

Standard Bulletin

The Standard



Environmental issues in the USA and Canada

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Ever since the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound on 24 March 1989, causing the largest oil spill in US history, the US has led the world in tackling ship-source pollution by introducing a range of measures. Any owner trading internationally needs to be aware of the relevant regulatory requirements for ships calling at US ports, and the aim of this edition of the *Standard Bulletin* is to bring members, and their officers and crew, up to date with developments in US pollution response and legislation, together with developments in Canada.

In our February edition of the *Standard Bulletin*, the club's Director of Loss Prevention, Chris Spencer, considered the US Environmental Protection Agency's Vessel General Permit scheme, which imposes stringent requirements for the control and monitoring of waste streams on ships operating in US waters. The risks of non-compliance with the VGP regulations include exposure to fines and criminal prosecutions. As with Marpol contraventions, club cover is discretionary, and there is therefore no automatic right to assistance or to a recovery of costs and financial penalties. In this issue, Austin P. Olney of Dewey & LeBoeuf LLP examines the challenges posed by the regulations and suggests practical measures to assist owners in ensuring compliance by their crew.

Public concern with environmental issues and a corresponding political enthusiasm for action has led to some sources of pollutants being increasingly heavily regulated. Peter G Bernard of Bernard & Partners provides an update on amendments to the Canadian Migratory Birds Convention Act, which has increased the potential fines that may be imposed upon shipowners and officers for discharging pollutants, including oily bilge water, in Canadian waters. Air pollution is another current area of concern, particularly in California, which has recently introduced new restrictions on ships calling at its ports or sailing within its waters, and these are examined by Philip Lempriere and Frances Keeler of Keesal, Young & Logan.

In 1999, when California became the first US state to introduce oil pollution response regulations in respect of non-tank ships, the Standard Club approached ECM Maritime Services LLC (ECM) to provide a cost-effective solution. Ten years on, the relationship is still going strong and the agreement reached back in 1999, whereby ECM provides Qualified Individual, Spill Manager and plan writing services to the club's non-tank members free of charge, has been expanded to cover both Californian and federal US



Coastguard requirements. Mike Minogue of ECM writes about the agreement with the club and the services which ECM offers to the club's members.

Finally, in the unfortunate event of a casualty, owners need to know how best to respond without making a bad situation worse. Gary Mauseth of Polaris Applied Sciences considers how to ensure that efforts at salvage do not increase ultimate liability, and how to participate most effectively in the National Resource Damage Assessment process.

Whilst we are sure that you will find the articles in this edition of use, they are designed to provide an overview. If members require specific advice on any of the issues covered, they should contact the club or the relevant contributor so that we can provide advice relevant to the member's particular circumstances.

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The club's New York office



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The Standard club's New York office plays a key role in the club's global network of offices. It was opened in 1998 and serves the club's North and South American members, who account for some 20% of the tonnage entered with the club. It is located in New York's old Maritime Exchange building in the heart of the financial district. New York remains an important maritime hub in North America, although less so as an actual port these days. Its position on the United States' eastern seaboard, its importance as a financial center, the highly respected federal courts of the Southern District of New York and its popularity as a venue for arbitration with American maritime interests, all ensure that New York maintains its position in the shipping industry. It was therefore the obvious choice for the club's US office.

The office is currently headed by Colin Snell, previously Syndicate Claims Director of Syndicate B, who first worked in the New York office from 2000 to 2004, with Ryan Puttick, a graduate of the United States Merchant Marine Academy at Kings Point, and myself, working as claims executives. We are all legally qualified and provide a full claims-handling service, in respect of both P&I and Defence issues, for our North and South American members.

Leading marine lawyer, LeRoy Lambert, will take over as President of the office on September 1 2009. He joins the club from the US law firm Blank Rome and was previously a partner with Healy & Baillie before its merger with Blank Rome in 2006. LeRoy has been in private practice for 25 years

and is a highly regarded figure in the field of maritime law, having been ranked as a leading shipping litigation lawyer by both *Chambers USA* and *Chambers Global*. He has also been recognized as one of the 10 "most highly regarded individuals" in the world by the *International Who's Who of Shipping and Maritime Lawyers*.

The New York office is kept fully abreast of environmental issues affecting our members by local experts and lawyers. In the event of a pollution incident, the member's immediate response is by necessity aimed at stopping and containing the pollutant and removing it. Thereafter, the focus is on the National Resource Damage Assessment process and the penalties imposed as a result. We are in a position to advise members on the likely development of a claim and have the knowledge to appoint the necessary experts to best minimize the potential liability. Also, the office is in the same time zone as many of these members, save for a three-hour time difference for members on the West Coast, which ensures that claims are handled efficiently.

In addition to claims-handling, the New York office is also a correspondent office to assist all the club's members when trading in and out of the Americas. It is part of the club's network of offices that give members the ability to contact a club representative 24 hours a day. In support of this role, the office has a close working relationship with many of the correspondents, lawyers and experts in both North and South America.



(LEFT TO RIGHT) COLIN SNELL, RYAN PUTTICK, EDDY MORLAND

Air Pollution – US regulations update



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Emissions from ocean-going ships continue to be of concern to air pollution regulators worldwide. In part, it is because these emissions are seen as large sources of various pollutants, including greenhouse gasses, and in part because other sources have already been heavily regulated. The following is a summary of some of the more recent regulations that will soon be enforced internationally and in California. While other jurisdictions in the US, and in particular the West Coast, are also looking at reducing emission from these sources, some of the measures will be voluntary.

Low Sulfur Fuels

MARPOL Annex VI Revisions

In October 2008, the Marine Environment Protection Committee (MEPC) of the IMO voted to revise the existing low sulfur fuel standards internationally from a maximum of 4.5% sulfur in fuel oil to 3.5% by 2012, and subsequently to 0.5% by 2020. In special Emission Control Areas (ECAs) the limits will drop from 1.5% to 1% sulfur in July 2010 and to 0.1% by 2015.

The US Environmental Protection Agency (EPA) has filed a joint application with Canada to establish the territorial waters of these countries as an ECA, up to 200 nm from shore. The exact boundaries of the ECA will be defined in the application. If approved by the IMO, all ships within the boundaries of the ECA would be required to meet the more stringent low sulfur fuel limits.

California Fuel Regulations

On July 24, 2008, the California Air Resources Board (CARB) adopted a low sulfur fuel regulation. This regulation requires the use of low sulfur fuels from within 24 nm of the coast. California first began regulating the sulfur content of fuels in ocean-going ships in 2007; however, those regulations were challenged and overturned in federal district court. The new regulation is expected to be implemented in two phases, beginning in July 2009. The fuel requirements as adopted apply to ocean-going ship main (propulsion) diesel engines, auxiliary diesel engines, and auxiliary boilers.

Phase I requires the use of marine gas oil with a maximum sulfur content of 1.5%, or marine diesel oil with up to 0.5% sulfur content effective for auxiliary engines, main engines and auxiliary boilers on July 1 2009. Phase II requires the use of marine gas oil or marine diesel oil with a maximum sulfur content of 0.1% effective January 1 2012, for all sources.



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As you can see, California will have the same standard as the MARPOL Annex VI special ECAs, but three years earlier.

Cold Ironing

In December 2007, California adopted a shore power regulation requiring container ships, reefers and cruise ships to use alternative power in lieu of auxiliary engines while at berth in Los Angeles, Long Beach, Oakland, San Francisco, San Diego and Hueneme. This process (called cold ironing) includes either linking to shoreside power or implementing alternative projects that will obtain emission reductions equivalent to using shoreside power.

This regulation, which became effective on January 2 2009, requires a fleet operator to reduce at-berth emissions from its ship's auxiliary engines at the port by 80% by 2020. The regulation will be phased in depending on which alternative is chosen. If shore power is available and compatible with a ship that is already equipped, it must be used commencing January 1 2010. Affected terminal operators and fleets electing alternative methods of emission control were to submit an initial terminal plan to CARB by July 1 2009. Fleets electing to use reduced power generation must submit initial plans by July 1 2013.

Implementation is hindered by the lack of infrastructure at the ports, limiting the supply of electricity. Terminal operators should be aware that California's regulation requires that terminal operators provide the infrastructure to supply the power to the berth. CARB has developed forms that must be filed by operators of fleets and by terminal operators, indicating whether shoreside power or alternative methods will be used to comply with the regulation. These are available on the CARB website at: <http://www.arb.ca.gov/ports/shorepower/plans.htm>

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Ship Speed Reduction

California

California has proposed a regulation that, in concept, would require ships to reduce their speed to 12 knots when operating close to shore. While initially, CARB had proposed to make the regulation mandatory, more recently, it has asked for input from all stakeholders as to whether the regulation should be mandatory or voluntary and whether the speed reduction should begin at 24 or 40 nm out. CARB is also drafting its technical reports that include emission reduction estimates and cost impacts. You can submit your comments, as well as any relevant technical data you might want to provide to:

<http://www.arb.ca.gov/ports/marinevess/vsr/vsr.htm>

CARB studies have shown that reducing ship speed increases engine efficiency, thus reducing ship emissions, including diesel particulate matter, oxides of nitrogen, carbon dioxide (greenhouse gas emissions) and oxides of sulfur. CARB estimates that reductions of between 14 to 36% may be obtained from the speed reduction measure, depending on the distance from shore at which the reduction is initiated and the pollutant involved.

Ports of Los Angeles and Long Beach

It is important to note that the concept for California's ship speed reduction regulation came from the ongoing voluntary measure that was initiated by the Ports of Los Angeles and Long Beach several years ago, with the input of EPA, CARB, South Coast Air Quality Management District, industry and

the Marine Exchange of Southern California. The program asked for voluntary participation for ships to reduce speed to 12 knots from 20 nm out. The program evolved and the Port of Long Beach now has its Green flag program. Under the Green Flag program, the Marine Exchange tracks ship speeds, and those companies that have 100% compliance receive a 15% reduction in dockage fees. The port just voted to extend the program to 40nm out and offers a higher dockage fee reduction, up to 25%.

On-board incineration

In 2005, CARB adopted a regulation that prohibits cruise ships from conducting on-board incineration within three nm of shore, unless instructed otherwise by the US Coast Guard. The regulation also contains recordkeeping and reporting requirements. California expanded this regulation in 2007 to include all ocean-going ships of 300 gt or more, including foreign-flagged ships. The regulation was designed to reduce toxic air contaminant exposure to individuals living near the Californian coast and in and around the ports.

Shipowners or operators must record information regarding incineration within three nm of the coast, including the date and time, and amount incinerated. CARB inspectors must be provided with the records upon request when inspecting the ship and the records must be kept for two years.



US EPA Vessel Discharge Permit requirements: compliance challenges and strategies



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In earlier editions of the *Standard Bulletin* dated 1 December 2008 and 10 February 2009, Chris Spencer, the club's Director of Loss Prevention, summarized the Vessel General Permit (VGP) requirements, which were issued in final form by the US Environmental Protection Agency (EPA) on 18 December 2008, and explained what impact they may have on ships calling at US ports or trading within US waters.

In this article, I shall examine the practical challenges presented by the VGP. It may not be obvious, but the risk of criminal enforcement for filing falsified reports or for making false statements to US officials is similar to the risk of the MARPOL Oily Water Separator (OWS) violations. I shall conclude by providing some lessons learned from those prosecutions that can be applied to a shipowner's VGP compliance program if they call at US ports.

Summary of final VGP requirements

The VGP requirements came into effect on 6 February 2009. They require all US and foreign flagged commercial ships, 79 ft in length or longer, operating in US waters to meet best management, inspection, monitoring, reporting, and recordkeeping practices for virtually every water-based waste stream generated by a ship.

The VGP incorporates additional requirements imposed by 25 states. Shipowners/operators must meet the added requirements of the states where they operate. The following chart highlights requirements added by coastal states, including states bordering the Great Lakes:

California: Submit a Notice of Intent for all ships regardless of size; monitor/measure all waste stream discharges; additional reporting forms.	Connecticut: Ballast water treatment systems must operate "to the highest level"; no discharge of graywater unless no storage capacity.	Florida: Stricter limits for discharge of oil.	Georgia: Marine sanitation devices should be used for graywater discharge on ships of under 20 gt.
Illinois: No discharge of blackwater or graywater.	Indiana: State officials may inspect ships.	Maine: No underwater hull cleaning.	Massachusetts: No discharge of graywater on ships above 400 gt.
Michigan: No blackwater or graywater discharge.	Minnesota: Ballast water treatment criteria.	New Hampshire: No sewage discharge in specified areas.	New Jersey: No graywater discharge.
New York: Ballast water treatment criteria; no bilge water/graywater discharge.	Ohio: Ballast water treatment criteria.	Pennsylvania: Ballast water treatment criteria.	Rhode Island: May revoke specific ship certification.

Understanding VGP enforcement risk

The VGP requirements create logistical and financial compliance burdens and expose shipowners/operators to substantial enforcement risk, both civil and criminal. The VGP imposes significant restrictions on operational discharges within the US three-mile territorial zone. These restrictions pose some risk of non-compliance, but the extensive and intensive inspection, monitoring, reporting and recordkeeping requirements present the greatest risk.

US enforcement of MARPOL shows that the greatest liability risk is deceitful behavior rather than the polluting acts themselves. What can be done about managing this risk? The history of US MARPOL enforcement provides some answers.

The MARPOL Annex I enforcement model

The MARPOL Annex I requirements for OWS are closely related to the VGP. Annex I limits the concentration of oil in bilge water discharges to 15 parts per million and, like the VGP, imposes monitoring and recordkeeping requirements. Since 2003, the US Department of Justice ("US DOJ") has prosecuted more than 90 companies and 67 crew members, and collected over \$200m in criminal penalties related to MARPOL violations. However, these companies and crew members were generally charged with making false statements to US officials, presenting falsified Oil Record Books (ORBs), and obstructing justice. They were not charged with pollution violations per se because the pollution typically occurred outside US jurisdiction.

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The root causes of these MARPOL violations commonly included: inadequate supervision of shipboard practices; insufficient spares and maintenance of pollution equipment; failure of management to independently verify and effectively monitor key performance data; weak environmental management systems (EMS) that existed on paper but not in practice; overburdened crew; failure to maintain a culture of compliance at sea; and the mistaken belief by crew members that they were helping the company by cutting corners. The full extent of such shortcomings throughout the industry is unknown, but the growing list of prosecutions (which includes some of the most respected names in shipping) suggests that many companies may not be prepared to fully comply with the extensive VGP inspection, monitoring, reporting, and recordkeeping requirements.

The VGP enforcement trap will be paperwork

The VGP presents the same risk of intentional non-compliance as the MARPOL requirements. Crew members may take short cuts because the VGP requirements are too burdensome. Crew members may think “who will ever know if the reports are false?” MARPOL enforcement cases have shown that this approach is extremely costly. First, US investigators are good at detecting falsified reports. Second, crew members have proved to be poor liars when closely questioned. Third, significant ‘whistleblower’ awards provided under US law often turn crew members into informants.

The VGP certifications

The VGP Part 1.7 requires “any report” (including monitoring data) to be certified, to be truthful, and to be “signed and dated by the person preparing the document.” The big challenge for owners/operators is to make sure that all those VGP reports (including mandatory annual reports of non-compliance) are true and that crew members do not expose their companies to huge fines by filing false reports or lying to port state authorities during routine inspections. Under US law, companies are subject to criminal prosecution for the criminal acts of their employees. Shipping companies have been routinely fined \$500,000 for each felony committed by crew members (for example, false statements made to government officials).

Start with the basics: Make sure your VGP runs on accurate information

Before a company even gets to the operational details of integrating VGP requirements into an existing Safety Management System (SMS) or EMS, management and crew need to make sure that the information conveyed to the US authorities is true, whether in written reports or in direct conversations with port state authorities.

The EPA and the US Coast Guard (USCG) are currently discussing a cooperative effort to enforce the VGP requirements. Companies should prepare now for close USCG, EPA, and state environmental agency scrutiny, which will probably take the form of expanded port state inspections. As a matter of priority, crew members need to be trained to avoid the perils of trying to trick the system. The cost of disclosing violations is likely to be far less than the cost of false reports or cover-ups.

Shipowners should therefore:

- train crew in the importance of telling the truth and the costs of not doing so
- educate crew on their legal rights and how and when to assert them; they are always better off saying nothing than lying
- simulate port state inspections and enforcement investigations with crew
- reinforce an ‘at sea’ compliance culture through frequent contact and encouragement by shoreside management
- independently verify data that drives EMSs
- have lawyers direct independent audits to protect results where appropriate

Benchmark VGP Management Systems to MARPOL Best Practices

The US DOJ has used its criminal authorities extensively to force the shipping industry to improve its environmental management practices. Court ordered Environmental Compliance Plans (ECPs) from MARPOL cases provide a list of ‘best practices’ that the US government believes will reduce environmental violations. Many companies have adopted these practices voluntarily and found them to be effective. These ECPs are intended to improve EMS generally by: reducing waterborne waste at the source; creating obstacles to illegal discharges; improving knowledge management practices; and requiring verification of key data.

Gearing up for VGP compliance

The VGP will burden and challenge shoreside management and crew. Simply adding more sections to the EMS and related forms may not suffice, particularly if shoreside management lacks the resources or knowledge management tools to monitor and analyze on a timely basis the vast number of ship reports (which are often received long after they are prepared). Keeping up with all the new monitoring, recordkeeping, and reporting, as well as the ultimate requirement to prevent discharges that violate the VGP, will require a robust EMS and extensive cooperation and coordination among crew and management. Here are some practical suggestions to catch problems before they present enforcement risks:

- capture contaminants upstream by improved maintenance practices and adding save-alls
- lock and tag valves to discharge lines to discourage illegal acts
- have deck department verify soundings in waste tanks; have shoreside management correlate the results with waste disposal reports and ORBs
- conduct riding audits, including senior shoreside management
- use tamper-proof ‘white boxes’ to monitor waste streams
- use electronic, real-time data management systems for key indicators
- use emerging remote sensing technology to monitor ship performance
- maintain full inventory of spares for pollution control equipment

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The club's US pollution response coverage for non-tank ships



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ECM Maritime Services LLC (ECM) is one of the leading resources for regulatory compliance and emergency pollution response in the US, the Panama Canal and Canada. It provides these services to many Standard Club members, including at the club's cost, provision of oil spill response plan preparation and maintenance to owners of non-tankships entered with the club.

When the United States first enacted the Oil Pollution Act of 1990 (OPA 90), the regulations required tankship owners calling at US ports to have Oil Spill Response Plans on board. Owners of these ships were required to identify a Qualified Individual (QI), who had to be resident in the US, available 24 hours a day, fluent in English, and with full authority to implement the plan. They were also required to identify and ensure the availability of private personnel and the equipment necessary to respond to a worst-case discharge of oil from one of their ships. Most tankship owners implemented their own contracts to comply with these regulations, including contracts with QI and Spill Management Team (SMT) vendors, Oil Spill Removal Organizations (OSROs), and salvage, emergency lightering and fire-fighting contractors (salvors).

However, whilst non-tankships were able to utilize the services of spill managers, OSROs and salvors on an ad-hoc basis following spills, they had no permanent contractual arrangements in place and, of course, under the new OPA 90 regulations, no legal requirement to put them in place.

This situation changed at the end of 1999 as a result of two developments. Firstly, California decided to enact its own state oil pollution response regulations in respect of non-tankships. These regulations, which were to take effect in February 2000, essentially mirrored those of OPA 90, requiring non-tankships to put in place the same spill response contracts as tankships. At about the same time, the two major OSROs, Marine Spill Response Corporation and National Response Corporation, introduced a dual tariff rate for their oil spill response services, making a more beneficial tariff available for owners who had an existing contract with them.

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Setting the standard: A difficult challenge for management

The VGP imposes numerous broadly stated performance requirements that, for the most part, are expressed as 'Best Management Practices'. While these standards are imprecise (some say vague), the permit holders must document their compliance through inspections and reports. One example of such imprecise standards is the VGP's requirement to "discharge only the minimal amount of ballast water essential for ship operations." While the VGP provides "suggested control measures to minimize the discharge of ballast water," it does not provide any set benchmark by which shipowners/operators can be said to have discharged only "the minimal amount of ballast water essential for ship operations." Another example of vague standards is preventing harmful overboard discharges of rust.

In the absence of specific standards, shipowners/operators may want to develop their own criteria, either based on their internally adopted standards or on standards developed with guidance from outside consultants, class societies, or industry organizations. Without such standards, it may be very difficult to train and instruct crew, and to audit compliance.

EPA Webcast and FAQs

On February 5, 2009, the EPA held a webcast to explain the VGP regulations and to answer some FAQs. The most notable EPA responses follow:

- **Notice of Intent Submittal Deadline.** NOI must be submitted before September 19, 2009 for ships greater than or equal to 300 gt or with a ballast water capacity of at least 8 cubic meters. The EPA strongly encourages that NOIs be submitted via the electronic system currently under development.
- **Notice of Intent Applicability.** A NOI should be submitted for any ship that is likely to call on a US port in the next five years (which coincides with the term of the VGP), even if it will only sporadically trade to the US during that time frame.
- **Inspection/Monitoring Requirements.** Ships that will only sporadically trade with the US do not need to comply with routine inspection/monitoring requirements while outside US waters. However, they should conduct routine (weekly) inspections/monitoring during any 'voyage' (the EPA did not elaborate on the definition of 'voyage') to a US port. Such ships must conduct their annual and dry dock inspections.



In order to assist its non-tankship members, the Standard Club entered into a contract with ECM to provide these members with the California required QI, SMT and plan writing services. The club funded this contract with ECM which, in turn, charged reduced retainer rates to the club. The club also engaged the services of ECM to put contracts in place between the club and the OSROs on behalf of all of the club's non-tankship members. These contracts were also funded by the club and provided their non-tankship members with the ability to access the OSROs, at their reduced tariff rates, in case of a spill response, not only in the State of California, but anywhere in the US.

Subsequently, in August 2005, the US Coast Guard (USCG) enacted its own oil spill compliance requirements for non-tankships, which are similar to the existing USCG regulations for tankships and the California state regulations for non-tankships. At that time, the Standard Club and ECM agreed to expand their current agreement to cover the new regulatory requirements for non-tankships.

In summary, pursuant to the agreement we have with the club, ECM provides QI/SMT and ship response plan preparation and maintenance for both California non-tankship response plans and USCG non-tankship response plans to the club's non-tankship members free of charge. The club's non-tankship members who enter into retainer agreements with ECM will only be charged for the annual cost of their required SMT tabletop exercise.

ECM maintains full-time, in-house personnel located on each coast of the US. In our offices in Norwalk (Connecticut), Roanoke (Virginia), Houston (Texas), Seattle (Washington) and Long Beach (California), spill responses are regionalized by coast, utilizing personnel familiar with the federal and state regulators and the issues that would effect a spill response incident for a particular location. ECM (Panama) S.A. performs 'Authorized Person' services as required under the Panama Canal Shipboard Oil Pollution Emergency Plan regulations. ECM Europe, located in Rome, offers staff to assist their Scandinavian, Greek, and other European clients, while Polaris, Inc. serves as ECM's agent in Japan.

Many of the ECM QI and SMT staff have been USCG employees and/or have sailed on board ships, offering a wealth of knowledge and expertise covering every facet of the maritime and environmental fields. Their response team is complemented with a network of support personnel, ensuring initial response capability on scene within two hours of notification.

In addition to the services noted above, ECM can also assist Standard Club members with compliance in the following areas:

Federal

- Shipboard Oil Pollution Emergency Plans and Shipboard Marine Pollution Emergency Plans required for all ships of 400gt or more
- OPA 90 Tank Vessel Response Plans (VRP)
- OPA 90 Certificate of Financial Responsibility (COFR) necessary for all ships of 300gt or more
- ISPS/US Maritime Transportation Security Act (MTSA) Ship Security Plans
- Ballast Water Management Plans
- International Carrier Bonds

USA individual state requirements (in addition to meeting the federal requirements)

- Alaska Tank and Non-tank Oil Spill Contingency Plan and Alaska COFR
- California Tank Vessel Oil Spill Contingency Plan and California COFR
- Texas General Land Office Online Database Registry for tank and non-tankships
- Washington Tank Vessel Voluntary Best Achievable Protection Program & Exceptional Compliance Program
- state-specific Ballast Water Management Plans

Canada

- Authorized Person coverage and Response Organization contracting

Panama

- Panama Canal Shipboard Oil Pollution Emergency Plan and Authorized Person services

ECM vets all required oil pollution planning and response contracts to ensure that our clients are receiving the best and most cost-effective coverage. We will negotiate these contracts on an annual basis to obtain the type of coverage that works best for the shipowner's trading patterns at the lowest possible cost. ECM also vets non-contracted resources, for listing as additional response resources in the VRP, allowing the call-out of the most economical contractors in cases of small spills, without deviating from the VRP.

In addition, ECM offers a worldwide team of surveyors who are well experienced in the latest international and US regulatory requirements and who can assist with regulatory, safety and condition inspections, including inspections within the ambit of the ship Inspection Report Programme (introduced by the Oil Companies International Marine forum), and with audits including ISM, ISPS and environmental compliance.

Further details are available on the ECM website - www.ecmmaritime.com

Increased Penalties under the Canadian Migratory Birds Convention Act 1994



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Canada is a trading nation which is dependent upon marine transport for its imports and exports. The Canadian government has recently been under increasing pressure from environmental groups to toughen its approach towards protection of the marine environment from ship-source pollution.

In this article, I shall examine the impact of the Migratory Birds Convention Act 1994 (MBCA) on shipowners trading to Canada, in light of recent amendments to the legislation which have significantly increased the potential penalties that may be imposed.

Shipowners can be prosecuted in Canada for discharging pollutants into the marine environment under the MBCA.¹ The Migratory Birds Convention was signed between the USA and Britain (on behalf of Canada) in 1916 and implemented into Canadian law by the MBCA with the aim of protecting and conserving migratory birds. The MBCA provides that it is an offense for any person or ship to deposit any substance harmful to migratory birds in waters frequented by them (s. 5.1(1) MBCA). It is a strict liability offense, which means that the prosecution is not required to prove that a shipowner acted intentionally or knowingly when discharging the substance in the marine environment. It is only required to prove beyond a reasonable doubt that the ship discharged a substance and that it was harmful to migratory birds. The burden then passes to the shipowner, who can escape conviction if he can demonstrate that he exercised due diligence to avoid the offense. The MBCA was amended in 2005 by Bill C-15,² which was introduced to target the effects of marine pollutants on migratory birds, in particular oily bilge water discharges from ocean-going ships passing along Canada's coast. It expanded the application of this offense from Canadian territorial waters (i.e. within 12 nm from shore) to the Canadian Exclusive Economic Zone (EEZ) (i.e. between 12 to 200 nm from shore.)

The legislation places an obligation on the master, chief engineer, owner and operator of a ship to take reasonable care to ensure that all persons on board do not discharge oily bilge water or for that matter, any other substance, harmful to migratory birds. Directors and officers of the corporate owner of the ship who "direct, authorize, assent to or acquiesce" in the discharge will be considered to be parties to the offense and liable to conviction (s. 13 (1.2) MBCA). It is also an offense to destroy, alter or falsify records or otherwise interfere with the investigation of an offense (s. 5.2 MBCA). This would include changing information in the engine room log book, oil record book or other data belonging to the ship. There is a risk that crews will be intimidated by investigations carried out under this legislation and may try to conceal minor regulatory breaches, with the result that they will face more serious criminal charges for making false statements or false records.

The MBCA provides extensive enforcement powers of arrest, search and seizure to environmental officials known as 'game officers', including the power to board and inspect a ship without a warrant. This has been a cause for concern in the shipping community as these officials are not trained mariners and are not necessarily familiar with the day-to-day running of a ship. However, the boarding and inspection powers can only be exercised in respect of a foreign flagged ship in the EEZ, with the consent of the Canadian Minister of the Environment. Game officers also have the power to direct a ship into port and detain it if they believe that the ship has committed an offense. But they can only exercise this power in respect of a foreign flagged ship in the EEZ, with the consent of the Canadian Attorney General.

Increased penalties

The Canadian courts have had the power under the MBCA to impose a fine of up to C\$300,000 for less serious offenses or up to C\$1m for more serious offenses and/or impose a term of imprisonment for a maximum of three years. If the offense involves more than one bird or one nest, a fine may be imposed for each single bird or nest as if it were a separate prosecution. These penalties were recently increased by the introduction of Bill C-16,³ which received royal assent on 18 June 2009. A date has not yet been set for it to come into force. Offenders are identified under the legislation as either individuals, small revenue corporations (with gross revenues of less than C\$5m) or other corporations.

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1. Prosecutions can also be brought under the Canada Shipping Act 2001, the Canadian Environmental Protection Act 1999 and the Fisheries Act 1985 for the discharge of pollutants into the sea along Canada's coasts.

2. Its full title is An Act to Amend the Migratory Birds Convention Act 1994 and the Canadian Environmental Protection Act 1999

3. Environmental Enforcement Act 2009. The Act amends nine environmental statutes in Canada, including the Canadian Environmental Protection Act 1999, by increasing the criminal penalties that can be imposed.



It establishes a range of fines that may be imposed, including mandatory minimum fines for a first offense, which are doubled in the case of a second or subsequent conviction:

1) Individuals

Minimum Fine: First Offense C\$5,000 to C\$15,000
Second Offense C\$10,000 to C\$30,000

Highest Fine: First Offense C\$1m
Second Offense C\$2m

2) Corporations

Minimum Fines: First Offense C\$100,000 to C\$500,000
Second Offense C\$200,000 to C\$1m

Highest Fine: First Offense C\$6m
Second Offense C\$12m

3) Ships under 7,500 tons dead weight

Minimum Fine: First Offense C\$25,000 to C\$75,000
Second Offense C\$75,000 to C\$150,000

Highest Fine: First Offense C\$4m
Second Offense C\$8m

4) Ships over 7,500 tons dead weight

Minimum Fine: First Offense C\$100,000 to C\$500,000
Second Offense C\$200,000 to C\$1m

Highest Fine: First Offense C\$6m
Second Offense C\$12m

These potential penalties apply to a shipowner, operator, master, and chief engineer as well as the directors and officers of the shipowning company.

There have been a small number of prosecutions under Bill C-15. The largest fine imposed to date is C\$600,000, which was imposed upon the Canadian National Railway in May 2009 after approximately 834,000 litres of heavy fuel oil spilled into an Alberta lake after a train derailment. The majority of prosecutions against shipowners have resulted in far smaller fines. However, the Canadian Government has made it clear by the introduction of these increased penalties that these offenses should be treated more seriously. The court will have to consider whether there are any aggravating factors when deciding upon the sentence to be imposed, such as the harm caused to the environment, whether the offense was committed inadvertently or recklessly, whether there was any attempt to mitigate the damage and whether there is any history of non-compliance.⁴

Conclusion

In Canada, as in many other nations in the world, protection of the environment is of primary importance. However, such protection must be achieved by responsible and consistent legislation. Although it is admirable to try to eradicate ship-source pollution, this legislation criminalizes shipowners for even accidental oil spills and places a heavy burden upon them in terms of the strict liability of these offenses and the heavy penalties that may be imposed. Objections have also been raised by various industry bodies against this legislation, on the grounds that it contravenes Canada's obligations under UNCLOS⁵ and MARPOL,⁶ which already address the issue of ship-source pollution. However, given the public's concern with pollution and the increasing pressure from environmental groups within Canada for the government to take a tougher approach towards enforcement of this legislation, it is likely that in the future, harsher penalties will be imposed upon shipowners who breach this legislation.

4. s. 2 (e) EEA

5. United Nations Law of the Sea Convention

6. International Convention for the Prevention of Pollution from Ships



Natural Resource Damages in the United States: Evolving issues



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The Oil Pollution Act of 1990 (OPA) imposes liability for oil pollution incidents in the navigable waters of the US, adjoining shorelines and the exclusive economic zone (i.e. between 12 and 200 nm from shore). It was enacted in response to the 1989 Exxon Valdez oil spill in Alaska and imposes liability for the removal costs and damages resulting from an oil spill on the Responsible Party (RP), e.g. the shipowner, operator or demise charterer of the ship from which the oil was discharged.

Federal, state and local government agencies in the US are designated as Natural Resource Trustees (Trustees) which act on behalf of the public to carry out a Natural Resource Damage Assessment (NRDA). This process assists the Trustees to determine appropriate restoration and compensation for the resources damaged by the incident, which may include the cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damaged natural resources.

The OPA is approaching the end of its second decade in force. During the last ten years, there have been some potentially significant procedural modifications made by many governmental agencies involved in NRDA. The impact of these modifications to shipowners' interests is dependent upon the particular circumstances of the incident and should be considered when evaluating potential exposures and developing NRDA response and defense strategies, in oil spill and grounding cases.

Oil Spills

Since 2000, federal regulations and guidelines have been modified to require the Trustees to invite the RP to participate in NRDA. The level of cooperation between Trustees and the RP is at the discretion of the individual Trustees. The ultimate objective is to mutually develop data that expedites agreement regarding the level of damage and the implementation of restoration. An advantage for the RP is that redundant assessment studies are avoided, as the OPA requires the RP to reimburse the cost of the government's studies as well as its own. In addition, the RP has direct knowledge of the Trustees' concerns and may have the opportunity to participate in focusing the studies which quantify the level of damage and develop cost-effective restoration.

Recently, it has become increasingly common for Trustees in larger incidents to adopt the 'Pay to Play' position with the RP. With increasing regularity, this position requires the RP to fund the entire package of Trustee studies in order to be deemed fully cooperative and to participate in the assessment and restoration process. If the RP does not fully participate in financing these studies, OPA provides the Trustees with a funding alternative, which allows them to finance initial NRDA activities without encumbering their own agency budgets.

The Oil Spill Liability Trust Fund (OSLTF) was established by OPA to provide funding for the cleanup of orphan spills, and for initiating the assessment of damage to natural resources caused by a discharge of petroleum. The US Coast Guard administers the OSLTF via the National Pollution Fund Center (NPFC). In the event of a spill, Trustees can develop generalized study plans and budgets, submit them to the NPFC, and receive an obligation from the OSLTF to cover the initial assessment studies within 48 hours of the request. The availability of funds from outside the Trustee agency's own budget eliminates the need for it to seek funding from the RP. Both the US National Oceanic and Atmospheric Administration (NOAA) and the Department of the Interior have adopted a policy of seeking a funding obligation from the OSLTF prior to requesting the cooperation of the RP.

The OSLTF also provides reimbursement of spill-related costs in the event that the RP prevails in limitation of its liability under OPA. Costs subject to limitation include cleanup expenditures, proven damages to the environment, and the reasonable costs to determine the damages. However, NPFC approval of the Trustees' initial injury assessment plan does not mean that the OSLTF will necessarily view the RP's direct funding of the studies as reimbursable.

An interesting recent development is the emergence of private contractors which offer their damage assessment services to Trustees. Typically, these contractors request no immediate funding, as they will seek recovery from the OSLTF through the Trustees. To date, ship interests have argued that such costs should be limited to initial studies.

Groundings

OPA allows the Trustees to recover damages to natural resources due to both the discharge of oil and the threat of a discharge. A ship stranding on habitats that are highly valued for their uniqueness or ecological significance could be responsible for restoring those resources damaged during the salvage or removal of the ship. The NOAA has taken the position that habitat injured during an attempt to extricate a grounded ship from the strand or the removal of a wreck with petroleum on board, is removing the threat of pollution and is therefore subject to the NRDA provisions of OPA. In numerous cases, the Trustees have claimed compensation for habitat, particularly coral that has been damaged under the footprint of the ship, within the extraction path, and by salvage activities. Costs for restoring coral have ranged from less than \$100 per square meter to more than \$5,000 per square meter. The current average cost is around \$500 per square meter.

CONTINUED OVER



Recently two species of coral – Elkhorn and Staghorn coral (*Acropora palmata* and *crevicornis*) have been listed as threatened under the US Endangered Species Act 1973. This means that it is illegal to damage these species, and shipowners who cause damage will be subject to claims for compensation and criminal charges. The US is also in the process of passing legislation making contact with coral reef illegal, which will also result in compensatory and punitive penalties.

Claiming monies for coral damage is no longer restricted to the US. Most countries with coral reefs are aware that large settlements have been made worldwide and are anxious to recover funds. In fact, some of the largest coral damage recoveries are presently being made outside the US. In an analysis of 30 coral damage cases worldwide, we found that restoration costs are related to three actions in approximately equal proportions: navigational error, action of the crew in an attempt to power off the strand, and the actions of the salvor. Use of the ship's engines whilst aground can result in scouring around the propeller and the deposit of very large quantities of sand associated with natural coral reef communities. Relocation of sand and rubble can smother live coral and associated plants and animals. Also the contact of salvage ships, tow wires, chains, and anchors with the reef can cause substantial damage and result in large monetary claims.

Conclusion

We have first-hand knowledge of cases in which the actions of the stranded ship's crew and the action of the salvor resulted in negotiated damages in excess of the value of the ship. The bulk of the damages could have been avoided by prudent actions of the crew and salvor without jeopardizing the safety of the ship and crew. Some salvage contracts may not hold the salvor liable for unnecessary injury to the reef, leaving a substantial, and expensive, restoration project for ship interests. Shipowners and operators may minimize their liability by as much as two thirds by alerting the operating companies, salvage masters, and response managers to the potential consequences of their actions. Safety of the crew is always the primary concern. Once safety is assured, effective strategies, plans and actions may be established by an informed response team and implemented in a coordinated manner to minimize the potential damage to the reef and subsequent restoration actions.

As with other casualty-related liabilities, minimizing loss and effectively dealing with environmental claims requires an understanding of the risks and adequate preparation to respond to those risks, as well as a knowledgeable and capable response team.



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