MARITIME REPORTER AND ENGINEERING NEWS

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May 2007

Air emissions, bunkers & charters

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Only in California (so far) do air emissions, bunkers, and charters come together.

California adopted its own restrictions on air emissions from ships, refusing to be swayed by the international standards found in Annex VI to the International Convention on the Prevention of Pollution from Ships (MARPOL Convention) – known as the Regulations for the Prevention of Air Pollution from Ships and the accompanying NOx Technical Code. Annex VI is now in force. The US Senate has given its consent to US ratification of the Annex. Implementing legislation has been adopted by the US House of Representatives and awaits action in the Senate.

The California restrictions have various provisions that are similar to MARPOL Annex VI, but important differences exist. California has also adopted the position that its restrictions apply to ocean-going ships within 24 nautical miles of the California coast (so-called "Regulated California Waters"). This claim of expanded jurisdiction is presently under challenge by a group of ship operators in federal district court. The likelihood of California prevailing on this jurisdictional issue is low – and will go even lower when the US Government ratifies and implements MARPOL Annex VI.

Fuel mixtures

In the meantime, in early April 2007, the California Air Resources Board (CARB) issued three Marine Notices intended to clarify how the CARB interprets various aspects of the air emission restrictions. The first Marine Notice discusses fuel mixtures and addresses situations where fuel (bunkers) is mixed in a tank through the addition of fuel to a tank that still contains fuel from previous purchases. In those situations where marine gas oil (MGO) is mixed with other MGO, the resulting fuel will be treated as MGO subject to all specifications of DMA grade fuel under International Standard ISO 8217, which includes a sulfur content limit of no more than 1.5% by weight. In those situations where marine diesel oil (MDO) is mixed with other MDO, the resulting fuel will be treated as MDO subject to all specifications of DMB grade fuel under ISO 8217, and the mix will be subject to a sulfur content limit of 0.5% by weight. In those situations where MGO is mixed with MDO, the resulting fuel will be treated as MDO subject to

all specifications of DMB grade fuel under ISO 8217, and the mix will be subject to a sulfur content limit of 0.5% by weight. The CARB strongly recommends that MGO and/or MDO not be placed in tanks that previously held residual fuel (or DMC grade fuel) unless that tank has been previously evacuated as completely as possible.

Port visit

The California air emissions program imposes a noncompliance fee on an ocean-going vessel that makes a port visit in California when the vessel is not in compliance with applicable requirements. The second CARB Marine Notice established the definition of "port visit" for purposes of this fee. A port visit is defined as all stops at a port, roadstead, or terminal facility in Regulated California Waters, as well as all moorings (i.e., the ship drops anchor) at an offshore location in Regulated California Waters away from a port, roadstead or terminal facility (e.g., Catalina Island or off Monterey). For a diesel-electric vessel, the noncompliance fee for the first port visited is $32,500. For other vessels, the noncompliance fee for the first port visit is $13,000. The noncompliance fee rises rapidly for subsequent port visits. Noncompliant port visits are computed for the life of the vessel, not per calendar year or voyage. It is unclear how changes in the owner or the operator will impact the fee schedule.

Responsible parties under charter arrangements

The third CARB Marine Notice has the potential to make life extremely interesting for an entity that engages in a time or voyage charter of an ocean-going ship that calls in California. The Notice addresses responsible parties under various charter arrangements. The air emission regulations apply to any person who owns, operates, charters, rents, or leases ocean-going vessels subject to the regulations, including the recordkeeping requirements. For ships operating under a bareboat or demise charter, the charterer is liable as the owner pro hac vice. This is consistent with customary maritime law. In the case of a time charter, the Notice states that the charterer may share responsibility for an emission violation, particularly where the charterer directs the ship's fuel purchases. This could prove interesting where the charterer directs the purchase of compliant fuel, but that fuel is mixed with noncompliant fuel left over from a previous charter. Things get very fuzzy in the case of a voyage or spot charter. The CARB expects the voyage or spot charterer to "take reasonably prudent precautions and steps to ensure that the vessel owner/operator is prepared to comply with the regulation while operating in Regulated California Waters during that voyage." The CARB provides no guidance on what constitutes reasonably prudent precautions, other than to say that it will be determined on a case-by-case basis and is heavily dependent on the circumstances. The CARB, though, seems to put the burden of proof on the charterer to demonstrate that the violation occurred despite its reasonably prudent precautions. Effectively, the CARB is saying that it will hold a charterer liable for air emission violations unless the charterer can prove that it is not liable, but the CARB refuses to disclose what evidence it wants to see to demonstrate such non-liability. Even the federal government does not go so far to stack the deck against the accused.

Recommendations

In view of the onerous position adopted by the CARB, it is recommended that the owners and operators of ocean-going ships avoid port calls in California to the maximum extent possible. When it is necessary to call in California, it is recommended that all bunkers on board be in full compliance with CARB regulations and that all fuel and operations records are examined for compliance with the recordkeeping requirements. Consideration might also be given (only half tongue in cheek) to having the ship towed into port in a dead ship situation. Time charterers should require the owner/operator to warrant that the bunkers on board at commencement of the charter are compliant with California (and MARPOL Annex VI) requirements and that new bunkers are not inappropriately mixed with old bunkers. Voyage or spot charterers should require that the owner/operator warrant that it is familiar with the CARB requirements, that the bunkers are compliant with California (and MARPOL Annex VI) requirements, and that the ship is in compliance with the applicable recordkeeping requirements. Only time will tell if the above recommendations are sufficient to keep the CARB wolf away from the door.