

BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 18, No. 2 • Second Quarter 2020

Joshua S. Force, Editor-in-Chief
Robert J. Zapf, Managing Editor

Inside This Issue

NAVIGATING ADMIRALTY JURISDICTION: THE NINTH CIRCUIT HOLDS THAT A STAND-UP PADDLE BOARD JUST DOESN'T DO IT

By Lisa Reeves 53

MANAGING EDITOR'S INTRODUCTORY NOTE

Robert J. Zapf 55

WINDOW ON WASHINGTON

Under the Yellow Jack

Bryant E. Gardner 63

BUSINESS OR PLEASURE? NAVIGATING THE INTERNAL REVENUE CODE WHEN YOUR BOAT IS A BUSINESS

Caroline D. Ciraolo 70

RECENT DEVELOPMENTS 77

TABLE OF CASES 95

BENEDICT'S MARITIME BULLETIN EDITORIAL BOARD 98

CONTRIBUTING AUTHORS TO THIS ISSUE 99

NAVIGATING ADMIRALTY JURISDICTION: THE NINTH CIRCUIT HOLDS THAT A STAND-UP PADDLE BOARD JUST DOESN'T DO IT

By Lisa Reeves*

As an avid paddle boarder, a recent decision of the United States Court of Appeals for the Ninth Circuit caught the author's attention: *In re: Blue Water Boating, Inc.*¹ In essence, the court held that an accident involving a rented standup paddle-board (SUP) in navigable waters did not fall within admiralty jurisdiction. This article explores the implications of the decision on future maritime cases, as well as the questions that remain unanswered by the opinion.

Primer on Admiralty Jurisdiction

Prior to analyzing this decision, it might be helpful to briefly review the current state of the law concerning admiralty jurisdiction, which has evolved, and will continue to evolve, over the years.

In 1995, the Supreme Court articulated a two-part test for admiralty jurisdiction in tort cases, now commonly referred to as the location and connection tests.²

* Lisa Reeves is the senior partner in Reeves McEwing LLP, which handles maritime and transportation issues in Pennsylvania, New Jersey, Delaware and beyond.

¹ *In re: Blue Water Boating, Inc.*, 786 F. Appx. 703, 2019 U.S. App. LEXIS 35994 (9th Cir. Dec. 4, 2019).

² *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

(Continued on page 56)



EDITORIAL BOARD

Joshua S. Force
Robert J. Zapf
Bruce A. King
Dr. James C. Kraska
Dr. Norman A. Martinez-
Gutiérrez
Francis X. Nolan, III
Anthony J. Pruzinsky
Dr. Frank L. Wiswall, Jr.,
Editor Emeritus

**RECENT
DEVELOPMENTS
CONTRIBUTORS**

Samuel P. Blatchley
Alena A. Eckhardt
Kevin M. McGlone
Shea Michael Moser
Joni Alexis Poitier
Thomas C. Sullivan
Jeffrey A. Yarbrough

COLUMNIST

Bryant E. Gardner

EDITORIAL STAFF

James Codella
Editorial Director
Cathy Seidenberg
Legal Editor

A NOTE ON CITATION:

The correct citation form for this publication is:
18 BENEDICT'S MAR. BULL. [53] (Second Quarter 2020)

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal or other expert assistance is required, the services of a competent professional should be sought.

From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

**LexisNexis™**

Matthew Bender®

MANAGING EDITOR'S INTRODUCTORY NOTE

In this edition we begin with an article by Lisa Reeves who discusses the recent decision of the United States Court of Appeals for the Ninth Circuit holding that an accident involving a rented standup paddle-board (SUP) in navigable waters did not fall within admiralty jurisdiction. Lisa provides an excellent primer on admiralty jurisdiction and decisions from other courts going both ways on the jurisdictional issue.

We follow with Bryant Gardner's column, Window on Washington. Here Bryant provides a thorough review of the regulatory actions taken to date affecting the maritime industry in light of the corona virus and COVID-19. As Bryant points out "[d]eemed to be 'essential' or 'critical infrastructure' by Federal and state quarantine authorities, the U.S. maritime industry remains on watch. It continues to sail, to work vessels, and to keep the supply chain moving." Hopefully, by the time of publication, we will have passed the peak of the wave of this pandemic, and start the voyage into smoother waters.

And with smoother waters, recreational boating activities may recommence in earnest. Our next article, by Caroline D. Ciralo, discusses the tax implications of peer-to-peer chartering of recreational vessels. As the old saying goes, there are only two certainties in life, and tax is one of them! Caroline provides guidance for owners to avoid the wrath of the IRS.

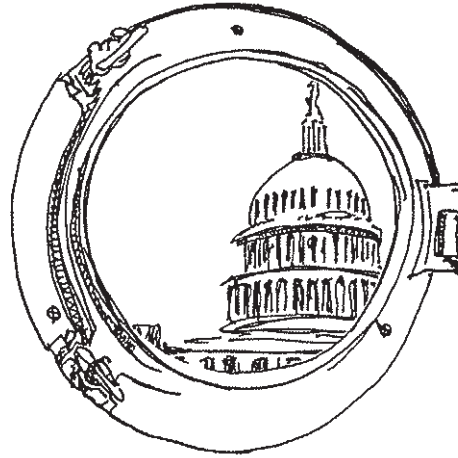
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



Under the Yellow Jack

Bryant E. Gardner

Hunkered down in a home office with the kids upstairs coming to grips with “distance learning,” it is hard to predict just how the COVID-19 pandemic will fully impact both our nation and the maritime industry crucial to our infrastructure. As of this writing, the United States is still in the throes of attempting to “flatten the curve” through social distancing and other measures. However, there is little doubt that the pandemic’s impact will be far-reaching, and an observation of how the industry and its regulators responded to the outbreak may prove instructive. It may also be a useful chronicle in the event of another super-flu, to remind us what we did, what worked, and what did not work.

Deemed to be “essential” or “critical infrastructure” by Federal and state quarantine authorities, the U.S. maritime industry remains on watch.¹ It continues to sail, to

work vessels, and to keep the supply chain moving. Of course, it does not continue unaffected, as crew issues become more complicated and vessel operators look warily toward the future. A number of internationally-flagged carriers, including Maersk, Boskalis, and Oldendorff, announced that they were suspending crew changes and extending crew services, effectively ordering crews to “shelter in place” even if that place is afloat on a working vessel. Taking protective measures a step further, Oldendorff also implemented a company-wide travel ban. Wallenius Lines, for example, announced on March 23, 2020 that it would begin reducing tonnage through charter redeliveries, early recycling, and cold lay-ups. Like other industries (including law firms), shore-side offices reduced or shifted to teleworking and began a series of belt-tightening measures. U.S. Merchant Marine stakeholders, including operators under the Maritime Security Program,² sought participation in early COVID-19 Federal stimulus packages, anticipating a dry-up of commercial and government-impelled cargoes. The U.S. Maritime Administration held several

¹ See, e.g., Christopher C. Krebs, Director, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 19, 2020) (listing “Maritime transportation workers—port workers, mariners, equipment operators” among essential workers). See also U.S. Coast Guard, Maintaining Maritime Commerce and Identification of Essential Maritime Critical Infrastructure Workers, MSIB No. 11-20 (Mar. 27, 2020) (naming more granular categories of maritime workers, including merchant mariners, pilots, stevedores, longshoremen, representatives of

seafarers’ welfare and labor organizations, marine consultants, naval architects, vessel owners and operators, shipping agents, fleet facility personnel, etc.).

² 46 U.S.C. Ch. 531.

all-hands stakeholders conference calls to hear industry concerns, one with Secretary Chao.³

Mariners and Mariner Credentials

On March 10 and March 30, 2020, the U.S. Coast Guard announced various allowances and extensions in connection with U.S. mariner credentials.⁴ The Coast Guard announced that all Regional Examination Centers and Monitoring Units would be closed until further notice, extended Merchant Mariner Credentials (MMC) expiring between March 1, 2020 and July 31, 2020 until October 31, 2020, and shifted to processing electronic submissions and www.pay.gov payments in lieu of mail and facsimile submissions or acceptance of checks and money orders for related applications.⁵ Standards of Training, Certification, and Watchkeeping (STCW) endorsements were similarly extended, and STCW Medical Certificates were extended three months. Additionally, the Coast Guard announced it would suspend enforcement of the requirement that pilots undergo annual physical examinations.

To date, the Transportation Safety Administration (TSA) continues to issue Transportation Worker Identification Credential (TWIC) cards as normal. However, TSA and the Coast Guard, which jointly administer the program, have announced some practical changes.⁶ During the pandemic, new hires with an acceptable form of identification under 33 CFR § 101.51(a) may have access to a secure or restricted area where another person with a TWIC can provide reasonable monitoring, suspending the side-by-side escorting required under 33 CFR § 101.105, and the Coast Guard intends to allow flexible changes to Facility Security Plans regarding required

escort rations in restricted areas.⁷ Additionally, the Coast Guard announced that it will not pursue suspension or revocation of MMCs for failure to hold a TWIC.⁸ Lastly, the service will be delaying implementation of the TWIC Reader Rule for 1,000-passenger facilities and vessels from June 7, 2020 to October 5, 2020.⁹

U.S. maritime unions responded variously. The Seafarers International Union announced it would close all hiring halls until further notice, coinciding with a 30-day suspension of routine crew reliefs, and the Seafarers Appeals Board indicated that individuals may be required to remain on ships longer than originally planned. The Seafarers and their member companies' association, the American Maritime Association, also entered into a memorandum of understanding adopting guidelines for shipboard preventive actions to coronavirus exposure, including gangway temperature screenings and questionnaires to be completed by anyone wishing to board, and limited visitor access on board. Additionally, under the agreement, crews are restricted to ship. All of the unions committed to stay the course and keep our nation's maritime transportation system moving, as they have in war and peace since the birth of the republic.

Immigration and Vessel Arrival Impacts

In mid-March 2020, President Trump issued a series of proclamations suspending entry to the United States of persons who have been in Iran, China, the Schengen Area of Europe, Ireland, or the United Kingdom during the preceding 14 days, with certain exceptions, most notably persons traveling as a sea crewmember.¹⁰ Coast Guard guidance further clarified that, for such vessels calling the specified risk countries during the last 14 days, crewmembers would be "permitted to disembark the vessel to conduct operations pier side or for the immediate and continuous transit through the U.S. to another country."¹¹ Additionally, the guidance clarified that non-passenger freight vessels which have

³ See U.S. Maritime Administration, Readout of Transportation Secretary Elaine L. Chao and Maritime Administrator Mark H. Buzby Call with Maritime Industry Leaders (April 2, 2020), available at <https://www.maritime.dot.gov/newsroom/press-releases/readout-transportation-secretary-elaine-l-chao-and-maritime-administrator>.

⁴ U.S. Coast Guard, Novel Coronavirus—Mariner Credentials, MSIB No. 08-20, Change 1 (Mar. 30, 2020); U.S. Coast Guard, Novel Coronavirus—Mariner Credentials, MSIB No. 08-20 (Mar. 19, 2020); IMO Letter No. 4204/Add.5 (Mar. 17, 2020).

⁵ U.S. Coast Guard, National Maritime Center, Coronavirus Disease (COVID-19)—Update #2 (Mar. 30, 2020).

⁶ U.S. Coast Guard, COVID 19—Transportation Worker Identification Credential (TWIC) Operations, MSIB No. 13-20 (April 3, 2020).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., President Donald J. Trump, Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus (Mar. 14, 2020), <https://www.whitehouse.gov/presidential-actions>.

¹¹ U.S. Coast Guard, Novel Coronavirus—Update (Change 3), MSIB No. 02-20 (Change 3) (Mar. 16, 2020).

been to the countries identified in the proclamations within the last 14 days would be permitted to enter and transit U.S. ports as normal, provided they do not have sick crewmembers on board.¹² Such vessels with sick crewmembers on board “should expect delays and need to work with local health and port officials prior to entry.”¹³ Additionally, the Coast Guard issued a statement that a vessel with an ill person on board is a “hazardous condition” pursuant to 33 CFR § 160.216, and the owner, agent, master, operator, or person in charge of the vessel must immediately notify the nearest captain of the port.¹⁴

The CDC issued guidance for ships to follow for the management of COVID-19.¹⁵ The guidance sets out best practices for minimizing the spread of illness aboard ship in the event of a suspected or known COVID-19 infection, personal protective equipment recommendations for crew, and reporting obligations. The CDC requires arriving non-cruise vessels to report immediately any death on board or illness meeting the CDC definition of “ill person”, and requires non-cruise vessels to disclose details about sick passengers, ports of call during the prior 14 days, and ports of call where the sick persons disembarked during the prior 14 days. The CDC requires close coordination with the appropriate CDC Quarantine Station regarding disembarkation of any suspected COVID-19 persons from vessels. Finally, the CDC recommends the on-onboard management of appropriate stores of personal protective equipment, such as masks, impermeable gloves, etc.—things that many operators may not necessarily have thought to have onboard in such quantities.

¹² *Id.*

¹³ *Id.* By contrast, Singapore suspended all crew changes within its territory.

¹⁴ U.S. Coast Guard, Vessel Reporting Requirements for Illness or Death, MSIB No. 06-20 (Mar. 13, 2020). An “ill person” is defined as a (A) person with a temperature of 100.4 °F accompanied by any of: skin rash, difficulty breathing, persistent or bloody cough, decreased consciousness or confusion of recent onset, new unexplained bruising or bleeding without previous injury, persistent vomiting other than sea sickness, or headache with a stiff neck; (B) fever for 48 hours or more; or (C) acute gastroenteritis. The Coast Guard also set up an email address for COVID-related questions, outbreakquestions@uscg.mil.

¹⁵ Centers for Disease Control and Prevention, Quarantine and Isolation, Interim Guidance for Ships on Managing Suspected Coronavirus Disease 2019 (Feb. 18, 2020), <https://www.cdc.gov/quarantine/maritime/recommendations-for-ships.html>.

Cruise Industry

The cruise industry in the U.S., led by the Cruise Lines International Association (CLIA) announced March 13, 2020 that its member operators would be voluntarily suspending cruise ship operations from U.S. ports for 30 days. The following day, the Centers for Disease Control and Prevention (CDC) issued a “no sail” order to the balance of the industry, applicable to larger vessels with a capacity of 250 persons or more.¹⁶ The order directed disembarkation of passengers and crew at port as directed by the Coast Guard in consultation with the CDC, prohibited any further embarkations, and suspended operations. On April 4, 2020, the Coast Guard announced the successful execution of the industry stand-down, including disembarkation of 250,000 persons in the United States, noting that there are still 114 cruise ships with 93,000 crew members aboard, either in or near U.S. waters.¹⁷ After President Trump mentioned the possibility of bailing-out the cruise lines, significant objections arose from U.S. mariner unions and other commentators, who noted that most cruise lines are foreign-flagged and as such do not pay U.S. taxes or hire U.S. employees in many cases. “American taxpayers should not be sending their hard-earned dollars to an industry that freeloards off our government and is notorious for exploiting low-cost foreign crews,” stated Don Marcus, President of the International Organization of Masters, Mates & Pilots.¹⁸ Also of note, the Great Lakes-Saint Lawrence Seaway System announced an indefinite suspension of pleasure craft lockages “to minimize all non-essential interactions between Seaway personnel and members of the general public during the COVID-19 crisis.”¹⁹

In March 2020, the Dutch-flag cruise ship ZAANDAM experienced an outbreak of the virus on an itinerary

¹⁶ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), Order Under Sections 361 & 365 of the Public Health Service Act (42 U.S.C. §§ 264 & 268) and 42 Code of Federal Regulations Part 70 (Interstate) and Part 71 (Foreign) No Sail Order and Other Measures Related to Operations (Mar. 14, 2020).

¹⁷ Press Release, U.S. Coast Guard, Coast Guard Oversees Disembarkation of 250,000 from Cruise Ships to Reduce Risks Under COVID-19 Emergency, MEDEVAC’d 31 (April 4, 2020).

¹⁸ International Organization of Masters, Mates & Pilots, Wheelhouse Weekly (Mar. 31, 2020).

¹⁹ Great Lakes-St. Lawrence Seaway System, Pleasure Craft Lockages Suspended at Canadian Locks Until Further Notice, 2020—Pleasure Craft Bulletin No. 1 (Mar. 26, 2020).

departing from Argentina and ending in Chile.²⁰ Passengers included Europeans, Canadians, Americans, and New Zealanders. The vessel sailed toward the Panama Canal, where passengers testing negative were moved to a sister ship. Following this delay, the vessel transited the canal with 446 guests and 602 crew, including 193 persons showing flu-like symptoms, with 8 people who had tested positive for COVID-19 and four deaths, bound for Florida according to news reports at the end of March. Florida Governor Ron DeSantis stated "We cannot afford to have people who aren't even Floridians dumped into South Florida using up those valuable resources," and the management of the vessel urged the authorities to allow people to disembark describing the situation as "a test of our humanity."²¹ President Trump urged Florida officials to permit the vessel to dock.²² A "unified command" was established to address the situation, consisting of officials from the U.S. Coast Guard, Broward County Sheriff, port authorities, the Florida Health Department, and the CDC.²³ On April 2, 2020 Florida agreed to allow both vessels to dock and for most passengers to disembark, except for 45 severely ill persons. Most of the foreign nationals were dispatched home directly on charter planes.²⁴

As the vessel and her sister ship approached South Florida, the Coast Guard issued a Marine Safety Information Bulletin which noted the strain upon local medical resources in the Seventh District and the unwillingness of many medical facilities in Miami to accept additional medical evacuations, and advised foreign passenger vessels operating within the District to increase their afloat medical capabilities for an indefinite period of time.²⁵ The Bulletin directed vessels requiring medical evacuations to coordinate with either the Joint Rescue Coordination Center (JRCC) Miami or JRCC San Juan, and stated that medical evacuations will occur if deemed necessary by the Coast Guard flight

surgeon, in which case the owner or operator of the vessel will be required to secure commercial transportation ashore, confirm availability of medical services and facilities, and coordinate a private ambulance prior to the evacuation. Additionally, the notices stated "Foreign flagged vessels that loiter beyond U.S. territorial waters, particularly those registered to The Bahamas, that require MEDEVAC to a shoreside facility should seek flag state support prior to seeking support from the limited facilities in the U.S."²⁶

Coast Guard Adjustments

The Coast Guard issued guidance for port and facility operations aimed at alleviating contagion points.²⁷ Approved Facility Security Plans and 33 CFR § 105.245 require a "Declaration of Security" (DOS) to be completed in certain situations, depending upon the Maritime Security (MARSEC) level. The Coast Guard announced that interactions among the Facility Security Officer, and the Master, Vessel Security Officer or their representatives could be appropriately conducted electronically for purposes of issuing the DOS, provided a conversation occurred. Similarly, the agency provided that meetings necessary for a Declaration of Inspection (DOI) required by 33 CFR § 156.150 prior to transfer of oil or hazardous materials to or from vessels could be conducted electronically, provided both persons in charge (PIC) from the vessel and facility do communicate and hold a conference to ensure mutual understanding prior to commencing operations.²⁸ Additionally, the Coast Guard reminded port facilities that any mariner access restrictions will be at the direction of Customs and Border Protection (CBP) and the Coast Guard—not at the discretion of the facility—and that facilities in the United States are required to receive vessel garbage and medical waste, subject to application for an exception where appropriate.²⁹ The Houston-Galveston Sector issued additional guidance requiring the reporting of any facility closures, reduced operations, deviations from Facility Security Plans, or labor shortages associated with the virus.³⁰ At the beginning of April, the Coast

²⁰ Reuters, Cruise ship with coronavirus outbreak sails to uncertain Florida welcome (Mar. 31, 2020).

²¹ *Id.*

²² Reuters, Trump urges Florida to welcome cruise ship with deadly coronavirus outbreak (Mar. 31, 2020).

²³ *Id.*

²⁴ Reuters, Florida Agrees to Let Holland America Cruise Ships Dock (April 2, 2020).

²⁵ U.S. Coast Guard, Medical Capability Requirements for Foreign Passenger Vessels Impacted by the Novel Coronavirus, MSIB No. 01-20 (Mar. 29, 2020).

²⁶ *Id.*

²⁷ U.S. Coast Guard, Novel Coronavirus—Port and Facility Operations, MSIB No. 07-20 (Mar. 18, 2020).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Coast Guard Sector Houston-Galveston, Marine Operations During a Stay-At-Home "Order, MSIB No. 13-20 (Mar. 25, 2020).

Guard put out a bulletin reminding vessel and facility operators that they must keep all oil spill response and removal resources in place and operational, and that they must notify the Coast Guard of any change in their capacity of 10% or more for a period of 48 hours or longer.³¹

The Coast Guard also modified its vessel inspection and examination procedures.³² Marine Inspectors, Port State Control Officers, and Commercial Fishing vessel examiners have been directed to confirm there are no ill persons onboard prior to boarding vessels for inspection. For U.S.-flag vessels and outer-continental shelf units due for statutory or regulatory inspections, officers in charge of marine inspection (OCMI) are authorized to accept objective evidence of the vessel's condition, such as recent classification surveys, pictures, video, vessel logs, etc., in lieu of in-person inspection. Alternatively, the OCMI's are authorized to defer inspection for 90 days, or issue a CG-835V to restrict vessel movement as a worklist item. Recognized Organizations (RO) and Third Party Organizations (TPO) are granted leeway to request extensions up to 90 days for surveys and audits coming due, with consideration given to "the vessel's history of compliance" and "objective evidence" by the OCMI or Office of Commercial Vessel Compliance (CG-CVC) in determining whether to grant extensions. The Coast Guard also offered the option to ROs and TPOs for remote surveys, subject to Coast Guard approval of procedures to be proposed by the surveying organization. Moreover, the Coast Guard suggested similar allowances for companies required to complete internal audits under the International Safety Management (ISM) Code and related plans. The Coast Guard announced that it would continue a risk-based program to target port state control exams, without issuing deficiencies or detaining vessels for expired certificates, documents, or mariner credentials until October 1, 2020.

The Coast Guard also issued guidance to operators encouraging the development of "in-house" random and pre-employment drug testing capabilities to minimize contact with third-party collectors on board vessels

pursuant to 46 CFR § 16.230, and relaxation of the 50% random test rate, giving "due consideration to those challenges when deciding whether or not to initiate an enforcement action against marine employers who fall short of the 50% requirement."³³ The Coast Guard also suggested it would grant requests to waive pre-employment testing for employees covered by a random testing requirement within 60 days of the intended hire date. The Coast Guard reaffirmed the post-casualty and reasonable cause testing requirements.

Fisheries

Many fisheries across the nation are subject to mandatory onboard observer coverage. Such observers monitor catch and provide critical fisheries data for use by the National Marine Fisheries Service (NMFS). On March 27, 2020, NMFS issued an emergency action temporary rule waiving onboard observer coverage requirements established under NMFS regulations and the Magnuson-Stevens Fishery Conservation and Management Act.³⁴ Specifically, the NMFS rule provides for waiver in the event that (a) local, state, or national governments or private companies or organizations that deploy observers pursuant to NMFS regulations, restrict travel or otherwise issue COVID-19-related social control guidance, or requirements addressing COVID-19-related concerns, such that it is inconsistent with the requirements or not recommended to place an observer or (b) no qualified observers are available for placement due to health, safety, or training issues related to COVID-19.³⁵ Additionally, the Coast Guard announced that it would consider 90-day extensions of 5-year commercial fishing vessel safety dockside exams, at the discretion of the OCMI, based upon an evaluation of the vessel's history.³⁶ Accepted Organizations and Similarly Qualified Organizations recognized as TPOs are also authorized to grant 90-day deferrals.

³¹ U.S. Coast Guard, COVID-19—Vessel and Facility Response Plans, MSIB No. 12-20 (April 2, 2020).

³² U.S. Coast Guard, Vessel Inspections, Exams, and Documentation, MSIB No. 09-20 (Mar. 26, 2020). Also of note, the United Kingdom Maritime and Coastguard Agency announced on March 27, 2020, that it would suspend port state control vessel inspections for "IMO 2020" compliance with low-sulfur vessel fuel rules.

³³ U.S. Coast Guard, COVID-19 Guidance for Maritime Operators on Compliance with Federal Drug Testing Requirements, MSIB No. 10-20 (Mar. 27, 2020).

³⁴ National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Emergency Measures to Address Fishery Observer Coverage During the COVID-19 Coronavirus Pandemic, 85 Fed. Reg. 17,825 (Mar. 27, 2020).

³⁵ *Id.*

³⁶ U.S. Coast Guard, Vessel Inspections, Exams, and Documentation, MSIB No. 09-20 (Mar. 26, 2020).

Federal Maritime Commission

On March 31, 2020, the U.S. Federal Maritime Commission announced that Commissioner Rebecca Dye will be leading an inquiry into COVID-19 supply chain impacts.³⁷ The order notes that “Recent global events have only highlighted the economic urgency of responsive port and terminal operations to the effectiveness of the United States freight delivery system. Given the Commission’s mandate to ensure an efficient and economic transportation system for ocean commerce, the Commission has a clear and compelling responsibility to actively respond to current challenges impacting the global supply chain and the American economy. Accordingly, the Commission has determined there is a compelling need to convene new Supply Chain Innovation Teams to address these issues.”³⁸ Commissioner Dye will begin by interviewing port directors to determine steps to mitigate critical supply chain challenges, and will engage industry leaders including liner shipping companies, ocean transportation intermediaries, marine terminal operators, beneficial cargo owners, drayage trucking companies, longshore labor representatives, rail officials, chassis providers, and port authorities.³⁹ In announcing the review, Commissioner Dye noted that small and medium-sized shippers, in particular, have been affected by the lack of cargo storage space.⁴⁰

Jones Act

In recent years, the onset of any major emergency seems to set stakeholders scrambling to push through or prevent a waiver of the U.S. cabotage law, popularly called the Jones Act.⁴¹ Rumors began spreading throughout the Washington maritime community of a potential energy-related waiver request. On April 3, 2020, President Trump reportedly met with energy interests, including oil major representatives, in the White House to discuss the possibility of a blanket period waiver (as opposed to a

specific movement waiver). In reply, nearly two hundred maritime interests, including vessel owners and operators, maritime unions, maritime schools, pilots’ associations, dredgers, shipbuilders, and others wrote to the President, asserting that the COVID-driven economic slowdown has reduced demand for domestic oil transportation by water and the existing fleet of Jones Act-qualified vessels, and forcefully argued against waiver of the cabotage laws. So far, no waiver.

International Maritime Organization

The International Maritime Organization (IMO), in a joint statement issued together with the World Health Organization (WHO), called upon member states to respect the requirements of “free pratique,” the principles of proper care for all travelers, and the prevention of unnecessary delays to persons and property on board, while also recognizing the need to prevent the spread of disease.⁴² The IMO subsequently issued a set of recommendations to member states, aimed at ensuring continued flow of maritime commerce during the pandemic including, *inter alia*: not imposing quarantine “on the ship itself” which would prevent access to a berth or timely discharge and/or loading of cargoes or other critical activities; granting seafarers “key worker” status regardless of nationality and providing them the travel exemptions necessary to facilitate crew changes; development of electronic and distance replacements for in-person clearance processes sufficient to ensure unimpeded vessel movements; ensuring pilots can continue to operate; permitting classifications and surveys to be undertaken when necessary to maintain compliance even if extensions are granted; and ensuring provision of seafarer emergency medical treatment ashore.⁴³

COVID-19 III Relief Bill

Tucked away in the third COVID-19 bill, the Coronavirus Aid, Relief, and Economic Security (CARES) Act⁴⁴

³⁷ Federal Maritime Commission, International Ocean Transportation Supply Chain Engagement, Fact Finding No. 29 (Mar. 31, 2020).

³⁸ *Id.*

³⁹ Federal Maritime Commission, Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts (Mar. 31, 2020); Federal Maritime Commission, International Ocean Transportation Supply Chain Engagement Order, 85 Fed. Reg. 19,146 (April 6, 2020).

⁴⁰ *Id.*

⁴¹ 46 U.S.C. § 55102.

⁴² International Maritime Organization, Joint Statement IMO-WHO on the Response to the COVID-19 Outbreak, Circular Letter No. 4204/Add.2 (Feb. 21, 2020).

⁴³ International Maritime Organization, Coronavirus (COVID-19)—Preliminary List of Recommendations for Government and Relevant National Authorities on the Facilitation of Maritime Trade During the COVID-19 Pandemic, Circular Letter No. 4204/Add.6 (Mar. 27, 2020).

⁴⁴ Pub. L. No. 116-136, 134 Stat. 281, § 14003, Mar. 27, 2020.

is a provision which will at long last end the diversion of monies from the Harbor Maintenance Trust Fund. Congress enacted the Harbor Maintenance Tax in 1986, which is a fee of 0.125% the value of imported cargo paid by users of federal authorized ports, to recover the operation and maintenance dredging costs for such ports. However, the funds in the trust, \$9.3 billion, sit unused as a basis for unrelated budget off-sets. The change should ensure that trust fund receipts collected going forward, expected to be \$24.5 billion over the next decade, are made available for port dredging. Additionally, the Act provides supplemental operating funds for the Coast Guard, U.S. Maritime Administration, and the maritime academies to contend with the virus.⁴⁵

Conclusion

The foregoing is a brief overview of some of the major U.S. maritime regulator responses to the opening weeks of the COVID-19 pandemic. The situation continues to evolve rapidly and will have moved further by the time of publication. Nevertheless, a consolidated review of responses to date will be instructive in future pandemics and shocks to the maritime transportation system. One thread that stands out: The Coast Guard has approached the situation flexibly and practically in many cases, seeking to balance safety with workability, consistent with its longstanding role as the industry's vigilant partner.

⁴⁵ *Id.*, Tit. VI & XII.