USA LOW SULFUR FUEL REGULATIONS EXTEND BEYOND TERRITORIAL WATERS

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In Pacific Merchant Shipping Association v. Goldstene, the Ninth Circuit Court of Appeals recently upheld the right of the state of California to require the use of low sulfur fuels in ships operating within 24 nautical miles (nm) of its coast. The court held a state may regulate conduct occurring outside its territorial boundaries if the conduct ultimately affects the health and safety of its citizens. The court also concluded that although compliance with the regulations would cost the industry billions of dollars, the economic cost of the regulations was not so onerous that California was unreasonably interfering with foreign commerce.

BACKGROUND

Fuel use regulations developed by the California Air Resources Board (CARB) have been in force since July 2009. These regulations require ocean-going ships transiting to or from California to use either marine gas oil of 0.3% to 1.5% sulfur content or marine diesel oil with a sulfur content of 0.5% or less in all main engines, auxiliary engines and auxiliary boilers from 24nm from shore. The sulfur limits are scheduled to decrease to 0.1% in January 2012.

The Pacific Merchant Shipping Association argued that California did not have the right to regulate conduct beyond its three-mile belt of territorial waters and the regulations unreasonably imposed a non-uniform and costly regulatory regime on the maritime industry.

While the court acknowledged that the costs for shipowners to comply with the fuel use regulations will be approximately $360 million annually and $1.5 billion through 2014, the Ninth Circuit upheld CARB's regulations. While the court noted that "we do believe [the regulations push California's] legal authority to its very limits...", it ultimately found California had a compelling interest in protecting the health and safety of its citizens from what it described as the "devastating impact on California and its residents of the low-grade fuel used by ocean-going vessels within 24 miles of the state's coastline...". It ruled that California's interest in protecting its citizens justified its extra-territorial regulation of marine fuel use.

The court also found that there were no concerns with the imposition of heightened fuel usage requirements on the maritime industry. The court held that requiring ships to switch to cleaner-burning fuels 24nm from California's coast, rather than from 3nm from the coast, did not impermissibly impact or affect national or foreign commerce by introducing non-uniform fuel use regulations. The court noted that when the United States implemented MARPOL Annex VI, it expressly reserved to the states the right to formulate fuel use rules. Pursuant to MARPOL Annex VI, the waters lying up to 200nm miles seaward of the US and Canadian coasts will become an emission control area (ECA), beginning in July 2012. All ships within the ECA will have to meet the current ECA fuel limitation of 1% sulfur. The ECA limitation decreases to 0.1% in 2015.

The court further observed that the CARB fuel regulations contain a sunset clause that provides for their termination once CARB determines the federal government has adopted and is enforcing requirements that will achieve equivalent emission reductions. The court said it was "reasonable to predict" that the sunset clause would be triggered in 2015 – the time when ships subject to MARPOL Annex VI ECA sulfur restrictions will match the CARB requirements.

IMPLICATIONS

This decision may have broader implications to the maritime industry. The seaward territorial limit of most states, including California, is three miles from the coastline. The decision recognises the right of states to impose operating restrictions on ships when they are operating outside of the state's territorial limits. Unless this decision is overturned, states may use this decision to attempt to

impose other types of operating restrictions on ships if they believe that pollution from ships is impacting their state resources or citizens.

FUTURE AMENDMENTS

Please note that CARB is currently seeking comments on proposed amendments to the regulations. CARB has proposed to extend the final compliance date of the 0.1% sulfur limitation to 2014 rather than 2012. Additionally, CARB is proposing to extend the area in which the rule applies in Southern California. The proposal would roughly double the regulated area for ships calling in the ports of Los Angeles and Long Beach by extending it another 24nm from the Channel Islands, which lie off the California coast.

The reason for this change, as explained by CARB staff, is two-fold. First, the US Navy has noted a sharp increase in traffic through the Point Mugu Sea Range, which is used by the Navy for testing and training, thus interfering with Navy operations. The Sea Range is outside of the current 24nm zone in which low sulfur fuel is required, but within the Contiguous Zone. Additionally, CARB believes that ships are changing their routes from the established Santa Barbara Channel shipping lanes to a route through the test range in order to avoid application of the regulations. Because the ships are not switching to low sulfur fuel where anticipated, the rule is not achieving the emission reductions CARB expected when it was first adopted.

In addition, CARB is considering other minor amendments to the regulations, including changes to the non-compliance fee, to account for partial compliance with the regulations. Currently, a ship may opt to pay a non-compliance fee of $45,500 if it notifies the agency before it arrives in California that it will not be in compliance. This fee increases with each visit and applies whether the ship fails to comply in whole or in part. The fee must be paid before the ship leaves the California port. CARB is proposing to reduce the non-compliance fee if a ship buys and utilises the fuel once it reaches a Californian port.

Below is a link to CARB's proposed amendments that are currently being considered: http://www.arb.ca.gov/ports/marinevess/documents/021711/amendments2011.pdf