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Nontank vessel response plan requirements

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On June 23, 2008, the US Coast Guard announced that, commencing August 22, 2008, it will commence active enforcement of the requirement for certain nontank vessels operating in waters of the United States to have oil spill response plans. Oil spill response plans were mandated for tank vessels as part of the original Oil Pollution Act of 1990 (OPA 90). A similar requirement for nontank vessels was not adopted until 2004, with the requirement for owners and operators of nontank vessels to prepare and submit oil spill response plans by August 9, 2005.

In February 2005, the Coast Guard issued non-regulatory guidance on development and review of oil spill response plans for nontank vessels. The rationale for the guidance was that, despite the lengthy time inherent in rulemaking, the statute required that the response plans be developed and submitted by a date certain. Therefore, the only viable option was to provide recommendations to the industry and expect that the industry will adhere thereto. The same scenario occurred in the earlier tank vessel response plan (VRP) process in 1993 when the rulemaking process could not keep pace with the statutory requirement.

A major difference between the 1993 and the 2005 scenarios was that, in 1993, the Coast Guard fully enforced the VRP requirements beginning on the date specified in the statute. In 2005, on the other hand, the Coast Guard issued a notice stating that it would not enforce the nontank vessel response plan (NTVRP) requirements "until regulations are issued and in effect." The notice went on to encourage owners and operators of nontank vessels to develop and submit response plans consistent with the guidance, but with the hammer of enforcement specifically withheld. The guidance also noted that a problem existed in the law, since the statute placed the requirement on nontank vessels of 400 gross tons or greater, as measured in accordance with the International Tonnage Convention (ITC). Many US vessels have never been measured under the ITC. In revised guidance issued in January 2006, the Coast Guard recommended that owners and operators of US vessels of or near 400 gross register tons and greater assume that the NTVRP requirements will apply. Later in 2006, Congress amended the statute to define "nontank vessel" as a self-propelled vessel that: (1) is at least 400 gross tons as measured under the ITC, or, for vessels not measured under the ITC, as measured under the Regulatory Measurement System; (2) is not a tank vessel; (3) carries oil of any kind as fuel for main propulsion; and (4) operates on the navigable waters of the United States (i.e., out to 12 nautical miles off the US coast).

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The Coast Guard continued with its policy of not enforcing the NTVRP requirements until the COSCO BUSAN incident in San Francisco Bay in November 2007. The container ship had a NTVRP and the cleanup following the oil spill proceeded well (after a minor glitch regarding the initial calculation of the amount of oil spilled). Regardless, the publicity and investigations that followed this prominent incident highlighted the non-enforcement policy. The Coast Guard has now changed course and will soon commence active enforcement.

In an effort to devote limited enforcement resources to those nontank vessels that pose the greatest risk, the interim enforcement policy will focus on those nontank vessels of 1,600 gross tons or greater. For such vessels without a properly submitted NTVRP, operational controls will be placed on the vessels by the Captains of the Port (COTPs). This will effectively prevent the larger nontank vessels from operating until and unless a proper NTVRP has been submitted.

Upon receipt of a NTVRP that meets the basic requirements, the Coast Guard will issue a 2-year interim operating authorization letter allowing the vessel to continue to operate while the NTVRP undergoes detailed review. The basic requirements for a NTVRP follow:

- (1) The plan must be consistent with the requirements of the National Contingency Plan and the applicable Area Contingency Plans;
- (2) The plan must identify the qualified individual having full authority to implement removal actions and must require immediate communications between that individual and the appropriate Federal officials and the persons providing response personnel and equipment;
- (3) The plan must identify and ensure by contract or other appropriate means the availability of private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;
- (4) The plan must describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or ashore, to be carried out under the plan to ensure the safety of the vessel and to mitigate or prevent the discharge or the substantial threat of a discharge;
- (5) The plan must contain a provision providing for periodic updates; and
- (6) The plan must be resubmitted for approval of each significant change.

A major difference between the tank vessel VRP requirement and the NTVRP requirement is that the NTVRP need not include provisions addressing discharges of less than the worst case discharge. The worst case discharge is the discharge in adverse weather of all the oil carried on the vessel. Also, nontank vessels are not required to carry discharge removal equipment and are not required to have emergency towing equipment. Further, nontank vessels are not required to acquire computerized, shore-based damage stability and residual strength calculation programs.

The companies that insure vessels for liability to third parties for oil spill expenses and damages (e.g., Protection and Indemnity Clubs) have consistently recommended that vessels to which the NTVRP statute applies develop and submit response plans on a timely basis. The majority of foreign vessels that call at US ports have done so, as have a significant number of US vessels. As the Coast Guard stated in its June 23, 2008 notice, though, “some nontank vessels still have not submitted a NTVRP”.

This noncompliance situation presents a potential liability problem (in addition to the upcoming enforcement problem). If a nontank vessel that has not submitted a NTVRP suffers an oil spill and if it can be shown that the response costs are greater and/or that the third party damages are greater than would have been the case if the vessel had a NTVRP, then it is possible that a court might find that the owner or operator was not entitled to limit its liability. Even if the owner or operator were to ultimately prevail on its limitation of liability petition, the potential allegations would unduly complicate the effort to limit liability.

Finally, it should be noted that planning for response to an oil spill is time and money well spent. Oil spills are increasingly expensive. Reducing the risk of an oil spill and implementing a plan to rapidly and efficiently cleanup after an oil spill occurs is in the best interests of ship owners and operators. It is to be hoped that no Coast Guard enforcement action will be necessary in this regard.