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The Perfect Storm Continues: Proposed Ballast Water and Air Emissions Regulations Present More New Challenges for the Maritime Industry; Opportunity to Comment is Limited

On Friday, August 28, 2009, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Coast Guard (“Coast Guard”) issued simultaneous but separate proposed new rulemakings governing the discharge of air emissions and ballast water discharges from a variety of types of vessels. These proposals are expected to have major impacts on the U.S. maritime industry as well as foreign flag vessels calling at U.S. ports. Comments on these proposed rulemakings must be submitted within 30 days for air emissions (by September 28, 2009) and 90 days for ballast water (November 26, 2009). Copies of both proposed rulemakings can be found at http://www.klgates.com/practices/vessel_discharge_resources/.

Given the importance of the new rulemakings to the maritime industry, comments on what the agencies are proposing will be especially important.

Emission Standards for Category 3 Engines

The air emissions standards proposed by EPA would apply stricter NO_x limitations for new engines, require the use of low sulfur fuel (less than 1,000 ppm) in U.S. waters, and require new reporting for particulate matter emissions. For further discussion of the emission standards being proposed, see “EPA Proposes New Air Emission Standards for Large U.S.-Flag Vessels” <http://www.klgates.com/newsstand/Detail.aspx?publication=5834>. These proposed changes anticipate and attempt to incorporate the international standards for air emissions from ships included in MARPOL Annex VI which are not yet effective, but will become so on July 1, 2010 unless sufficient objections are raised before January 1, 2010. EPA has also said it is acting under its Clean Air Act authority to propose these new low sulfur fuel requirements.

The proposal to create an Emission Control Area (“ECA”) on coastal areas is also based on the yet-to-be-finalized ECA proposal currently pending before the International Maritime Organization (“IMO”). That proposal cannot be approved by IMO until March 2010. In addition, however, EPA has proposed that the ECAs in the United States extend to inland waters that can be accessed by ocean-going vessels, even though the IMO proposal does not do so. The application of these standards to internal waters – such as the restriction on burning only low sulfur fuel beginning in 2016 and the prohibition against burning of residual fuel in U.S. waters – will be a major change for some U.S.-flag vessels. Foreign flag vessels calling at U.S. ports will be required to undertake fuel switching in order to operate in U.S. waters.

This proposal may represent a new and as yet untested exercise of authority by the EPA, which may be subject to significant questions. For example, may the EPA use its authority to promulgate rules to implement IMO requirements adopted in

accordance with Annex VI in order to impose requirements that have yet to be approved under that process? May the EPA use this authority to impose requirements that are beyond the scope of IMO authority?

Ballast Water Standards for Discharges in U.S. Waters

The Coast Guard is proposing to establish standards for the discharge of ballast water in the United States and to create a process for approval of ballast water management systems. Vessels that operate in only one Captain of the Port area would be exempt from these requirements. All others, including those that operate domestically between or among Captain of the Port areas, would be subject to the standards.

Phase One of the new rules would impose ballast water standards equivalent to the IMO standards, allowing ballast water exchange to remain an option. The new requirements would be phased in for existing vessels beginning in 2014 with new vessels complying after January 1, 2012. Phase Two would apply standards that would be 1,000 times more stringent so that ballast water exchange would no longer be acceptable. The Phase Two standard is intended to encourage the development of technology by the competitive market. The rules would require a practicality review in 2013, before the Phase Two rules would become effective in 2015. Separate rules would be maintained for the Great Lakes. These requirements are separate from the discharge requirements that must be met under the Vessel General Permit recently issued by the EPA. For more details on the ballast water requirements imposed by the Vessel General Permit,

see

<http://www.klgates.com/newsstand/Detail.aspx?publication=5211>.

A more detailed discussion of the proposed rules will be included in an upcoming Alert.

Providing Comments

The EPA and Coast Guard are each asking for comments on numerous aspects of these important new rules. Each agency has an obligation to respond to comments and explain why it accepts or rejects them. Providing data, facts and other substantive information is essential to ensure the rules are effective and make sense for the industry. Comments can also be in the form of questions seeking clarification of any aspect of the new rules.

These new rules provide further evidence of the perfect storm of the new environmental world in which the maritime industry must operate. These proposals, final rules and other actions that impose or seek to impose new environmental requirements on the maritime industry can be found at http://www.klgates.com/practices/vessel_discharge_resources/.

Examine these rules carefully. The rules will shape the industry in the coming years and could result in many changes for companies and for the industry as a whole. Comments can be submitted to the EPA and Coast Guard by email (a-and-r-docket@epa.gov), through the federal eRulemaking portal (<http://www.regulations.gov>), or by mail or hand delivery to the respective agency.

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