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# ENERGY LAW REPORT

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# Pratt's Energy Law Report

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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# MARPOL Annex VI Enforcement—Are You Prepared? Tips to Enhance Compliance and Reduce Enforcement Risk

***By Jeanne M. Grasso and Kierstan L. Carlson****

*In this article, the authors explain that, with "IMO 2020" now in effect, ship owners and operators trading in U.S. waters should take steps to reduce the risk of an enforcement action.*

The United States has been aggressively enforcing compliance with the International Convention for the Prevention of Pollution from Ships ("MARPOL") for nearly 30 years. Enforcement actions have been brought against ship owners and operators across the industry, as well as against individual masters, engineers, shoreside personnel, and other corporate officers.

To date, most MARPOL prosecutions have involved violations of MARPOL Annex I through "magic pipe" bypasses of the Oily Water Separator ("OWS") or improper discharges of sludge, though some have involved Annex V garbage violations and, very recently, Annex VI emissions violations. Few, other than in the early 1990s, have involved illegal discharges in U.S. waters; rather, virtually all cases have been brought for false entries in the ship's records, including the Oil Record Book ("ORB") and Garbage Record Book. This is because maintaining inaccurate records while in domestic waters or presenting inaccurate records to the U.S. Coast Guard ("USCG") during an inspection is a crime and the jurisdictional hook needed for prosecution. Most cases also involve some kind of unlawful "post-incident conduct" that constitutes an independent crime under U.S. law, such as destroying records or lying to USCG inspectors or special agents.

While most countries view recordkeeping violations for illegal discharges occurring in international waters as within the purview of the flag State, the U.S. government disagrees—evidenced by the approximately eight to 10 MARPOL prosecutions per year for at least the last decade, including eight in 2018 and nine in 2017, all of which have resulted in high penalties and/or jail time, as well as reputational harm to the ship owners and operators. Not only are MARPOL Annex I prosecutions likely to continue, but we also expect U.S. authorities to begin focusing more heavily on violations of MARPOL Annex VI

* Jeanne M. Grasso, a partner in the Washington, D.C., office of Blank Rome LLP, is co-chair of the Maritime & International Trade Practice Group and a member of the firm's Maritime Emergency Response Team. Kierstan L. Carlson is an associate in the firm's Maritime & International Trade Practice Group in the Washington, D.C., office. The authors may be contacted at grasso@blankrome.com and carlson@blankrome.com, respectively.

(air emissions) now that the worldwide sulfur limit of 0.50 percent is in effect. The United States brought the first Annex VI criminal case in 2019, following the same playbook it uses in Annex I cases. And, with the implementation of the 2020 sulfur cap, and all of the compliance challenges that come along with it, the risk of an enforcement action is that much greater. Ship owners and operators must take steps now to ensure compliance with Annex VI, including maintaining accurate records, or risk becoming a target in the next port state control inspection.

## IMO 2020 AND THE RESULTING COMPLIANCE CHALLENGES

Known widely as "IMO 2020" or the "2020 sulfur cap," significant amendments to the fuel sulfur standards under MARPOL Annex VI came into effect in 2020.

First, as of January 1, 2020, the worldwide limit for sulfur content in bunker fuel oil is 0.50 percent for ships operating outside of emission control areas ("ECAs").

Second, a ban on the carriage of non-compliant fuel went into effect on March 1, 2020. The only exception to this rule is that ships fitted with exhaust gas cleaning systems (often referred to as "scrubbers") will be permitted to carry fuel with a higher sulfur content. Importantly, none of these changes impacts the fuel sulfur limit applicable within ECAs—that limit has been 0.10 percent since 2015 and will remain in effect.

The 0.50 percent limit required under IMO 2020 is a substantial reduction from the prior limit of 3.50 percent. To comply, ships must do one of three things:

(1) Carry and use only compliant fuel on board;

(2) Equip ships with scrubbers; or

(3) Plan for ships that can be powered through alternative means, such as liquefied natural gas ("LNG").

Undoubtedly, each of these options may present challenges for ship owners and operators. Opting to use compliant fuel will require careful planning and also presents concerns about engine compatibility and fuel blending. Plus, the USCG has signaled that ships submitting fuel oil non-availability reports will receive additional scrutiny and likely will be boarded.

Comparably, opting to comply by utilizing scrubbers requires ships to manage wastes and/or washwater, which cannot be discharged in certain U.S. states and various countries, and to plan for potential equipment failures.

Finally, running a ship on LNG or some other alternate fuel must be planned years in advance, generally when the ship is built, and is often not a realistic option for ships already in service.

## U.S. ANNEX VI ENFORCEMENT TO DATE AND IMPACT OF IMO 2020

U.S. authorities have a range of enforcement options for violations of MARPOL Annex VI, including the issuance of letters of warning ("LOWs"), which carry no penalty; notices of violation ("NOVs"), which carry a penalty up to $10,000; the imposition of a civil penalty up to $74,552 per violation; and referral of the matter to the U.S. Environmental Protection Agency ("EPA") for investigation or to the U.S. Department of Justice for criminal enforcement. The trigger for a criminal enforcement action will commonly be falsifying records to demonstrate compliance when a ship is not in compliance.

Until recently, and as companies have been adjusting to the North American and Caribbean ECAs over the past few years, Annex VI enforcement has been limited primarily to LOWs and NOVs, and a few civil penalty actions from the EPA. But the tide is changing. In August 2019, the United States concluded its first-ever Annex VI criminal prosecution. Two shipping companies were convicted and sentenced to pay a total fine of three million dollars for violations of Annex VI for using non-compliant fuel in the Caribbean ECA, failing to maintain an accurate ORB, maintaining false bunker delivery notes ("BDNs"), and obstructing justice. The conduct involved the vessel siphoning off fuel from cargo tanks and creating fake BDNs to show that the fuel was acquired shoreside. That said, the BDNs indicated that the vessel was nonetheless burning non-compliant fuel, which naturally caught the USCG's attention during a port state control exam. There is little doubt that the case serves as a warning that the United States is not going to take Annex VI violations lightly.

To that end, the USCG has issued guidelines for compliance and enforcement of the U.S. ECAs and Annex VI generally (CG-CVC Policy Letter 12-04, Change 1). The USCG also has spelled out exactly how compliance with Annex VI will be verified: the USCG will review BDNs, fuel change-over procedures, and other documentation to assess compliance; and if warranted under the circumstances—e.g., the ship is missing BDNs, the BDNs indicate non-compliant fuel, the crew are unfamiliar with or not following procedures—the USCG will expand the inspection. This mirrors how the USCG would handle the discovery of a potential Annex I violation and it is exactly how the government handled the Annex VI criminal case. We also expect that the USCG would respond to a whistleblower report of an Annex VI violation just as it would to a reported OWS bypass: the USCG would immediately proceed with an expanded MARPOL examination followed by an investigation by special agents.

The USCG's enhanced scrutiny of BDNs and other vessel records increases the possibility that some non-compliance could be found, as well as that a ship's

crewmembers could expose the company to liability by attempting to hide their misconduct. The whistleblower provisions contained in the Act to Prevent Pollution from Ships, which implements MARPOL in the United States, presents an additional layer of complexity, as it could incentivize crewmembers to report problems to the USCG rather than to shoreside managers, as we have seen with Annex I violations.

## RECOMMENDATIONS TO ENSURE COMPLIANCE AND REDUCE ENFORCEMENT RISK

The risks of a potential enforcement action for noncompliance with MARPOL remain high if companies do not have the proper compliance systems in place. The United States has been regularly prosecuting companies and individuals for decades and expects that companies operating in U.S. waters understand the risks associated with failing to comply with MARPOL. This will not change simply because the focus may be shifting to Annex VI. Ship owners and operators must become vigilant about MARPOL compliance overall and proactively review and strengthen their compliance regimes in order to minimize the risks of becoming the target of a MARPOL enforcement action, along with the financial and reputational harm that comes with it.

In some cases, enforcement actions have resulted from a company's unwillingness to invest time and money into compliance. But in others, they have resulted from a flaw in an otherwise adequate compliance program. Indeed, no company, even one with resources, upgraded equipment, and procedures galore, is immune from a mistake. There is always room for improvement—and room to reduce risk.

Environmental compliance is dependent primarily on:

(1) The competence and training of the ship's complement;

(2) A comprehensive environmental management system, which includes verification;

(3) The degree of shoreside management oversight employed; and

(4) The strength of the overall corporate compliance culture.

There is no reason to believe this will change if/when the enforcement focus shifts to Annex VI. Therefore, we recommend ship owners and operators dedicate resources to improving the following management practices to create a culture of compliance to reduce risk:

- *Enhanced Compliance Training*: Creating a sustainable compliance culture aboard the ship is difficult due to frequent crew rotations and the unpredictability of future vessel assignments. But, enhanced training programs for both engineering officers and unlicensed crew-

members are a must—they ensure that the officers and crew are knowledgeable and prepared, but they also communicate the company's commitment to rigorous compliance standards—and that non-compliance will not be tolerated.

- *Open Reporting System*: Anonymous hotlines or other electronic reporting methods through which crewmembers can alert shoreside management of environmental deficiencies or violations aboard a ship are imperative; the lack of an anonymous reporting mechanism is viewed skeptically by U.S. enforcement authorities. Some companies have even instituted an internal monetary reward system for crewmembers who provide accurate information regarding environmental problems as a means to counterbalance incentives offered for whistleblowing.
- *Verification/Audit Program*: A periodic audit program, including unannounced audits, is a critical element of a robust environmental compliance program. Whether conducted internally or by third-party consultants, routine audits can uncover problems and allow the company to correct non-compliances before they turn into enforcement concerns. Regular spot checks of records and verification of compliance outside the audit function is also important.
- *Role of Superintendent*: Periodic shipboard visits by the technical superintendent are vital; their detailed knowledge of the ship and familiarity with the engineering officers and crewmembers allow superintendents to identify conditions in the engine room that raise environmental compliance issues. Superintendents must take the time while aboard to speak with the ratings and officers, carry the compliance message from shore to ship, and be instructed to promptly inform shoreside management of any compliance issues so they can be dealt with promptly.
- *Internal Investigations*: If the company has information suggesting that an intentional MARPOL violation (whether Annex I, V, or VI) has occurred or is ongoing aboard a vessel, a company should conduct an immediate internal investigation, in consultation with counsel. Many circumstances will warrant counsel conducting the investigation. Counsel can develop a complete factual record and provide legal advice concerning any corrective actions or reporting obligations that may exist. Taking initiative early on can help to control the potential negative consequences of any identified MARPOL deficiency, while strengthening the company's overall environmental compliance program.

Should a company find itself in the unenviable position of discovering a MARPOL non-compliance, we recommend considering disclosure to the ship's

flag State and possibly to the U.S. Coast Guard if a U.S. port call is forthcoming. Consultation with counsel plays a critical role in whether, how, and to whom such a disclosure should be made. While port and coastal states are authorized to perform port state control inspections or to investigate and consider enforcement actions for pollution events occurring in their territorial waters, these functions are secondary to the primary environmental compliance assurance role reserved to the flag State under international law.

## CONCLUSION

The United States has long been the most aggressive enforcer of MARPOL, whether or not the violations occur in U.S. waters, and this trend will continue. With IMO 2020 in effect, the enforcement focus is expanding and already shifting to Annex VI. Ship owners and operators trading in U.S. waters should take steps now to reduce the risk of an enforcement action: strengthen and test your compliance program; plan for potential problems relating to compliant fuel or scrubbers; and be prepared to immediately address any non-compliance if or when it arises.