UK DEFENCE CLUB

Soundings

Sulphur Series: Countdown to 2020

Compliance with the sulphur cap – is there a margin for error?

As 1st January, 2020 looms large, with less than a month to go, many operators have started to use low sulphur fuels and, in line with industry predictions, issues are already being experienced in relation to the measurement of sulphur levels. In particular, it appears that purported "low sulphur" bunkers are regularly being found to be above the required 0.50% limit and discrepancies between test results for the same bunkers are being noted.

Where newly stemmed bunkers are found to contain more than 0.50% sulphur, at the very minimum, this is likely to result in time loss and disruption while samples are tested again and in worst case scenarios, the time and costs of de-bunkering and tank cleaning operations may have to be incurred. Failure to react promptly and appropriately may also lead to penalties, fines or detention. It is important that Members are fully aware of what steps should be taken to minimise losses and liabilities.

Fuel sampling and testing for compliance

When stemming bunkers, a representative MARPOL delivered sample should be taken by continuous drip sample at the ship's manifold and witnessed, sealed and signed by the supplier and ship representatives.

Commercial samples should also be taken during bunkering in accordance with customary practice by continuous drip sample at the ship's manifold. Although this is not mandatory, it provides very important information to the ship in terms of fuel handling and quality. In cases where tests of such samples indicate a sulphur level above 0.50%, IMO guidance (MEPC.321(74)) is that the flag State and competent authority at destination, such as Port State Control ("PSC"), should be notified without delay, with copies of such communication also sent to the

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administration under whose jurisdiction the bunker supplier is located and to the bunker supplier. The local authority may require further investigations and is likely to test the MARPOL sample.

The maximum permitted sulphur content in the delivered sample or manifold sample is limited to 0.50%, and there is no permissible tolerance for this under MARPOL. Fuel delivered with a sulphur content of over 0.50% will technically be in breach of MARPOL, though it is still not clear how local authorities will react to small variances in the sulphur content.

Local authorities can also take additional samples in two places in order to verify compliance: downstream of the fuel oil service tank ("in use" sample) and from the ship's storage tanks ("on-board" sample). In accordance with the recognised margin of error provided for this fuel in ISO 4259, the maximum sulphur allowed in these samples is 0.53% (or 0.11% for ECA fuel). However, to reiterate, no margin will be permitted in relation to delivered or manifold samples, which must comply with the 0.50% maximum limit.

Action in case of non-compliance

If delivered fuel is found to contain more than 0.50% sulphur, appropriate action should then be determined on a case-by-case basis. The IMO has issued Guidance for Port State Control on Contingency Measures for Addressing Non-Compliant Fuel Oil (MEPC.1/Circ.881). In line with this, the applicable PSC, the flag State and the ship are expected to work together to agree on the most appropriate solution, which may include consideration of the following:

1. Actions pre-determined in the Ship Implementation Plan;
2. Discharging non-compliant fuel oil to another ship to be carried as cargo or to an appropriate ship-board or land-based facility, if practicable and available;
3. Managing the non-compliant fuel oil in accordance with a method acceptable to the PSC; and
4. Operational actions, such as modifying sailing or bunkering schedules and/or retention of non-compliant fuel oil on-board the ship.

Margin for error

Due to the inherent variability in testing methods, separate tests of the same fuel sample are unlikely to yield precisely the same results each time. For this reason, as discussed above, a tolerance of 0.03% is generally acknowledged in the industry (0.01% for ECA fuel). However, the MARPOL guidance makes it quite clear that there is no permitted margin of tolerance in relation to the delivered or manifold sample and sulphur levels over 0.50% will be considered to be in breach.

An easily foreseeable scenario, therefore, will be where the BDN records a sulphur content slightly below 0.50%, but subsequent testing of commercial samples reveals a sulphur content slightly above that level, or vice versa. In such cases, although the fuel may arguably fall below the 0.50% limit based on application of the margin or tolerance, the authorities may nevertheless treat it as being non-compliant. It is still unclear how the authorities will react to such small variations. Some technical experts advise that several tests should be carried out and the average result taken as the true specification. However, it remains to be seen how the authorities will approach this and the fact remains that there is no margin of tolerance written into MARPOL in respect of delivered or manifold samples.

This mis-match of approaches could also mean that where the ship is found liable for a breach of MARPOL it may be difficult to pass liability to the supplier, who may seek to rely on the industry margin of tolerance. Contractual provisions will need to be aligned to avoid this, as far as this is possible. Prudent bunker purchasers may move to a practice of ordering 0.47% maximum sulphur content bunkers to allow the necessary room for manoeuvre.

The fact that test results are often not received until after the ship has sailed from the bunkering port gives an added layer of complexity to the issue. Parties are likely to encounter logistical issues such as identifying de-bunkering facilities and a source of compliant replacement bunkers on an ad hoc basis. If this is not possible at the ship's next destination then a deviation from the route may be necessary, resulting in additional time loss. In some cases, it is conceivable that a FONAR situation may arise if alternative bunkers cannot be found. Such situations will need to be considered on a case by case basis and guidance should be sought from the Club if required.

Robust enforcement

In short, therefore, Members should be clear that no margin of tolerance will be accepted by the authorities in respect of delivered fuel. The MARPOL sample and any commercial samples which are taken should contain a maximum of 0.50% sulphur content and the authorities are likely to take action if the samples are above this threshold. A margin of tolerance up to 0.53% will only apply to the in use or on-board samples which may be tested by local authorities to verify compliance with the regulations.

A robust approach to compliance is expected by all PSC regimes in accordance with the applicable MARPOL guidelines and Members are advised to be highly vigilant. Incidences of non-compliance should be taken seriously and action taken as appropriate on a case-by-case basis. If in doubt, Members are advised to contact the Managers for guidance.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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