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REPORT



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U.S. Government's Continued Focus on Large Ship Air Emissions

*By Marcella Burke, Ilana Saltzbart, William J. (Bill) Sauers,
and Arlene Hennessey**

The authors discuss new air pollution regulations applicable to vessels operating in U.S. waters as well as ships operating within the 200 nautical mile border around the United States.

The U.S. Environmental Protection Agency (“EPA”) and the U.S. Coast Guard (“USCG”) continue to signal interest in addressing air pollution from large ships and ocean-going vessels. Since statements made by EPA personnel in 2014,¹ EPA, along with the USCG, has recently paved the way for increasing enforcement of sulfur oxides (“SOx”) and nitrogen oxides (“NOx”) requirements of Annex VI to the International Convention for the Prevention of Pollution from Ships (“MARPOL”).

Annex VI is implemented in the U.S. through the Act to Prevent Pollution from Ships (“APPS”).² Annex VI, APPS and implementing regulations promulgated by the EPA under the Clean Air Act, impose engine-based and fuel-based standards that apply to U.S. flagged ships wherever located, and to non-U.S. flagged ships operating in U.S. waters. The EPA and USCG will enforce these requirements pursuant to authority under APPS, the Clean Air Act and a 2011 Memorandum of Understanding between the EPA and USCG setting forth the terms by which the EPA and USCG will mutually cooperate in enforcement and implementation. In 2019, EPA and USCG revised the protocol for referrals of violations to include more detailed procedures, and may

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¹ On March 20, 2014, Janet McCabe, then-acting EPA’s assistant administrator for the Office of Air and Radiation (“OAR”), commented at an American Bar Association conference that reducing air pollution from marine vessels was a prominent emerging issue for the agency. Earlier that same month, on March 4, OAR’s then-Director of the Office of Transportation Air Quality, Christopher Grundler, testified before the House of Representatives Subcommittee on Coast Guard and Maritime Transportation about the EPA’s marine vessels program. Grundler stated that the program is “one of the most important and cost-effective air quality programs the U.S. government has put into place in the past decade.”

² 33 U.S.C. §§ 1901 *et seq.*

signal increased focus on enforcement.³ The protocol describes the USCG's procedure for determining deficiencies⁴ or violations,⁵ referrals to the EPA, and when deemed necessary, referrals to the U.S. Department of Justice.

The engine and fuel standards affect a large swath of the maritime sector, including companies that manufacture, sell or import marine diesel engines, companies that make vessels that use such engines, the owners and operators of large vessels, such as cruise ships, tankers, container ships and bulk carriers, and marine diesel fuel suppliers.

The regulations apply to vessels operating in U.S. waters as well as ships operating within the 200 nautical mile border around the U.S., including the North American Emission Control Area ("ECA") and the U.S. Caribbean ECA, which encompasses waters around Puerto Rico and the U.S. Virgin Islands.

WHICH REQUIREMENTS WILL THE EPA ENFORCE?

Beginning January 1, 2020, for fuel used in global shipping, the sulfur content limit was reduced from 35,000 ppm to 5,000 ppm pursuant to MARPOL Annex VI.⁶ To facilitate implementation of this 2020 global marine fuel standard, effective as of December 2019,⁷ the EPA amended its diesel fuel

³ Accessible via: <https://www.epa.gov/enforcement/united-states-coast-guard-and-united-states-environmental-protection-agency-revised>.

⁴ See USCG Marine Safety Manual, Volume V ("MSM, Vol. V"), COMDTINST M16000.10A (April 2008), part C, chapter 3, para. A.2.a. ("A deficiency is any condition, operation, or act pertaining to a vessel or facility that fails to meet acceptable standards including but not limited to those established by applicable international conventions, U.S. laws or regulations, industry standards, equipment manufacturers[] recommendations, 'good marine practice,' etc. Examples include equipment which is considered to be unsatisfactory for its intended purpose; vessel or facility operations which place persons, property, or the environment at risk; or inadequate response by personnel to contingency drills.").

⁵ See MSM, Vol. V, part C, chapter 3, para. A.2.b ("A violation is any deficiency resulting from a failure to meet applicable U.S. statutory or regulatory requirements where sufficient evidence exists to initiate administrative, judicial, or criminal proceedings (including suspension and revocation hearings, civil penalty hearings, and criminal prosecution) as appropriate.").

⁶ See Regulation 14.1.3 of MARPOL Annex VI.

⁷ See 84 Fed. Reg. 69,335, 69,337 (Dec. 18, 2019) (stating "the narrow set of amendments in this rule are intended to remove a regulatory obstacle to the distribution and sale in the United States of marine fuel that meets MARPOL Annex VI global sulfur standard of 5,000 ppm sulfur. In the future, after we have a better understanding of the nature of the fuel made available to comply with the 2020 global marine fuel standard (*i.e.*, whether it is mostly distillate fuel, blended fuel, or residual fuel), we may consider a supplemental rule to address any additional implementation questions with respect to residual fuel.").

regulations to allow suppliers to distribute diesel fuel that complies with this global marine limit of 5,000 ppm.

Importantly, this same fuel exceeds the more stringent emission limitations in effect for the designated North American ECA and U.S. Caribbean ECA for marine diesel fuel and engines via the EPA's regulations, promulgated pursuant to its authority under APPS and the Clean Air Act, which were effective as of January 1, 2015, and January 1, 2016, respectively. For marine diesel fuel, the EPA allows the production and sale of diesel fuel with up to 1,000 ppm sulfur for use in Category 3 marine diesel engines (e.g., used in most large ships, carriers, or tankers).

Further, marine diesel fuel oil above 1,000 ppm sulfur is generally prohibited, unless alternative devices or methods are employed to achieve equivalent emission reductions. For the Category 3 diesel engines, the EPA requires the use of high-efficiency emission control technology, such as selective catalytic reduction, to meet the aggressive NO_x limits, which range from 2.0 to 3.4 g/kW-h, depending upon engine speed, and requires an 80 percent reduction in NO_x emissions below previous levels.

FEDERAL ENFORCEMENT: A SHARED RESPONSIBILITY BETWEEN THE EPA AND USCG

The EPA and USCG's memorandum of understanding and subsequent protocols regarding the enforcement of Annex VI requirements provide that the EPA and USCG will jointly and cooperatively enforce the provisions of Annex VI.

These efforts include inspections, investigations and enforcement actions if a violation is detected through oversight of marine-fueling facilities, on-board compliance inspections and record reviews. The USCG has issued guidance regarding the methods and procedures it will use to verify compliance with Annex VI requirements. In general, the USCG is responsible for verifying compliance with Annex VI requirements and the EPA is responsible for enforcing violations pertaining to certain Annex VI requirements, including Regulation 13, which established NO_x emission standards, and Regulations 14 and 18, which established sulfur limits for fuels.

The USCG inspects U.S. and foreign-flagged ships for compliance with Annex VI requirements during comprehensive domestic inspections and Port State Control examinations. If a violation is discovered, the USCG can issue a no-sail order to the vessel operator of a U.S.-flagged ship or a detention order to the operator of a foreign-flagged ship. Further, if the USCG determines that such violation of Annex VI is subject to fines, it may issue a Letter of Warning or Notice of Violation, or effect revocation or withholding of a vessel's customs clearance.

Both the EPA and USCG can commence enforcement actions for violations of Annex VI, and the regulatory SO_x and NO_x standards. Violators of Annex VI, APPS or an implementing regulation may result in criminal and/or civil liability. For civil violations, the statute specifies that companies may be liable for a penalty of up to \$25,000 for each violation. This statutory maximum has been increased to as high as \$74,552 for violations that occur after November 2, 2015, and where penalties are assessed on or after February 6, 2019.⁸ Under APPS, each day of a continuing violation constitutes a separate violation. Since 2016, the EPA has settled a number of claims for violations of the APPS for emissions exceedances referred to it by the USCG. In these settlements, the large ship owner or operator failed to comply with the required fuel sulfur limits while operating within the designated North American ECA, and therefore a daily civil penalty was assessed. The penalties ranged from approximately \$11,000 to \$17,000.

More recently, in August 2019, the USCG pursued a significant enforcement action that resulted in criminal sentencing of a vessel's owner and operator, the master, and the chief engineer for use of non-compliant fuel in excess of the sulfur content permitted in the U.S. Caribbean ECA, and the resulting record falsification and investigation obstruction that ensued. The shipping companies were sentenced to criminal fines of \$1,500,000, in addition to a four-year term of probation and implementation of an environmental compliance plan. The master and chief officer were also sentenced to a three-year probation term, which limits their merchant vessel activity, with the chief officer also being individually sentenced to a criminal fine. The timing of these severe penalties, made in advance of the January 1, 2020 global shipping fuel standard, may be seen as a message to the industry at-large.

⁸ See 40 C.F.R. § 19.4 (table 2).