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U.S. Coast Guard Ballast Water Discharge Rule Establishes New Requirements and Enforcement Risks for Ship Owners and Operators

The U.S. Coast Guard (USCG) recently issued a final rule intended to reduce the importation of invasive species into the United States, which is estimated to cost the United States billions of dollars each year. *See Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters*, 77 Fed. Reg. 17254 at 17301 (March 23, 2012) (the "Rule"), to be codified at 33 CFR Part 151 and 46 CFR Part 162. The Rule applies to U.S. and foreign ships calling at U.S. ports and sets out the federal ballast water management regulations pursuant to the National Aquatic Nuisance Prevention Control Act (NANPCA) and the National Invasive Species Act (NISA). (Note that each state is entitled to impose more stringent requirements pursuant to the Clean Water Act (CWA).) In general, the Rule requires ship owners/operators to install, operate and maintain a USCG-approved ballast water management system (BWMS) to satisfy the treatment standards for living organisms (e.g., invasive aquatic species, bacteria and other pathogens) in ballast water as specified by the Rule.

As a result of the Rule, ship owners/operators will be subject to new regulatory requirements that not only will increase operating costs, but also will provide the federal government with yet another opportunity to bring an enforcement action seeking (potentially significant) monetary fines and penalties for noncompliance, as well as criminal sanctions for deliberate/willful violations of the Rule (which are often sought in cases brought by the government against ship owners/operators for alleged violations of the Act to Prevent Pollution from Ships, which implements the International Convention for the Prevention of Pollution From Ships, known as "MARPOL," for domestic enforcement purposes). Accordingly, ship owners/operators should be familiar with the Rule, options for compliance, and how to best manage the risks associated with these new requirements.

Overview of the Ballast Water Rule

Currently, ships are required to reduce the risk of importing invasive species by practicing "ballast water exchange" while at sea, *i.e.*, flushing out ballast water and replacing it while in transit. According to the USCG, the new requirements will be more effective than ballast water exchange and better protect ecosystems within U.S. waters. Notably, the Rule overlaps with both the U.S. Environmental Protection Agency's Vessel General Permit program under the CWA (which already requires ships operating in U.S. waters to abide by certain discharge limits) and the International Maritime Organization's (IMO) International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWC) (which will likely soon enter into force once certain threshold country/merchant shipping gross tonnage ratification requirements are satisfied).

Who is impacted by the Rule?

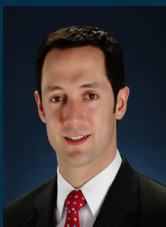
The Rule, which becomes effective June 21, 2012, applies to two groups of ships that discharge ballast water into U.S. waters. The first group includes ships that currently are required to conduct ballast water exchange. This group includes all ships, both U.S. and foreign, that are equipped with ballast tanks and that operate in U.S. waters, with certain exceptions. (Exceptions include, for example, crude oil tankers engaged in coastwise trade and certain armed forces vessels.) The second group includes ships that do

Questions?

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not operate beyond the U.S. Exclusive Economic Zone, but take on and discharge ballast water in more than one Captain of the Port Zone and are greater than 1,600 gross tons register.

What are the discharge standards required by the Rule?

Once the Rule becomes applicable to a particular ship (which depends on (1) the size of the ship and (2) when the ship was constructed, as discussed below), ballast water discharged into U.S. waters must contain fewer than 10 organisms per cubic meter for organisms equal to or larger than 50 micrometers, and fewer than 10 organisms per milliliter for organisms less than 50 micrometers and greater than or equal to 10 micrometers. The Rule also includes specific concentration limits on certain indicator microorganisms (e.g., *Escherichia coli*).

When do the standards go into effect?

For “new vessels,” *i.e.*, ships constructed on or after December 1, 2013, the new standards will apply on delivery of the ship. For ships built prior to December 1, 2013 and having a ballast water capacity between 1,500 and 5,000 cubic meters, the standards will apply upon the first scheduled dry-docking after January 1, 2014. Finally, for ships built prior to December 1, 2013 but with ballast water capacity below 1,500 cubic meters or greater than 5,000 cubic meters, the standards will apply upon the first scheduled dry-docking after January 1, 2016. The Rule, however, does provide for a case-by-case extension of the applicable compliance date where it can be documented that compliance is not possible within the specified timeframe (requests need to be made at least 12 months prior to the applicable compliance date).

How may the standards be met?

In order to meet the ballast water treatment standards imposed by the Rule, ship owners will be able to choose among available BWMS, subject to USCG approval. Currently, available technologies for BWMS include, but are not limited to, chemical disinfection (e.g., chlorine dioxide), ultraviolet radiation, ultrasound treatment, and deoxygenation. (Ships subject to the Rule also have the option of transferring ballast water at a facility that will treat and dispose of the water, using potable water as ballast water, or not discharging any ballast water into U.S. waters.) The implementation of the USCG approval system for BWMS, however, is likely to take up to three years. Accordingly, the Rule provides for the temporary acceptance of BWMS that are approved by a foreign administration in accordance with the IMO standards under the BWC, provided that the USCG determines that the system is at least as effective as ballast water exchange.

Conclusion

The compliance obligations imposed by the Rule will not only require ship owners/operators to incur additional costs related to the evaluation, installation, operation (including significant record-keeping requirements) and maintenance of BWMS, but also will provide the federal government with a new enforcement opportunity to assess civil fines and penalties (up to \$35,000/day), as well as criminal sanctions for “knowing” violations. The U.S. Department of Justice (DOJ) continues to make pollution from ships an enforcement priority, as seen in the many oil-water separator (OWS) cases brought over the past several years, and it is not a stretch to anticipate DOJ continuing that trend in future enforcement of the ballast water management requirements contained in the Rule. Accordingly, while the compliance dates are some time away, it is not too early for ship owners/operators to fully appreciate the new requirements imposed by the Rule and the risks associated with non-compliance. Finally, we note that the USCG is continuing to evaluate stricter standards for ballast water treatment and a broader applicability of the Rule. Fair weather and following seas in the meantime.

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