



**CLIENT ALERT:
ENFORCEMENT OF THE NORTH AMERICAN
EMISSION CONTROL AREA (“ECA”)
EFFECTIVE AS OF AUGUST 1, 2012**

INTRODUCTION

The United States Coast Guard (“USCG”), in conjunction with the U.S. Environmental Protection Agency (“EPA”), has commenced enforcement of the North American Emission Control Area (“ECA”) effective August 1, 2012. The North American ECA was created in 2010 by resolution of the Marine Environmental Protection Committee (MEPC) of the IMO as an amendment to Annex VI of MARPOL, which has been in effect in the United States as of January 2009. The North American ECA technically entered into force on August 1, 2011, although enforcement did not take full effect until August 1, 2012. The North American ECA covers an area extending 200 miles seaward from the East, West and Gulf Coasts of the United States, as well as the Hawaiian Islands. A separate U.S. Caribbean Sea ECA enters into force on January 1, 2013, with enforcement to commence as of January 1, 2014.

REQUIREMENTS FOR VESSELS OPERATING IN THE ECA

Vessels operating in the North American ECA – with only very limited exceptions - are required to utilize fuel oil with sulfur content not in excess of 1.00% (10,000 ppm). The maximum sulfur content is to be reduced to .10% effective January 1, 2015. Alternatively, vessels may utilize “equivalent controls” to reduce emissions under Regulation 4 of Annex VI, i.e. such as gas cleaning apparatus, provided such measures are i) approved by the vessel’s Flag State, and ii) determined to be at least as effective as low sulfur (1.00%) fuel in reducing emissions.

August 3, 2012

As reflected in a recent June 26, 2012 Memorandum issued by the EPA (*Interim Guidance on the Non-Availability of Compliant Fuel Oil for the North American Emission Control Area*), vessels will be required to maintain and, if requested, make available to the U.S. authorities the following documentation evidencing compliance with the requirements of Annex VI:

- Bunker delivery notes for vessels 400 gross tons and above. (Vessels less than 400 gross tons are not required to maintain bunker delivery notes but will still need to document compliance via fuel oil records or similar documentation);
- Representative fuel oil samples, taken at the time of fuel oil delivery;
- Written fuel oil changeover procedures, which show how and when the fuel oil changeover is to be done to ensure that only compliant fuel oil is burned within a designated ECA;
- The fuel oil changeover logbook that contains the volume of compliant fuel oil in each tank as well as the date, time, and position of the ship when any fuel oil changeover operation is completed prior to entry into or commenced after exit of a designated ECA.

Non-Availability of Compliant Fuel Oil: What Should an Owner/Operator Do to Avoid or Minimize a Violation?

The interim guidance memorandum issued by the EPA – referenced above – reflects that the U.S. Government is cognizant that it may not be possible for owners/operators to procure compliant fuel oil in all instances: *“MARPOL Annex VI Regulation 18, as incorporated by reference in 40 C.F.R. § 1043.100, anticipates the possibility that despite your best efforts to obtain compliant fuel oil, you may be unable to do so, and the United States has the authority to take into account all relevant circumstances to determine the appropriate action to take, including not taking control [i.e. enforcement] measures.”* At this very preliminary stage – as enforcement of the ECA is only just commencing – it remains to be seen how the U.S. authorities interpret what does or does not constitute “best efforts” to procure compliant fuel oil, and thus just how much latitude they will exercise in assessing penalties for non-compliance. Having said that, the EPA memo does provide some guidance as to what an owner/operator may be required to do in order to evidence “best efforts.” For example, while the memo states that vessels may not be obligated to “deviate” from their intended voyage to procure compliant fuel, the U.S. Government “does not consider having to change berth or anchor within a port in order to receive compliant fuel to be a deviation.” In sum, the EPA’s guidance provides – albeit somewhat generally – that *“[t]he United States government expects a vessel operator to make any adjustments that can be made to fuel oil purchase protocols that would allow the purchase of compliant fuel oil prior to entering the North American ECA.”*

In the event a vessel is unable to procure compliant fuel prior to entering the North American ECA, the owner/operator must advise both the Flag State and the proper U.S. authorities, which in this instance, is the EPA. Moreover, to the extent the owner/operator wants the U.S. government to consider the efforts taken to procure compliant fuel oil in determining what action/enforcement the government will take, the owner/operator must submit a “Fuel Oil Non-Availability Report” to the EPA. This report must contain, among other things, a *“description of the actions taken to attempt to achieve compliance prior to entering the North American ECA, including a description of all attempts that were made to locate alternative sources of compliant fuel oil, and a description of the reason why compliant fuel oil was not available...”*

It is important to note that the “Fuel Oil Non-Availability Report” is required to be signed by an “authorized representative” of the company and must contain the following affirmation: *“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.”*

As reflected in the above certification, the submission of a false statement in the “Fuel Oil Non-Availability Report” could have severe ramifications not only for the individual signing the report, but also for the company under U.S. criminal law, including, but not limited to charges under the False Statement Act. If you have any questions or concerns in completing this report, we would suggest that you seek the advice of counsel as early as possible in the process. In this regard, please note that the report must be submitted to the EPA no later than 96 hours prior to entering the North American ECA.

Finally, it should be noted that the submission of a “Fuel Oil Non-Availability Report” does not mean that the vessel is deemed in compliance with MARPOL Annex VI, but it will at least provide the U.S. government with information on which they can then make a determination as to what, if any, enforcement action will be pursued.

CRIMINAL LIABILITY

Owners and operators are urged to familiarize themselves with the guidelines set forth by the U.S. Coast Guard in CG-CVC Policy Letter 12-04, dated July 25, 2012 ("*Guidelines for Compliance and Enforcement of the Emission Control Areas Established Within the United States Jurisdiction as Designated in MARPOL Annex VI Regulation 14*"). Specific attention should be drawn to paragraph 9 of the Policy Letter ("Enforcement of detected violations") as it is clear that this section contemplates potential criminal liability arising from violations of MARPOL Annex VI. The USCG Policy Letter specifically references "intentional use of non-compliant fuel oil with falsified log books" as an example of a potential criminal violation. Thus, there is the potential that violations of MARPOL Annex VI identified as a result of the USCG/EPA implementation and enforcement of the North American ECA may very well result in the same types of criminal prosecutions and charges that have previously arisen in the context of "magic pipe" and other MARPOL related violations. Again, to the extent owners/operators have any concerns as to potential Annex VI violations, they should seek urgent guidance/intervention from counsel.

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Disclaimer:

FHM will be providing further guidance regarding the North American ECA. Owners/Operators and other interested parties are urged to visit our website for further updates. In the interim, should you require any further information or have any questions, please do not hesitate to contact us.