

# THE CRIMINALIZATION OF MARITIME ACCIDENTS AND MARPOL VIOLATIONS IN THE UNITED STATES

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I. INTRODUCTION.....	207
II. BACKGROUND.....	210
III. THE LEGAL AUTHORITY FOR PROSECUTIONS OF ALLEGED ENVIRONMENTAL VIOLATIONS .....	211
A. The Act to Prevent Pollution from Ships.....	212
B. The Clean Water Act .....	214
C. The Refuse Act .....	216
D. National Marine Sanctuaries Act.....	216
E. Migratory Bird Treaty Act.....	217
F. Park System Resource Protection Act .....	217
G. National Wildlife Refuge System Administration Act .....	218
H. False Statement Act .....	218
I. Obstruction and Perjury.....	219
J. Conspiracy .....	220
K. Sarbanes-Oxley Act of 2002 (Obstruction of Justice) .....	220
IV. THE NATURE OF CRIMINAL LIABILITY .....	221
A. Mens Rea .....	222
B. Basic Elements of Criminal Liability .....	222
1. Criminal Negligence.....	222
2. Recklessness .....	223
3. Knowing Conduct.....	224
4. Corporate Liability .....	224
V. PROSECUTIONS FOR VIOLATIONS ARISING FROM MARINE ACCIDENTS .....	226
VI. CRIMINAL INVESTIGATIONS AND PROSECUTIONS IN THE UNITED STATES OF DELIBERATE VIOLATIONS.....	231
A. Coast Guard Investigations.....	231

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B. Dealing with the Coast Guard and DOJ in Pollution Investigations.....	235
CONCLUSION .....	237

## I. INTRODUCTION

The March 24, 1989 grounding of the EXXON VALDEZ on Bligh Reef and the resulting crude oil spill into the pristine waters of Prince William Sound in Alaska triggered the first criminal prosecution of a mariner following a maritime accident.<sup>1</sup> The subsequent prosecution of Captain Joseph Hazelwood, Exxon Shipping Company, and Exxon Corporation forever changed the manner in which government officials, the media, the public, and the maritime industry deal with a maritime accidents that result in significant pollution. Prior to the EXXON VALDEZ there was no thought of criminally prosecuting the mariners, vessels, owners, or operators of the vessel involved in an accident. Now, such prosecutions are common place, not only in the United States, but in countries around the world that have taken their cue from the EXXON VALDEZ incident.<sup>2</sup>

1. The EXXON VALDEZ grounding resulted in the spilling of an estimated 257,000 barrels of oil into Prince William Sound. EXXON VALDEZ Oil Spill Trustee Council, Questions and Answers, <http://www.evostc.state.ak.us/facts/qanda.cfm> (last visited Mar. 24, 2011). Prior to the recent explosion aboard the oilrig DEEPWATER HORIZON in the Gulf of Mexico and the resulting spill, the EXXON VALDEZ disaster was the largest oil spill in American history. Recent scientific estimates indicate as much as 4,900,000 barrels of oil were spilled into the Gulf of Mexico as a result of the DEEPWATER HORIZON disaster. Campbell Robertson and Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, August 3, 2010, at A14.

2. For example, after the sinking of the tanker PRESTIGE and the resulting oil spill, the vessel's master, Apostolos Mangouras, was arrested by Spanish authorities and accused of not cooperating with salvage crews and harming the environment. He was released on €3 million bail, which was upheld by the European Court of Human Rights. Justin Stares, *Industry Shocked by Mangouras Verdict*, LLOYD'S LIST, January 9, 2009, available at <http://www.maritimeasia.net/ll/news/viewArticle.htm?jsessionid+967E339E109330C4AE8>. Additionally, two Indian seafarers were arrested, prosecuted and convicted by South Korean authorities after the tanker HEBEI SPIRIT was "hit by a runaway barge and spilled more than 10,000 tons of crude oil into coastal waters." Michael Ha, *Hebei Spirit Case Getting International Spotlight*, KOREA TIMES, January 21, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/04/116\\_38295.html](http://www.koreatimes.co.kr/www/news/nation/2009/04/116_38295.html). In April 2004, eight crewmembers of the TASMAN SPIRIT were arrested and detained for eight months in Pakistan after the vessel grounded, which resulted in an oil spill near the port of Karachi. The detained crewmembers were eventually released after months of negotiations between the Pakistani

Wide-spread media coverage and the immense scale of major pollution incidents typically results in an adverse political environment, which ensures that any allegations of environmental damage or violations of environmental regulations will be aggressively investigated by U.S. authorities. In addition to the civil liability (civil penalties and fines) that ordinarily flows from any maritime accident, a criminal investigation and charges may also ensue if the accident results in pollution of U.S. navigable waters.<sup>3</sup>

With respect to intentional violations of environmental laws and regulations,<sup>4</sup> the United States government has become increasingly aggressive in pursuing violators of MARPOL and other U.S. environmental laws and criminal statutes.<sup>5</sup> Depending on the circumstances, criminal charges may be brought against individuals (e.g. crewmembers or corporate officers of the vessel owner, operator, or manager), as well as the corporate entities that own, manage, or operate the vessel.

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authorities, the EU, the Greek government, and the IMO. Jeanne Grasso and Allison Fennell, *Criminal Prosecutions and the Maritime Industry—A World-wide Trend*, 2005 INTERNATIONAL OIL SPILL CONFERENCE, <http://www.iosc.org/papers/IOSC%202005%20a159.pdf>.

3. The United States' territorial seas extend twelve miles from its shores. See *United States v. One Big Six Wheel*, 166 F.3d 498, 499 (2d Cir. 1999) (citing Presidential Proclamation 5928 of December 27, 1988, 43 U.S.C. § 1331 (West Supp. 1998), which set the twelve mile jurisdiction limit for U.S. territorial seas); see also Pub. L. No. 104-132, Title IX, § 901(a), 110 Stat. 1317 (1996) (providing, "Congress declares that all the territorial sea of the United States, as defined by Presidential Proclamation 5928 of December 27, 1988, for purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code"). The exclusive economic zone ("EEZ") of the United States is a zone contiguous to the territorial sea extending 200 nautical miles from the baseline from which the territorial sea is determined. See Proclamation No. 5030, 3 C.F.R. 22 (March 10, 1983). Within the EEZ, the United States has control of all economic resources, including fishing, mining, oil exploration and any pollution of these resources. Hence, U.S. authorities can assert jurisdiction over foreign vessels and pursue civil remedies for violations of U.S. law in the EEZ. See, e.g., *United States v. MARSHALLS 201*, No. 06-00030, 2008 U.S. Dist. LEXIS 38627, at \*10 (D. Guam May 8, 2008) (holding that Magnuson-Stevens Fishery Conservation and Management Act, specifically 16 U.S.C. § 1861(d), recognizes U.S. jurisdiction for enforcement of EEZ).

4. In particular, the International Convention for the Prevention of Pollution from Ships (MARPOL 1973/1978), Nov. 2, 1973, 1340 U.N.T.S. 184, as amended by Protocol of 1978, February 17, 1978, 1340 U.N.T.S. 62, enacted in the United States by the Act to Prevent Pollution from Ships of 1980 (the "APPS") (codified at 33 U.S.C. §§ 1901-1915 (2006)).

5. The environmental and other statutes of interest are discussed in further detail in this article, beginning at page 211. It should also be noted that it is not the authors' intention to place criminalization of maritime accidents and intentional violations of MARPOL and other environmental regulations on the same footing. Clearly, intentional pollution is more egregious and should be punished as such.

In today's environmentally conscious world, it is extremely important that everyone involved in the operation of a vessel, as well as their attorneys, is aware of and prepared for possible criminal investigation and prosecution flowing from maritime accidents and intentional violations of MARPOL and other environmental regulations. Indeed, the criminal prosecution and conviction of crewmembers and vessel owners, operators, and managers may result not only in criminal penalties including incarceration and substantial fines, but may also lead to unlimited civil liability under the Oil Pollution Act of 1990 for the owner or operator.<sup>6</sup>

There is an obvious distinction between investigations by the United States Coast Guard ("Coast Guard") or prosecutions undertaken by the Department of Justice ("DOJ") with respect to maritime accidents resulting in marine pollution, and those investigations or prosecutions involving intentional violations of environmental and other laws. However, the investigative and prosecutorial methodology is, for the most part, the same. In either case, there will be, at the very least, an investigation by the Coast Guard into the circumstances of any alleged marine pollution and, if there is any evidence of a violation of U.S. environmental regulations, a likely referral to the Department of Justice for prosecution under the applicable statutes. The U.S. government has not hesitated to file both civil and criminal actions against crewmembers, corporate officers, vessel owners, and managers when a maritime accident resulted in marine pollution.<sup>7</sup> However, as will be discussed in detail below, the U.S. government has been even more aggressively prosecuting crewmembers, vessel owners, and managers when it believes there has been a deliberate violation of

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6. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2720, 2731-2738, 2751-2753, and 2761-2762 (2006); *see* 33 U.S.C. § 2704(c) (2006) (providing, "Subsection (a) [general rule of limits on liability] does not apply if the incident was proximately caused by (A) gross negligence or willful misconduct of, or (B) the violation of an applicable federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail)").

7. For example, in the NORTH CAPE barge spill incident off the coast of Rhode Island, the owning company, its President and Operations Manager were all charged and pleaded guilty to criminal violations of various environmental statutes on the grounds that they knew, or should have known, that the anchoring system on the oil carrying barge was not working properly. In that case, while the President and Operations Manager avoided jail time, they were required to pay substantial fines and bear the stigma of a criminal conviction. The tug master was also charged and convicted but paid a smaller fine.

environmental laws and regulations.

## II. BACKGROUND

Water pollution by ship occurs in one of two ways: 1) as a result of a casualty or accident or, 2) as a result of deliberate conduct by mariners operating vessels. Aside from marine accidents resulting in unintended discharges, the principal source of water pollution, which is addressed by international and U.S. domestic environmental laws and regulations, is the oil-contaminated waste created by the engineering machinery of virtually all ocean-going vessels. During a typical voyage, significant amounts of oily water collect in a ship's bilges. This water must either be disposed of through the vessel's pollution control equipment or discharged on shore. To facilitate the discharge of oil-contaminated water without causing pollution, all ocean-going vessels over 400 registered gross tons are required to be equipped with a pollution-control device known as an oily-water separator or oil-water separator ("OWS").<sup>8</sup> An OWS processes oil-contaminated water that has collected in a ship's bilges and separates the oil-contaminated water into water containing no more than fifteen parts of oil per million ("ppm"), which can be legally discharged overboard, and oil/water mixture of over fifteen ppm, which is retained onboard.<sup>9</sup> In addition, the normal operation of a ship produces a significant quantity of oil sludge through the use of fuel lubricating oil purifiers and other oil handling equipment. This oil sludge, once it has been removed by the purifiers or other machinery, cannot be processed through an OWS. It must be either be off-loaded to shore facilities or burned in the ship's incinerator.

To keep track of the amounts of oil waste produced and later off-loaded or incinerated, vessels are required to maintain an oil record book ("ORB").<sup>10</sup> Vessels also maintain bilge sounding logs and other records detailing the amount of waste-oil the ship produced during the recorded period. In addition, pursuant to applicable flag and ISM requirements<sup>11</sup> a

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8. MARPOL 73/78, Annex I, Regulation 16; 33 C.F.R. § 155.370 (2010).

9. See discussion of the Act to Prevent Pollution from Ships *infra* 212-14, for a detailed description of the relevant laws and implementing regulations establishing this standard.

10. See discussion *infra* p. 213 regarding Coast Guard, MARPOL and APPS treatment of this requirement.

11. International Management Code for the Safe Operation of Ships and for Pollution Prevention (the "ISM Code"), <http://www.imo.org/>.

vessel must maintain passage plans, navigational charts and other records that the Coast Guard and other investigators review either as a regular part of their Port State Control inspections or after any accident or casualty. Suffice it to say, there is no shortage of documentary evidence onboard a vessel that a Coast Guard investigator may rely on in investigating a marine pollution incident, whether it arises from an accident or unintended casualty, or from intentional conduct.<sup>12</sup> As will be discussed below, the Coast Guard is quite sophisticated in using such materials when investigating pollution incidents.

### III. THE LEGAL AUTHORITY FOR PROSECUTIONS OF ALLEGED ENVIRONMENTAL VIOLATIONS

Regardless of whether a pollution incident arises from a marine casualty or a deliberate attempt to circumvent applicable laws, Coast Guard personnel will investigate any allegation or suspicion of wrongdoing, and DOJ prosecutors will not hesitate to pursue criminal charges when reasonable cause exists to believe that a crime has been committed. Hence, any discussion of potential liability after a pollution incident should begin with a review of the environmental and criminal statutes upon which the U.S. government has relied in past prosecutions of crewmembers, corporate personnel, vessel owners, or managers.<sup>13</sup>

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12. The Coast Guard is granted broad authority when searching vessels and questioning crewmembers on the high seas and in waters over which the United States has jurisdiction. 14 U.S.C. § 89(a) (2006) (“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States.”). U.S. courts have further held that Fourth, Fifth and Sixth Amendment protections are substantially limited when the Coast Guard exercises its authority under 14 U.S.C. § 89(a). *See, e.g., United States v. Aikins*, 946 F.2d 608, 613 (9th Cir. 1990) (holding that “[t]he Fourth Amendment was not ‘understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.’”) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)); *United States v. Juda*, 46 F.3d 961, 966, 1995 AMC 1996 (9th Cir. 1995) (holding that with respect to extraterritorial application of United States law, the Due Process Clause of the Fifth Amendment requires only proof of a nexus between the alleged illegal conduct and effects in the United States).

13. The Coast Guard will initially conduct investigations into alleged violations of the relevant pollution statutes or regulations. If the Coast Guard determines there is sufficient evidence of a crime, it will formally request via letter to DOJ that it commence a criminal investigation of the vessel, crewmembers, owner or manager.

### *A. The Act to Prevent Pollution from Ships*

The primary statute for the criminal enforcement of conduct that results in pollution of the United States' navigable waters is the Act to Prevent Pollution from Ships ("APPS").<sup>14</sup> Congress enacted APPS in 1980 to implement the 1973 International Convention for the Prevention of Pollution From Ships ("MARPOL") into U.S. legislation; it is the statute most commonly used and cited by the U.S. government in its efforts to prevent pollution and to secure convictions for intentional MARPOL violations.

MARPOL is the result of a determination by various maritime nation-states that ships transiting international waters are a significant source of pollution, and that this problem can be effectively addressed only if each of the participating nations passed domestic laws to enforce MARPOL's rules and regulations. APPS made MARPOL applicable to vessels over 400 tons registered in the United States or operating in United States' territorial waters. APPS authorized the United States Coast Guard, now an agency within the Department of Homeland Security, to promulgate regulations implementing MARPOL.<sup>15</sup> The Coast Guard has promulgated various administrative regulations to enforce the provisions of MARPOL and APPS.<sup>16</sup> APPS and the Coast Guard's implementing regulations are intended to assure compliance with MARPOL and to prevent pollution in United States' territorial waters.<sup>17</sup>

MARPOL, APPS, and the Coast Guard's implementing regulations provide that an oil/water mixture containing no more than fifteen ppm may legally be discharged directly to the sea.<sup>18</sup> The regulations also require that vessels be equipped with an oil-sensing monitor commonly referred to as an Oil Content Meter ("OCM") which sends a signal to a three-way valve to close if the mixture it is sampling is over fifteen ppm and thus prevents discharge to the sea of water containing more than fifteen ppm.<sup>19</sup> Oil residue created by an OWS must be properly disposed of by, for example, collecting it in a tank for disposal upon a ship's entry into port or by

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14. Act to Prevent Pollution from Ships of 1980, 33 U.S.C. §§ 1901-1915 (2006).

15. See 33 U.S.C. § 1907(b) (2006).

16. See, e.g., 33 C.F.R. pt. 151 (2010); 33 C.F.R. pt. 155 (2010).

17. See 33 U.S.C. § 1907 (c)(1) and (c)(2) (2006).

18. 33 C.F.R. § 151.10 (a)(5) and (b)(3) (2010); MARPOL Annex I, Reg. 9(4).

19. 33 C.F.R. § 151.10(a)(6) and (b)(5) (2010); MARPOL Annex I, Reg. 16.

incinerating the oil residue in the vessel's incinerator.<sup>20</sup>

To assure that oily water is properly processed and disposed of, Coast Guard regulations and MARPOL both require that the responsible ship's officer—usually the chief engineer or other high-ranking engineer—record every operation involving the transfer of oil-contaminated waste on a tank-to-tank basis in an ORB.<sup>21</sup> For example, if oil-contaminated water is pumped from a ship's bilges to a collecting tank before processing in an OWS, the responsible officer must record the date of that pumping operation, the time of day when the operation began and ended, and the quantity of oil-contaminated water pumped from the bilges to the tank. Similarly, upon processing the oil contaminated water in the OWS, the responsible officer must record the time and date of that operation, the quantity of oil-contaminated water processed, and the latitude and longitude at which the operation began and ended. Any transfer or disposal of oil sludge must also be recorded in the ORB.<sup>22</sup> MARPOL also requires that the responsible officer record the occurrence of either of two emergencies that justify the legal bypassing of the OWS: (1) were necessary to secure the safety of the ship or life at sea; (2) where the discharge results from damage to the ship or its equipment.<sup>23</sup> MARPOL further requires that the responsible officer sign or initial his name after every entry in the ORB.<sup>24</sup>

Section 1908(a) of APPS makes it a class D felony to knowingly violate any provisions of MARPOL.<sup>25</sup> A class D felony is punishable by up to six years imprisonment and a fine of up to \$250,000 for an individual and \$500,000 for a corporation.<sup>26</sup> A vessel violating a provision of MARPOL may be arrested and sold to satisfy any fine or penalty under the Act.<sup>27</sup>

It is generally acknowledged that the U.S. government has no

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20. 33 C.F.R. § 151.10 (2010).

21. 33 C.F.R. § 151.25(a).

22. 33 C.F.R. § 151.25(a), (d) (2010); MARPOL Annex I, Reg. 20.

23. 33 C.F.R. § 151.25(g) (2010); MARPOL Annex I, Reg. 20.

24. 33 C.F.R. § 151.25(h) (2010); MARPOL Annex I, Reg. 20.

25. 33 U.S.C. § 1908(a) (2009).

26. 18 U.S.C. § 3581(b)(4) (2006); 18 U.S.C. § 3571 (b)(3) (2006); 18 U.S.C. § 3571(c)(3) (2006).

27. 33 U.S.C. § 1908(d) (2006).

jurisdiction over discharges by foreign-flag vessels in international waters<sup>28</sup> that violate of MARPOL.<sup>29</sup> Despite this limitation, the Coast Guard aggressively investigates and prosecutes violations of APPS and other environmental statutes by charging crewmembers and corporate entities for presentment of a false ORB, for obstruction of justice, conspiracy and witness tampering, often using these offenses as a means to extend its reach beyond U.S. territorial waters.<sup>30</sup>

### **B. The Clean Water Act**

The Federal Water Pollution Control Act (the “Clean Water Act”)<sup>31</sup> is another important and frequently used United States statute relating to the pollution of US waters. The Clean Water Act was passed by Congress to establish goals for eliminating the release of toxic chemicals and other substances and to, hopefully, eliminate water pollution by a targeted year.

The Clean Water Act’s provisions prohibit the discharge of any pollutant by “any person” into U.S. navigable waters, except where permitted.<sup>32</sup> A “knowing” violation of the Clean Water Act is a felony,<sup>33</sup> a

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28. “International waters” are those waters lying outside the United States’ territorial seas. *United States v. Louisiana*, 349 U.S. 11, 23 (1968). U.S. territorial seas extend twelve miles from its shores. *See also* *United States v. One Big Six Wheel*, 166 F.3d 498, 499 (2d Cir. 1999) (citing Presidential Proclamation 5928 of December 27, 1988, 43 U.S.C. § 1331 (West Supp. 1998), which set the twelve mile jurisdiction limit for U.S. territorial seas)

29. *See, e.g.*, *United States v. Abrogar*, 459 F.3d 430, 434-35 (3d Cir. 2006) (“Congress made § 1908(a)’s criminalization of MARPOL violations applicable only to . . . foreign ships in three specific circumstances: (1) ‘while’ the ship is within ‘the navigable waters of the United States’; (2) ‘while’ in the ‘exclusive economic zone of the United States’; and (3) when at a port or terminal of the United States.”); *see also* Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, TUL. MAR. L.J. 149, 153 (2007-2008).

30. *See, e.g.*, *United States v. Royal Caribbean Cruise Lines*, 11 F. Supp. 2d 1358, 1361, 1998 AMC 1817 (S.D. Fla. 1998) (defendant accused of violating the False Statement Act by making false entries in the ORB, even though the alleged pollution occurred in Bahamian waters). Further discussion of the False Statements Act is found *infra* at page 221.

31. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1274, 1281-1301, 1311-1330, 1341-1346, 1361-1377, 1381-1387 (2006).

32. 33 U.S.C. § 1362(5) (2006) defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” The Clean Water Act also defines “person” so as to include “any responsible corporate officer.” 33 U.S.C. § 1319(c)(6) (2006).

33. 33 U.S.C. § 1319(c)(2) (2006).

“negligent” violation is a misdemeanor.<sup>34</sup> The Clean Water Act also prohibits the discharge of oil or hazardous substances into U.S. navigable waters or into the waters of the contiguous zone in such quantities as the President determines may be harmful.<sup>35</sup> Failure to report a discharge is a Class E felony punishable by imprisonment of up to five years.<sup>36</sup> The Clean Water Act also provides that the term “person” includes any “responsible corporate officer.”<sup>37</sup> In short, the Clean Water Act has been treated by federal courts as a public welfare statute<sup>38</sup> and is rigorously enforced against both individuals and corporations.<sup>39</sup>

The Clean Water Act has evolved extensively over the years, with amendments added in 1961, 1966, 1970, 1972, 1977 and 1987. The most significant amendments to the Clean Water Act are the amendments made pursuant to the federal Oil Pollution Act of 1990 (“OPA 90”).<sup>40</sup> OPA 90 was passed by Congress in the wake of the EXXON VALDEZ oil spill and sets forth requirements designed to prevent marine pollution and to define and increase the parameters of civil liability for oil spills in the territorial waters of the United States. Most importantly, OPA 90 amends and supplements the Clean Water Act’s civil and criminal penalty provisions.

In addition to civil damages that a party responsible for the pollution may face, the Clean Water Act, as amended by OPA 90, imposes civil penalties of up to \$25,000 per day or up to \$1,000 per barrel of oil upon parties responsible for illegal discharges.<sup>41</sup> Parties failing or refusing to comply with any government regulation or removal orders issued by the President may be liable for penalties of up to \$25,000 per day or three times the government’s cleanup cost under its liability trust fund.<sup>42</sup> Moreover, if a party’s conduct is deemed willful or grossly negligent, these penalties are increased to at least \$100,000, but not more than \$3,000 per

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34. *Id.* § 1319(c)(1).

35. *Id.* § 1321(b)(3).

36. 33 U.S.C. § 1321(b)(5) (2006); 18 U.S.C. § 3559(a)(4) (2006).

37. 33 U.S.C. § 1319(c)(6) (2006).

38. *United States v. Cota*, No. 08-00160, 2008 U.S. Dist. LEXIS 65911, at \*5-6 (N.D. Cal. July 21, 2008) (“the [Clean Water Act] properly creates a public welfare offense”).

39. 33 U.S.C. § 1362(5) (2009) and 33 U.S.C. § 1319(c)(6) (2009).

40. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2720, 2731-2738, 2751-2753, 2761-2762 (2006).

41. 33 U.S.C. § 1321(b)(7)(A) (2006).

42. *Id.* § 1321(b)(7)(B)-(C).

barrel of discharged oil.<sup>43</sup>

### C. *The Refuse Act*

Under section 407 of the Rivers and Harbors Appropriation Act of 1899 (“Refuse Act”),<sup>44</sup> any discharge of refuse of any kind from a vessel into U.S. navigable waters is prohibited.<sup>45</sup> A violation of the Refuse Act is a Class A misdemeanor, and a person guilty of a violation of the Act may be fined up to \$25,000 per day or imprisoned for no less than thirty days and no more than one year.<sup>46</sup> The courts have interpreted the term “refuse” broadly under the Refuse Act to include discharges of oil and petroleum.<sup>47</sup> Violations of the Refuse Act are strict liability offenses requiring no proof of intent or negligence.<sup>48</sup> Accordingly, a person can be convicted of a misdemeanor violation under the Refuse Act based solely upon proof that the person placed any banned substance into navigable waters of the United States.

### D. *National Marine Sanctuaries Act*

The National Marine Sanctuaries Act (“NMSA”)<sup>49</sup> is a federal statute that authorizes the Secretary of Commerce to designate and protect areas of the marine environment as national marine sanctuaries. The NMSA makes it a criminal offense to “destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary.”<sup>50</sup> Hence, this statute may apply where a marine pollution incident causes damage to a designated marine sanctuary. For example, the NMSA was among several wildlife and sanctuary protection statutes listed in the complaint filed by the United States against the owners and managers of the M/V COSCO BUSAN in the civil action brought after the vessel allided with the

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43. *Id.* § 1321(b)(7)(D).

44. Rivers and Harbors Appropriation Act of 1899 U.S.C. §§ 401, 403-405, 406-409, 411-416, 418 (2006).

45. 33 U.S.C. § 407 (2006).

46. *Id.* § 411 (2006); 18 U.S.C. § 3559(a)(6) (2006).

47. *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224, 230, 1966 AMC 1122 (1966) (noting that “refuse” within the meaning of 33 U.S.C. § 407 includes “all foreign substances and pollutants apart from those specifically excepted by statute.”).

48. *See* United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974) (“the Refuse Act has commonly been termed a strict liability statute.”).

49. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445(c)(1) (2006).

50. *Id.* § 1436(1).

San Francisco Bay Bridge in November of 2007.<sup>51</sup>

A person convicted under the NMSA may be fined or imprisoned for not more than six months.<sup>52</sup> In addition, for violation of the statute or a regulation issued thereunder, the NMSA provides for civil penalties of no more than \$100,000 for each violation, with each day the violation continues constituting a separate offense.<sup>53</sup>

#### ***E. Migratory Bird Treaty Act***

The Migratory Bird Treaty Act (“MBTA”)<sup>54</sup> is a federal statute implementing a number of bilateral treaties between the United States and other nations to protect migratory birds. The MTBA makes it unlawful at any time, and by any means or manner, to kill any migratory bird included in the terms of the treaties.<sup>55</sup> Conviction of a violation of the statute is a misdemeanor punishable by fines up to \$15,000 per violation and imprisonment for no more than six months.<sup>56</sup> This statute is commonly invoked in addition to the APPS and other environmental statutes when a pollution incident results in the death of members of a protected migratory bird species.<sup>57</sup>

#### ***F. Park System Resource Protection Act***

The Park System Resource Protection Act<sup>58</sup> is another federal statute that may be invoked by federal prosecutors when marine pollution affects an area designated as a national park. The Park System Resource Protection Act makes any person who “destroys, causes the loss of, or injures any park system resource . . . liable to the United States for response costs and damages resulting from such destruction, loss or injury.”<sup>59</sup> It also

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51. United States v. M/V COSCO BUSAN, 557 F. Supp. 2d 1058, 2008 AMC 1360 (N.D. Cal. 2008).

52. 16 U.S.C. § 1437(c)(2)(A) (2006).

53. 16 U.S.C. § 1437(c)-(d) (2006).

54. Migratory Bird Treaty Act, 16 U.S.C. § 703-712 (2006).

55. *Id.* § 703(a).

56. *Id.* § 707(a).

57. *See, e.g.*, United States v. Cota, No. 08-0160, 2008 U.S. Dist. LEXIS 85186, at \*1-2 (N.D. Cal. Oct. 7, 2008) (corporate manager charged with violations of both the Clean Water Act and Migratory Bird Treaty Act).

58. 16 U.S.C. § 19jj (2006).

59. *Id.* § 19jj-1(a).

makes any vessel “liable in rem for such destruction, loss, or injury.”<sup>60</sup> While the Park System Resource Protection Act does not provide for criminal penalties, it can and has been used as a statutory basis for recovery by the United States in instances where a vessel allegedly caused pollution that harmed a national park resource.<sup>61</sup>

### ***G. National Wildlife Refuge System Administration Act***

The National Wildlife Refuge System Administration Act (“Refuge Act”)<sup>62</sup> was passed by Congress for the “purpose of consolidating the authorities relating to . . . areas that are administered by the Secretary [of the Interior] for the conservation of fish and wildlife.”<sup>63</sup> The Refuge Act prohibits anyone from disturbing, injuring, removing, destroying or otherwise harming any real or personal property of the United States or taking or possessing any fish, bird, mammal or other wild animal within those areas protected by the Refuge System.<sup>64</sup> A person who knowingly violates or fails to comply with the provisions of the Refuge Act or any regulations issued thereunder is subject to fines and possible imprisonment of up to one year.<sup>65</sup> A person who otherwise violates the statute is also subject to fines and possible imprisonment not to exceed 180 days.<sup>66</sup>

### ***H. False Statement Act***

Federal statutory law (commonly referred to as the “False Statement Act”)<sup>67</sup> makes it a felony to knowingly or willfully make or use “any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”<sup>68</sup> The potential penalties for this offense include fines and imprisonment for up to five years.<sup>69</sup> The

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60. *Id.* § 19jj-1(b).

61. *United States v. M/V COSCO BUSAN*, 557 F. Supp. 2d 1058, 1060, 2008 AMC 1360 (N.D. Cal. 2008).

62. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd-668ee (2006).

63. 16 U.S.C. § 668dd(a)(1).

64. *Id.* § 668dd(c).

65. *Id.* § 668dd(f).

66. *Id.*

67. 18 U.S.C. § 1001 (2006).

68. *Id.* § 1001(a).

69. *Id.*

Coast Guard and the DOJ have increasingly relied upon the False Statement Act to enforce MARPOL and APPS when the suspected pollution occurred outside of U.S. territorial waters. Suspected violators may be charged with making a false entry or omission in the ORB presented to the Coast Guard, in violation of both APPS and the False Statement Act. To sustain a conviction for a violation under this statute, the government must prove beyond a reasonable doubt: (1) that a statement or concealment was made; (2) the information was false; (3) the information was material; (4) the statement of concealment was made knowingly and willfully; and (5) the statement or concealment falls within the jurisdiction, i.e. area of an authorized function, of the Coast Guard.<sup>70</sup>

Falsity through concealment exists where disclosure of the concealed information is required by a statute, government regulation, or form.<sup>71</sup> Also, a false statement about, or concealment of, any prohibited discharge is a violation of both APPS and the Clean Water Act (if the discharge occurs in U.S. navigable waters), since both impose the duty to report.

### ***I. Obstruction and Perjury***

A number of U.S. criminal statutes provide severe penalties for obstructing justice, providing false information to a government representative, and providing false testimony under oath to a grand jury. 18 U.S.C. § 1505 makes it a federal crime to corruptly, or by threats of force or any threatening communication, influence, impede or obstruct or attempt to influence, impede or obstruct the administration of the law under any pending proceeding before a an agency or department of the United States.<sup>72</sup> Persons convicted of violating this statute face potential imprisonment of no more than five years and potential fines.<sup>73</sup>

U.S. authorities in particular have vigorously investigated and prosecuted individuals and corporations suspected of tampering with witnesses in connection with an on-going investigation of pollution and illegal discharge incidents.<sup>74</sup> Under 18 U.S.C. § 1512, anyone who uses physical force or “knowingly uses intimidation, threatens, or corruptly

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70. *Cota*, No. 08-00160, 2008 U.S. Dist. LEXIS 65911, at \*7.

71. *See id.* at \*8 (finding Coast Guard had statutory authority to request completed physical examination forms, which contained false information).

72. 18 U.S.C. § 1505 (2006).

73. *Id.*

74. 18 U.S.C. § 1512(a)(1)-(d)(2006).

persuades another person” with an intent to “hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission, of a federal offense,” shall be fined or imprisoned up to ten years, or both.<sup>75</sup> Ship owners or operators are frequently charged with violating both 18 U.S.C. § 1512 and 1505 under the principle of *respondeat superior* when the Coast Guard or DOJ believes that crewmembers have hindered or attempted to hinder a Coast Guard investigation.

### ***J. Conspiracy***

There are three conspiracy statutes that U.S. investigators and the DOJ may potentially rely upon to prosecute those involved in violations of environmental laws.<sup>76</sup> Of these three statutes, the most relevant to this discussion is found at 18 U.S.C. § 371, which makes it a Class E felony for two or more persons to conspire “either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose.”<sup>77</sup> Each such person convicted of an offense under this provision is subject to fines or imprisonment up to five years, or both.<sup>78</sup> This is a very handy “add on” charge for prosecutors if they determine that several crewmembers or crewmembers and company officials conspired to obstruct justice, destroy evidence, or tamper with witnesses.<sup>79</sup>

### ***K. Sarbanes-Oxley Act of 2002 (Obstruction of Justice)***

Prosecutors in the United States have recently begun utilizing the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”)<sup>80</sup> as an additional tool for prosecuting defendants suspected of violating environmental laws and regulations. Specifically, Sarbanes-Oxley includes a provision making it a

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75. *Id.* § 1512(a)-(b).

76. 18 U.S.C. §§ 371-373 (2006).

77. 18 U.S.C. §371; 18 U.S.C. § 3559(5) (2006).

78. *Id.* § 371; 18 U.S.C. § 3559(5).

79. Press Release, Env’t & Natural Res. Div., U.S. Dep’t of Justice, Tanker Company Sentenced for Concealing Deliberate Vessel Pollution (Mar. 21, 2007) (on file with author), available at [http://www.justice.gov/opa/pr/2007/March/07\\_enrd\\_171.html](http://www.justice.gov/opa/pr/2007/March/07_enrd_171.html) (Overseas Shipping Group Inc. was sentenced by the district court to pay a \$27.8 million criminal fine and \$9.2 million community service payment for violations of the Clean Water Act, APPS, conspiracy, false statements, and obstruction of justice.).

80. Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519 (2006).

Class A felony to knowingly “alter, destroy, mutilate, conceal, cover up, falsify or make a false entry in any record, document or tangible object” with an intent to “impede, influence or obstruct any matter within the jurisdiction of any department or agency of the United States.”<sup>81</sup> The DOJ has found the Sarbanes-Oxley obstruction provision to be useful in the prosecution of oil pollution.

For example, in *United States v. Jho* the U.S. brought charges against Kun Yun Jho, chief engineer aboard an ocean-going oil tanker owned and operated by Overseas Shipholding Group, Inc., including charges that he violated the Sarbanes-Oxley obstruction provision.<sup>82</sup> The district court denied defendant’s motion to dismiss the Sarbanes-Oxley charge.<sup>83</sup> Although Sarbanes-Oxley was originally intended to set new and enhanced standards for the boards and management of all public companies and accounting firms, U.S. authorities have realized that they now have a powerful law enforcement tool that potentially exposes a wrongdoer to up to twenty years of imprisonment. The threat of charging an engineering officer or other crewmember under this section, rather than the False Statements Act with its lower potential jail time, generally serves the purpose of pressuring the individual to admit wrongdoing and possibly implicate the vessel owners and/or managing company.<sup>84</sup>

#### IV. THE NATURE OF CRIMINAL LIABILITY

Whether pollution results from an accident or an intentional violation of MARPOL or other environmental statutes, the Coast Guard and other investigators will initially focus their investigation on the vessel’s crewmembers. The Court Guard will also investigate the role and knowledge of the vessel owner, operator, manager and individual corporate officer if the evidence so dictates.

In applying this traditional principle, one would expect that in maritime accidents resulting in pollution (as distinguished from intentional

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81. *Id.*

82. *United States v. Jho*, 465 F. Supp. 2d 618, 625, 635, 2008 AMC 87 (E.D. Tex. 2006) (defendant charged with violating 18 U.S.C. § 1519).

83. *Id.* at 636 (holding that the only proof required to convict defendant of violating 18 U.S.C. § 1519 was proof that he had made false entries in the ORB with the “intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of the United States Coast Guard.”).

84. See discussion of corporate vicarious liability and the doctrine of respondeat superior *infra* at pages 224-27.

violations of environmental regulations), criminal liability would be predicated on the individual's mental status: criminal negligence, recklessness and willful ignorance, or willful or knowing conduct. Unfortunately, this basic concept of law and fairness relating to minimal intent requirements has been abandoned in the application of public welfare statutes.<sup>85</sup>

### *A. Mens Rea*

It is a well established principle in U.S. federal and state courts that a person must have criminal intent or mens rea in order to be convicted of a crime.<sup>86</sup> The principle inherited from common law was to not criminalize an individual's conduct absent a showing of evil intent or motive. Judicial interpretations of criminal statutes have long incorporated the concept of mens rea, even if that element was not specifically provided for in the relevant statute. While the mental state necessary to trigger criminal liability will vary by statute, it is an essential element that must be proved for conviction of any criminal offense.

### *B. Basic Elements of Criminal Liability*

#### 1. Criminal Negligence

U.S. criminal law generally recognizes a distinction between criminal and civil negligence. American courts adjudicating common law criminal cases have time and again held that the civil negligence standard of failure to use reasonable care is not enough to impose criminal liability. Courts instead require a showing of criminal negligence before an individual may

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85. A public welfare statute is intended to protect the public at large from "potentially harmful or injurious items" and may render criminal certain conduct that a person should reasonably know is "subject to stringent public regulation and may seriously threaten the community's health or safety." *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). In many instances, obtaining a conviction under a public welfare statute does not require proof of any *mens rea* element. See *Morrisette v. United States*, 342 U.S. 246 (1952) (discussing and distinguishing public welfare statutes from traditional criminal statutes). For a more detailed discussion of public welfare statutes in the pollution context, see Nathaniel D. Shafer, Emily S. Fuller, Allison L. Frumin, *Environmental Crimes*, 46 AM. CRIM. L. REV. 471 (2009).

86. See *Morrisette*, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

be convicted of a criminal offense.<sup>87</sup> In contravention of this long-recognized distinction, the criminal negligence provisions of the Clean Water Act have been construed to require proof of only simple negligence rather than gross negligence.<sup>88</sup> Obviously, the level of proof necessary to establish simple negligence is far less than necessary to establish gross negligence. Thus, conviction under criminal negligence provisions of the Clean Water Act is almost a foregone conclusion.

## 2. Recklessness

Reckless conduct requires a higher level of culpable conduct than negligence. By definition, negligence is a failure to perceive risk. Recklessness, on the other hand, entails the perception and conscious disregard of a risk.<sup>89</sup> As a general rule, proof of reckless conduct is required to impose criminal liability for a more serious offenses while less serious offenses require only proof of criminally negligent conduct.<sup>90</sup>

Hence, proving recklessness, even under the environmental statutes, is a more daunting task for prosecutors. Prosecutors seeking to prove recklessness find convictions under this theory more difficult to obtain. Criminal charges based on recklessness, however, are frequently used as bargaining chips to obtain guilty pleas for offenses requiring only proof of negligence. Such a plea may result in the imposition of fines, the vessel owner's and/or their underwriters' cooperation in cleaning up and restoring the affected area, and potentially unlimited liability under the OPA.<sup>91</sup>

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87. See, e.g., *United States v. Dominguez-Ochoa*, 386 F.3d 639, 641 (5th Cir. 2004) (noting that under relevant Texas statute “[a] person acts with criminal negligence . . . with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint” (emphasis omitted)).

88. *Hanousek*, 176 F.3d at 1121 (concluding that “Congress intended that a person who acts with ordinary negligence in violating the [Clean Water Act] may be subject to criminal penalties.”).

89. *Dominguez-Ochoa*, 386 F.3d at 641.

90. See *United States v. Gomez-Leon*, 545 F.3d 777, 791 (9th Cir. 2008) (discussing distinction between criminal negligence as *mens rea* element for conviction for negligence homicide and recklessness as *mens rea* element necessary to achieve a conviction for manslaughter).

91. 33 U.S.C. § 2704(c)(1) (2006) provides for potentially unlimited liability for a violation of the OPA when gross negligence or willful misconduct is present. See discussion *supra* note 5.

### 3. Knowing Conduct

Many environmental statutes that do not specify a requisite mental state are enforced as strict liability statutes in order to further the public welfare goals discussed above. Cognizant of this trend, Congress expressly included a knowledge element as part of the mens rea requirement in some environmental statutes, in order to prevent the criminalization of innocent conduct. To be convicted under these statutes, the defendant must knowingly—meaning intentionally and voluntarily—commit the prohibited act.<sup>92</sup> It is not necessary that the accused be aware that their actions were illegal.<sup>93</sup> Moreover, some courts have held that willful ignorance on the part of the accused is the equivalent of knowledge for purposes of satisfying the mens rea requirement.<sup>94</sup> This concept is readily applied to those instances where an accused, normally a supervisory figure, deliberately overlooks or consciously avoids learning of criminal conduct or activity that should have been obvious to him.

### 4. Corporate Liability

It is a well established principle in U.S. criminal law that a corporation may vicariously incur criminal liability (referred to as “respondeat superior” liability) for the actions of employees acting within the scope of their employment and for the intended benefit of the employer.<sup>95</sup> This is also true even when the employee acts in a manner contrary to the desires and/or established procedures and practices of the corporation. In addition to vicarious criminal liability for employee conduct, a corporation may incur direct criminal liability for the acts or omissions of directors and officers.<sup>96</sup> If corporate policies, instructions, guidance, or directions cause

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92. See, e.g., § 1908(a) of APPS (codified at 33 U.S.C. § 1908(a) (2006)) (“A person who knowingly violates the MARPOL Protocol . . . this chapter, or the regulations issued thereunder commits a class D felony.”).

93. See *United States v. Int’l Minerals and Chems. Corp.*, 402 U.S. 558, 563 (1971).

94. See cases cited in Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1382-90 (1992).

95. See, e.g., *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 309, 2009 AMC 153 (2d Cir. 2009) (affirming jury conviction of corporate owner for violations of APPS and false entries in oil record book by crewmembers); see also *N.Y. Cent. and Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979).

96. The U.S. Department of Justice has made very clear its intent to prosecute corporations based on the acts of their employees, noting that “[c]orporations do not act alone but through the acts of individuals and [those individuals] must also be held accountable.” Press Release, Env’t

or contribute to a marine accident or intentional violation of environmental statutes, the corporation will face the real prospect of direct criminal liability. For example, a vessel owning company may be criminally liable if it is shown in court that its officers and directors knew of crew incompetence, or failed to properly train the crews or implement and monitor compliance programs that would prevent marine pollution incidents or accidents.

In intentional violations of environmental statutes, a corporation may be directly criminally liable if crewmembers intentionally bypass the OWS, by submitting a false record, such as the ORB, to the authorities to cover up an illegal act, or lie to authorities with the knowledge and consent of the corporation or someone acting on behalf of the corporation.<sup>97</sup> Furthermore, corporate actions (depending upon privity, knowledge, and control) can result in individual criminal liability for corporate officers as well as for the corporation.<sup>98</sup>

The well-established “Responsible Corporate Officer Doctrine” imposes criminal liability on corporate officers when it is shown they were in a position to know about or prevent the criminal act at issue but did nothing to stop the conduct. Hence, corporate officers face the prospect of criminal liability for violations of environmental statutes, even if the officer did not participate in the underlying illegal activity. The harsh consequences of this doctrine mean that a corporate officer may be found criminally liable based solely on his or her position of responsibility and regardless of actual conduct or knowledge.

The Responsible Corporate Officer Doctrine is of particular significance and concern for vessel operating and/or management personnel. Under this doctrine, if an officer or managing corporate employee actively engages in acts or omissions that result in a spill incident or an intentional violation of environmental regulations, that individual may be charged with crimes under any of the various environmental

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& Natural Res. Div., U.S. Dep’t of Justice, Cruise Ship Engineers Indicted Today for Making False Log Books to Conceal Dumping of Waste Oil (Dec. 18, 2003) (on file with author), available at [http://www.justice.gov/opa/pr/2003/December/03\\_enrd\\_709.htm](http://www.justice.gov/opa/pr/2003/December/03_enrd_709.htm).

97. *Ionia Mgmt.*, 555 F.3d at 309.

98. See, e.g., *United States v. Park*, 421 U.S. 658, 673-74 (1975) (holding a corporate officer could be found guilty of violating statute intended to protect public welfare, even though he did not actively participate in the violation, because that officer “‘had a responsible relation to the situation,’ and ‘by virtue of his position . . . had . . . authority and responsibility’ to deal with the situation” that caused the violation.).

statutes discussed above. For instance, if a company manager knowingly hires an incompetent master or crewmember who is then responsible for an oil spill, fails to comply with the ISM Code, or fails to implement systems to monitor the vessel personnel's compliance with the ISM requirements or environmental regulations, both the company and the manager are at risk. If an individual at the vessel's operating company knows, or should have known, of a defect in the vessel's equipment, which causes or exacerbates a spill incident or an intentional violation of the regulations, that individual and the operating company are both at risk of criminal prosecution.<sup>99</sup>

The fact that an owning, operating, or managing company and its personnel are located outside the United States has little effect on liability. United States prosecutors have displayed surprising ingenuity, doggedness, and resilience in pursuing those responsible for spill incidents in the United States, even minor ones. Under the right circumstances, United States prosecutors can (and will) confiscate vessels to collect fines and penalties, charge and hold vessel personnel pending investigation and trial, and charge owning, operating, and management companies and responsible corporate officers with violations of environmental regulations, even if such individuals are outside the United States. It should be borne in mind that the United States is a signatory to a number of extradition treaties with other countries and, if necessary, prosecutors can invoke such treaties to bring a responsible individual to the United States to stand trial for violations of environmental criminal statutes.<sup>100</sup>

## V. PROSECUTIONS FOR VIOLATIONS ARISING FROM MARINE ACCIDENTS

As noted above, the U.S. government has been increasingly aggressive

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99. For example, in *United States v. Rivera*, a corporate officer was prosecuted after the MORRIS J. BERMAN oil spill in Puerto Rico. The defendant, general manager Rivera, had directed the crew of the tug EMILY S to transport the barge MORRIS J. BERMAN from San Juan, Puerto Rico to Antigua, despite warnings that the towing wire was in a seriously deteriorated condition. 131 F.3d 222, 223, 1998 AMC 609 (1st Cir. 1997). During the voyage, the tow wire parted and the barge ran aground, resulting in an oil spill. Rivera was convicted and appealed to the First Circuit Court, who overturned based on the determination that the evidence adduced by the prosecution was "insufficient to establish that Rivera knew that the vessel's condition was 'likely to endanger the life of an individual.'" *Id.*

100. A complete list of the nations who are signatories to extradition conventions or treaties to which the United States is a party can be found at 18 U.S.C. § 3181 (2006). Currently, there are over 100 nations with whom the United States has some form of agreement for extradition. *Id.*

in prosecuting vessel owners and managers for pollution related offenses even when these incidents arise from maritime accidents. Vessel owners and managers confronted with the adverse (and sometimes tragic) results of a maritime accident have found that in addition to potential civil liability, they and their corporate officers face the potential for criminal sanctions for violations of environmental protection laws.

What should seafarers, owners, operators, and their attorneys expect to encounter after a marine pollution incident when investigators arrive at the scene?

Initially, it is important for all crewmembers and other corporate officials on the scene to remember that law enforcement personnel (e.g. Coast Guard, FBI, state police, DOJ, etc.) deployed to investigate potential violations of environmental regulations, intentional or otherwise, will focus on making a determination as to whether a crime has been committed. If law enforcement officials believe that a crime has in fact been committed, they will also, as part of the investigation, make an initial determination as to who should bear responsibility for the alleged violation. Hence, the law enforcement officers' first priority will be to gather evidence in support of any subsequent criminal prosecution.

In the event of an oil spill, the investigation will most certainly involve representatives from the Coast Guard, EPA, DOJ, and sometimes, depending on the location of the spill, agents from the FBI, state police, state EPA, and occasionally local authorities. Each department or agency is separate and distinct and pursues its own agenda in accordance with guidance from that agency's chain of command. The Coast Guard and the Civil Division of the EPA excepted, these various law enforcement agencies are solely concerned with investigating and, where necessary, supporting prosecution of, any alleged violations of environmental or other statutes. The FBI and state police gather facts and evidence, which in turn are passed on to the DOJ and/or state or local authorities for use in determining whether to bring criminal charges. Prosecutors may initially play an advisory or supervisory role in any criminal investigation of a marine pollution incident. However, they are ultimately responsible for making the decision to prosecute alleged violations.

Unlike the FBI or state police, the Coast Guard has a dual mission. The Coast Guard is tasked with investigating the incident, supervising and ensuring that proper cleanup takes place, and determining the cause of the underlying accident as well as whether any corrective administrative action is necessary. With respect to possible criminal charges, the Coast Guard

must turn over any evidence of criminal conduct it discovers in the course of a casualty or pollution investigation to the U.S. Attorney.<sup>101</sup> Crew members, shipowners, operators, managers, and their attorneys should never forget the Coast Guard's criminal investigatory role. All such individuals should deal with Coast Guard casualty investigators and criminal investigations division personnel in a professional manner, but bear in mind that that these agencies are engaged in law enforcement as well as marine safety.

An example of a maritime accident that resulted in criminal charges is the case that arose from the allision of the M/V COSCO BUSAN with the San Francisco Bay Bridge in November 2007, while the vessel was outbound from her berth at the Port of Oakland, California.<sup>102</sup> As a result of the allision, the M/V COSCO BUSAN spilled over 50,000 gallons of bunker fuel oil into San Francisco Bay.<sup>103</sup> No injuries or fatalities occurred, but the spill contaminated 26 miles of shoreline and caused the death of countless migratory birds. The spill also "temporarily closed a fishery on the bay, and delayed the start of the crab-fishing season."<sup>104</sup>

The U.S. government subsequently charged the vessel's manager, Fleet Management Ltd. "with criminal violations of the Clean Water Act and the Migratory Bird Treaty Act as well as three counts of false statement and two counts of obstruction of justice."<sup>105</sup> Specifically, the DOJ alleged Fleet Management "concealed ship records and created materially false, fictitious and forged documents with an intent to influence the Coast

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101. "Prosecution in the federal courts for violations of those laws or regulations enforced by the Coast Guard which provide, upon conviction, for punishment by fine or imprisonment is a matter finally determined by the Department of Justice." 33 C.F.R. § 1.07-90(a) (2010). Hence, the Coast Guard must turn over all evidence it collects in the course of its investigations to DOJ so that the DOJ can make its determination and, if applicable, prosecute the offender in criminal proceedings.

102. National Transportation Safety Board Accident Report, NTSB/MAR-09/01, Allision of Hong Kong-Registered Containership M/V Cosco Busan with the Delta Tower of the San Francisco-Oakland Bay Bridge (November 7, 2007), <http://www.nts.gov/publictn/2009/MAR0901.pdf>.

103. *United States v. M/V COSCO BUSAN*, 557 F. Supp. 2d 1058, 1059, 2008 AMC 1360 (N.D. Cal. 2008).

104. NTSB/MAR-09/01, at page xi.

105. *United States v. Cota et al*, 2008 U.S. Dist. LEXIS 85186, at \*1-2 (N.D. Cal. 2008). The United States also brought civil charges against Fleet Management for the same conduct, as well as criminal charges against the pilot. The United States also sought forfeiture of the vessel pursuant to both the Park System Resource Protection Act and the NMSA. *See* 16 U.S.C. § 1911(b) (2006); 16 U.S.C. § 1437(e)(1) (2006).

Guard's investigation."<sup>106</sup> These forged documents allegedly included "a false berth-to-berth passage plan for the day of the crash . . . created after the incident at the direction of shore-side supervisors and with the knowledge of the ship's master."<sup>107</sup> In addition, it was charged that a ship's officer "falsified the ship's official navigational chart to show fixes that were not actually recorded during the voyage."<sup>108</sup>

On August 13, 2009, Fleet Management pleaded guilty to these charges and was ordered to pay \$10 million for its role in the spill, of which \$2 million was designated to fund marine environmental projects in San Francisco Bay.<sup>109</sup> Fleet Management was "also ordered to implement a comprehensive compliance plan that . . . include heightened training and voyage planning for ships engaged in trade in the United States. The new training and voyage planning requirements [are] subject to auditing and the court's supervision."<sup>110</sup>

The COSCO BUSAN is not an isolated instance of the U.S. government seeking criminal sanctions for a marine pollution accident. On December 6, 2005, the cargo ship M/V SELENDANG AYU was carrying a cargo of soybeans from Tacoma to China when it developed engine trouble near the Aleutian Islands.<sup>111</sup> The crew shut down the engine to repair a crack in the cylinder liner. Despite working around the clock for several days, the crew was unable to re-start the engine resulting in the vessel foundering in high seas and winds and ultimately breaking into two parts.<sup>112</sup> The M/V SELENDANG AYU's crew radioed for help and was

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106. Press Release, Env't & Natural Resources Div., U.S. Dep't of Justice, Shipping Firm Sentenced to Pay \$10 Million for Causing Cosco Busan Oil Spill and Coverup (February 19, 2010) (on file with author), *available at* <http://www.justice.gov/opa/pr/2010/February/10-enrd-168.html>.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* See also United States v. Fleet Mgmt. Ltd., No. 08 Civ. 0160 (N.D. Cal. February 22, 2010) (judgment in criminal case requiring Fleet Management to "develop, adopt and implement and fund certain remedial measures to include an Enhanced Compliance Program" subject to court supervision).

111. Press Release, Env't & Natural Resources Div., U.S. Dep't of Justice, Ship Operator Pleads Guilty and Sentenced to Pay \$10 Million Related to Charges Arising from Grounding in the Aleutians (August 22, 2007) (on file with author), *available at* [http://www.justice.gov/opa/pr/2007/August/07\\_enrd\\_644.html](http://www.justice.gov/opa/pr/2007/August/07_enrd_644.html).

112. As typically occurs after a marine casualty, the Monday morning pundits characterized the decision to attempt to repair the ship at sea as "ridiculous" and "suicidal," especially given the

eventually evacuated from the distressed vessel. The vessel subsequently grounded and spilled approximately 340,000 gallons of bunker fuel, as well as several thousand tons of soybeans, into the Alaska Maritime National Wildlife Refuge.<sup>113</sup> IMC Shipping Co. Pte. Ltd. (“IMC”), a Singaporean corporation and the vessel’s operator, and Ayu Navigation, the vessel owner, together with their Protection & Indemnity underwriter, spent over \$100 million in cleaning up the spill and \$2.5 million in reimbursing the State of Alaska for its spill related expenses.

IMC was charged with criminal violations of the Refuse Act and the MBTA for allegedly killing thousands of migratory birds as a result of the grounding and spill. On August 27, 2007, IMC pleaded guilty to these charges and was sentenced to pay a total criminal penalty of \$10 million, which included “\$4 million in community service, specifically \$3 million to conduct a risk assessment and related projects for the shipping hazards of the area where the [vessel] went aground . . . and \$1 million for the Alaska Maritime National Wildlife Refuge.”<sup>114</sup> In addition, the vessel’s master was charged under 18 U.S.C. §1001 with making a false statement during the casualty investigation.<sup>115</sup>

As these two instances illustrate, the U.S. government is clearly prepared and willing to pursue criminal sanctions for pollution and other consequences arising from maritime accidents, regardless of the fault of the vessel owner, operator or manager, or crew. Moreover, an oil spill may result in onerous financial penalties and the court ordered implementation of new training programs and other protective measures.<sup>116</sup>

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fact that the vessel might have been able to travel at least part of the way to the nearest port of refuge at Dutch Harbor. Mark Thiessen, *Alaska gets nearly \$850,000 from Selendang Ayu owners*, ALASKA JOURNAL OF COMMERCE (May 1, 2009), [http://www.alaskajournal.com/stories/050109/loc\\_img\\_news003.shtml](http://www.alaskajournal.com/stories/050109/loc_img_news003.shtml). The truth of the matter is that the crew acted heroically under very difficult circumstances.

113. *Id.*

114. Press Release, Env’t & Natural Resources Div., U.S. Dep’t of Justice, Ship Operator Pleads Guilty and Sentenced to Pay \$10 Million Related to Charges Arising from Grounding in the Aleutians (August 22, 2007) (on file with author), *available at* [http://www.justice.gov/opa/pr/2007/August/07\\_enrd\\_644.html](http://www.justice.gov/opa/pr/2007/August/07_enrd_644.html).

115. *See* United States v. Kailash B. Singh, No. 05 CR 0025 (D. Alaska 2005).

116. *See, e.g.,* United States v. Fleet Mgmt. Ltd., No. 08 Civ. 0160 (N.D. Cal. February 22, 2010).

## VI. CRIMINAL INVESTIGATIONS AND PROSECUTIONS IN THE UNITED STATES OF DELIBERATE VIOLATIONS

In theory, Coast Guard investigations into allegedly intentional violations of environmental laws or regulations should be fairly similar to investigations into pollution arising from maritime accidents. However, recent experience demonstrates there is a critical difference. This difference is the willingness—one might say excessive enthusiasm—of the Coast Guard to engage in aggressive and sometimes unfair tactics when investigating allegedly intentional violations, and to impose real and substantial prejudgment penalties before a vessel owner or manager is even charged with a criminal violation.

### A. *Coast Guard Investigations*

Since the tragic events of September 11th, the Coast Guard has undertaken a comprehensive program, pursuant to a directive issued by the Office of Homeland Security, of boarding all foreign flag-state vessels calling U.S. ports.<sup>117</sup> As a result of these security measures, there has been heightened scrutiny of vessels and vessel records and logs. Such scrutiny, rightly or wrongly, has led to a rash of vessel and crew detentions, as well as criminal allegations and charges against vessel officers, crewmembers, owners, operators, managers, and officers of the corporate entities that own the vessels. When a vessel enters U.S. ports or territorial waters, the Coast Guard is authorized to examine the vessel's equipment and records,<sup>118</sup> including the ORB, to determine whether the vessel has operable pollution prevention equipment, whether it poses any danger to United States ports and waters, and whether the vessel has discharged any oil-contaminated water in violation of MARPOL, APPS, or other applicable federal regulation.<sup>119</sup> In conducting these inspections, the Coast Guard generally relies (unless Coast Guard personnel possess prior knowledge of illegal activity, e.g. through a report from a whistleblower) on a ship's ORB and

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117. Homeland Security Presidential Directive 13, also entitled National Security Presidential Directive 41 (Dec. 21, 2004), [http://www.dhs.gov/xabout/laws/gc\\_1217624446873.shtm](http://www.dhs.gov/xabout/laws/gc_1217624446873.shtm).

118. 14 U.S.C. § 89(a) (2009) (“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States.”).

119. 33 C.F.R. §§ 151.23(a), (c) (2009).

statements of the crew to determine whether the vessel's oil-contaminated water is being properly handled and disposed of.<sup>120</sup>

In the early days of OWS investigations, Coast Guard investigators and prosecutors focused their efforts on alleged bypasses of shipboard OWS equipment through the use of flexible hoses and flanges in order to effect illegal overboard discharges. However, Coast Guard investigators have become increasingly cunning in their approach to investigating possible MARPOL violations. Investigators and prosecutors utilize sophisticated tactics and forensic testing to determine whether an OWS bypass has occurred. For instance, the Coast Guard has developed a forensic analysis to "fingerprint" oil samples from holding tanks on the vessel and its overboard piping and valves. The Coast Guard also uses computer programs to compare the vessels' bilge sounding logs and ORB entries to the expected waste oil production of the vessel, its tank capacities, and incinerator use and capacity, in order to determine whether the ORB entries are correct.<sup>121</sup> Coast Guard investigators are also very skilled in determining and locating the use of other bypass methods and cross-over connections.

However, the government's most effective "secret weapon" in the war against MARPOL violations is the use of "whistleblowers," most of whom are current or former crewmembers. The government is authorized under APPS to pay whistleblowers up to one-half of the assessed fine.<sup>122</sup>

Additionally, the Coast Guard has established an Oily Water

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120. *Id.* § 151.23(c).

121. The Coast Guard maintains and operates the Marine Safety Laboratory in Groton, Connecticut. The Coast Guard's Investigative Service will frequently forward samples of water or oil taken from a ship during an inspection to the Marine Safety Laboratory for analysis. The results of that analysis may then be used as evidence against a vessel, vessel owner or operator or crewmember if the DOJ charges them with violations of an environmental statute. Such evidence, however, is not guaranteed to be admissible. In a recent ruling, a U.S. district court excluded the expert testimony of a Marine Safety Laboratory chemist on the basis that it was confusing and irrelevant and therefore insufficient to meet the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). *United States v. Mylonakis*, No. 09 CR 0492 (S.D. Tex. 2010) (Minute Order striking testimony of Kristi Juare).

122. 33 U.S.C. § 1908(a) (2006). A significant example is the case *United States v. OMI Corp.* OMI eventually pled guilty to falsifying documents to hide violations of APPS. The "whistleblowers" involved received \$2.1 million of an assessed criminal fine of \$4.2 million, a substantial sum for mariners who normally earn about \$1,000 a month. Press Release, Env't & Natural Resources Div., U.S. Dep't of Justice, Fiscal Year 2004 Summary of Litigation Accomplishments (on file with author), available at [http://www.justice.gov/enrd/ENRD\\_2004\\_Lit\\_Accomplishments.html](http://www.justice.gov/enrd/ENRD_2004_Lit_Accomplishments.html).

Separation Systems Task Force (“OWSSTF”) to examine a wide range of issues related to oily water separation equipment, including the operation of the OWS, the vessel’s incinerator, OCM, piping and valves. In short, Coast Guard personnel and other law enforcement personnel now scrutinize the use and functionality of oily water separation systems more carefully than ever before. U.S. authorities have made it clear that they will seek jail sentences for Masters, Chief Engineers and, occasionally, Second Engineers of vessels and crews committing pollution offenses, whether they occur in U.S. waters or not.<sup>123</sup> Even if no pollution incident has actually occurred, Coast Guard and U.S. prosecutors have, upon mere “discovery” of a flexible hose or other “suspicious looking” equipment in the engine room, commenced a Grand Jury investigation seeking to prosecute the presentation of an ORB containing “false” entries.<sup>124</sup>

Where reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or penalty for a MARPOL violation under APPS, the Coast Guard has the authority to request the U.S. Customs and Border Protection revoke the required Customs clearance for a vessel seeking to leave U.S. territorial waters, effectively detaining the vessel.<sup>125</sup> In such instances, Coast Guard officials

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123. See *United States v. Abrogar*, 459 F.3d 430, 433 (3d Cir. 2006). In *Abrogar*, Noel Abrogar, the chief engineer aboard the vessel MAGELLAN PHOENIX, pled guilty to a violation of APPS based on his failure to maintain an accurate ORB. *Id.* at 432-33. The pre-sentence report recommended he receive a six level enhancement under the relevant provisions of the Sentencing Guidelines. *Id.* at 433. Abrogar appealed the six level enhancement, and the Third Circuit Court of Appeals concluded that since the United States did not have jurisdiction to prosecute an individual on a foreign-flagged vessel for failing to maintain an accurate ORB outside of U.S. waters under APPS, the alleged discharges could not be considered relevant conduct under the Guidelines. *Id.* at 434-37. Hence, the six level enhancement could not apply. *Id.* In combination with the Fifth Circuit’s decision in *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008), the *Abrogar* decision has been interpreted to require foreign flagged vessels to maintain an accurate ORB. See *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 308, 2009 AMC 153 (2d Cir. 2009).

124. Charges brought under U.S. law typically surround alleged omissions and false statements contained in the ORB and other vessel records, as well as any false statements that the crew may make in connection therewith. See 33 U.S.C. § 1908(a) (2006); 18 U.S.C. § 1001 (2006); 18 U.S.C. § 371 (2006); 18 U.S.C. § 1505 (2006); 18 U.S.C. § 1512 (2006); 18 U.S.C. § 1519 (2006). Furthermore, if the alleged illegal pollution activity occurs in U.S. jurisdictional waters, APPS, the Clean Water Act, OPA 90 and other statutes described in this Article will likely be included in the charges listed in any information or indictment.

125. “If any ship subject to the MARPOL Protocol, Annex IV to the Antarctic Protocol, or this chapter, its owner, operator, or person in charge is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury,

and U.S. prosecutors have demanded security in exchange for release of the vessel in the range of \$500,000 to \$2 million, usually in the form of a corporate surety bond or cash, rather than the customary Letter of Undertaking.

Currently, there is a major dispute between the Coast Guard and the defense bar as to the interpretation of the language of 33 U.S.C. §1908(e) in respect to what the Coast Guard can demand as security before it releases the customs hold. In the view of the defense bar, the language of 33 U.S.C. § 1908(e) does not permit the Coast Guard authority to demand anything more than a bond or cash security. The Coast Guard, on the other hand, has taken the position that this section authorizes it to demand whatever conditions “the Secretary” (usually the Captain of the Port where the vessel is located) deems appropriate. In this regard, the Coast Guard has and continues to demand security agreement terms and conditions that include: detaining crewmembers for an indefinite period of time; requiring the owner or operator to pay the detained crewmembers’ wages, per diems for food and hotel rooms for an indefinite period of time;<sup>126</sup> waiving various fundamental constitutional rights, freedoms, civil liberties, and personal protections afforded to the vessel owner, operator, and individual crewmembers; and, stipulating to the authenticity of documents and things seized from a suspected vessel by the Coast Guard or produced by the vessel owner and operator. In short, the Coast Guard and DOJ force many vessel owners and operators to actually fund the investigations against them, as well as the ensuing prosecution.<sup>127</sup>

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upon the request of the Secretary, shall refuse or revoke the clearance required by section 60105 of title 46. Clearance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.” 33 U.S.C. § 1908(e) (2006).

126. The proper procedure for handling crewmember witnesses is to designate each such individual a material witness pursuant to 18 U.S.C. § 3144 (2006), which permits the Coast Guard to temporarily detain material witnesses. However, such detainment requires the Coast Guard to file an application with a judicial officer, who would then review the government’s allegations to ensure that only witnesses having relevant and material knowledge are detained. *Id.* If the application is granted, it is the government’s responsibility to pay the crewmembers’ lodging, meals, incidental expenses and witness fees. 28 U.S.C. § 1821 (2006). Of late, there is a trend whereby the Coast Guard will detain eight to fifteen crewmembers, most of who are not necessary for their investigation. Detention of such witnesses at the vessel owner or operator’s expense serves to increase operating costs substantially, which is in practical terms a pre-judgment punishment not authorized by the applicable statutes.

127. Costs for maintaining, housing, and paying for detained crewmembers, together with repatriation expenses for such crewmembers and their replacements, may be upwards of \$500,000. This is basically an ad-hoc pre-judgment penalty that cannot be recovered if the owner

Nothing in the language of 18 U.S.C. § 1908(e) grants the Coast Guard any legal basis for demanding the onerous terms and conditions that are presently part of standard security agreements. Consequently, the Coast Guard's legal authority in this regard is now being challenged through administrative proceedings pursuant to the Administrative Procedures Act and, undoubtedly, the challenge will ultimately find its way to the courts.<sup>128</sup>

The Coast Guard also has the authority to interview crewmembers, to issue subpoenas for the appearance of witnesses or the production of documents and evidence pertaining to violations of MARPOL, APPS, or any other applicable federal statute or regulation.<sup>129</sup> If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, the Coast Guard is empowered to deny the vessel entry into a United States port or detain the vessel until it is determined that the vessel does not present an unreasonable threat to the marine environment.<sup>130</sup> Coast Guard inspectors have additional enforcement tools at their disposal against vessels and persons found to be in violation of applicable laws, including the imposition of civil penalties.<sup>131</sup>

### ***B. Dealing with the Coast Guard and DOJ in Pollution Investigations***

When interacting with a law enforcement investigation team, an attorney responding to the scene of a maritime incident should initially focus his or her efforts on gathering the facts and persuading the investigators, if possible, that no crime has been committed. This approach can be daunting, especially when whistleblowers are involved, as the Coast Guard will typically embrace the whistleblowers' version of events.<sup>132</sup> If the attorney concludes that the investigators are convinced a crime has been committed, the attorney's focus should necessarily shift to protecting his or

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and operator prevail at trial or the investigation is dropped by the government.

128. A person suffering a legal wrong due to agency action is entitled to judicial review after final agency action. 5 U.S.C. § 702 (2006); *see also* Conservation Law Fund. v. Busey, 79 F.3d 1250, 1261 (1st Cir. 1996) (citing 5 U.S.C. §§ 702 as basis for subject matter jurisdiction in reviewing agency action).

129. 33 C.F.R. § 151.07(d) (2009).

130. *Id.* § 151.08.

131. 33 U.S.C. § 1908(b) (2006); 46 U.S.C. § 60105 (2006); 33 C.F.R. § 1.07 (2009) (civil penalties).

132. There have been several recent cases where juries and/or the presiding Judge has acquitted the defendants because they simply did not believe the testimony of the whistleblowers.

her clients' due process and other legal rights.

First and foremost, the attorney should remind all on-board crewmembers that they cannot be forced to speak to law enforcement officers investigating the cause of the incident.<sup>133</sup> Shipowning companies, operators, and managers should ensure that company officials do not engage in coercion of mariners, such as forcing them to give potentially incriminating statements to law enforcement officials.

Moreover, every individual under investigation, including crewmembers, onshore personnel and corporate officers, should be aware of their right to consult with counsel and to have counsel present when interviewed by law enforcement officials. Ideally, each individual crewmember under investigation would retain his or her own attorney. Crewmembers involved in the incident should be interviewed as soon as possible after the incident occurs or the investigation is commenced. The attorney must then make an initial determination as to whether his or her crewmember client bears any risk of criminal liability for a pollution related offense or other criminal conduct. If there is no risk of personal liability, the attorney, after securing an agreement of non-prosecution with the prosecutor, may make his or her client available to the prosecutors for an interview with the attorney in attendance. On the other hand, if the crewmember faces a real risk of criminal liability, then the attorney should advise the crewmember to invoke his constitutional rights under the Fifth Amendment to the U.S. Constitution. Law enforcement officials will readily understand if an attorney informs them his client is not willing to speak with them, as this is a normal practice in any criminal investigation.

A shipowning, operating, or managing corporation should secure separate legal representation when there is a possibility that it will be held criminally liable for the incident.

These insights are of crucial importance to any vessel owner, operator, manager, or crewmember operating in U.S. waters today. Over the last decade, U.S. authorities have frequently commenced comprehensive investigations that involved the "arrest" of innocent crewmembers deemed "material witnesses," often removing them from ships or hotel rooms in shackles and throwing them in jail until released by a judge.<sup>134</sup>

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133. U.S. CONST., amend. V.

134. Such practices by the Coast Guard are in direct contravention of Article 230 of the United Nations Convention on the Law of the Sea ("UNCLOS"). Art. 230 provides:

Monetary penalties and the observance of recognized rights of the accused

In summary, the most important thing for crewmembers, vessel owners, operators and managers to remember in the context of maritime accidents, is to be prepared for the possibility that they may become witnesses, subjects or targets of a criminal investigation. In this regard, the companies and their personnel must be prepared, in advance, to deal with government investigations. Advance training in ISM and ISPS compliance, knowing and adhering to applicable environmental regulations and procedures, maintaining a well-defined compliance program and a separate response plan, and advance preparation in dealing with potential government investigations will invariably lessen the risk to the owner, operator, manager, and crewmembers of criminal prosecution, fines, and administrative actions.

### CONCLUSION

For better or worse, the criminalization of maritime accidents and intentional MARPOL violations has become a fact of life for shipowners, operators, managers, and crewmembers, not only in the United States, but in a number of countries around the world. The world's population grows more environmentally aware and intolerant of maritime accidents resulting in pollution of the environment or intentional pollution through MARPOL violations. As a result, the prosecution of polluters—even the innocent ones—does not appear to offend the public's sensibilities, with the exception of those who become the target of such prosecutions, and those members of the maritime community who believe that they are being over-regulated as an industry and disproportionately punished for conduct that

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1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
  2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
  3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.'’ While UNCLOS has not been ratified by the United States, the United States does recognize UNCLOS as a codification of international customary law. Hence, the United States already honors the majority of the provisions of the convention.

would be overlooked or treated as a civil violation in other industries. Under the circumstances, the maritime industry needs to carefully implement and monitor compliance procedures, practices, and regulations to minimize the risk of maritime accidents and pollution. At the same time, the industry must, through its various trade organizations, actively petition governments and regulatory bodies around the world to de-criminalize maritime accidents and the unreasonable detention of seafarers in the absence of criminal behavior.