

ECA - MARPOL ANNEX VI “New” Regulations, Requirements, and Issues

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ROADMAP

- 1. Regulatory Background**
- 2. Consequences of Drop from 1% to 0.1%**
 - Increased cost of compliance
 - Increased cost of non-compliance
 - EPA's new Penalty Policy
- 3. Main Issues Moving Forward**
 - Liability between shipowners and charterers
 - Impact on other contractual provisions
 - Effect on P&I coverage
 - The next Magic Pipe?
 - Prevention costs versus violation costs

PART ONE

REGULATORY BACKGROUND

BRIEF BACKGROUND TO NEW RULES

MARPOL: International Convention for the Prevention of Pollution from Ships (1973), modified by the 1978 Protocol.

MARPOL Annex I, “Regulations for the Prevention of Pollution by Oil”

- Entered into force, 2 October 1983.
- Ratified by the United States, August 1980.

MARPOL Annex VI, “Regulations for the Prevention of Air Pollution from Ships”

- Entered into force, 19 May 2005.
- Ratified by the United States, October 2008.

MARPOL ANNEX VI

More Than Just Sulfur...

Regulation 12 - Ozone Depleting Substances

Regulation 13 - Nitrogen Oxides (NO_x)

Regulation 14 - Sulfur Oxides (SO_x)*

Regulation 15 - Volatile Organic Compounds (VOCs)

Regulation 16 - Shipboard Incineration

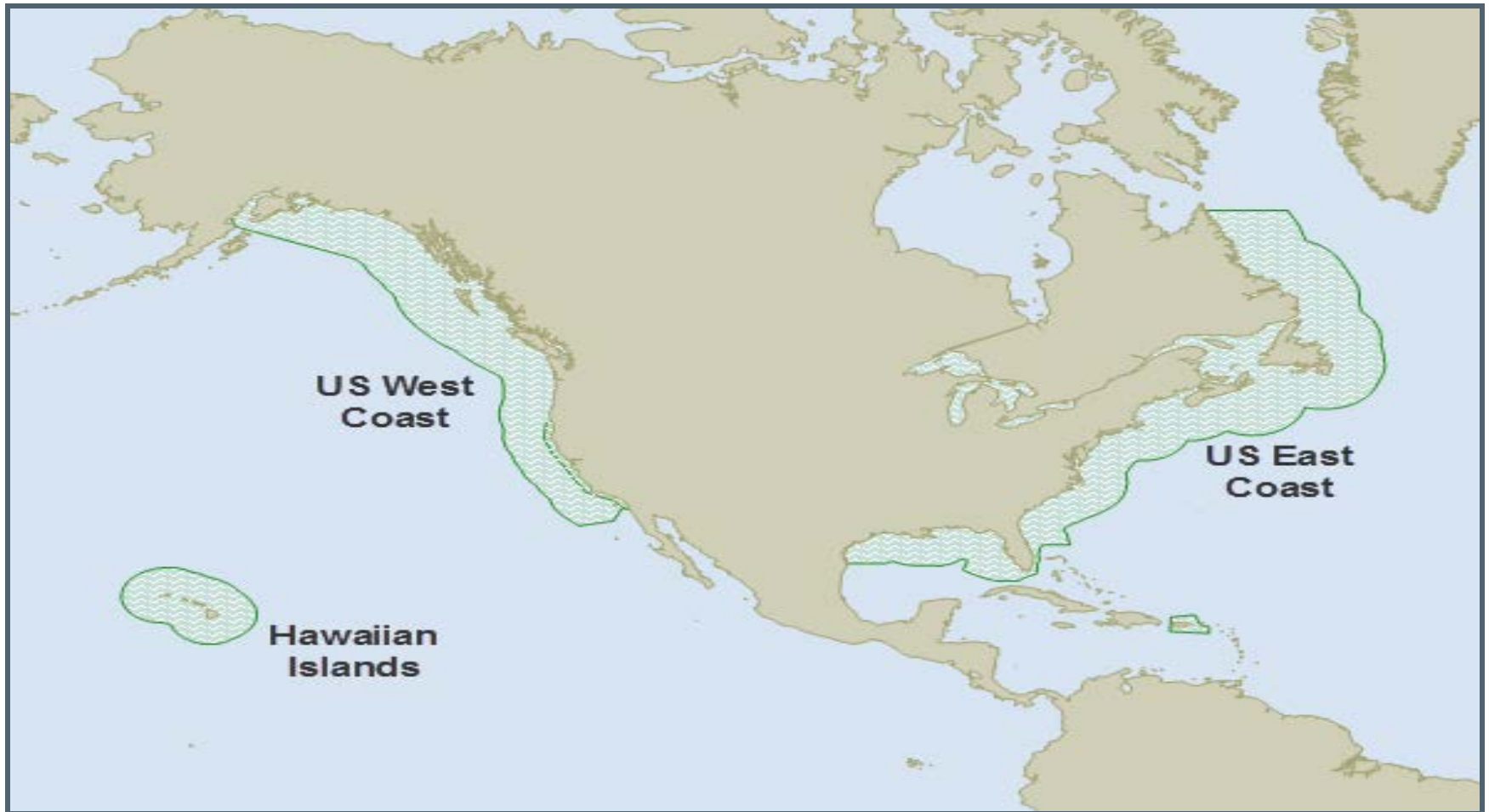
Regulation 18 – Fuel Oil Availability & Quality Control*

**** Addressed In This Presentation***

THE TWO SETS OF ENGINE EMISSIONS STANDARDS UNDER ANNEX VI

1. “Global” standards for the sulfur content of fuel and for nitrogen oxides (NO_x) emissions from engines apply to ships **at all times**; and
2. “Geographic” based standards that require ships operating in designated **Emission Control Areas (ECAs)** to comply with more stringent fuel sulfur and engine NO_x limits.

THE NORTH AMERICAN ECA (Enforced as of August 1, 2012)



THE PHASED STANDARDS

Standard	Year	Fuel Sulfur Content – parts per million (%)
Geographic Emission Control Area Standard	Pre 2012	15,000 ppm (1.5%)
	2012	10,000 ppm (1.0%)
	2015	1,000 ppm (0.1%)
Global Standard	Pre 2012	45,000 ppm (4.5%)
	2012	35,000 ppm (3.5%)
	As of 01 Jan 2020	5,000 ppm (0.5%)

ENFORCEMENT OF MARPOL IN THE U.S.

How Does This International Treaty Get Enforced?

- US enforces MARPOL through The Act to Prevent Pollution from Ships (APPS) and the Clean Air Act
- Comprehensive administration, inspection and enforcement regime
- Provides authority to the US Coast Guard and the Environmental Protection Agency to enforce MARPOL
- CG inspects; EPA/DOJ enforces
- Criminal and civil penalties for violations



Note: Recordkeeping requirements allow US to assert jurisdiction over foreign flag vessels for all violations of Annex VI on the high seas once they enter US waters.

WHAT MUST YOU DO TO COMPLY WITH LOW SULFUR FUEL REQUIREMENTS?

1. Implement the procedures and maintain the records to prove compliance;
2. Consume low sulfur fuel when in the North American and Caribbean ECAs; and
3. When low sulfur fuel is not available, submit a fuel oil non-availability report (FONAR) at least 96 hours before the vessel enters the ECA.

KEY ANNEX VI -- ECA RECORDKEEPING REQUIREMENTS

Bunker delivery notes - Regulation 18.5 and 40 C.F.R. §1043.70 (maintained for 3 years)

Maintain Representative fuel oil samples, taken at the time of fuel oil delivery, sealed/signed by Master or Officer In Charge - Regulation 18.8.1 and 40 C.F.R. §1043.70 (maintained for 1 year)

Written fuel oil changeover procedures, which show how and when the fuel oil changeover is performed to ensure that only compliant fuel oil is burned within the ECA - Regulation 14.6 and 40 C.F.R. §1043.70.

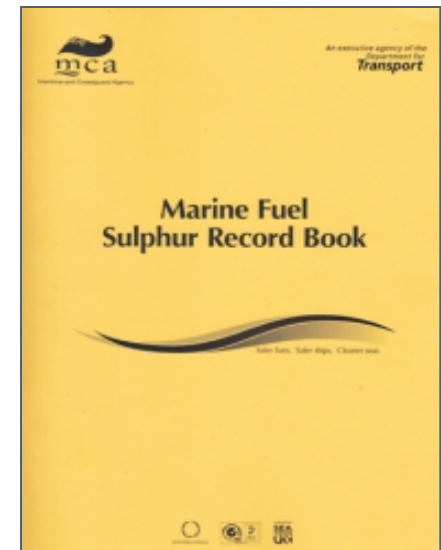
KEY ANNEX VI -- ECA RECORDKEEPING REQUIREMENTS (CONT'D)

Fuel Oil Changeover Logbook (a.k.a. Sulphur Record Book)

- Annex VI Regulation 14.6 and 40 C.F.R. §1043.70.

Must accurately record:

- Fuel changeover procedures
- Vessel's position/date/time at entrance/exit from ECA
- Volume of low sulfur fuel onboard
- Position, date and time of any fuel-oil-change-over operation prior to entering and after exiting an ECA
- ***MUST BE COMPLETE, ACCURATE & TRUTHFUL***



Other records:

- Record Book of Diesel Engine Parameters
- Ozone Depleting Substances Record Book

DEMONSTRATION OF INABILITY TO OBTAIN FUEL

The Fuel Oil Non-Availability Report

“FONAR”

FONAR

- Allows vessels without compliant fuel to enter U.S.
- Submitted to EPA > 96 hours before entering ECA
- Not a “Get Out of Jail Free” card
- FONAR amounts to a request for leniency
- Demonstrate that the company made “best efforts” to obtain compliant low sulfur fuel
- Signed “under penalty of law”
- Must be accurate and truthful
- Legal minefield

EPA GUIDANCE ON FONARS

June 26, 2012 – EPA Interim Guidance on the Non-Availability of Compliant Fuel

- Online Reporting: <https://cdx.epa.gov/>
- Must be submitted NLT 96 hours before entering North American ECA
- **Cost - Not a valid basis for asserting non-availability**

FONAR must include:

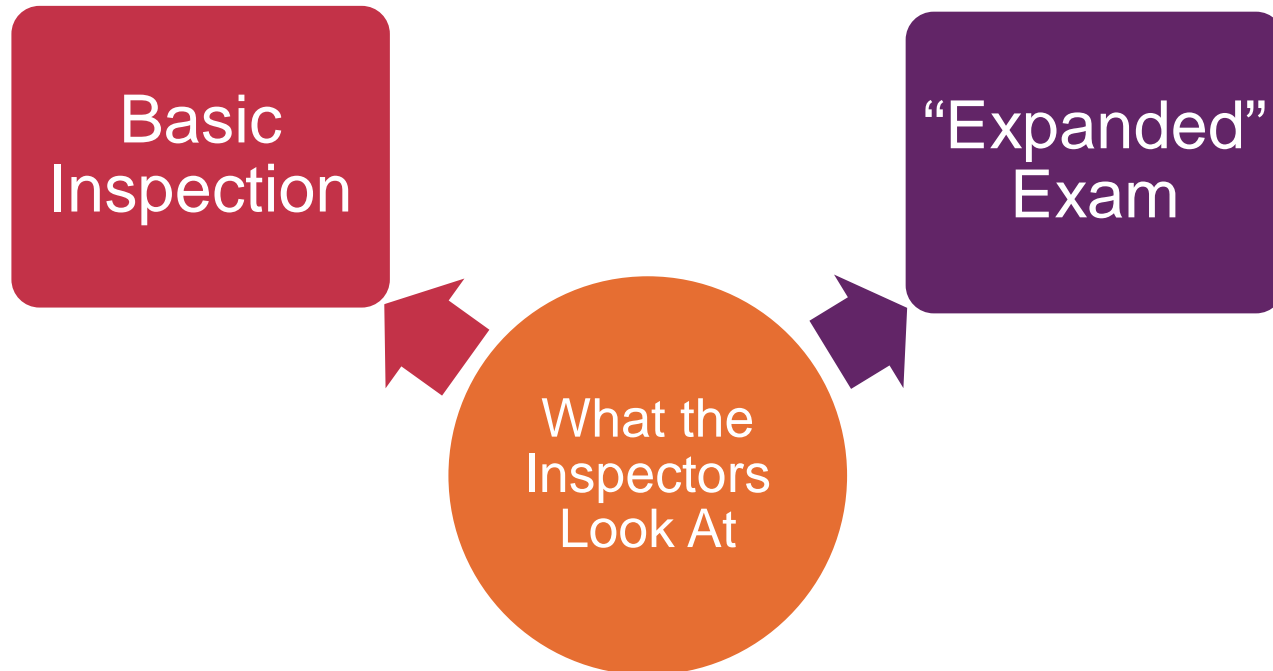
- record of actions taken in an attempt to achieve compliance; and
- evidence that, despite the vessel's "best efforts," the vessel was unable to purchase compliant fuel from primary and alternative sources.

(EPA Interim Guidance at pages 4-5)

Vessel is not expected to deviate from intended voyage/incur undue delay (Annex VI Reg 18.2.2)

As of January 1, 2015, if distillates are the only compliant fuel available, vessels will be expected to purchase and burn distillates in the ECA (EPA Notice – November 2014)

COAST GUARD INSPECTIONS/ENFORCEMENT



WHAT THE COAST GUARD LOOKS AT?

Basic Inspection Reviews/ Examines

- IAPP Certificate / EIAPP Certificate
- Exhaust cleaning systems documentation (if fitted) for each engine
- Type Approval Certificate for incinerator
- Vessel's incinerator
- Bunker Delivery Notes (spot check) for each fuel delivery
- Verify fuel samples onboard (spot check) for each fuel delivery
- Verify vessel is utilizing low sulfur fuel oil
- Logbooks, sounding records, changeover procedures, and informal queries of crew to ensure they understand the policies
- Examine any alternative compliance methods used (if applicable)

WHAT THE COAST GUARD LOOKS AT?

“Expanded” Exam

Might include review of ...

- Technical files
- Record books
- Reports of non-compliance provided to flag
- Sound tanks and compare with shipboard Annex VI records
- Equipment used to switch over to ECA compliant fuel
- Fuel Oil Non-Availability Reports (FONARS”)
- Potential sources of ozone depleting substances
- Test incinerator
- “Interview” crewmembers



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

██████████ 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

██████████
President
██████████

Dear ██████████

Subpoena Duces Tecum under Sections 8(b) and 8(f)(3) of the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1907(b) and 1907(f)(3)

The United States Environmental Protection Agency (EPA) hereby requires ██████████ (you) to submit certain information as part of an EPA investigation to determine compliance with Annex VI of the MARPOL Treaty (Annex VI) and the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901-1915 (2008). Annex VI requires ships operating within an Emissions Control Area (ECA) to use fuel with a sulfur content not exceeding 1.00%.

The EPA is issuing this subpoena under sections 8(b) and 8(f)(3) of the APPS, 33 U.S.C. §§ 1907(b) and 1907(f)(3). Pursuant to section 8(f)(3), the EPA has the authority to enforce regulations 17 and 18 of Annex VI for cases involving shoreside violations, and for any other matters that have been referred to the EPA by the U.S. Coast Guard. Pursuant to section 8(f)(3), the EPA has "all of the authorities of the [U.S. Coast Guard], as specified in [section 8(b)], for the purposes of enforcing" these regulations. 33 U.S.C. § 1907(f)(3). Section 8(b) requires the U.S. Coast Guard to investigate potential violations of the regulations "upon receipt of evidence that a violation has occurred..." and provides the U.S. Coast Guard, and the EPA in matters referred to it by the U.S. Coast Guard, with the authority to issue subpoenas to require the attendance of any witness, and the production of documents and other evidence, in furtherance of such an investigation. 33 U.S.C. § 1907(b). The U.S. Coast Guard has referred all violations related to fuel oil non availability reports to the EPA, and thus the EPA is authorized to issue this subpoena for documents and information in this case. Exhibit A specifies the information that you must submit. Exhibit B provides instructions for your response to this request.

Under 40 C.F.R. Part 2, Subpart B, you may assert a claim of business confidentiality for any portion of the submitted information. You must specify the page, paragraph, and sentence when identifying the

8(b) and 8(f)(3) of the APPS

Authority to enforce regulations 17 and 18 of Annex VI

Any other matters that have been Referred to the EPA by the U.S. Coast Guard.

"all of the authorities of the [U.S. Coast Guard]"

U.S. Coast Guard has referred all Violations related to fuel oil non Availability reports to the EPA, and thus the EPA is authorized to issue this subpoena.

information subject to your claim. Exhibit D specifies the assertion and substantiation requirements for business confidentiality claims.

Failure to provide the required information may result in the initiation of a civil action pursuant to section 8(b) of the APPS, 33 U.S.C. § 1907(b). Failure to provide all requested information in its entirety, and in the format requested, may result in additional inquiries and civil penalties. It is important that your responses be clear, accurate, and complete. The EPA will regard submitted information that is misleading, false, incomplete, or submitted without regard to its accuracy as a violation of the APPS and/or criminal statutes. The EPA may use any information submitted in response to this request in an administrative, civil or criminal action.

[Redacted] must submit all requested information under an authorized signature with the following certification:

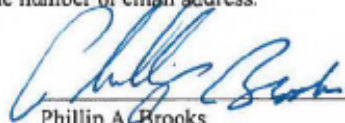
I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are significant penalties for knowingly submitting false statements and information, pursuant to Section 8(b) of the APPS, 33 U.S.C. § 1907(b) and 18 U.S.C § 1001.

Please submit all requested information, via courier service or overnight delivery or email, to:

Matt Haber, Senior Advisor (Air-1)
Air Enforcement Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
haber.matt@epa.gov

You must submit your responses within 30 calendar days from the date of this subpoena. If you anticipate being unable to fully respond to this subpoena by this date, you must contact Matt Haber at +1 (415) 947-4154 or haber.matt@epa.gov within 15 calendar days of the date of this subpoena and, with an appropriate justification, request in writing an extension of time to respond to the information requests below. If timely submitted, the EPA will review your request and may extend the time in which all or part of your response must be provided. Any questions regarding this subpoena should also be directed to Matt Haber at the above phone number or email address.

Date [Redacted] / 2014


Phillip A. Brooks
Director, Air Enforcement Division

Failure to provide the required information may result in the initiation of a civil action.

Additional inquiries and civil penalties.

The EPA will regard submitted information that is misleading, false, incomplete, or submitted without regard to its accuracy as a violation of the APPS and/or criminal statutes. The EPA may use any information submitted in response to this request in an administrative, civil or criminal action.

I certify that the statements and information are, to the best of my knowledge and belief, true and complete.

Responses within 30 calendar days

EXHIBIT A

Subpoena Duces Tecum

1. Provide copies of all [REDACTED] corporate policies and procedures containing [REDACTED] environmental protection policies related to compliance with Annex VI of the MARPOL Treaty, as they relate to the North American Emissions Control Area (ECA). Include all revisions to such policies, and the date such original documents and revisions were distributed to relevant staff, including crews of [REDACTED] vessels. Include and highlight relevant sections that enable [REDACTED] and vessel crew to implement effectively the environmental protection policy and procedures for compliance with or pertaining to MARPOL Annex VI.
2. Provide relevant excerpts from the Safety Management System for each vessel listed in Appendix C. Identify all provisions related to compliance with requirements in any ECA.
3. Provide a copy of the International Air Pollution Prevention (IAPP) Certificate and all supplements to IAPP certificates issued by the Flag Administration for each vessel listed in Appendix C for the time period in question.
4. For each filed Fuel Oil Non-Availability Report (FONAR), as listed in Exhibit C:
 - a. List each bunker supplier that does business at the port of call the vessel visited prior to entering the North American ECA, as well as at each port the vessel visited since receiving orders to proceed to a destination in the North American ECA (U.S. or Canada);
 - b. Provide copies of all correspondence with each bunker supplier you listed in response to a. above, beginning with the date that the vessel received orders to proceed to a destination in the North American ECA (U.S. or Canada); and
 - c. If the fuel purchase was a contractual function of another party, provide copies of all contracts covering the period as stated above.
5. Submit copies of [REDACTED] fuel procurement policies and contracts as they relate to any vessel for which [REDACTED] filed a FONAR.
6. Provide an electronic spreadsheet with the following information for each FONAR that [REDACTED] filed. Make sure to provide any missing information required by EPA's FONAR guidance,¹ but previously not submitted.
 - a. Report Date;
 - b. Report Form ID;
 - c. Ship Operator Name;
 - d. Vessel Name;
 - e. Flag Country;

Corporate policies and procedures containing environmental protection policies related to compliance with Annex VI of the MARPOL Treaty, as they relate to North American Emissions Control Area (ECA).

Procedures for compliance with or pertaining to MARPOL Annex VI.

Provide relevant excerpts from the Safety Management System for each vessel.

Identify all provisions related to compliance with requirements in any ECA.

For each filled Fuel Oil Non-Availability Report: List each bunker supplier that does business at the port.

Provide copies of all correspondence with each bunker supplier.

If the fuel purchase was a contractual function of another party, provide copies of all contracts.

Submit fuel procurement policies.

¹ <http://www2.epa.gov/sites/production/files/documents/finalfuelavailabilityguidance-0626.pdf>

6. Provide an electronic spreadsheet with the following information for each FONAR that [REDACTED] filed. Make sure to provide any missing information required by EPA's FONAR guidance,¹ but previously not submitted.
- Report Date;
 - Report Form ID;
 - Ship Operator Name;
 - Vessel Name;
 - Flag Country;
 - IMO ID Number;
 - Date of ECA First Notice;
 - Location of ECA First Notice;
 - Name of Ports after First Notice;
 - Name of Last Port before ECA Entry;
 - Name of Port with Fuel Oil Supply Disruption;
 - Narrative Explaining the Reason for Noncompliance;
 - Name of Fuel Suppliers Contacted;
 - Date of Entry in the ECA;
 - Time of Entry in the ECA;
 - Sulfur Content of Non-Compliant Fuel Oil;
 - Projected Hours on Main Propulsion;
 - Name of First Port of Call (POC);
 - Compliant Fuel Oil Available at First POC;
 - Plan to Bunker Compliant Fuel Oil at First POC;
 - Name of Fuel Suppliers Contacted at First POC (N/A is not an acceptable answer);
 - Name of Second POC;
 - Compliant Fuel Oil at Second POC;
 - Plan to Bunker Compliant Fuel Oil at Second POC;
 - Name of Fuel Suppliers Contacted at the Second POC;
 - Date of Exit from ECA;
 - Time of Exit from ECA;
 - Has this vessel operated in the ECA in the previous 12 months;
 - Number of Separate Visits to the ECA;
 - Number of Ports visited in the ECA;
 - Previously submitted FONARs;
 - Number of Previously submitted FONARs;
 - Designated Corporate Official Name;
 - Designated Corporate Official E-mail;
 - Designated Corporate Official Phone Number; and
 - Description of Actions to Achieve Compliance (Narrative is acceptable).
7. For each vessel where you submitted a FONAR containing a statement that no storage room is available for segregated bunkers, submit the following:
- A dated copy of any contracts, engineering drawings or other planning documents that [REDACTED] created for retrofit of the vessel for segregated bunkers, or any alternative compliance strategy;
 - A copy of the vessel's tank diagram; highlight tanks that are designed for or dedicated to ECA compliant fuel; and
 - All soundings of these tanks for the period in question, or if soundings are no longer available, so state and submit documents which accurately describe the vessel tank levels for 15 calendar days prior to entry into the North American ECA and the vessel tank levels while in the North American ECA.

Electronic spreadsheet with the following information for each FONAR:

- Report Date
- Report Form ID
- Ship Operator Name
- Vessel Name
- Flag Country
- IMO ID Number
- Date of ECA First Notice
- Location of ECA First Notice
- Name of Ports after First notice
- Name of Last Port before ECA Entry
- Name of Port with Fuel Oil Supply Disruption
- Narrative Explaining the Reason for Noncompliance
- Name of Fuel Suppliers Contacted
- Date of Entry in the ECA
- Time of Entry in the ECA
- Sulfur Content of Non-Compliant Fuel Oil
- Projected Hours on Main Propulsion
- Name of First Port of Call (POC)
- Compliant Fuel Oil Available at First POC
- Plan to Bunker Compliant Fuel Oil at First POC

6. Provide an **electronic spreadsheet with the following information for each FONAR** that [REDACTED] filed. Make sure to provide any missing information required by EPA's FONAR guidance,¹ but previously not submitted.

- a. Report Date;
- b. Report Form ID;
- c. Ship Operator Name;
- d. Vessel Name;
- e. Flag Country;

- f. IMO ID Number;
- g. Date of ECA First Notice;
- h. Location of ECA First Notice;
- i. Name of Ports after First Notice;
- j. Name of Last Port before ECA Entry;
- k. Name of Port with Fuel Oil Supply Disruption;
- l. Narrative Explaining the Reason for Noncompliance;
- m. Name of Fuel Suppliers Contacted;
- n. Date of Entry in the ECA;
- o. Time of Entry in the ECA;
- p. Sulfur Content of Non-Compliant Fuel Oil;
- q. Projected Hours on Main Propulsion;
- r. Name of First Port of Call (POC);
- s. Compliant Fuel Oil Available at First POC;
- t. Plan to Bunker Compliant Fuel Oil at First POC;
- u. Name of Fuel Suppliers Contacted at First POC (N/A is not an acceptable answer);
- v. Name of Second POC;
- w. Compliant Fuel Oil at Second POC;
- x. Plan to Bunker Compliant Fuel Oil at Second POC;
- y. Name of Fuel Suppliers Contacted at the Second POC;
- z. Date of Exit from ECA;
- aa. Time of Exit from ECA;
- bb. Has this vessel operated in the ECA in the previous 12 months;
- cc. Number of Separate Visits to the ECA;
- dd. Number of Ports visited in the ECA;
- ee. Previously submitted FONARs;
- ff. Number of Previously submitted FONARs;
- gg. Designated Corporate Official Name;
- hh. Designated Corporate Official E-mail;
- ii. Designated Corporate Official Phone Number; and
- jj. Description of Actions to Achieve Compliance (Narrative is acceptable).

7. For each vessel where you submitted a FONAR containing a statement that no storage room is available for segregated bunkers, submit the following:
- a. A dated copy of any contracts, engineering drawings or other planning documents that [REDACTED] created for retrofit of the vessel for segregated bunkers, or any alternative compliance strategy;
 - b. A copy of the vessel's tank diagram; highlight tanks that are designed for or dedicated to ECA compliant fuel; and
 - c. All soundings of these tanks for the period in question, or if soundings are no longer available, so state and submit documents which accurately describe the vessel tank levels for 15 calendar days prior to entry into the North American ECA and the vessel tank levels while in the North American ECA.

Electronic spreadsheet with the following information for each FONAR:

- u. Name of Fuel Suppliers Contacted at First POC (N/A is not an acceptable answer)
- v. Name of Second POC
- w. Compliant Fuel Oil at Second POC
- x. Plan to Bunker Compliant Fuel Oil at Second POC
- y. Name of Fuel Suppliers Contacted at the Second POC
- z. Date of Exit from ECA
- aa. Time of Exit from ECA
- bb. Has this vessel operated in the ECA in the previous 12 months
- cc. Number of Separate Visits to the ECA
- dd. Number of Ports visited in the ECA
- ee. Previously submitted FONARs
- ff. Number of Previously submitted FONARs
- gg. Designated Corporate Official Name
- hh. Designated Corporate Official E-mail
- ii. Designated Corporate Office Phone Number, and
- jj. Description of Actions to Achieve Compliance (Narrative is acceptable)

- f. IMO ID Number;
- g. Date of ECA First Notice;
- h. Location of ECA First Notice;
- i. Name of Ports after First Notice;
- j. Name of Last Port before ECA Entry;
- k. Name of Port with Fuel Oil Supply Disruption;
- l. Narrative Explaining the Reason for Noncompliance;
- m. Name of Fuel Suppliers Contacted;
- n. Date of Entry in the ECA;
- o. Time of Entry in the ECA;
- p. Sulfur Content of Non-Compliant Fuel Oil;
- q. Projected Hours on Main Propulsion;
- r. Name of First Port of Call (POC);
- s. Compliant Fuel Oil Available at First POC;
- t. Plan to Bunker Compliant Fuel Oil at First POC;
- u. Name of Fuel Suppliers Contacted at First POC (N/A is not an acceptable answer);
- v. Name of Second POC;
- w. Compliant Fuel Oil at Second POC;
- x. Plan to Bunker Compliant Fuel Oil at Second POC;
- y. Name of Fuel Suppliers Contacted at the Second POC;
- z. Date of Exit from ECA;
- aa. Time of Exit from ECA;
- bb. Has this vessel operated in the ECA in the previous 12 months;
- cc. Number of Separate Visits to the ECA;
- dd. Number of Ports visited in the ECA;
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- a. A dated copy of any contracts, engineering drawings or other planning documents that created for retrofit of the vessel for segregated bunkers, or any alternative compliance strategy;
 - b. A copy of the vessel's tank diagram; highlight tanks that are designed for or dedicated to ECA compliant fuel; and
 - c. All soundings of these tanks for the period in question, or if soundings are no longer available, so state and submit documents which accurately describe the vessel tank levels for 15 calendar days prior to entry into the North American ECA and the vessel tank levels while in the North American ECA.

For each vessel where you submitted a FONAR containing a statement that no storage room is available:

- a. Contracts, engineering drawings or other planning documents that ...created for retrofit of the vessel
- b. Highlight tanks that are designed for or dedicated to ECA compliant fuel
- c. All surroundings...for 15 calendar days prior to entry into the North American ECA

PART TWO

CONSEQUENCES OF DROP
FROM 1% TO 0.1%

IMPORTANT

WHAT ARE THE CONSEQUENCES FOR NOT COMPLYING?

Commercial

- Damage to Vessels
- Vessel Delays
- Business Reputation

Regulatory

- Civil Penalties
- Criminal Penalties

INCREASED COST OF COMPLIANCE

- Compliant fuel is more likely to:
 - cause ignition and combustion problems
 - contain more catalytic fines
 - cause engine damage
 - cause injury to crew
- May result in complications when changing to low-sulfur fuel in preparation for entry to an ECA
 - Need time to “purge” before entry
- Time/energy to train crew on new procedures
- Compliant fuel is less available - more expensive
- Additional paperwork and regulations to deal with both onboard and shoreside

PENALTIES / CRIMINAL LIABILITY

For knowing violations:

- Fines up to \$500,000 per offense for corporations such as owners and operators
- Fines up to \$250,000 per offense for individuals
- Jail time for individuals 5-10 years
- Corporate vessel interests can be charged for the acts of their employees, **even if acting contrary to written company policy**

(APPS, 33 U.S.C. §1908(a))



Source: U.S. Coast Guard

PROSECUTOR'S ENFORCEMENT TOOLS

- **Arrest, detain and/or confiscate vessels** to obtain security and/or collect fines/penalties based on whistleblower allegation alone;
- **Criminally charge and/or hold vessel personnel** as “material witnesses” for an indefinite period of time as part of the USCG/DOJ environmental prosecution strategy;
- **Criminally charge owning/operating and/or management companies** under a theory of vicarious liability; and
- **Criminally charge responsible corporate officers**, as well as managing company personnel.

Sarbanes
Oxley (18
U.S.C. §
1519)

Tampering
with
Witnesses
(18 U.S.C.
§ 1512)

The False
Statement
Act (18
U.S.C. §
1001)

Conspiracy
(18 U.S.C.
§ 371)

Obstruction
of Justice
(18 U.S.C.
§1505)

VOLUNTARY REPORTING

APPENDIX V DISCLOSURES

Coast Guard Environmental Crimes Voluntary Disclosure Policy

- Applies broadly “to criminal violations under all of the Federal environmental statutes that the Coast Guard administers”
- Provides that entities who maintain compliance management programs to prevent, detect, and correct MARPOL violations and who promptly report such violations within 21 days of discovery *may avoid* criminal charges so long as:
 1. The Coast Guard is satisfied the violation is not part of a pattern or broader practice;
 2. The violation does not involve a prevalent management philosophy or practice that conceals or condones environmental violations; and
 3. The violation does not reveal conscious involvement or disregard by senior management.

PENALTIES - Civil Liability

“[a] person who...violate[s] MARPOL...or the regulations thereunder...[is] liable...for a civil penalty...”

- Statutory maximum civil penalty set by APPS at \$25,000 – after indexing to inflation, maximum civil penalty is \$40,000 per violation
- Each day of a continuing violation constitutes a separate violation

(APPS, 33 U.S.C. §1908(b))



EPA'S NEW CIVIL PENALTY POLICY

Released January 15, 2015

- Describes how EPA initially calculates civil penalties for violations of the ECA regulations
<http://www2.epa.gov/sites/production/files/2015-01/documents/marinepenaltypolicy.pdf>.
- Similar to EPA's other longstanding penalty policies
- Starting point for all negotiations in civil cases

EPA'S NEW CIVIL PENALTY POLICY (cont'd)

Key Provisions

- **Primary goal is deterrence** – remove “economic benefit” of noncompliance and address “gravity” of violation
- **Economic benefit component** – uses a mathematical formula based on price difference between compliant and non-compliant fuel and the amount of noncompliant fuel used while in the ECA
- **Gravity component** – uses sulfur content of non-compliant fuel to measure ‘gravity’ with a table that increases fine based on higher sulfur content
- Other factors can offset these amounts: good faith, history of violations, prompt correction and reporting, supplemental projects

EPA'S NEW CIVIL PENALTY POLICY

THINGS TO REMEMBER

- Highly discretionary - it is just a starting point
- EPA tends to use the policy when the results are favorable and disregards when numbers are less favorable
- EPA tends to start negotiations from the maximum fine and move downward
- There may be times when the penalty has to be contested
- The policy is not binding on a court

ONE LAST THING ABOUT APPS

Whistleblowing Provision

- APPS contains provisions that provides for awards to anyone who notifies the government of wrongdoing that eventually results in a conviction and fine
- The reward can be as large as 50% of the total APPS fine
- No prior report to the company is required!
- Having company policies *sometimes* reduces this threat
- Whistleblowers often ignore company policies or claim ineffectiveness or fear of retaliation
- Given large awards and lawyers who chase them, a proactive internal program can be cost-effective

PART THREE

Main Issues Moving Forward

ISSUE ONE: WHOSE FINE IS IT ANYWAY?

Liability Between Parties

- Liability is imposed on any person who violates Annex.
- Time charter: who is the person responsible for MARPOL compliance? The shipowner? Charterer? Bunker broker? Fuel supplier?
- Person can include entity with authority to assure compliance (power to comply) and who benefits economically from noncompliance (incentive NOT to comply)
- Can be multiple parties?
- *Responsible corporate officer* of multiple entities can face individual exposure
- Cannot contract away this liability – can't indemnify for jail time!

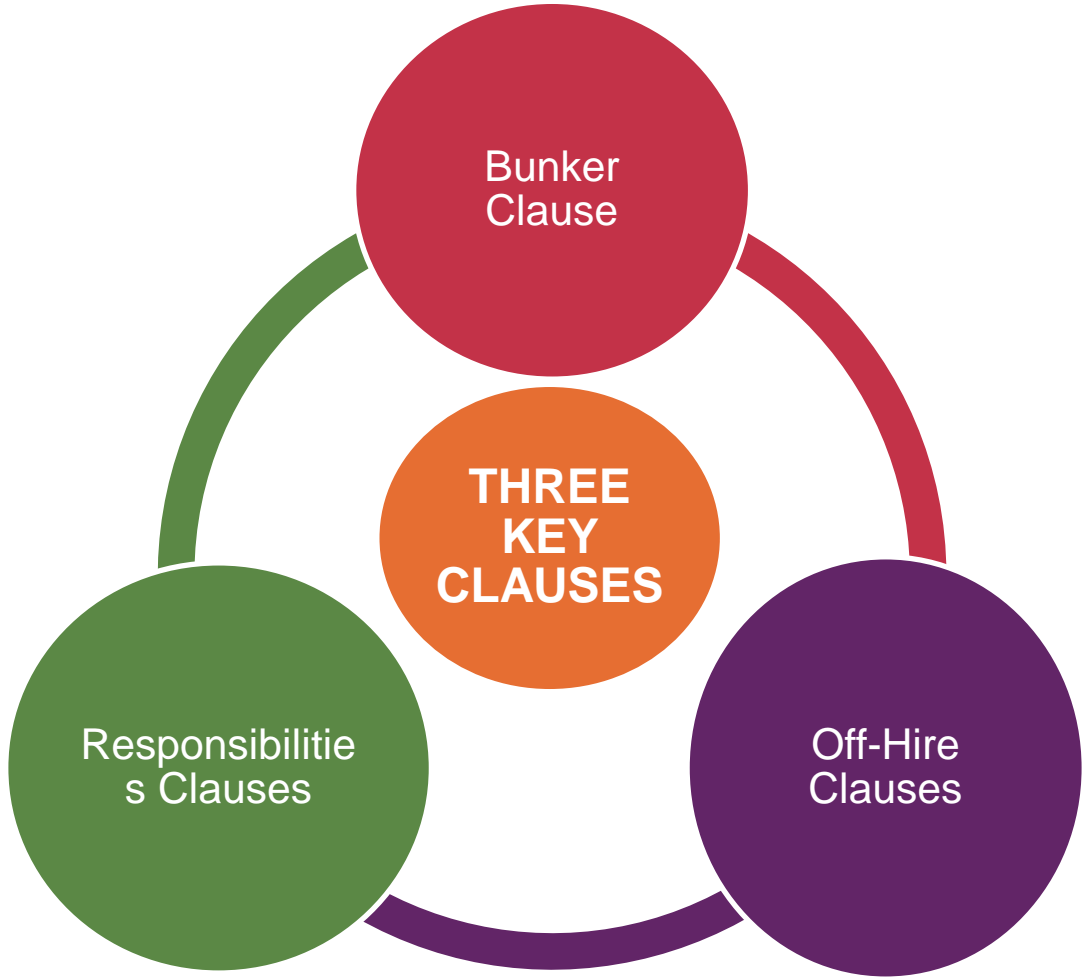
ISSUE ONE: WHOSE FINE IS IT ANYWAY? (cont'd)

Having said that...

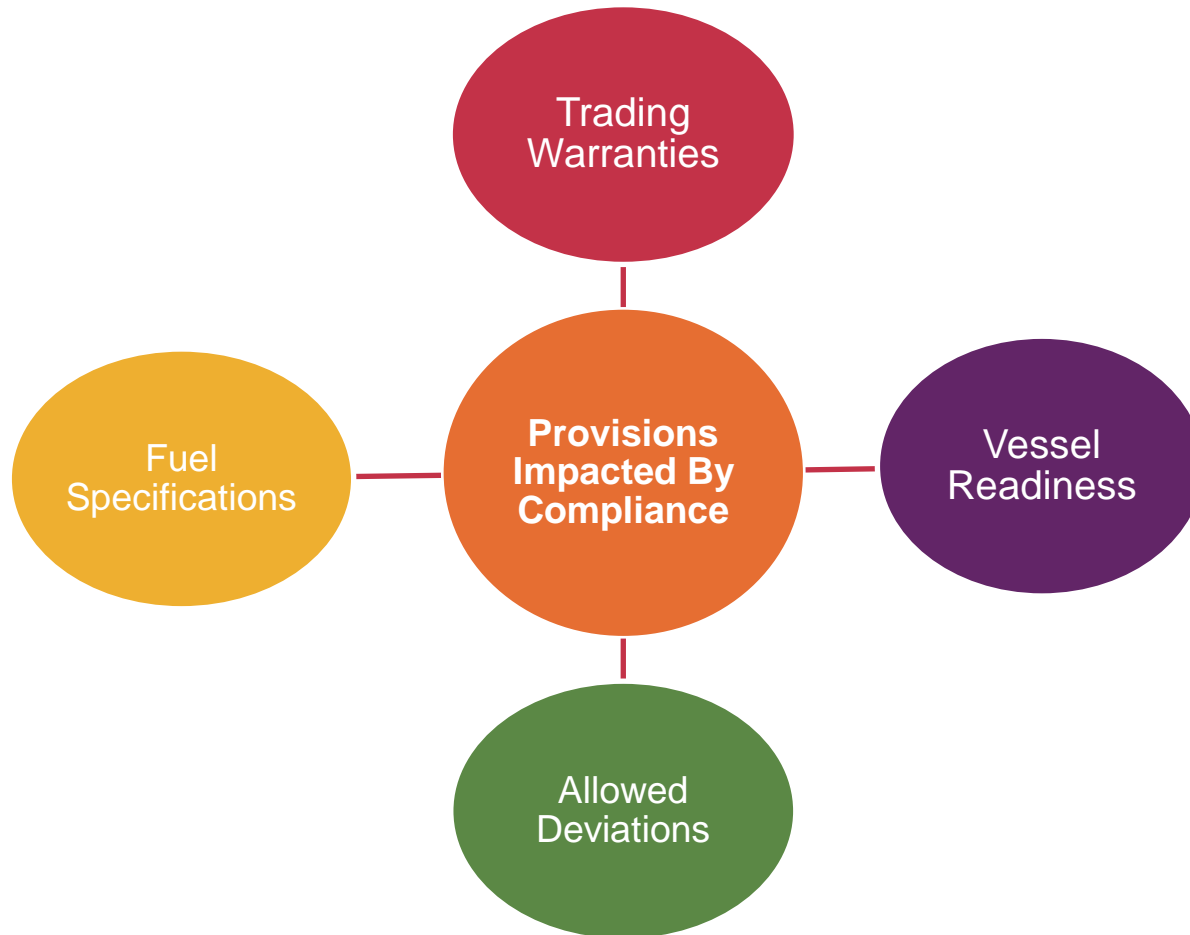
- **Shipowner:** General rule, MARPOL compliance is shipowner's responsibility
- **Charterer:** May be liable to shipowner (and potentially to the USCG and/or EPA) based on actual fault and indemnity language in the charterparty
- **Bunker Broker:** Typically deemed an agent of the purchaser, and thus not a party to the contract and not subject to liability
- **Fuel Supplier:** Suppliers in MARPOL signatory countries have an obligation to comply with Annex VI
 - Shipowners/charterers can bring claims if fuel is off-spec
 - Relative bargaining position claims are usually limited to the value of the bunkers provided

LIABILITY BETWEEN SHIP-OWNERS AND CHARTERERS

- Most likely subject of future litigation and arbitration
- Shipowner may seek to recover damages that result from the charterer's wrongdoing
- Charterer may seek to recover damages that result from the ship's detention



ISSUE TWO: IMPACT ON OTHER PARTS OF CHARTER CONTRACT



ISSUE THREE: EFFECT ON P&I COVERAGE

Does It Cover Annex VI?

- P&I coverage does not extend to willful misconduct or criminal activity.
- P&I clubs have historically not insured against the risks associated with MARPOL violations.
- Clubs can provide discretionary cover where the member satisfies the club that he took steps as were reasonably necessary to avoid the event giving rise to the fine.
- Annex VI violations potentially provide more wiggle room than the strict Annex I regulations on oil discharge.

EFFECT ON P&I COVERAGE: CLAIMS ARISING FROM DAMAGE CAUSED BY COMPLIANT FUEL

- Clubs/fixed premium insurers offer comprehensive policies to charterers - insure against liability for damage to the hull
- Liability for physical damage caused by the shift to compliant fuel probably a covered risk under the policy
- Liability for personal injury due to exposure to toxic substances (compliant fuel?) is a covered P&I risk
- Legal costs associated with any of these covered risks are also probably covered under the policy
- FD&D covers legal and other costs relating to Annex VI disputes between the owner and charterer

ISSUE FOUR: WILL “MAGIC FUEL” BE THE NEXT “MAGIC PIPE?”

What is a “Magic Pipe”?

- Annex I governs the discharge of oil and oil/water mixtures
- APPS using strict record-keeping regulations to essentially obtain jurisdiction for environmental crimes committed in international waters (i.e., intentional falsification of records)
- Annex I allegations usually involve the use of a pipe to bypass the vessel’s Oil/Water Separator combined with record keeping that falsely records use of OWS
- Hence—“Magic Pipes”

“MAGIC FUEL”

- Expect scrutiny of logbooks and records by Coast Guard Port State Control inspectors
- Practice sound International Safety Management (ISM) Code policies and procedures
- Train onboard vessel personnel
- Know the requirements, policies, and options available
- Accuracy of ship records is *essential*

IS THERE A BUSINESS CASE FOR PROACTIVE PLANNING TO AVOID/LIMIT LIABILITY?

Delicate Balance

- Cost of Compliance Measures vs. Potential Liability Exposure for Failure to Comply
- Compliance measures don't have to be expensive to be effective.

Benefits

- Fuel Efficiencies For Alternative Means of Compliance (i.e. LNG)
- Focus of Safety/Compliance Culture = improved risk mitigation and management
- Improved Brand Reputation
- Attract Investors & Talent

ENFORCEMENT COSTS OF NON-COMPLIANCE

- Defense Costs
- Delayed Departure of the Vessel
- Post Bond To Secure Release of Vessel
- House, Feed, Pay Wages of Crewmember Witnesses While the Investigation/Prosecution Proceeds
- Payment of Fines/Whistleblower Rewards
- Alternative Fines Act
- Lost Business/Business Reputation
- Government Dictated Environmental Compliance Plan During Term of Probation (could be up to 5 years)

MAGIC PIPE PENALTIES

Top 10 Penalties

Total Penalty	Date
\$37 million	05/27/07
\$25 million	04/04/05
\$18 million	04/19/02
\$10.5 million	02/01/06
\$10.4 million	06/21/13
\$9 million	09/16/98
\$6.5 million	07/10/06
\$5.5 million	08/22/02
\$4.75 million	06/19/08
\$4.2 million	04/03/04

Average total penalty/fine was \$2.53 million.

(Based on 63 false record book cases from April 1993 to June 2014)

PREVENTATIVE COSTS OF COMPLIANCE

- Environmental Compliance Plan (ECP)
 - Cost of Assessing & Developing ECP
 - Cost of Auditing
 - Cost of Engineering Changes
 - Cost of Training Programs
- Integrate Compliance Measures Into Existing Safety Management Systems Or Implement Stand-Alone Compliance Program
- Key: Implement an ECP on your own terms, not the government's terms!

COST COMPARISON?

- Prevention costs or enforcement costs – it is your choice:

“Ounce of prevention is worth a pound of cure”

- Whether it is 5:1, 10:1, or 20:1, it is clear that money spent up front is money well spent

Details regarding the firm's maritime practice may be
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