

# Sulphur reduction – MARPOL Annex VI: the club's perspective



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As of 1 January 2015, ships are required to use fuel oil with a sulphur content of no more than 0.10% within designated emission control areas and no more than 3.5% outside of them.

This isn't really 'news'. After all, the shipping industry has been preparing for these stricter rules under MARPOL Annex VI since October 2008, when the International Maritime Organization (IMO) adopted amendments to the MARPOL Convention. Furthermore, since June 2014, all EU member states have been expected to implement Directive 2012/33/EU to bring European air pollution laws in line with MARPOL Annex VI.

However, it has been, and to some extent remains, an open question as to how the United States, the EU and individual maritime states will handle enforcement of MARPOL Annex VI.

### MARPOL Annex VI

The Emission Control Areas (ECAs) are defined in the Annexes of MARPOL. They include the European waters of the Baltic Sea and the North Sea, as well as the North American and Canadian coastlines and the US Caribbean Sea.

Regulation 14 of Annex VI provides the limit values and the means to comply with them. Any ship that operates both outside and inside ECAs should operate on different fuel oils in order to comply with the respective limits. This means that, before entry into an ECA, the ship must change over to ECA-compliant fuel oil. Each ship

in this position has to carry written procedures including instructions for:

- recording quantities of the ECA compliant fuel oils on board;
- recording the date, time and position of the ship when either completing the changeover prior to entry or commencing changeover after exit from an ECA;
- entries to be made in a logbook as prescribed by the ship's flag state (in the absence of such prescription, entries can be made in the ship's Annex I Oil Record Book);
- maintaining bunker delivery notes on board the ship for a period of three years from the date the fuel was delivered; and
- maintaining a sealed bunker sample on board, for a period of 12 months after delivery.

The first level of control under Regulation 14 is the actual sulphur content of the bunkered fuel oil. The value should be stated by the fuel supplier on the bunker delivery note and tested where necessary. The second level of control is the ship's crew, who must ensure ECA compliant fuel oils are kept separately in segregated bunker tanks and are not mixed with other oils with higher sulphur content during transfer operations.

**There are several restrictions placed on the filing of a FONAR.**

The FONAR must be submitted to the EPA at least 96 hours before the ship enters the ECA. The FONAR must include a record of all actions taken in an attempt to achieve compliance and evidence that the ship used its 'best efforts' to obtain compliant fuel. Although the EPA encourages voluntary disclosures, it states that "the filing of a [FONAR] does not mean your ship is deemed to be in compliance...". It should also be noted that cost is not a valid justification for not using compliant fuel.

If this is not possible, the ship may use any equally effective "fitting, material, appliance or apparatus or other procedure, alternative fuel oil, or compliance methods" in terms of emissions reduction, if approved by the enforcing agency (often flag state) which is a party to MARPOL Annex VI.

**Compliance and documentation requirements**

Annex VI, Regulation 14 does allow national administrations to approve different means of compliance, so long as they are at least as effective as the means prescribed in Regulation 14. These must be approved by the appropriate administration under IMO guidelines. Once an initial or renewal survey has taken place, and compliance with Annex VI has been verified, an International Air Pollution Prevention Certificate will be awarded to every ship over 400gt. This is subject to the ship being registered under a flag state signatory to the MARPOL Convention.

**Enforcement in the EU**

In line with EU Sulphur Directive 2012/33/EU, member states are required to implement "effective, proportionate and dissuasive" penalties for violating the sulphur provisions. It is anticipated that in most EU member states, the violation of the Directive's laws will result in fines. The level of these fines is currently unknown and is likely to vary between member states.

**Enforcement in the USA**

On 16 January 2015, the US Environmental Protection Agency (EPA) released a penalty policy for violations of MARPOL Annex VI, in respect of ships operating in the North American and US Caribbean Sea ECAs.

In the United States, the US Coast Guard (USCG) and the EPA have the authority to investigate potential MARPOL violations. If a ship is not able to comply with the new sulphur emissions limit, while transiting the North American ECA, the EPA has

advised that a Fuel Oil Non-Availability Report (FONAR) must be filed.

The newly released penalty policy applies to violations under MARPOL Annex VI. According to the EPA memorandum, the EPA may impose a civil penalty of \$25,000 per violation. The duties (as per above) of burning compliant fuel, maintaining written procedures, recording the fuel changeover in the log book, and retaining bunker delivery notes and samples of the fuel oil are all considered separate obligations and, thus, separate violations if breached. Crucially, each day a violation continues, a separate penalty of \$25,000 is levied.

The policy letter sets forth the EPA's methodology for how violations will be reviewed and evaluated, describing the agency's plans to deter through penalties that remove the economic benefit of non-compliance and discussing the adjustment (i.e. mitigating) factors that will be taken into consideration to obtain a fair and equitable penalty. For example, the USCG and the EPA, when assessing the level of any fine or penalty, will be likely to look at the following circumstances:

1. The economic benefit obtained, through breach of MARPOL Annex VI;
2. The gravity of the non-compliance, for actual sulphur fuel violations and record-keeping violations;
3. The degree of wilfulness (or recklessness) or negligence;
4. The owner or operator's history of cooperation or non-compliance;
5. The perpetrator's ability to pay.

As previously reported, there are a variety of legal considerations and contractual allocations of risks that should be examined in the context of the sulphur emissions standards. Members are reminded that, aside from the civil penalties discussed above, non-compliance with the sulphur emissions standards can lead to increased

Members are reminded that club cover for fines arising from breaches of MARPOL, including Annex VI, is strictly discretionary and, given the well-known enforcement practices of the USA authorities especially, the huge penalties and the absolute requirement to have effective shore-side and on-board management systems, members should not expect the board to approve reimbursements of such liabilities, save in the most exceptional circumstances.

inspections/targeting by authorities, ship delays, business reputation issues and criminal penalties.

It should also be noted that the USA government will proceed against the owner, at least initially, regardless of the contractual relationship between owner and charterer. Thus, even if the charterer is responsible for arranging and purchasing bunkers under the charterparty, the owner may still face a liability for non-compliance under MARPOL. Such considerations should be at the forefront of an owner's mind, especially when entering into new time charter business.

The methodologies and goals of the EPA, which are set out in its policy letter, follow the structure of previous EPA policy letters on civil penalties under different Annexes to MARPOL.

#### **Club cover**

Shipowners and operators should already be well aware that environmental offences have a high profile and many authorities have punished MARPOL Annex I violations with harsh penalties. At present, there is no reason to believe that the EPA and USCG will take a more lenient view when it comes to Annex VI. The recent EPA penalty notice certainly indicates that the United States authorities intend to take the new regulations for low sulphur emissions very seriously.

Indeed, the club has seen a general increase, not only in the *number* of fines for MARPOL violations (largely under Annex I), but also the *level* of fines. This is especially so in the USA, where numerous Annex I fines have run into the multi-millions. In some cases, the perpetrators have even been imprisoned, including not only officers and crew directly responsible for the MARPOL violation, but also senior managers of the company.

In relation to MARPOL Annex I, often it is not the act of pollution itself that has been prosecuted, but instead the false entries made in oil record books, log books, and the false statements made by crew. Of course, an owner or operator could blame such conduct on laziness or the wilful misconduct of crew who have acted in contravention of written procedures laid down in their company rulebook. However, it is not enough for there merely to be procedures. Instead, the core culture of the company needs to give MARPOL prime importance.

The 2007 Standard Bulletin provided an outline of MARPOL best practice. This has been summarised and updated in more recent publications, the most recent being our **Standard Safety in 2014** where the club highlighted the need for owners and operators to ensure they have a company culture of 'zero pollution', promoted by the company CEO and senior management.

The club will continue to issue up-to-date articles and publications on MARPOL (and all its Annexes) for its members, including commentary on legal as well as safety and loss implications.

The law in this area is ever changing and The Standard Club is always on hand to assist. If a member has any questions in relation to this article, they should not hesitate to contact the author, experts or their usual club contact.