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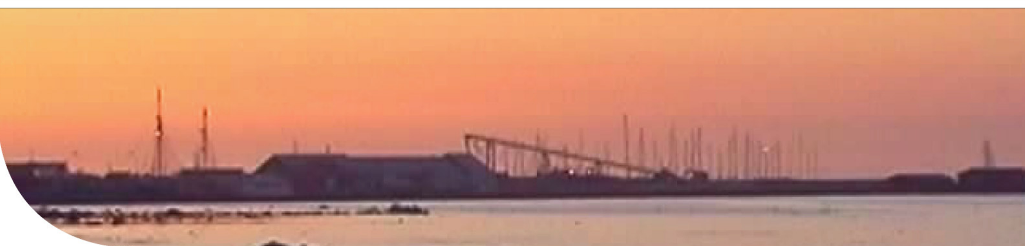


Compensation for contingency in connection with Marine Pollution

The Defence Command Denmark' right to claim compensation for contingency measures taken by the Admiral Danish Fleet Headquarters in connection with marine pollution and/or danger of pollution.

On the 1st of January 2000, responsibility for environmental surveillance at sea was transferred to the Royal Danish Navy. Prior to the 1st of January 2000 the surveillance had been administered ministry for the environment.

The transfer was motivated by a political desire to decrease costs for environmentally related tasks performed by the Navy. The main legal source regulating the maritime environment is the The Maritime Environment Protection Act ("MEPA"). The MEPA provides the Defence Command Denmark (DCD) with the legal basis for imposing administrative fines, in cases of pollution. The authority can also claim expenses incurred for contingency measures taken in connection with pollution incidents or threatening pollution.

The maritime industry has, within the last few years, faced a major increase in claims from the Defence Command Denmark for contingency measures in connection with groundings, collisions bunkering pollution incidents etc.

The procedure for the Admiral Danish Fleet HQ is to deploy an environmental protection vessel when an incident involving pollution or risk of pollution arises e.g. grounding. Depending on the circumstances the environmental protection vessel may stay on scene until the operation, causing a pollution hazard has been completed.

There are examples of environmental protection vessels being released at the request of the owners / operators.

An evaluation, by the Admiral Danish Fleet, of the circumstances of the situation forms the basis for a decision for possible release an environmental vessel. In general it is unlikely that environmental vessels will be released during the actual salvage operation e.g. when the vessel is being pulled off the ground. It is, however, likely that the environmental vessels can be released during lightering of a grounded vessel.

It should be noted that there is no obligation for the Admiral Danish Fleet to release the environmental vessel merely because a request for such release has been made.

However, in the past, keeping the authorities up to date on the development of the operation has proven to be beneficial, e.g. providing salvage plans etc. in order to get the Authorities to release the environmental vessels.

In cases where an actual pollution has occurred it would be difficult to argue against the right of the Admiral Danish Fleet / DCD to impose fines and take contingency measures. One exception is, however, situations where a Master of a vessel "admits" to having illegally discharged a smaller amount of oil-like substances during bunkering or similar activities. The process of collecting evidence is very time consuming and thereby costly for the owner / operator of the vessel. In such cases should the presence of the Admiral Danish Fleet, as well as any contingency measures taken after the master admitting pollution, in our opinion, be considered as excessive and therefore disputed. If the oil – spill has an extend which require any actual anti pollution work, e.g. skimming or the like, being performed obviously it will be difficult to dispute the Navy`s right to do so.

In one "guilty plea" case the task force of the Admiral Danish Fleet HQ kept collecting evidence for almost ten hours after the Master had admitted to discharging of a smaller amount of oil during bunkering and accepted an administrative fine.

Navy practices in administrating the environmental regulation, at a minimum, raises the following issues:

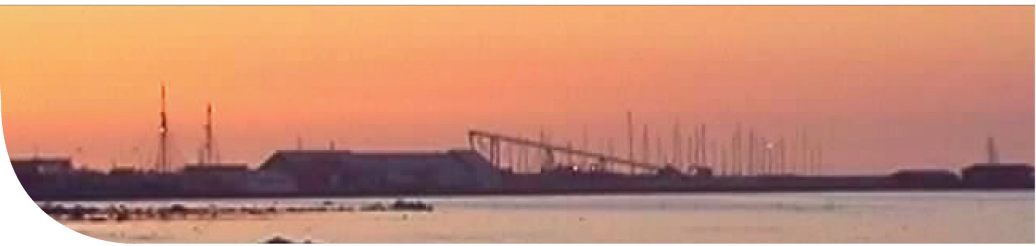
- A) The interpretation of the concept of risk as laid down in the MEPA § 44.
- B) The reluctance in admitting the vessel back to sea in "guilty plea" cases

The relevant article 44 in the MEPA reads:

"In a case where a discharge has occurred or there is a risk that discharge will occur, in non compliance with the law or guidelines issued pursuant to the law or as encompassed with article 58 which results in expenses for contingency measures, all such expenses for reasonable contingency measures must be carried by the owner of the vessel or platform."

The wording of the article gives rise to another issue:

"what are reasonable contingency measures ?"



It would appear that the determinant in deciding whether to deploy an environmental protection vessel or not is the “risk of pollution” as described in § 44. If there is no risk of pollution it is obvious that no vessel should be deployed. It does not appear from practice what is considered to be “reasonable contingency measures”.

In practice environmental protection vessels have been deployed even in cases where the risk for pollution has been so remote that it could only be considered theoretical. In particular, contingency measures appear to have been excessive in cases where the potential pollution would consist of only small amounts of light gas oil.

In cases of grounding and or collision the Master of the vessel is, according to the MEPA § 38, obligated to contact the Admiral Danish Fleet HQ and report the situation. It should be sufficient to pass on the information to “Lyngby Radio” who in turn will relay the information to the Admiral Danish Fleet HQ. Lyngby Radio is maintaining a listening watch on Vhf Ch. 16. It is not considered sufficient to contact the nearest port.

In the “guilty plea” cases the greatest source of annoyance is the reluctance of the authorities to let the vessel sail. All owners / operators are aware of the consequences of a delay. The Danish Maritime Authorities’ “Board of Detention” will hear, free of charge, all cases where a vessel has been detained in virtue of the MEPA and / or law on ships safety at sea. If the detention is deemed unlawful, the owner / operator has a reasonable chance of recouping lost revenue by documenting such loss and claiming it from the authorities. There are examples of cases of older date that have been before the Board of Detention.

The political winds in Denmark are presently blowing towards an increase in the level of fines issued for breach of maritime environmental law.

It is difficult to draw definitive conclusions with respect to the above issues. In our opinion, it is helpful to distinguish between cases of a risk of pollution and actual pollution. In case of the latter a distinction must also be made between a “plea guilty” situation and a situation in which liability is disputed by the alleged polluter.

The MEPA § 42 imposes an obligation on the authorities to avoid unnecessary delay and / or costs. Hence in a “plea guilty” situation where the owner or owners’ representatives clearly communicate guilt to the authorities, the vessel ought to be able to get out to sea quickly. The authorities should also be made aware that the owners intend to try the case before the Board of Detention should the vessel be delayed unnecessarily. Obviously, one should be careful not to “press” the authorities too hard since it could have an unintended effect.

In cases where the pollution liability is disputed, precise and detailed statements should be made by the involved personnel. Obviously these statements should be kept strictly confidential. During the tank sampling by the Admiral Danish Fleet HQ one or more of the ship’s officers should monitor the sampling and carefully note from which tank each sample was taken. The authorities will almost certainly question all involved parties during an investigation into the breach of environmental law. Due to the potential penal implications of the alleged offence, careful consideration should be given to allowing any such questioning without the presence of legal representation.

Finally there is the situation where the risk of pollution is potential, such as in the case of grounding. Generally, in such cases, ensuring that progress status report information flows to the authorities should be highly prioritized. Obviously all information should be passed on subject to self-incrimination and / or procedural values of statements. Information should therefore be strictly factual e.g. salvage plans incl. changes etc. An approved reporting chain should be established and remain in place throughout the process, in order to prevent the release of sensitive information by mistake. Ensuring that appropriate information is shared with the authorities in a timely manner will make it difficult for the authorities to justify the presence of environmental protection vessels after a diving survey etc – provided that the survey does not reveal fractures / cracks in the steel or other similar problems.

It remains to be seen what effect a SCOPIC clause would have on the costs of contingency measures taken by the admiral fleet. One could argue that when a salvage operation is performed on LOF terms and the SCOPIC clause is chosen, contingency measures have already been taken by the salvor. hence the “contingency measures” that could be justified by the Admiral Fleet HQ would be very limited.

If the salvage operation is performed on LOF and the SCOPIC clause is chosen it should be brought to the attention of the authorities. At this stage it is not known to what extend the authorities recognise the relevance of a SCOPIC clause, as it pertains to refraining from maintaining environmental surveillance.