

2013–2014 U.S. Maritime Legislative Developments

Constantine G. Papavizas* and Lawrence I. Kiern**

I INTRODUCTION

The 113th Congress was generally known as a Congress frozen into inactivity by deep seated policy disputes. Not surprisingly, the 113th Congress did not have much to show for its efforts in general after the two one-year sessions. Little was different in the maritime sphere, where Congress passed no major legislation during the two years other than the Howard Coble Coast Guard and Maritime Transportation Act of 2014 (the “2014 Coast Guard Act”).¹ That legislation touched, as is usually the case with Coast Guard authorization bills, a wide range of maritime policy and legal matters ranging from the treatment of abandoned seafarers in environmental investigations to cruise vessel passenger protections.

II LEGISLATIVE DEVELOPMENTS

A. Environment

1. Abandoned Seafarers Fund

The 2014 Coast Guard Act establishes a Treasury account entitled the “Abandoned Seafarers Fund” to provide basic support for seafarers involved in an investigation, or who have been abandoned in the United States by a vessel owner or operator, or to reimburse a vessel owner or operator that

*Partner and Chair, Maritime Practice, Winston & Strawn LLP (Washington, D.C.). B.A. Georgetown University; M.I.A. Columbia University; J.D. George Washington University.

**Partner, Winston & Strawn LLP (Washington, D.C.). B.S. U.S. Coast Guard Academy; M.A. Wesleyan University; Ph.D. University of Connecticut; J.D. University of Michigan.

¹Pub. L. No. 113-281, 128 Stat. 3022 (2014) (“2014 CGA”).

advanced seafarer support funds during an investigation where the owner or operator was not ultimately convicted.² The legislation authorizes the account up to a maximum of \$5 million.

The account is to be funded by fines recovered for violations of the Act for the Prevention of Pollution at Sea and other funds recovered from vessel operators and owners with respect to their obligation to support seafarers in the United States.³ Vessel owners and operators that refuse to reimburse the account for costs incurred will be subject to *in rem* vessel arrest and revocation of vessel departure clearances required by 46 U.S.C. § 60105 for any vessel they operate.

Since 2007, the U.S. Coast Guard repeatedly proposed legislation for the establishment of a seafarer's fund to support seafarer witnesses and targets in the United States and to secure Coast Guard access and jurisdiction over them during investigations. Until 2014, these proposals had failed to achieve approval by the Congress. The enactment of this provision provides the imprimatur of Congress for what has to this point been largely an *ad hoc* agency enforcement procedure and expands its application beyond such investigations to include instances where a seafarer is simply abandoned in the United States.

Early in the history of Coast Guard investigations of environmental law violations, the agency encountered the challenge presented when foreign crew members who had been allowed to leave the United States subsequently declined to cooperate in the investigations and refused to return for legal proceedings here. In light of this experience, the agency concluded that as a general matter it would require foreign crew members to remain in the United States pending the conclusion of its investigations and the resulting legal proceedings, if any. This resulted in crew members being required to remain in the United States for many months pending the outcome of the investigation.

The crew members of foreign-flag vessels were usually key to the agency's investigations and prosecutions by the U.S. Department of Justice. But, the agency lacked specific statutory authority and funding to provide lodging, subsistence, medical care, and other basic support for these crew members who remained in the United States while the government's investigations and legal processes ground along.

For many years the Coast Guard resorted to financial security agreements whereby the vessel operator was required to agree to bear the costs of their crew members remaining in the United States during what was often a

²2014 CGA § 320.

³See 33 U.S.C. §§ 1905-1915.

months-long investigation. The agency imposed the requirement to sustain the seafarers in the United States on the vessel operators as a condition for release of vessels from the United States and to allow them to resume trading. But, such arrangements would not suffice in circumstances where a vessel operator was not inclined to provide the undertaking, or in other circumstances where a seafarer was simply abandoned by the vessel operator.

2. Vessel Incidental Discharges

The 2014 Coast Guard Act extends for three years, *i.e.* through December 18, 2017, the moratorium upon the Environmental Protection Agency's (EPA) imposition of permitting requirements with respect to discharges incident to the normal operation of small vessels (under 79 feet) and fishing vessels.⁴ The EPA promulgated its Small Vessel General Permit on September 10, 2014⁵ with an effective date of December 19, 2014. In anticipation of the December 18, 2014 expiration of the existing moratorium, the 2014 Coast Guard Act relieves small and fishing vessel operators from compliance with that proposed permit, although ballast water discharges still require vessel general permit coverage.

This three-year postponement of the small vessel permit marked the disappointing end of a vigorous push by representatives of the maritime industry in the second session of the 113th Congress for broader legislative reform of key environmental regulations.⁶ Industry representatives appeared before Congress early in the session on behalf of a phalanx of maritime interests: The Chamber of Shipping of America, The American Waterways Operators, the Shipping Industry Coalition, the International Association of Independent Tanker Owners (INTERTANKO), the Cruise Lines International Association (CLIA), the Maritime Industrial Transportation Alliance (MITA) and the commercial fishing industry.⁷

These representatives complained about the burdens thrust upon them by recent regulatory requirements enforced by the Coast Guard and the EPA. Specifically, the industry targeted for criticism the EPA's regulations governing vessel discharges into U.S. waters and air emissions from vessels as far offshore as the U.S. Exclusive Economic Zone.

Among other things, industry witnesses called for legislative relief from the 2013 EPA Vessel General Permit (VGP). First, they criticized the dis-

⁴2014 CGA § 602.

⁵79 Fed. Reg. 53,702 (Sept. 10, 2014).

⁶E.g. S. 2094, 113th Cong., 2d Sess. (2014) ("Vessel Incidental Discharge Act" with 32 co-sponsors).

⁷Hearing before the Coast Guard and Maritime Transportation Subcomm., Comm. on Transp. and Infrastructure, U.S. House of Representatives, "Maritime Transportation Regulations" (March 4, 2014).

parate regulatory regimes governing vessel ballast water treatment. Although they testified that the EPA and Coast Guard had coordinated the agencies' differing statutory authorities, industry witnesses complained that the differing statutes imposed irreconcilable regulatory burdens. Specifically, they complained that while the Coast Guard had agreed to provide exemptions from the requirement to install ballast water treatment systems on certain vessels that had established that they could not comply, the EPA had refused to accept the Coast Guard's exemption decisions as protecting vessel operators from enforcement action. Thus, they argued that this left these vessels potentially in violation of the Clean Water Act and subject to penalties levied by the EPA and citizen suits. The industry representatives argued that the only remedy was to legislate a new uniform national standard for ballast water treatment consistent with the Coast Guard approach.

Likewise, industry witnesses decried the ability of individual states to impose additional regulatory requirements under the EPA's VGP. According to the industry, states have imposed disparate additional requirements regulating discharges from vessels and yielding a patchwork of regulations that burden the industry. According to one account offered by an industry witness, a typical vessel voyage along the Pacific Coast from Washington state to California required the vessel to comply with 25 supplementary state-specific conditions added to the permit by the two states. According to the industry, "This example underscores why clear, consistent federal rules for ballast water and other vessel discharges are desperately needed."

The EPA's VGP also came under a critique from a representative of the commercial fishing industry.⁸ He denounced it as an "incredibly complicated" regime providing "little environmental benefit" that risked the creation of a "cottage industry of litigators." While he acknowledged the potential benefit of the VGP's ballast water treatment goal, he roundly denounced the VGP's requirements imposed on commercial fishing operations as unwarranted "big government, big business requirements." He objected to the inspection, monitoring, and reporting requirements as onerous and the potential penalties as oppressive. He also criticized specific requirements as applied to commercial fishing vessels as wholly impractical, e.g. washing the vessel's anchor chain and prohibiting cooling water discharges in port. He called upon the Congress to enact legislation to exempt the commercial fishing industry from the VGP.

In response to the criticisms of the industry, representatives of the Coast Guard and the EPA were conciliatory while maintaining that their hands were tied by the applicable statutes which left them no further discretion.

⁸Id. (Statement of James Roussos, Lamonica Fine Foods & Oceanside Marine).

The EPA witness who testified about ballast water treatment did go farther than the agency had before offering comfort to the complaining industry.⁹ Industry witnesses emphasized that the EPA's decision to make ballast water treatment enforcement a "low priority" was cold comfort because technically some vessels would still be in violation of the Clean Water Act, and therefore subject to citizen suits, and also perhaps technically breaching their charter parties which require compliance with all applicable laws. In response to questioning, EPA Deputy Assistant Administrator Michael Shapiro testified that history showed that the EPA had never brought an enforcement action in like circumstances when it had announced the subject to be a "low priority."

At this juncture it remains unclear if the fears voiced by industry witnesses will be realized or avoided by agency actions. First, the VGP includes a re-opener clause which expressly provides a mechanism for the EPA to accept the Coast Guard exemptions.¹⁰ While the provision does not commit the EPA in advance to accept the Coast Guard's exemption determinations, that is not surprising. And, the EPA and Coast Guard have both agreed on the need to take a practical approach to the challenges of implementation. In this circumstance, if the EPA ultimately accepts the Coast Guard's exemption decisions there will be no Clean Water Act violation.

Second, industry witnesses highlighted the possibility that some foreign type-approved ballast water treatment systems which the Coast Guard has accepted for a five year period may not ultimately gain Coast Guard type approval and, therefore, they will have to be torn out and replaced at great cost to the vessel operators. While this is a possibility five years in the future, it is also possible that the manufacturers of these interim systems will achieve type approval and it is also possible that the Coast Guard may extend the deadline further if the circumstances warrant. After all, the history of these regulatory projects by the agencies with respect to ballast water treatment systems is one of extended deadlines to accommodate practical realities. Vessel operators also have it within their control to identify the best interim systems most likely to secure ultimate Coast Guard type-approval.

During the 113th Congress, neither the Committee on Transportation and Infrastructure, nor the House itself, considered the more ambitious proposal of industry witnesses to establish a uniform national discharge standard. Based on a previous proposal offered in the House in 2008, it appears such a proposal would prove controversial as many representatives would not support preempting the authority of their individual states to impose stricter

⁹*Id.* (Statement and Testimony of Michael H. Shapiro, Principal Deputy Assistant Administrator, Office of Water, U.S. Environmental Protection Agency).

¹⁰See 79 Fed. Reg. 53,702 (Sept. 10, 2014).

standards under the Clean Water Act. So, the industry garnered legislative support for its proposal,¹¹ to establish a uniform national standard in the U.S. Senate. The bill was advanced by then-Senator Mark Begich of Alaska and Senator Marco Rubio of Florida, the then-chairman and ranking member of the Senate Subcommittee on Oceans, Atmosphere, Fisheries, and the Coast Guard. It enjoyed bipartisan support and had 32 co-sponsors. But, the legislation did not secure the consent of the Senate Committee on Environment and Public Works, and the Committee's then-chairwoman Senator Barbara Boxer of California expressed her opposition to the measure in the context of agreeing to the postponement of the small vessel regulation for three years.

3. Clean Cruise Ship Act

During the 113th Congress, Senator Dick Durbin of Illinois, the then Majority Whip, introduced legislation to protect the Great Lakes and coastal waters of the United States by extending the Clean Water Act to regulate millions of gallons of wastewater from cruise ships.¹² Durbin's bill, known as the Clean Cruise Ship Act, would have banned the release of raw, untreated sewage in U.S. waters, including the Great Lakes. Durbin's legislation was supported by a wide range of environmental groups including: Friends of the Earth; Earthjustice; Oceana; Surfrider; Campaign to Safeguard America's Waters; and Northwest Environmental Advocates.

With regard to earlier versions of the proposal, Sen. Durbin indicated that, "The average cruise ship produces over 1.2 million gallons of wastewater every week. . . . Under the current system, these ships can directly dump their waste into our oceans and the Great Lakes with minimal oversight. Vacation cruises can be a wonderful way to see the world, but we cannot afford to leave the destruction of the oceans in the wake of these ships."¹³ He pointed to reports published by the Pew Oceans Commission, the U.S. Commission on Ocean Policy, and the EPA that confirmed the significant threat of cruise ship pollution to human health and aquatic environments.

Because of the limited reach of the Clean Water Act, waste and other harmful pollutants are only minimally regulated near coastal waters of the United States and can be discharged untreated offshore. Environmental advocates complained that these pollutants contaminate our coastal waters resulting in beach closures, consumption of polluted fish and shellfish, risk

¹¹See S. 2094, 113th Cong., 2d Sess. (2014).

¹²S. 1359, 113th Cong., 1st Sess. (2013).

¹³Press Release, *Durbin Introduces Clean Cruise Ship Act to Protect Oceans, Marine Life and Great Lakes* (Oct. 21, 2009).

to public health for people swimming in our oceans and damage to coral reefs (areas around Florida and Jamaica have lost nearly 90% of their living coral reefs). These same advocates acknowledged that although some cruise ship operators are trying to reduce this pollution, industry efforts are not uniform. The federal standards proposed in Durbin's Clean Cruise Ship Act were aimed to establish one set of requirements for the industry. The proposal would also establish a Cruise Vessel Pollution Control Fund to collect fees from the industry to fund enforcement by the federal agencies.

Durbin's proposal would amend the Clean Water Act by: (1) regulating cruise ships under the EPA's National Pollutant Discharge Elimination System for sewage, graywater and bilge water; (2) prohibiting the discharge of sewage, graywater, and bilge water within twelve miles of shore; (3) requiring that, outside of 12 miles, sewage, graywater, and bilge water be treated to reduce pollution to the levels currently achievable by advanced wastewater treatment systems; (4) prohibiting the dumping of sewage sludge, incinerator ash and hazardous waste in U.S. waters; and (5) creating inspection and sampling programs and an onboard observer program.

Despite Senator Durbin's call for reform and the apparent need to regulate this pollution, his proposal stalled in the U.S. Senate. With Republican party control of the 114th Congress it seems unlikely that this proposal will gain sufficient support to advance in the foreseeable future. In such circumstances, the industry should not be surprised to see state initiatives to prevent this pollution from affecting state waters.

4. Notification and Tribal Inclusion Measures

The 2014 Coast Guard Act amended the notification provisions of marine casualty and oil pollution response statutes by requiring the Coast Guard to notify the "recognized Indian tribe that is or may reasonably be expected to be affected. . . ." and to require the oil pollution response process to include advance planning with respect to the closing and reopening of fishing areas.¹⁴

5. Mobile Offshore Drilling Unit (MODU) Response Plans

Another modest reform following the *Deepwater Horizon* incident is included in 2014 Coast Guard Act.¹⁵ The provision simply requires the Coast Guard to ensure that MODU vessel response plans include the facility response plan related to the MODU's operations. This will ensure that the

¹⁴2014 CGA § 312.

¹⁵2014 CGA § 317.

Coast Guard will have the relevant information in the event of a pollution incident.

B. Jones Act

Several federal laws generally restrict U.S. domestic maritime commerce to U.S.-flag vessels built in the United States and owned and operated by U.S. citizens and are collectively often referred to as the “Jones Act.”¹⁶ Although the Jones Act can trace its origins to the third Act of the first U.S. Congress in 1789¹⁷ and is supported by an organized collection of interests,¹⁸ it has not escaped criticism and has been the subject of periodic amendment efforts, both to strengthen the law and to narrow exemptions, or to waive and to weaken the law by creating exemptions or watering down existing requirements.

1. Jones Act Waivers

The Jones Act, like all “navigation or vessel-inspection laws,” can be waived “in the interest of national defense” either upon the request of the Secretary of Defense or by the U.S. Department of Homeland Security.¹⁹ The waiver authority became a matter of controversy with respect to the sale of crude oil from the Strategic Petroleum Reserve (SPR) in 2011 when almost 50 individual Jones Act waivers were issued.²⁰ Since that time, the U.S. Congress has narrowed the waiver authority and otherwise attempted to restrict the issuance of Jones Act waivers. The 113th Congress, in the Consolidated Appropriations Act, 2014, re-enacted a temporary provision (limited to the fiscal year being funded in the legislation) that prohibited any Jones Act waiver relating to crude oil distributed from the SPR unless the Secretary of Homeland Security, after consulting with the Departments of Energy and Transportation and the U.S. maritime industry, took “adequate measures to ensure the use of United States flag vessels.”²¹ The provision also required DHS to provide notice to designated Congressional committees within two business days of any request for any Jones Act waivers. The

¹⁶The “Jones Act” as it applies to the transportation of “merchandise” is section 27 of the Merchant Marine Act, 1920, as amended. 46 U.S.C. § 55102.

¹⁷Act of July 20, 1789, ch. 3, 1 Stat. 27.

¹⁸The primary coalition supporting the Jones Act is the American Maritime Partnership. See www.americanmaritimepartnership.com.

¹⁹46 U.S.C. § 501.

²⁰See Constantine G. Papavizas and Lawrence I. Kiern, *2011–2012 U.S. Maritime Legislative Developments*, 44 J. MAR. L. & COMM. 347, 352 (July 2013).

²¹Pub. L. No. 113–76, § 527, 128 Stat. 5, 274 (2014).

provision, as did prior provisions, originated in the Senate Homeland Security Subcommittee of the Appropriations Committee then chaired by Senator Mary Landrieu of Louisiana. The Senate Report accompanying the fiscal year 2014 (as well as the Report issued for the fiscal year 2015) legislation stated that the reason for the provision was that the Committee was “concerned about the lack of transparency in issuing these waivers.”²² This provision expired on September 30, 2014 and was not renewed for fiscal year 2015.

2. Jones Act Enforcement

As Congress has expressed concern regarding the issuance of Jones Act waivers, it has also requested stepped-up enforcement of the Jones Act. Customs and Border Protection, which enforces operational aspects of the Jones Act, had been required by Congress to submit quarterly reports of Jones Act violations. In the 113th Congress, CBP was reminded by the Senate Committee on Appropriations that those reports “have not been received.”²³ That Committee also urged CBP “to levy penalties for previously documented violations” and “continue working with the Offshore Marine Service Association in order to investigate future potential violations, and dedicate adequate resources to vigorously enforce the Jones Act on the Outer Continental Shelf.”

3. Puerto Rico

As the Jones Act applies to the transportation of merchandise and passengers between the continental United States and Puerto Rico, the Jones Act has sometimes been criticized by shippers engaged in shipping to or from Puerto Rico and consumers in Puerto Rico. In response to a request from the Pedro Pierluisi, the Resident Commissioner of Puerto Rico, the U.S. Government Accountability Office issued a report in March 2013 analyzing the economic impact on Puerto Rico of the Jones Act.²⁴ The report concluded that the “effects of modifying the application of the Jones Act for Puerto Rico are highly uncertain . . .” Commissioner Pierluisi followed with the introduction of legislation in the U.S. Congress in July 2013 to exempt the transportation to and from Puerto Rico of bulk cargo (including energy car-

²²S. Rep. No. 77, 113th Cong., 1st Sess. at 39 (2013); S. Rep. No. 198, 113th Cong., 1st Sess. at 47 (2014).

²³S. Rep. No. 198, 113th Cong., 1st Sess. at 15 (2014).

²⁴U.S. Gov’t Accountability Office, *Puerto Rico – Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act*, GAO-13-260 (March 2013).

goes such as liquefied natural gas or LNG).²⁵ No action was taken by the 113th Congress on this Puerto Rico proposal.

C. Security

1. Cruise Passenger Protection Act

Then-Senator Jay Rockefeller, who served as Chairman of the Senate Commerce, Science and Transportation Committee during the 113th Congress, proposed legislation to set strict new safety standards for cruise ships because he claimed the industry's "bill of rights" for passengers was an inadequate response to a recent spate of accidents involving cruise ships.²⁶ The bill would have directed the Secretary of Transportation to develop industry standards that would have to be posted by the industry and included in advertising.

Senator Rockefeller sharply criticized the industry at a committee hearing. He asked skeptically: "Is this industry really trying to adopt a culture of safety?"²⁷ Under the bill, the Transportation Department would need to develop a consumer complaints hotline and website and would be empowered to investigate complaints. Fines as high as \$25,000 per day could be assessed for violations, rising to a \$50,000 daily cap for a "continuing violation." Individuals found willfully skirting the regulations would face fines as high as \$250,000 and up to a year in prison. The bill would have also strengthened on-board crime reporting requirements for cruise lines and make it easier for passengers to access such data. Representative Doris Matsui of California introduced a companion measure in the House of Representatives.²⁸

Like Senator Durbin's proposal on cruise ship pollution, Senator Rockefeller's safety measure largely stalled. However, one modest provision arising from the proposal was enacted into law as part of the 2014 Coast Guard Act.²⁹ This provision required enhanced reporting of criminal activity on cruise ships by the industry so that this information will be available to prospective passengers when they consider cruise vacations.

²⁵H.R. 2838, 113th Cong., 1st Sess. (2013).

²⁶S. 1340, 113th Cong., 1st Sess. (2013).

²⁷Hearing before the Sen. Comm. on Commerce, Science & Transp., "Cruise Industry Oversight: Recent Incidents Show Need for Stronger Focus on Consumer Protection" (July 24, 2014).

²⁸H.R. 2800, 113th Cong., 1st Sess. (2013).

²⁹2014 CGA § 321.

2. Clarification of High Risk Piracy Waters

As a result of pirate attacks against the U.S.-flag vessels *M/V Maersk Alabama* and *M/V Liberty Sun* in 2009, the U.S. Congress enacted a provision in the Coast Guard and Maritime Transportation Act of 2012 requiring the Secretary of Transportation to provide armed personnel to protect U.S.-flag vessels or reimburse vessel owners for the provision of armed personnel when the vessels transit “high-risk waters.”³⁰ The 2014 Coast Guard Act revised the requirement to provide for reimbursement only and it modified the definition of “high-risk waters” to mean waters for which the Coast Guard has determined that an act of piracy has occurred within the preceding 12 months and has issued an advisory warning during such period.³¹

D. Preservation and Promotion of the U.S.-Flag Fleet

1. Cargo Preference Restoration

The Cargo Preference Act of 1954 reserves 50 percent of certain U.S. Government impelled ocean cargoes to privately owned U.S.-flag vessels.³² The 1954 Act was amended in 1985 to increase, among other things, the percentage reservation to 75 percent for U.S. Government international food-aid cargoes mainly authorized by Public Law 480. The 75 percent increase was repealed in 2012 in the Moving Ahead for Progress in the 21st Century Act (MAP-21).³³ Legislation was offered in prior Congresses to restore the 75 percent reservation.³⁴ However, no action was taken on those bills. In the 113th Congress, a provision to restore the 75 percent was included in the 2014 Coast Guard Act which passed the U.S. House of Representatives.³⁵ The U.S. Senate declined to include the provision in its version of the 2014 Coast Guard Act, and the provision was not included in the final version of the bill.

2. Cargo Preference Administration

The application of the Cargo Preference Act of 1954 has sometimes led to disputes and controversy, particularly with regard to which U.S. Government programs it applies. Since 1970, the law has provided that

³⁰Pub. L. No. 112-213, § 503, 126 Stat. 1540, 1575 (2012).

³¹2014 CGA § 306.

³²46 U.S.C. § 55305.

³³Pub. L. No. 112-141, § 100124, 126 Stat. 405, 915 (2012).

³⁴E.g. H.R. 6170, 112th Cong., 2d Sess. (2012) (42 co-sponsors).

³⁵H.R. 4005, 113th Cong., 2d Sess. § 318 (2014).

every agency having responsibility under the 1954 Act must undertake that responsibility under regulations promulgated by the U.S. Department of Transportation. In 2008, the law was strengthened to provide that, “The Secretary [of Transportation], after consulting with the department or agency or organization or person involved, shall have the *sole responsibility* for determining if a program is subject to the requirements of this section.”³⁶ The 2008 amendment also provided, for the first time, for the potential imposition of civil penalties for non-compliance with cargo preference. However, the 1954 Act as amended in 2008 further provides that cargo preference shall be administered pursuant to “regulations *and* guidance issued by the Secretary of Transportation.”³⁷ That phrase was apparently interpreted by the U.S. Maritime Administration to require the issuance of regulations prior to the implementation of the 2008 amendment – which MARAD was unable to accomplish. The House-passed 2014 Coast Guard Act sought to remedy this problem by including a provision that would have required other agencies to apply cargo preference in accordance with DOT determinations issued in accordance with “any rules or guidance issued by the Secretary [of Transportation]” and the “issuance of such rules or guidance is not a prerequisite to the issuance of final determinations . . .”³⁸ The Senate declined to adopt this provision and it was not included in the 2014 Coast Guard Act that became law.

3. *Maritime Security Program Funding*

The U.S. Maritime Security Program has been one of the most successful U.S.-flag promotion programs. First authorized in the Maritime Security Act of 1996,³⁹ the Maritime Security Act of 2003 provides stipends to 60 militarily useful privately owned U.S.-flag vessels until September 30, 2025.⁴⁰ Although MSP has been successful, the U.S. House of Representatives cut funding for the Program from \$186 million to \$166 million in the Fiscal Year 2015 Transportation/HUD appropriations bill.⁴¹ USA Maritime, a coalition that directly or indirectly represents virtually the entire international trading U.S.-flag fleet, asserted that the cut “would undoubtedly result in the reduction in the size of the MSP fleet and a further decline in the United States merchant marine.”⁴² The proposed cut was

³⁶Pub. L. No. 110–417, § 3511, 122 Stat. 4356, 4769–70 (2008) (emphasis supplied).

³⁷46 U.S.C. § 55305 (emphasis supplied).

³⁸H.R. 4005, 113th Cong., 2d Sess. § 316 (2014).

³⁹Pub. L. No. 104–239, 110 Stat. 3118 (1996).

⁴⁰Pub. L. No. 111–383, 124 Stat. 4137, 4518 (2011).

⁴¹H.R. 4745, 113th Cong., 2d Sess. (2014).

⁴²Statement of Niels M. Johnsen on behalf of USA Maritime before the House Comm. on Transp. and Infrastructure, Coast Guard and Maritime Subcomm. (Sept. 10, 2014).

subsequently reversed and full funding was ultimately provided by Congress for MSP for fiscal year 2015.

4. National Maritime Strategy

Although the United States has a stated goal in statute of maintaining and promoting a privately owned U.S.-flag merchant marine and has had the goal arguably since the founding of the Republic,⁴³ the United States has not enacted new major maritime promotional legislation since the creation of the Maritime Security Program (most recently amended in 2012). In the 2014 Coast Guard Act, Congress moved to prompt further planning and study and to address challenges to the U.S.-flag fleet and to the development of a national maritime strategy.⁴⁴ Specifically, the 2014 Coast Guard Act requires the Secretary of Transportation to submit a national maritime strategy addressing, among other things, measures to increase support for the privately owned U.S.-flag fleet and to make the fleet more competitive. Separately, the 2014 Coast Guard Act required the Coast Guard to commission an assessment by the National Academy of Sciences of the impact on U.S.-flag vessels of U.S. specific standards which differ from international standards.⁴⁵

5. U.S.-Flag Requirement and LNG Exports

The U.S. Government is in the process of permitting a number of liquefied natural gas (LNG) export terminals and facilities anticipating a substantial oversupply of natural gas in the United States. The House Coast Guard and Transportation Subcommittee included a provision in an early version of the 2014 Coast Guard Act that called for a study on the application of a U.S.-flag requirement to LNG exports.⁴⁶ Specifically, the Government Accountability Office would have been required to report on the number of jobs that would be created in the U.S. maritime industry if, commencing on January 1, 2019, LNG exports had to go on U.S.-flag vessels constructed in the United States. Rep. John Garamendi offered an amendment before the House Coast Guard and Transportation Subcommittee that would have required the eventual use of U.S. constructed LNG tank vessels in U.S. foreign trade. That amendment was not accepted by the Subcommittee.

⁴³See 46 U.S.C. § 50101.

⁴⁴2014 CGA § 603.

⁴⁵2014 CGA § 605.

⁴⁶H.R. 4005, 113th Cong., 2nd Sess. § 320 (2014).

*E. Safety**1. Offshore Supply Vessel Third Party Inspection*

Over opposition from the Coast Guard, Congress delegated the agency's inspection authorities to classification societies for certain offshore supply vessels.⁴⁷ The provision is similar to existing alternative compliance authority that Congress previously provided in some respects, but appears to be broader in other respects and has led to agency concern about its scope, particularly as it relates to vessel manning authority which has not traditionally been the province of classification societies. The agency is also concerned about the potential negative impact that removing these vessels from regular Coast Guard inspection would have on its marine inspector training and development programs. The provision would allow the agency to terminate a certificate issued by a classification society that "reduced the operational safety of that vessel," and also requires a report from the agency in two years about how the delegation has worked.

2. Limitation on Coast Guard Regulation of OCS Vessels

In 2013, the Coast Guard commenced a rulemaking project to require vessels engaged in U.S. outer continental shelf activities to develop, implement and maintain a vessel-specific Safety and Environmental Management System, or SEMS.⁴⁸ The purpose of the rule was to require vessel owners and operators to be pro-active in the evaluation and assessment of operational risks and to adopt responsive management systems consistent with the American Petroleum Institute's Recommended Practice for Development of a Safety and Environmental Management Program for Offshore Operations and Facilities. Industry reaction to the Coast Guard proposal was not positive. The Offshore Marine Service Association, for example, indicated that it "sees no need or benefit for mandatory, vessel-specific SEMS plans. Our members' vessels already operate in accordance with the BSEE [U.S. Department of Interior Bureau of Safety and Environmental Enforcement] SEMS plans required by customers while also operating under their company's (but not vessel specific) safety management system."⁴⁹

In the 2014 Coast Guard Act, the U.S. Congress determined to delay action on the Coast Guard SEMS regulation.⁵⁰ Specifically, the 2014 Coast

⁴⁷2014 CGA § 315.

⁴⁸78 Fed. Reg. 55,230 (Sept. 10, 2013).

⁴⁹Comment of the Offshore Marine Service Association (Jan. 23, 2014), U.S. Coast Guard Docket No. USCG-201-0779.

⁵⁰2014 CGA § 322.

Guard Act requires the Coast Guard to precede any further regulatory action with the provision of an analysis to Congress of the effects of such a SEMS regulation, including “an estimate of all associated direct and indirect operational, management, personnel, training, vessel design and construction, record-keeping, and other costs.” The 2014 Coast Guard Act required that such analysis be submitted within one year after the date of enactment, which was December 18, 2014.

F. Fishing

1. Liens Against Fishing Permits

A 2001 U.S. Court of Appeals case, *Gowen, Inc. v. F/V Quality One*,⁵¹ determined that a limited entry fishing permit issued to a named vessel was a vessel appurtenance and therefore subject to maritime liens. The case has been criticized by a variety of commentators in part on the basis that it has created uncertainty in the financing of fishing vessels.⁵² Congress has considered on several occasions in the past modifying existing statutory law to change this result.⁵³ The 113th Congress again considered making changes in the law of maritime liens and fishing permits by including a provision in the House of Representatives-passed bill.⁵⁴ That provision, which was not included in the final 2014 Coast Guard Act, would have made it clear that the Commercial Instruments and Maritime Lien Act⁵⁵ does not establish a maritime lien on a fishing permit.

2. Application of Title XI to Fishing Vessels

The 1996 Sustainable Fisheries Act prohibited the use of U.S. Government Title XI guaranteed financing for the construction of new large fishing vessels that would increase harvesting capacity within the U.S. exclusive economic zone.⁵⁶ As large fishing vessels with limited entry fishing permits have aged, this requirement has come under scrutiny. In connection with Congressional consideration of the 2014 Coast Guard Act, Representative Rick Larsen of Washington proposed an amendment that

⁵¹244 F.3d 64 (1st Cir. 2001).

⁵²E.g. Andrew I. Aley & Stephen B. Johnson, *Reconsidering Gowen: Toward a Rationalized View of Fishing Permits and Maritime Liens*, 11 BENEDICT'S MAR. BULL. 111 (Third/Fourth Quarter 2013); Bryant E. Gardner, *Fishing for Change*, 10 BENEDICT'S MAR. BULL. 18 (2012).

⁵³E.g. S. 608, 112th Cong., 1st Sess. (2012).

⁵⁴H.R. 4005, 113th Cong., 2d Sess. § 301 (2014).

⁵⁵46 U.S.C. §§ 31301–31310.

⁵⁶Pub. L. No. 104–297, 110 Stat. 3559 (1996).

would have limited the prohibition and permitted the use of Title XI guarantees for certain large fishing vessels without increasing the harvesting capacity of those vessels. The 2014 Coast Guard Act as enacted did not include Representative Larsen's proposed amendment.

G. Arctic

The gradual opening of Arctic sea routes and increased exploration for natural resources in the Arctic region is turning Congressional attention to the issues arising from those and other Arctic activities. In the 113th Congress, Senators Maria Cantwell of Washington and Mark Begich of Alaska introduced the Coast Guard Arctic Preparedness Act with the ostensible purpose of providing the Coast Guard the tools it needs to protect America's interests in the Arctic and to meet its Arctic mission requirements.⁵⁷ Specifically, that Act would have clarified the Coast Guard's operations mission to include ice breaking capabilities for the federal government and to extend the life of the Coast Guard's currently idled heavy icebreaker *Polar Sea* for seven to ten years, among other things.

As indicated by Senator Begich, "With the Arctic opening up new opportunities for development and shipping, the Coast Guard needs to be better prepared to support increased activity in the region The U.S. is an Arctic nation and it's time that we commit serious resources to the region and start acting like one."⁵⁸

Ultimately, substantial portions of the Coast Guard Arctic Preparedness Act were rolled into the 2014 Coast Guard as Title V of that Act.⁵⁹ In particular, the 2014 Coast Guard Act, among other things, encouraged the federal government to coordinate Arctic policy with affected governments through the International Maritime Organization (IMO), mandated that the Coast Guard improve maritime domain awareness in the Arctic, required regular reports to be provided to Congress by the Coast Guard on the status of IMO Polar Code negotiations, and required renewed focus by the Coast Guard on its polar icebreaker capabilities.

⁵⁷S. 2131, 113th Cong., 2d Sess. (2014).

⁵⁸*Begich Bill Strengthens Coast Guard Resources, Capabilities in the Arctic*, ALASKA NATIVE NEWS (March 18, 2014).

⁵⁹2014 CGA §§ 501–506.

*H. Miscellaneous**1. Opportunities for Sea Service Veterans*

In an effort to provide work opportunities for discharged veterans of the U.S. armed forces, Congress included provisions in the 2014 Coast Guard Act that make it easier for sea service veterans to demonstrate competency.⁶⁰ The 2014 Coast Guard Act also requires the Coast Guard to process the paperwork needed by retired Coast Guard personnel more expeditiously to assist such personnel with obtaining employment in the commercial maritime industry, to increase awareness among Coast Guard personnel of commercial maritime opportunities and to report back to Congress on efforts made to assist Coast Guard personnel in transitioning to the commercial maritime industry.

2. Uninspected Vessels in the U.S. Virgin Islands

Congress effectively equalized inspection standards for small passenger vessels between the British Virgin Islands and the U.S. Virgin Islands by requiring the Coast Guard to inspect such vessels carrying passengers to or from a port in the U.S. Virgin Islands pursuant to the United Kingdom safety regime.⁶¹

⁶⁰2014 CGA § 309.

⁶¹2014 CGA § 312.

