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### **The First Year of Fines: Update on the New Marine *Administrative Monetary Penalty System***

Offences under the *Canada Shipping Act 2001* ("CSA 2001") no longer need to be prosecuted in court in order for mariners and vessel owners to feel the financial sting of accidents or momentary lapses in judgment. Fines ranging from \$250 to \$25,000 can now be issued like parking or speeding tickets, with the onus being on the mariner or vessel owner to appeal the fine.

Since the *Canada Shipping Act 2001* came into effect in July of 2007, the new Administrative Monetary Penalty system (or "AMP system") has slowly been coming on-line, providing a quicker, more streamlined way of penalizing mariners and vessel owners for infractions ranging from discharging a pollutant, to hiring unqualified crew or not maintaining machinery, to cheating on an exam. The system is expected to result in more mariners and vessel owners being ticketed for offences, resulting in improved compliance with regulations.

In its first seven months (between May 26, 2008 and December 31, 2008) the Transport Canada issued seven penalties ranging from \$250 to \$5,000. These include:

- \$1,250 to a fishing master for not having a valid fishing master certificate;
- \$1,250 to a crewman for forging a training certificate;
- \$250 to a master for hiring a crewman without the required crewing certificate;
- \$1,250 to a fisherman for discharging a pollutant; and
- \$1,000, \$1,250 and \$5,000 to vessel owners for allowing a non-certificated master to run their vessel.

Records of these offences are contained in the newly established Marine Enforcement Management System ("MEMS") database, which are maintained for 5 years after each offence, and available to the public. While these fines are not overly large at this early point, the MEMS allows for offenders to be tracked, with repeat offenders receiving increasingly large fines under the AMP system.

There are currently 76 offences under the AMP system that can attract fines, with additions expected in the future. Below is a list of some of fines that mariners should take note of:

- Discharging a pollutant: \$1,250-\$25,000;
- Making false entries in bridge or engine logs: \$1,250-\$25,000;
- Cheating on a certification exam: \$600-\$2,400;
- Fraudulently holding a certificate: \$600-\$25,000;
- Obstructing or making false statements to an inspector: \$1,250-\$25,000;
- Failure to mark (or keep marked) the vessel with its official number: \$600-\$10,000;
- Operating vessel without its certificates aboard: \$250-\$5,000;
- Manning a vessel without appropriately certificated crew: \$1,250-\$25,000;
- Obstructing a master in the safe operation of a vessel: \$1,250-\$5,000;
- Failing to ensure machinery meets regulated safety requirements: \$1,250 - \$25,000;
- Carrying too many passengers for vessel's certificate: \$1,250 - \$25,000;
- Crew actions that jeopardize the safety of vessel or other persons aboard: \$1,250 - \$5,000;
- Vandalizing ships machinery or safety equipment: \$1,250 - \$25,000;

- Departing port without clearance: \$6,000 - \$25,000; and
- Disciplining or dismissing employee who, in good faith, reports an actual or believed contravention: \$1,250-\$25,000.

While some of the fines, such as discharging a pollutant, existed previously to the AMP system (and under some regulations had much higher penalties than \$25,000), the offender had to be prosecuted in court in order for Transport Canada to demand a fine. The lengthy time and huge expense involved in court proceedings meant many infractions went uncharged. The new AMP system makes it much easier for Transport Canada to penalize offenders.

Whether a fine will be in the low or high end of the ranges noted above will depend on whether the offence was a first offence, the severity of the offence, and the degree of fault of the offender (accidental versus intentional). In order to help Inspectors apply the AMP system consistently across the country, the Department of Transport has issued a *Compliance & Enforcement Policy* that outlines the process taken when a contravention has occurred. This policy provides several important points.

Firstly, Transport Canada's response will be a "graduated escalation of severity of enforcement". Enforcement will sometimes result in only a verbal warning for minor, first-time offenders. This may escalate to a written warning for less minor offences. For more serious offences, or for repeat offenders, Transport Canada can issue an Assurance of Compliance, or move directly to issuing a penalty (called a "Notice of Violation"). An Assurance of Compliance is essentially a written promise to correct a behavior or situation that is an offence. The Assurance of Compliance gives the offender an opportunity to correct the problem without an AMP fine being issued. However, if the Assurance of Compliance is breached (such as the requirement is not met within the time required by the agreement) the AMP fine is issued automatically and the fine is doubled.

It is important to note that the CSA 2001 states that where a mariner or owner agrees to enter into an Assurance of Compliance rather than accept a violation ticket, the party is deemed to have committed the violation – this is important because a record of such violations is kept for 5 years and perhaps longer. As such, while agreeing to enter into an Assurance of Compliance may avoid having to pay a fine, it does not avoid a record of a violation being kept.

Secondly, inspections that may give rise to observed offences are based on a risk assessment by Transport Canada. Vessels and crew that are considered to be high risk offenders will be inspected more frequently and thoroughly. It is important in this regard to avoid a first offence being recorded because subsequent to the first offence the vessel and crew will come under greater scrutiny.

You can dispute an AMP fine but you must do so within 30 days of receiving the ticket. You can also dispute the facts on which an Assurance of Compliance is based, but this must be done within 48 hours of signing the Assurance (disputing the facts may be important because once an Assurance is signed the party has essentially admitted to alleged facts and these go on their record).

AMP fines are disputed by filing a Notice of Dispute with the Transportation Appeal Tribunal of Canada ("TATC"). The TATC is independent of Transport Canada. If the mariner is unsuccessful in disputing the fine at the first level of the TATC, they can appeal to a three member appeal panel of the TATC. The TATC can reduce the fine to the lowest end of the penalty range, but not below that.

There are several final points mariners and vessel owners should be reminded of as we move through the second full year of the AMP system being in place:

- Employers and vessel owners are liable for the fines issued to their employees;
- Employees have whistle-blower protection, meaning they cannot be reprimanded or dismissed for reporting an infraction, provided they do so in good faith;
- If an AMP fine is appealed, Transport Canada needs only to prove it was “more likely than not” that the offence occurred, rather than the greater typical burden of showing there is no “reasonable doubt” the offence did not occur (this makes it easier for Transport Canada to prove the offence occurred);
- If an Assurance of Compliance is breached, the fine is doubled and the offender cannot use as a defence the fact they exercised reasonable care to avoid the breach.

Mariners and vessel owners are well advised to keep these points in mind. In all, the AMP system is becoming what is was intended to be, a powerful and efficient tool in improving compliance with shipping laws in Canada.

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