Pitfalls to Avoid in Changing Times: An Overview of Air Emissions, Ballast Water, Jones Act, and Other Regulatory Challenges

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February 28, 2019
NAMEPA – Creating Order out of Chaos
Houston, TX

The information contained herein is abridged and summarized from numerous sources, the accuracy and completeness of which cannot be assured. This should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.
What We’ll Be Talking About …

• Legal Framework
• Compliance Challenges and Regulatory Issues
• Enforcement Risks
• Focus – Air Emissions, Ballast Water, Jones Act
Key Domestic Legislation

• Federal Law / Regulations
  • Act to Prevent Pollution from Ships ("APPS"), implementing MARPOL Annex VI
  • Clean Water Act
    • EPA’s Vessel General Permit
  • National Invasive Species Act
  • Vessel Incidental Discharge Act of 2018
  • Coastwise Laws
Key International Conventions

• International Convention for the Safety of Life at Sea ("SOLAS")
• International Code for the Safe Operation of Ships and for Pollution Prevention ("ISM Code")
  • Safety Management System
  • Cyber Risks
Components of a Safety Management System

• Commitment from top management
• Procedures that describe what is done on board the ship
  • Cargo sampling/testing
• Procedures for internal and external audits
• A Designated Person Ashore as the link between the ships and shore staff
• A system for identifying where actual practices do not meet those that are documented and for implementing associated corrective actions
• Regular management reviews
• Mandatory Planned Maintenance System used as a tool maintaining the vessel according to the specified maintenance intervals
Complying with a Safety Management System

• Importance of following the policies and procedures

• Importance of making them “follow-able”

→ Becoming significant USCG enforcement tool for many environmental and safety issues

Say what you do, do it, and prove it!
International Convention for the Prevention of Pollution from Ships ("MARPOL")

- Annex I—Oil
- Annex IV—Sewage
- Annex V—Garbage
- Annex VI—Air
North American and Caribbean ECAs

- Covers most of North America (generally to 200 nm), plus Puerto Rico and U.S. Virgin Islands (generally to 50 nm)
- As of January 1, 2015, vessels required to use fuel with a Sulphur content 0.10% or less
- MARPOL global limit on fuel Sulphur content outside of ECAs will be reduced to 0.5% from the current 3.5% global limit on and after January 2020.
  - Scrubbers in lieu of low Sulphur fuel?
Exhaust Gas Cleaning Systems

Scrubber Challenges

- Open Loop, Closed Loop, Hybrid
- Bans in Open Loop in many ports
  - Germany, Singapore, China, California, Connecticut
- Water pollution issues
- Cost and availability of high Sulphur fuel
- Timing
- Carriage ban March 1, 2020
2020 Sulphur Cap—USCG’s View

• Believes 0.5% compliant fuel will be available per IMO study
  • May be instances of regional non-availability, but this can be managed through the transport of compliant fuels to areas where it is not available.

• Agrees with industry concerns that consistent global enforcement is needed or will create competitive disadvantage.

• Industry should expect to see a strong PSC effort to ensure compliance, including referral to flag state and enforcement.

• Paris/Tokyo MOU “Letters of Warning on 1.1.19

→ Accurate records are critical.
2020 Sulphur Cap: Key Points

• January 1, 2020: Sulphur content of any fuel used on board vessels shall not exceed .5% and when ships are operating within an ECA, Sulphur content shall not exceed .1%

• March 1, 2020: Sulphur content of fuel used or carried for use shall not exceed .5%, unless vessels are equipped with Exhaust Gas Cleaning Systems (or scrubbers)

• A ship is non-compliant if the Sulphur content is more than .5%, even if compliant fuel is not available

• A Fuel Oil Non-availability Report (FONAR) is not a get-out-of-jail-free card.
Fuel Oil Non-Availability Reports ("FONARS")

• Pertains to operations in the ECA
  • Charterers vs. Owners / procurement of fuel

• If compliant fuel not available, must notify Flag State and Port State under Annex VI
  • Lowest Sulphur fuel must be used
  • NOT a waiver, but helpful

• At the end of 2017, the USCG had taken 11 enforcement actions in the last 3 years regarding MARPOL Annex VI violations (9 Notices of Violation, 1 Letter of Warning, and 1 civil penalty action reduced to a Letter of Warning)

• "Typical" NOV is $5,000
2020 Sulphur Cap: Key Points

- Port States have significant obligations, but what oversight?
- Improvements are warranted in how ships, port states, and enforcement agencies present their information
  - Better reporting by all parties in order to have the best understanding of how compliance, regulation, and enforcement are working
- BDN is key document to show quality and is used for compliance purposes.
- Sniffers, drones and sensors have been suggested as the future of detection.
  - Currently used in ECAs for red flag purposes not enforcement
2020 Sulphur Cap: Key Points

• BIMCO clauses published December 10, 2018
• 2020 Marine Sulphur Clause Content Clause for Time Charter Parties
  • Replaces 2005 Clause
  • General Indemnity clause
• 2020 Fuel Transition Clause for Time Charter Parties
  • Deals with one-off event of switching from 3.50% to .50%
  • Process will need to start before January 1, 2020
  • Intent is to provide fair allocation between parties in managing remaining fuel
ECA Enforcement

• Joint enforcement between the USCG and EPA
  • EPA shore-side fuel suppliers sampling
  • EPA fly-over ship emissions sampling
  • USCG and EPA vessel fuel sampling program
  • USCG during port State control inspections
• Trade Groups calling for strict enforcement of .1% limit
  • Trident Alliance—~ 50 members
ECA Enforcement (cont.)

• Civil Penalties—up to $25,000/day
  • Goals
    • Level playing field
    • Deterrence
  • Penalties—gravity, economic benefit, equitable adjustments
  • Since inception, about 80 deficiencies and over a dozen enforcement actions for failure to switch fuels before entering the ECA, failure to burn compliant fuel, and incomplete bunker delivery notes and other records.

• Criminal Penalties
  • Knowing or willful violations can give rise to criminal liability
  • Extensive recordkeeping requirements....
MEMORANDUM


FROM:  Phillip A. Brooks, Director

Air Enforcement Division, Office of Civil Enforcement

TO:  Mobile Source Enforcement Personnel
Ballast Water Requirements

• IMO’s Ballast Water Convention
  • Entered into force September 8, 2017
  • Numerical standards that limit the number of organisms permitted in ballast water discharges

• U.S. EPA’s Vessel General Permit

• Vessel Incidental Discharge Act of 2018

• U.S. Coast Guard’s Ballast Water Management Program
  • Type-approval of Ballast Water Management Systems—different protocol employed by U.S. Coast Guard (13 now); organisms must be dead
EPA’s 2013 Vessel General Permit

• VGP effective for five years (until December 2018)
  • New draft expected some time ago
• VGP regulates “discharges incidental to the normal operation of commercial vessels” greater than 79 feet in length
• 27 “incidental discharges”—examples:
  • Ballast water
  • Bilge water
  • Gray water
  • Deck washdown and runoff
  • Oil to sea interfaces
• Recordkeeping, Inspections, Reporting
Covered Incidental Discharges

- Deck washdown/runoff and above water line hull cleaning
- Bilgewater/OWS effluent
- Ballast water
- Anti-fouling hull coatings
- Aqueous film forming foam
- Boiler/economizer blowdown
- Cathodic protection
- Chain locker effluent
- Controllable pitch propeller and thruster hydraulic fluid, other oil-to-sea interfaces
- Distillation/reverse osmosis brine
- Elevator pit effluent
- Welldeck discharges
- Exhaust scrubber washwater discharge
- Firemain systems
- Freshwater layup
- Gas turbine washwater
- Graywater
- Motor gasoline & compensating discharge
- Non-oily machinery washwater
- Refrigeration/air condensate discharge
- Seawater cooling overboard discharge
- Seawater piping biofouling prevention
- Boat engine wet exhaust
- Sonar dome discharge
- Underwater ship husbandry & hull fouling discharges
- Graywater mixed with sewage
- Fish hold effluent
State Certifications

• States’ Roles: can regulate more stringently
  • ...and many have
• MUST be aware of these requirements as well
VGP 2018?

• Draft 2018 VGP originally to be published in late 2017 with a final permit originally to have been issued in the summer of 2018.

• *Expected to be published in March 2019 with at least a 30-day comment period.*

→ NOT

• *EPA will administratively continue the 2013 VGP until the final 2018 VGP issued.*

• *Vessels currently covered under the 2013 VGP (filed a Notice of Intent (“NOI”) to be covered) will automatically be covered.*
Since the inception of the VGP in 2008, industry has been trying to preempt state law and make the regulation of incidental discharges uniform

- Uniform standards for incidental discharges set by EPA and implemented by USCG
- Once in effect, will replace the VGP and some USCG regulations
- Gives states the ability to enforce the requirements
- Preemption of state laws
- States may charge fees
- States may prohibit certain discharges whether treated or not

This could be a game changer.
USCG—Ballast Water Management

• Mandatory ballast water management and reporting
  • Applies to vessels operating in U.S. waters with ballast tanks

• Require compliance with treatment standard

• Same as IMO’s, but a different testing protocol for type-approvals

• Compliance with ballast water requirements is a port state control priority—civil and criminal penalties
USCG—Options

• Coast Guard Final Rule (March 2012)—Options:

  • USCG Type-Approved Treatment System
  • Use only water from the U.S. public water system
    • Not generally practical
  • Do not discharge ballast water in U.S. waters
    • Not generally practical (okay outside 12 miles)
  • Discharge to a shore-based treatment facility
    • None available
  • Alternate Management System or Extension
    • Interim solution
    • **Current Regulatory Posture:** Vessels with AMS must use them unless they have an extension

→ Extensions key in past, but phasing out now
Guidelines for Evaluating Potential Courses of Action When a Vessel Bound for a Port in the United States has an Inoperable Ballast Water Management ("BWM") System

- Ballast Water Convention Certificates do not equal compliance with US requirements
- Prior to compliance date, exchange is allowed and a vessel may claim the route exemption
- After compliance date, must get USCG permission to discharge after exchange.
- Inoperable systems must be reported to the USCG, along with a compliance alternative as set forth in the Ballast Water Management Plan.
- Control actions will be based on the facts at hand and the vessel’s history.
  - Training, maintenance, repair, and spares are critical
Ballast Water—Compliance and Enforcement

• Regular USCG vessel inspections include ballast water management

• Follows existing compliance approach
  • Documentation, equipment condition and operation, maintenance, and crew knowledge/training

• Enforcement actions in 2017 →
  • 219 deficiencies and 17 control actions
  • USCG will continue to be aggressive
## Marine Safety Center
### BWMS Type Approval Status

<table>
<thead>
<tr>
<th>Application Received</th>
<th>Manufacturer (Country)</th>
<th>Model</th>
<th>Independent Laboratory</th>
<th>System Type</th>
<th>Capacity</th>
<th>Certificate Issued* (Amended)</th>
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</thead>
<tbody>
<tr>
<td>20 Sep 2016</td>
<td>Optimarin (Norway)</td>
<td>OBS/OBS Ex</td>
<td>DNV GL</td>
<td>Filtration + Ultraviolet</td>
<td>167 – 3,000 m³/h</td>
<td>02 Dec 2016 (03 Nov 2017)</td>
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<tr>
<td>21 Sep 2016</td>
<td>Alfa Laval (Sweden)</td>
<td>PureBallast 3</td>
<td>DNV GL</td>
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<td>BalClor</td>
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<td>Filtration + Electrolysis</td>
<td>50– 8,500 m³/h</td>
<td>06 Jun 2017 (05 Jan 2018)</td>
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<td>ERMA FIRST (Greece)</td>
<td>Erma First FIT</td>
<td>Lloyd’s Register</td>
<td>Filtration + Electrolysis</td>
<td>100 – 3,740 m³/h</td>
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<td>Techcross, Inc. (Republic of Korea)</td>
<td>Electro-Cleen</td>
<td>Korean Register</td>
<td>Electrolysis</td>
<td>150 – 12,000 m³/h</td>
<td>05 Jun 2018</td>
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<td>28 Sep 2017</td>
<td>Samsung Heavy Industries Co., Ltd (Republic of Korea)</td>
<td>Purimar</td>
<td>Korean Register</td>
<td>Filtration + Electrolysis</td>
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<td>15 Jun 2018 (20 Jul 2018)</td>
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<td>BIO-SEA B</td>
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<td>Aquarius EC</td>
<td>DNV GL</td>
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<td>250 – 4,000 m³/h</td>
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<td>Hyundai Heavy Industries Co., Ltd. (Republic of Korea)</td>
<td>HiBallast</td>
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<td>75 – 10,000 m³/h</td>
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<td>Headway Technology Co., Ltd. (People’s Republic of China)</td>
<td>OceanGuard</td>
<td>DNV GL</td>
<td>Filtration + Electrolysis</td>
<td>65 – 5,200 m³/h</td>
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<td>29 Mar 2018</td>
<td>JFE Engineering Corporation (Japan)</td>
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<td>Control Union</td>
<td>Filtration + Chemical Injection</td>
<td>500 – 3,500 m³/h</td>
<td>13 Nov 2018</td>
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*Some manufacturers have requested multiple amendments to their Type Approval Certificates. The first date is the date when the original certificate was issued, and the date in parentheses is the date of the current amendment. Copies of Type Approval Certificates can be found at [http://www.dco.uscg.mil/msc/Ballast-Water/TACs/](http://www.dco.uscg.mil/msc/Ballast-Water/TACs/), or by visiting the USCG Approved Equipment List at: [http://cgmix.uscg.mil/Equipment/Default.aspx](http://cgmix.uscg.mil/Equipment/Default.aspx).

Revised 13 November 2018
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<td>03 Mar 2018</td>
<td>De Nora (USA)</td>
<td>BALPURE</td>
<td>Lloyd’s Register</td>
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<td>Alfa Laval (Sweden)</td>
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<td>DNV GL</td>
<td>Filtration + Ultraviolet</td>
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<td>Filtration + Ultraviolet</td>
<td>167 – 3,000 m³/h</td>
<td>02 Dec 2016 (03 Nov 2017)</td>
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<td>30 Mar 2018</td>
<td>Panasia Co., Ltd. (Republic of Korea)</td>
<td>GloEn-Patrol</td>
<td>DNV GL</td>
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<td>Enviroleanse, LLC (USA)</td>
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<td>30 Aug 2018</td>
<td>NK BMS Co., Ltd. (Republic of Korea)</td>
<td>NK-O3 BlueBallast II</td>
<td>Lloyd’s Register</td>
<td>Ozone</td>
<td>200 – 8,000 m³/h</td>
<td>Pending</td>
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<td>27 Sep 2018</td>
<td>NK BMS Co., Ltd. (Republic of Korea)</td>
<td>NK-O3 Blue-Ballast II Plus</td>
<td>Lloyd’s Register</td>
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<td>135 – 3,000 m³/h</td>
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<td>Wärtsilä Water Systems, Ltd. (UK)</td>
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<td>Techeross, Inc. (Republic of Korea)</td>
<td>Electro-Cleen</td>
<td>Korean Register</td>
<td>Electrolysis</td>
<td>150 – 12,000 m³/h</td>
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Background—The Jones Act

- Section 27 of the Merchant Marine Act of 1920 (now 46 USC 55102)—commonly referred to as the Jones Act—restricts the U.S. coastwise trade in merchandise to coastwise-qualified vessels.

- U.S. Customs and Border Protection ("CBP") primary enforcement agency, interprets the Jones Act and makes determinations as to whether a voyage or type of activity is covered by the Jones Act.

- U.S. Coast Guard makes Jones Act vessel eligibility determinations.
Coastwise Merchandise Statute

A vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel is wholly owned by U.S. citizens and has a certificate of documentation with a coastwise endorsement. 46 USC § 55102

• Trigger is the lading of merchandise at one coastwise point and the unlading of it at a different coastwise point
• A violation can be avoided by discharging cargo at the same berth and same port where it was loaded
What Is Merchandise?

Merchandise—“Goods, wares, and chattels of every description”

• Goods do not have to be sold to constitute “merchandise”
• Includes even “valueless” materials such as dredge spoils, salvage scrap, rocks, and mud, regardless of whether the material has commercial value
• Does not include “equipment” or “supplies” of the vessel
  • Recent example: a grab loaded aboard a foreign-flag vessel should be treated as “equipment of the vessel,” not merchandise, as long as the grab is used solely in the loading and unloading of the transporting vessel. Important to manifest equipment properly.
What Is a Coastwise Point?

The Coastwise Laws apply to:

• Ports and points on land in most U.S. jurisdictions
• Inland waters and Great Lakes
• The 3-mile territorial sea—the entire territorial sea is a “point,” including a vessel in the territorial sea, whether anchored or not
• All “points” on the Outer Continental Shelf, e.g., wells, platforms, and anchored vessels used in oil and gas development
What is a Coastwise Qualified Vessel?

Jones Act (“Coastwise Qualified”) vessels must meet stricter requirements than other U.S.-flag vessels:

• U.S. built
• U.S. flag
• 75% U.S.-owned at every tier
  • U.S. President/CEO
  • U.S. Chairman of the Board
  • Majority of quorum
• Never sold foreign
Exceptions

The Coastwise Laws do not apply to:

- American Samoa
- Commonwealth of the Northern Mariana Islands (except government cargo)
- Canton Island and the U.S. Virgin Islands
  - Until the President declares by proclamation that the coastwise laws apply

Unique rules for Guam – U.S. flag vessel
- Coastwise qualified vessel not required

→ Legislative efforts at Puerto Rico exemptions post-Maria stalled
Jones Act Applies to Indirect Shipments

A vessel may not provide any part of the transportation of merchandise by water, or **by land and water**, between points in the United States to which the coastwise laws apply, **either directly or via a foreign port.**

Examples:

- Foreign storage, followed by return to the U.S.
- Shipments by truck or rail out through Canada to U.S. ports
  - Voyage documentation or foreign customs clearance does not overcome Jones Act
Rules for Indirect Shipments Back to U.S.

• Stopping, or even unloading, at a foreign point does not avoid a coastwise violation, unless the “continuity of voyage” is broken.  

• This requires a showing of no intent for the merchandise to come back to the United States; intent must be shown for goods to become “common stock” of a foreign country.  

• Can be triggered by unforeseen governmental rejection at border.  

• Possibility to return cargo to a U.S. point, after CBP review, if continuity is broken due to casualty, contamination or other unforeseen event.
Manufacturing or Processing Overseas: “New and different products”

• 19 CFR 4.80b(a)—“...merchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a **new and different product**, and the new and different product thereafter is transported to a coastwise point”
Commingled Foreign Storage

Special rules for commingled products stored outside the U.S.:

• “First Sold Foreign” Rule—The quantity of commingled product equal to that of product transported out of the United States on non-coastwise-qualified vessels must be sold foreign prior to transportation of any of the commingled product back to the United States
Coastwise Merchandise Statute “Third Proviso”

• 46 U.S.C. § 55116 - Canadian rail lines

• The “Jones Act” does not apply to the transportation of merchandise between points in the continental United States, including Alaska (but not Hawaii), if:

  • over through routes in part over Canadian rail lines and connecting water facilities...

  • if the routes are recognized by the Surface Transportation Board and rate tariffs for the routes have been filed with the Board
Jones Act Waivers

• May **only** be issued in the “interest of national defense”

• Rarely used authority. Most recently used for short term responses to Hurricanes Harvey and Marina.

• Other waiver examples:
  • On September 2, 2005, DHS granted a 17-day waiver for the transportation of oil and refined petroleum products due to Hurricane Katrina. DHS granted a second waiver after Hurricane Rita struck the Gulf Coast immediately following Hurricane Katrina
Jones Act Waivers (cont.)

- Waiver approved in 2006 upon a request for a one-time movement of a jack-up rig to facilitate exploration and production of natural gas in Cook Inlet, Alaska. Not a situation involving a response to a catastrophic event, such as a hurricane or major oil spill, but key members of Congress and DOE strongly supported the waiver.

- Waivers granted for draw downs of the Strategic Petroleum Reserve. Since 1975, three SPR draw downs have occurred in response to: Operation Desert Storm (1991), Hurricane Katrina (2005), and unrest in Libya (2011).

- In November 2012, short-term Jones Act waiver issued during Hurricane Sandy.
Enforcement/Penalties

• **Merchandise Violations**
  • Penalties may be assessed against any person transporting the merchandise or causing it to be transported, including the importer, consignee, master, vessel agent, or vessel owner/operator

• **Penalties**
  • Include seizure of the merchandise transported illegally or a penalty up to the domestic value of the merchandise or actual cost of the transportation, whichever is greater

• **CBP’s Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages**
  • Unless vessel in distress or some humanitarian reason for coastwise violation, it will be considered commercial expediency.
  • First violations commonly mitigated to 10%
  • Repeat offense hurts possibility of mitigation
U.S. Port State Control

MARPOL Challenges Continue
Two Decades of MARPOL Cases

• MARPOL Annex I referrals from USCG to DOJ continue on a monthly basis, and have been for more than 20 years
  → Cruise ships, tankers, container ships, bulk carriers, drill rigs, tugs/barges, ferries, fishing vessels

• EPA’s Vessel General Permit, Annex VI compliance, and ballast water compliance have been incorporated into a standard PSC examination

• Accurate vessel documentation is key
  • It’s better to document a violation, than to try and cover it up!
  • Falsification is the fastest way to a criminal prosecution
Port State Control Trends—2017

- 10,190 different vessels from 84 flags making 83,566 port calls
- 9,390 safety/environmental inspections
- 91 safety/environmental detentions (down from 98 in 2016)
  - Bulk (33)
  - General cargo (11)
  - Container/Chemical (10)
  - Tanker (9)
  - 11 appealed and 3 granted
- Sector San Juan—13 detentions
- Sectors Miami and New Orleans—11 detentions
- Largest single factor is intentional MARPOL violations
  - Historically 25% of all detentions
  - In 2017, 10% of all detentions
  - Firefighting (22%) and ISM Code (18%)
2016–2018 MARPOL Prosecutions

• 7 criminal prosecutions in 2016
  • $9+ million in penalties

• 8 criminal prosecutions in 2017
  • $48+ million in penalties

• 8 criminal prosecutions in 2018, so far...
  • $10+ million in penalties
  • Bilge water to sewage and gray water systems

“This conviction ensures that the defendant is held accountable with a criminal fine and a contribution to conservation efforts in coastal Delaware, as well as a two-year ban from United States ports. The message to the shipping industry is clear: environmental crimes at sea will not be tolerated.”
Examples of Improper Conduct

• Bilge wells and bilge tank pumped into the sewage tank
• Lube oil drums thrown overboard
• Bilge holding tank pumped into a gray water tank
• Magnets to allow technical water through the OCM to trick it
• Crimping the OCM outlet pipe to trap water inside
“Post Incident Conduct”

• **False Statements Act**—It is a felony to falsify documents, lie to government officials—either orally or in writing (18 U.S.C. 1001)
  - Interviews, documents, meetings, log books, general conversation

• **Obstruction of Justice**—It is a felony to interfere with an investigation (18 U.S.C. 1505)
  - Destroying or concealing documents, modifying documents, encouraging someone not to talk or to lie to an investigator, or lying to an investigator about what happened
Whistleblowers and Awards

• Over 100 crew members have received APPS awards since mid 1990s
• Over $17 million USD awarded
• Award provision can undermine open reporting system
• Can result in increase in pollution

→ Need to develop culture to avoid this and encourage reports to come to shoreside management

“In the discretion of the Court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to a conviction.”
Trends

• Cases will continue
  • Penalties higher and more jail time

• Increased international cooperation

• Additional areas of regulation and increased record-keeping requirements
  • Emissions
  • Vessel General Permit
  • Ballast Water
Staying Out of Trouble

• Comprehensive Environmental Compliance Program
• Good Company Culture!
• Strong, Ongoing Communication Between Ship and Shoreside
• Training, training, training
  • Crew Declarations
• Transparency with Flag State and with Regulators
• Internal Investigations
• Open Reporting
• Audit Program

“The Department of Justice will continue to prosecute shipping companies who break the laws that protect our oceans.”
Questions?

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