Inspection Circulars (“NVIC”), and the USCG Maritime Commons blog. This formal advice from the USCG is something on which owners are basing significant investment dollars, and stakeholders should continue to closely monitor any published policy developments. However, when there are unannounced changes in positions that only surface when a request for an extension has been denied, the USCG creates inconsistencies in the path to compliance, which can lead to confusion and instability for owners/operators striving for compliance.

Changes in ballast water policy are often driven by factors beyond the control of industry stakeholders, though factors such as external market conditions, legislative pressures, and international input could have an impact on the direction the USCG takes on a particular matter, including ballast water compliance. To that end, on March 1, the USCG released NVIC 01-18, a comprehensive document that offers its latest guidance on ballast water management. While this new NVIC discusses how the USCG will review extension requests, it falls short of providing an applicant with clear standards for what is required in terms of receiving an extension.

For example, within 24 hours of the release of NVIC 01-18, the USCG rejected extension requests under the NVIC, some of which had been pending for months. Those denials shed light on what the USCG is actually now requiring. Specifically, based on the denials, applicants will now need to provide evidence of a completed acquisition contract, delivery receipt, or other verifiable proof that a BWMS has been purchased; verifiable proof that the purchased BWMS will be installed on the vessel on a specific date; and documentation that the BWMS is expected to receive type approval. These “requirements” range from impractical to impossible for most shipowners. Unfortunately, NVIC 01-18 does not provide notice to the industry on these critical and burdensome details.

Inoperable BWMSs

The USCG released CG-CVC Policy Letter 18-02 on February 14, 2018, “Guidelines for Evaluating Potential Courses of Action when a Vessel Bound for a Port in the United States has an Inoperable Ballast Water Management System.” This recent BWMS policy letter sets forth much-needed guidance on how the USCG will deal with vessels coming into U.S. ports with inoperable BWMSs. It is intended to offer guidance to USCG personnel, as well as vessel masters, owners, operators, agents, and persons in charge of vessels when evaluating potential courses of action if a vessel destined for a U.S. port has an inoperable BWMS. Importantly, this policy letter lays out compliance options for circumstances in which a vessel has, or has not, passed its compliance date and has an inoperable BWMSs when calling on a U.S. port.

Notably, the USCG makes it clear that even if a vessel has an inoperable BWMS and requests consideration to discharge ballast water for reasons of extraordinary circumstances as laid out in 33 CFR § 151.2040, requests based on bankruptcy of the BWMS manufacturer that may have factored into the inoperability will not be afforded special consideration.

However, the most recent guidance outlined in CG-CVC Policy Letter 18-02 does provide an option for compliance when a BWMS is inoperable and the vessel has passed its compliance date. Relying again on its discretionary

authorities, a District Commander or Captain of the Port may approve ballast water exchange in accordance with 33 CFR 151.2025(a)(3). This requires an affirmative step from the vessel owner/operator to seek such approval. If the USCG grants approval under this policy, the vessel must perform complete ballast water exchange in an area 200 nautical miles from any shore prior to discharging ballast water. Such a policy indicates that the USCG is still striving to work with the industry on options, but those options will continue to diminish as the shift towards compliance and enforcement continues. Vessels that have not passed their compliance date as yet may continue to meet USCG requirements through ballast water exchange. NVIC 01-18 also offers similar guidance on inoperable BWMSs.

Enforcement

For the past few years, the USCG has been in compliance mode, with an emphasis on education and outreach as the industry has implemented the ballast water management regulations. This is understandable given that the USCG conducts Port State Control (“PSC”) examinations, which include compliance with ballast water management requirements, on about 9,300 foreign vessels per year. That focus on educational outreach, though, may be changing somewhat as the USCG has signaled in the past few months a new emphasis on enforcement of ballast water violations, announcing that compliance with the USCG’s ballast water management requirements is now a PSC priority. According to one USCG Sector Commander who issued a Notice of Violation and fine last year to the operator of a bulk carrier for non-compliance, “[t]he Coast Guard is committed to the protection of the marine environment through strong and robust administration and oversight of ballast water management practices.”

To illustrate how that enforcement looks in practice, routine PSC inspections in the United States may include reviews of vessel documentation, visual inspections of the condition of BWMS equipment, actual operations of ballast equipment, and queries to the vessel’s crew on their knowledge of BWMS operations. Since the 2012 Final Rule was released, the USCG has issued more than 600 deficiencies and taken close to 20 enforcement actions that have ranged from written warnings to fines of \$5,500. Stakeholders should expect those enforcement numbers to increase in the near future.

Non-compliance with the BWMS regulations can be costly for several reasons. For example, if a vessel comes into port and has not utilized one of the compliance methods set forth previously, the vessel almost certainly will not be able to discharge ballast water in port. In such cases, the USCG may require the vessel to divert its voyage, modify cargo operations, and sail outside 12 nautical miles to discharge ballast water, which could result in incurring pilotage and

launch fees, extra fuel fees, demurrage, and other financial repercussions. In recent cases, such activities ranged from \$35,000 and \$150,000 for one port call. The new NVIC offers insight into the USCG's enforcement posture and scope of enforcement options that range from education to criminal penalties. Put simply, non-compliance is costly, and it would behoove all owners to ensure compliance. Absent that, forethought about a contingency plan is imperative.

CONCLUDING GUIDANCE

Prior to embarking on a voyage to the United States, ship owners must ensure that they are able to properly manage their ballast water when operating in waters subject to U.S. jurisdiction, which includes utilizing one of the compliance options available or ensuring that the vessel has an extension to its compliance date. What is equally important, though, is to have a contingency plan in place and understand how to manage a non-compliance before you come into a U.S. port. There are many things an owner can do to minimize risk and manage a non-compliance, but, hiding that non-compliance is not one of those things. Lack of preparation, especially in these circumstances, will inevitably be costly. As such, based on the foregoing and despite the extensive guidance set forth in NVIC 01-18, the ballast water conundrum continues.

