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### UPDATE ON NORTH AMERICAN EMISSION CONTROL AREA ENFORCEMENT AND FUEL AVAILABILITY GUIDANCE

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**Maritime****New Development**

Enforcement of the North American Emission Control Area ("ECA") begins August 1, 2012. All vessels subject to MARPOL, with certain exceptions, will be required to utilize fuel oil with a sulfur content not exceeding 1.00% (10,000 ppm) while operating in the North American ECA or install and use an equivalent compliance method approved by its flag State. Recent Environmental Protection Agency ("EPA") guidance provides insight on EPA's intentions with regard to addressing ECA compliant fuel oil availability. The following is a summary of the key enforcement guidance and EPA's guidance on fuel oil availability.

**Background**

The North American ECA was established in 2009 pursuant to Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), which is implemented domestically through the Act to Prevent Pollution from Ships ("APPS"). The North American ECA encompasses most of the United States and Canada's coastal waters out to 200 nautical miles from the coastline. It does not include the Pacific U.S. territories, smaller Hawaiian Islands, the Commonwealth of Puerto Rico and the U.S. Virgin Islands, the Aleutian Islands and Western Alaska, and the U.S. and Canadian Arctic. In 2011, the U.S. Caribbean ECA was established and includes the waters adjacent to the Commonwealth of Puerto Rico and the U.S. Virgin Islands out to approximately 50 nautical miles from the coastline. However, the U.S. Caribbean ECA requirements will not be enforceable until January 2014.



Further information regarding creation of the North American and U.S. Caribbean ECAs may be found in our previous advisories: "[United States and Canada Propose 200 Nautical Mile 'Emission Control Area' Under MARPOL Annex VI](#)"; "[EPA Finalizes Emissions Standards for Category 3 Marine Diesel Engines and Implements North American ECA](#)"; and "[Update on Compliance Requirements – EPA's Vessel General Permit and MARPOL Annex VI](#)."

**ECA Requirements**

All vessels subject to MARPOL operating within the North American ECA, with limited exceptions, will be required to use fuel oil with a sulfur limit not exceeding 1.00% (10,000 ppm). In the alternative, vessels may install and use equivalent methods that are approved by its flag State in accordance with MARPOL Annex VI Regulation 4 and 40 C.F.R. § 1043.55, such as an exhaust gas cleaning device. On January 1, 2015, the sulfur limit will be further reduced to 0.10% (1,000 ppm).

In addition, marine diesel engines on vessels constructed on or after January 1, 2016 will be required to have Tier III NOx after-treatment controls when operating within an ECA. The after-treatment controls must meet a NOx emission limit of 3.4 grams per kilowatt hour for engines operating below 130 revolutions per minute ("rpm") and 2.0 grams per kilowatt hour for engines operating above 2,000

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rpm. Engines running between 130 and 2,000 rpm will be required to meet NOx limits on a sliding scale.

Vessels operating in the North American ECA will also be required to meet certain requirements to demonstrate compliance with ECA standards, including:

- Bunker delivery notes on vessels 400 gross tons or more;
- Representative fuel oil samples, taken at the time of delivery;
- Written fuel changeover procedures establishing how and when fuel oil changeover is to be done to comply with ECA requirements; and
- A fuel changeover logbook, which includes the date, time, and position of the ship when the changeover is completed, as well as the volume of compliant fuel oil in each tank.

#### **Coast Guard/EPA Enforcement**

On June 27, 2011, the U.S. Coast Guard and EPA entered into a Memorandum of Understanding ("MOU") setting forth the terms by which the Coast Guard and EPA will cooperate in connection with compliance and enforcement of MARPOL Annex VI, as implemented by APPS. Both the Coast Guard and EPA have the authority and responsibility under APPS for fuel oil quality and availability. The MOU provides that EPA will verify compliance with fuel oil availability and quality and maintain a register of local fuel oil suppliers. The Coast Guard will examine bunker delivery notes and records during its routine port State control inspections. The two agencies will share information about inspections, examinations, and investigations. In addition, EPA may, either on its own or at the Coast Guard's request, attend or assist with flag State and port State control inspections. When a violation is suspected, the agency with the relevant expertise will investigate. The Coast Guard and EPA must mutually agree on which agency will initiate enforcement action.

Also on June 27, 2011 the Coast Guard and EPA issued a joint letter to industry as a reminder of MARPOL Annex VI and ECA requirements. The letter explains that violation of such requirements may result in criminal liability for knowing violations or a civil penalty of up to \$25,000 per day of violation, with each day the violation continues constituting a separate offense. The Coast Guard previously published CG-543 Policy Letter 09-01 (February 4, 2009), on MARPOL Annex VI compliance guidelines.

Further information regarding the MOU may be found in our previous advisory: ["Update on Compliance Requirements—EPA's Vessel General Permit and MARPOL Annex VI."](#)

#### **ECA Compliant Fuel Oil Availability**

EPA expects that ECA compliant fuel oil will be available from fuel oil suppliers serving vessels that operate in the North American ECA, particularly as it has reportedly been available for vessels operating in North Sea and Baltic ECAs since July 2010. Recognizing, however, that it is possible some vessels may not be able to obtain ECA compliant fuel prior to entering the North American ECA, EPA published "Interim Guidance on the Non-Availability of Compliant Fuel Oil for the North American Emission Control Area" on June 26, 2012 to describe how vessels can make fuel oil non-availability notifications. The guidance may be found at:

#### **Best Efforts**

Vessels are required to make "best efforts" to obtain ECA compliant fuel prior to entering the North American ECA. When it is expected that a vessel will enter the North American ECA, the vessel owners and operators must take care in voyage planning to ensure that reasonable efforts are made to obtain ECA compliant fuel oil at every port along the intended voyage. Vessels are not required to deviate from their intended voyage to obtain ECA compliant fuel oil. However, having to change berths or anchor within a port to receive compliant fuel oil is not considered a deviation.

EPA also does not require vessels to use a fuel oil with viscosity less than 11 centistokes to meet the sulfur standards. Although EPA stated that it does "expect distillate fuels of various grades to be used as blending agents" to produce an ECA compliant fuel oil blend, EPA does not require vessels to blend their own ECA compliant fuel oil blend onboard. Thus, owners and operators are not expected to purchase distillate fuel to meet ECA fuel oil requirements.

If a vessel is unable to obtain ECA compliant fuel oil prior to entering the North American ECA, it must ensure that it obtains the lowest sulfur fuel oil available prior to entering the North American ECA. It must also obtain compliant fuel oil at the first U.S. port-of-call at which it is available in a sufficient quantity to allow it to complete its voyage in the North American ECA. Furthermore, if the vessel, owner, or operator is aware that the vessel will be returning to the North American ECA in the future and likely will not be able to obtain ECA compliant fuel oil prior to re-entering, the vessel must obtain a sufficient quantity of compliant fuel oil from a U.S. port-of-call to make the return trip.

### Unavailability

If, despite best efforts, a vessel is unable to obtain ECA compliant fuel oil prior to entering the North American ECA, the owner or operator of the vessel must notify the Coast Guard and the vessel's flag Administration before entering the North American ECA. Notification should be made to the Coast Guard Sector at the vessel's U.S. port of destination. Notification should also be made to EPA via e-mail at [marine-eca@epa.gov](mailto:marine-eca@epa.gov).

In addition, the owner or operator should submit a Fuel Oil Non-Availability Report as soon as it becomes aware that it will not be able to procure and use ECA compliant fuel oil in the North American ECA, but in any event no later than 96 hours prior to entering the North American ECA. Fuel Oil Non-Availability Reports are not required; however, they should be submitted if the owner or operator wants the EPA to consider its efforts to obtain ECA compliant fuel when determining what enforcement action to take in response to a violation. The filing of a Fuel Oil Non-Availability Report does not mean a vessel is deemed in compliance with MARPOL Annex VI. However, the EPA will review the information provided in the report and will consider the following in determining whether to impose a penalty:

- Whether the sulfur content of the fuel used was the lowest sulfur available at the time of purchase and along the vessel's intended voyage;
- Whether the vessel obtained ECA compliant fuel oil at its first port call in the United States and continued to use ECA compliant fuel oil for the remainder of its voyage in the North American ECA;
- How many Fuel Oil Non-Availability Reports have been previously filed;
- Whether owners or operators of other vessels on similar voyages submitted Fuel Oil Non-Availability Reports; and
- Any other relevant factors.

The EPA is in the process of creating an electronic system to receive Fuel Oil Non-Availability Reports. Prior to implementation of an electronic system, the reports should be sent to [marine-eca@epa.gov](mailto:marine-eca@epa.gov).

### Conclusion

Owners and operators with vessels that operate in the North American ECA should review the MARPOL Annex VI requirements and applicable Coast Guard and EPA compliance guidelines, including the recently published guidance on ECA compliant fuel oil availability, to help ensure compliance in light of the August 1, 2012 enforcement date.

Notice: The purpose of this Advisory is to identify select developments that may be of interest to readers. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. The Advisory should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.