



Thursday 28<sup>th</sup> April 2011

## Bulletin 761 - 04/11 – Californian legal ruling on Low sulphur fuels - USA

Received from our New Jersey office, this legal notice produced by Keesal, Young & Logan provides background and insight into the legal situation of low sulphur fuels in the US state of California.

### QUOTE

#### ***Court Upholds California Low Sulfur Fuel Regulations***

*The Ninth Circuit Court of Appeals recently upheld the right of the state of California to require the use of low sulfur fuels in vessels operating within 24 nautical miles (nm) of its coast. The court, in Pacific Merchant Shipping Association v. Goldstene, 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.*

*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 recognizes the right of states to impose operating restrictions on vessels 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 vessels, if the states believe pollution from vessels is impacting state resources or citizens.*

*At issue in Goldstene were fuel use regulations developed by the California Air Resources Board ("CARB") that CARB has been enforcing since July 2009. These regulations require ocean-going vessels transiting to or from California to use either marine gas oil (MGO) 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 24 nm from shore. The sulfur limits are scheduled to decrease to 0.1% in January 2012.*

*The Pacific Merchant Shipping Association argued California did not have the right to regulate conduct beyond its 3-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 the costs for ship owners 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, "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 California's interest in protecting its citizens justified its extra-territorial regulation of marine fuel use.

The court also found there were no concerns with the imposition of heightened fuel usage requirements on the maritime industry. The court held requiring vessels to switch to cleaner burning fuels 24 nm from California's coast, rather than from 3 nm 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 200 nautical miles seaward of the US and Canadian coasts will become an emission control area (ECA), beginning 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 the CARB fuel regulations contain a sunset clause that provide 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" the sunset clause would be triggered in 2015-- the time when vessels subject to MARPOL Annex VI ECA sulfur restrictions will match the CARB requirements.

Please note 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 vessels calling in the ports of Los Angeles and Long Beach by extending it another 24 nm from the Channel Islands, which lie offshore 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 that is used by the Navy for testing and training, thus interfering with Navy operations. The Sea Range is outside of the current 24 nautical mile zone in which low sulfur fuel is required, but within the Contiguous Zone. Additionally, CARB believes 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 first adopted the rule.

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 vessel leaves the California port. CARB is proposing to reduce the noncompliance fee if a ship buys and utilizes the fuel once it reaches a California port.

Anyone wishing to comment on CARB's proposed amendments should contact CARB as soon as possible, so your comments may be fully considered. CARB is expecting to hold additional workshops on the amendments.

## UNQUOTE

Source of Information:

Frances Keeler at Keesal, Young & Logan  
<http://www.kyl.com/practice-areas/maritime>