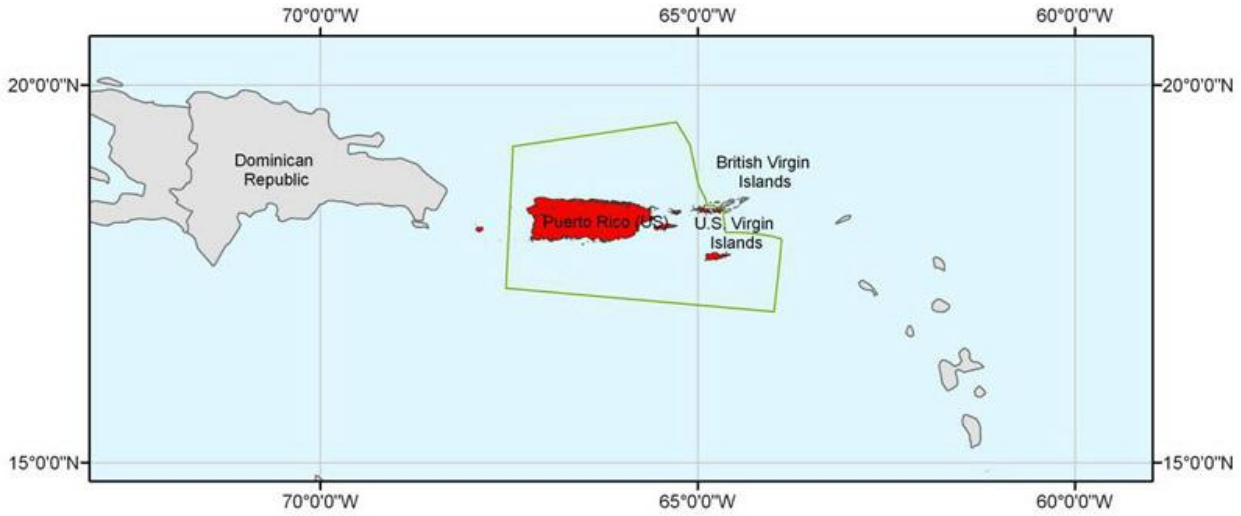
North American and Caribbean Emissions Control Areas

On January 1, 2015, the permissible sulfur limit for marine fuels within specially-designated Emissions Control Areas (ECAs) will be reduced to **0.10%** (i.e. 1,000 ppm). Members operating within the North American and Caribbean ECAs should be aware that the US Coast Guard and US Environmental Protection Agency (EPA) have been actively inspecting and enforcing the ECAs – and they have not indicated whether there will be a grace period when the sulfur limit is lowered on January 1, 2015. The purpose of this article is to remind Members of actions which are required to comply with the ECAs, advise Members what to do if they cannot comply with ECAs, and warn Members of potential commercial, civil, and criminal consequences of non-compliance.

The North American ECA generally extends 200 miles from the US and Canadian coasts including remote islands:

Source: http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf.

The Caribbean ECA generally extends outward from Puerto Rico and the US Virgin Islands:



Source: http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f11024.pdf.

As the US Coast Guard has explained on its website in an answer to a frequently asked question, MARPOL Annex VI does not contain an innocent passage exception or exemption. Therefore, Members should exercise caution, for example, when sailing between Florida and Cuba even if the voyage does not begin or end in a US port.

There are several methods to achieve ECA compliance. The primary method is to use ECA-compliant fuel when operating within ECAs. Members using this method must also develop written procedures for fuel oil change-overs, record fuel oil change-overs in a log book, retain all Bunker Delivery Notes for three years, and retain fuel oil samples for no less than 12 months. Alternative compliance methods, if pre-approved, are also permissible. Examples of possible alternative methods include the use of LNG as fuel or the use of scrubbers to abate harmful emissions.

As mentioned above, the US Coast Guard and EPA have been actively inspecting and enforcing the ECAs. Port State Control (PSC) inspections are the primary method for assessing compliance. However, the US Coast Guard and EPA have demonstrated that PSC inspections are not the only method for assessing compliance.

In April 2012, the US EPA reportedly experimented with vessel fly-overs to collect samples from smokestack plumes near Chesapeake Bay. In June 2014, the US Coast Guard and EPA jointly collected bunker samples from vessels' fuel oil service tanks in ports of Los Angeles and Long Beach. Although the results of these extraordinary efforts are not yet known, the message is clear: the US is actively searching for vessels in default of compliance.

Members, therefore, should always make "best efforts" to obtain and burn compliant fuel when operating within the North American and Caribbean ECAs. "Best efforts" means searching for and obtaining compliant fuel prior to commencing a voyage within the ECA. Deviation from a planned voyage may not necessarily be required, but shifting within a port is not considered deviation. Delay is also not required, but "delay" has not been defined. It will remain to be seen how stringent these factors may be applied in the future.

Most notably, as of January 1, 2015, "best efforts" probably also means using distillate fuels if necessary.

Like the International Maritime Organization, the US anticipates the possibility that despite "best efforts" to obtain compliant fuel, it may not be

possible to obtain compliant fuel. If Members are unable to obtain compliant fuel, then they are not excused from compliance; rather, their obligations to use best efforts to achieve compliance are arguably greater. For example, if Members are unable to obtain compliant fuel before entering the ECA, then "best efforts" means searching for compliant fuel at each port during ECA transit and using the "next cleanest fuel oil possible" during ECA transit.

Members are strongly advised to voluntarily disclose all instances in which their vessels cannot comply with the ECAs. US Coast Guard Commander Ryan Allain recently said:

"***It's better to tell us first, than have us discover it later.***"

In theory, voluntary disclosure may reduce likelihood of criminal charges. In a more general context, the US Coast Guard's Maritime Law Enforcement Manual says that if an owner or operator has a self-implemented "compliance management system" and an "environmental audit" reveals a violation of environmental laws which are voluntarily and promptly disclosed to the US and promptly corrected by the owner or operator, then the US Coast Guard "will not recommend to the US Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity." The same general principle should apply in the ECA context. Again it will be necessary to see how this will work in practice.

As a practical matter, Fuel Oil Non-Availability Reports (FONARs) should be submitted as soon as Members become aware of inability to comply and not later than 96 hours prior to ECA entry. FONARs are electronically submitted

through the EPA's Fuel Oil Non-Availability Disclosure Portal (FOND). Some of the information that must be included in FONARs are:

- Voyage plans including first notice of orders to transit the ECA;
- Date and time of ECA entry;
- Sulfur content of fuel used during ECA transit;
- Description of "best efforts" to obtain and use compliant fuel – including names and addresses of fuel suppliers contacted;
- Operational constraints that prevented compliance (e.g. if third party tests reveal off-spec fuel which cannot be used, then attach laboratory analysis and Note of Protest); and
- History of FONARs submitted by the vessel and the owner or operator.

As always, Members should ensure that all information contained within FONARs is truthful because FONARs must be certified under penalty of perjury.

> "I certify under penalty of law that the statements and information made herein 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, including the possibility of fines and imprisonment pursuant to 18 U.S.C. § 1001."

The consequences of making or submitting false statements (18 U.S.C. § 1001) are discussed below.

After submitting a FONAR, vessels do not need to wait for confirmation from the US Coast Guard or EPA prior to entering the ECA. Nonetheless, FONAR records must be saved for five years. Even without this express direction, Members should anticipate US Coast Guard or EPA requests for additional information.

The US Coast Guard and EPA have both carefully clarified that FONARs are evidence of violations, but the US will consider circumstances when determining what enforcement action, if any, to take.

Notably, the US does not consider the relatively higher cost of compliant fuel to be a valid basis for inability to obtain compliant fuel.

The potential consequences of violations and failure to voluntarily disclose violations could have severe consequences. The Act to Prevent Pollution from Ships (APPS), for example, authorizes the US to refuse or revoke a vessel's clearance if reasonable cause exists to believe that the vessel violated the ECA.

The US may grant clearance upon the filing of a bond or other surety, but the conditions of such bond or other surety can be onerous. In cases challenging conditions of such bond or other surety, US federal courts have upheld conditions requiring vessel owners and operators to:

- Pay wages, housing, and transportation costs, along with a per diem for crew members that remain in the jurisdiction;
- Encourage the crew to cooperate with the government's investigation;

- Maintain the employment of the crew members that remain in the jurisdiction;
- Arrange for repatriation of crew members;
- Stipulate to the authenticity of documents and items seized from the vessel;
- Help the government serve subpoenas on foreign crew members located outside of the US;
- Waive objections to both in personam and in rem jurisdiction; and
- Enter an appearance in federal district court.

In addition to revoking clearance, the US may issue subpoenas for witness testimony and production of documents and other evidence upon receipt of evidence that a violation has occurred (e.g. FONAR).

Compliance with subpoenas can be compelled by court order. In February 2014, EPA served administrative subpoenas on four vessel owners and operators who had each filed approximately 20-40 FONARs between August 2012 and January 2014.

These subpoenas reportedly required the production of:

- Corporate policies and procedures related to MARPOL Annex VI compliance;
- Fuel procurement policies and contracts;
- A list of each bunker supplier that does business at the port of call the vessel visited prior to entering the ECA, as well as at each port the vessel visited since receiving orders to proceed to a destination in the ECA;

- Copies of all correspondence with each bunker supplier listed;
- A spreadsheet of information submitted within the FONARs, supplemented with additional information not previously submitted;
- Documentation of the distance travelled inside the US portion of the ECA during which the vessels were burning non-compliant fuel, and the amount of fuel burned; and
- A list of vessels that had entered the ECA since it took effect on August 1, 2012, that had used non-compliant fuel without filing a FONAR, including vessels that transited the US portion of the ECA but did not arrive at a US port.

US Coast Guard, EPA, and, possibly, US Department of Justice enforcement actions can take a variety of forms. APPS permits the assessment of civil penalties of up to $40,000/day for each violation (i.e. the statutory amount adjusted for inflation as per regulations) and $8,000 for each false, fictitious, or fraudulent statement in connection with an investigation. Allegations of knowing violations leading to criminal charges are potentially Class D felonies punishable by fines up to $500,000 for each violation for a company, and $250,000 and/or 5-10 years imprisonment for each violation for an individual.

Other criminal charges that are potentially applicable – most of which fall under the "It's not the crime, it's the cover-up" category – include false statements, obstruction, witness tampering, and conspiracy. The Alternative Fines Act, pursuant to which fines up to double the pecuniary gain to companies that violate ECA or double the pecuniary loss to companies that comply with ECA, is also potentially applicable.

Perhaps the most extreme enforcement remedy is to ban a vessel, individual, or company from operating in US waters. A US Coast Guard Policy Letter says that entry can be denied due to a history (i.e. three detentions within twelve months) of operating in US waters in substandard conditions.

A federal court hearing a challenge to this policy concluded that the US Coast Guard is empowered to enforce environmental standards by denying entry to ships so long as entry is conditioned on compliance with an Environmental Compliance Program and not conditioned only on the passage of time.

Members are strongly encouraged to make best efforts to achieve compliance. If compliance cannot be achieved, then Members are strongly encouraged to voluntarily disclose non-compliance and cooperate with US investigators. Remember: the US authorities are actively searching for vessels in default of compliance.

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