

## **U.S. AUTHORITIES' INVESTIGATION AND PROSECUTION OF ALLEGED BY-PASSING OF OILY WATER SEPARATION SYSTEMS**

Since the tragic events of September 11th, 2001, pursuant to a directive of the Office of Homeland Security, the U.S. Coast Guard has undertaken a comprehensive program of boarding foreign flag-state vessels calling U.S. ports. As a result of the new heightened security measures, there has been a significant increase in the scrutiny to which vessels, and its records/logs, are being inspected. Such scrutiny, rightly or wrongly, has led to a rash of vessel/crew detentions, as well as criminal allegations and charges against vessel Owners, Operators, Managers, Officers and crew.

Additionally, the U.S. Coast Guard has recently established an Oily Water Separation Systems Task Force (OWSSTF) to examine a wide range of issues related to oily water separation equipment and its use on vessels in U.S. waters. Coast Guard and other law enforcement personnel are scrutinizing the use and functionality of oily water separation systems more carefully than ever before, and U.S. authorities have made it clear that they will seek jail sentences for Masters and Chief Engineers of ships committing pollution offenses, or falsifying records, such as the vessel's Oil Record Book (ORB). Quite often, even if no pollution incident has occurred, the Coast Guard and U.S. prosecutors, upon the mere "discovery" of potential bypassing paraphernalia such as a flexible hose or suspicious fittings and piping in the engine room, will commence a Grand Jury investigation seeking to prosecute an alleged illegal bypassing of the oily water separation system and/or the presentation of an Oil Record Book containing "false entries."

### **U.S. Government's *Modus Operandi***

Coast Guard investigators and prosecutors appear to have focused their efforts on alleged bypasses of shipboard oily-water separation equipment through the use of flexible hoses, fittings, unauthorized piping and flanges installed for the purpose of effecting illegal overboard discharges. While the U.S. government has no jurisdiction over unauthorized discharges by foreign-flag vessels in international waters in violation of MARPOL, the Department of Justice (DOJ), through referring agencies, such as the Coast Guard and Environmental Protection Agency (EPA), does aggressively investigate and prosecute possible illegal discharges in US waters, false Oil Record Book entries, obstruction of justice, conspiracy and witness tampering.

### **Criminal Sanctions**

There is a broad array of criminal sanctions available to the U.S. government in the investigation and prosecution of cases involving a suspected criminal offense. Recently, there have been an number of investigations and prosecutions involving alleged MARPOL and other environmental offenses. The United States treats such violations seriously, and has demonstrated that it will spare no expense in the investigation and prosecution of such matters.

For your guidance, we provide below a general outline of applicable laws and statutes which U.S. Federal prosecutors generally look to in charging a vessel Owner, Operator, Manager,

Officers or, in many circumstances, individual crewmembers in alleged by-pass of the OWS system investigations.

A. The Act to Prevent Pollution from Ships (APPS)

The Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1911, adopts as U.S. law the provisions of the International Convention for the Prevention of Pollution from Ships ("MARPOL"). Various administration regulations have been promulgated by the Coast Guard to enforce the provisions of MARPOL and the APPS. See 33 C.F.R. pts. 151 and 155.

Under 33 U.S.C. § 1908(a), it is a class D felony to knowingly violate the provisions of MARPOL. A class D felony is punishable by up to 10 years imprisonment, and a fine of up to \$250,000 for an individual, and \$500,000 for a corporation, for each violation. 33 U.S.C. § 1809(a); 18 U.S.C. § 3559(a)(4); 18 U.S.C. § 3571 (b)(4); 18 U.S.C. § 3571(c)(3). A vessel violating a provision of MARPOL may be arrested and sold to satisfy any fine or penalty under the Act 33 U.S.C. § 1908(d). There is also a civil fine provision in this regulation that can be invoked in addition to the criminal fines mentioned above, 33 U.S.C. § 1908 (b). Under this section, if it is found that a party has violated the Marpol protocol, a civil fine of \$25,000 for each violation can be assessed. In addition, if it is found that a vessel owner and/or operator/manager has presented a false statement or writing to the authorities, directly or vicariously through the crewmembers on the vessel, such owner and/or operator manager can be fined an additional \$5,000 for each such false entry. Each day that the above-mentioned violations continue constitutes a separate violation for which the fines can be assessed.

The United States Coast Guard has recently been requesting security as provided for under APPS for alleged MARPOL violations in amounts ranging from \$500,000 for each alleged criminal violation and \$250,000 for each alleged civil violation. In some recent prosecutions the Coast guard has demanded, and obtained, security in the amount of \$2.5 million. In many instances, the Coast Guard has demanded that the vessel owner and/or operator provide a corporate surety bond or cash for the security requested, rather than the customary *Letter of Undertaking*.

B. Security for Release of Vessels Under the Act to Prevent Pollution from Ships (APPS)

In addition to the security mentioned above, under 33 U.S.C. § 1908(e), the United States may revoke the U.S. Customs clearance of a vessel and detain it where reasonable cause exists to believe that the ship, its owner, operator or person in charge may be subject to a [criminal] fine or civil penalty for a MARPOL violation under the APPS.

C. The Clean Water Act

The Clean Water Act (CWA) 33 U.S.C. § 1251, *et seq.* prohibits the discharge of any pollutant by any person into navigable waters of the United States, 33 U.S.C. § 1311(a). A "knowing" violation of the Act is a felony. A "negligent" violation is a misdemeanor. The Act also prohibits the discharge of oil or hazardous substances into the navigable

waters of the United States, or into the waters of the US "contiguous zone" (200 nautical miles) ...in such quantities as may be deemed to be harmful. 33 U.S.C. § 1321(b)(3). Failure to report a discharge is a felony punishable by imprisonment of up to five years. 33 U.S.C. § 1321 (b)(5). The Clean Water Act also provides that the term "person" includes a "responsible corporate officer." 33 U.S.C. § 1319 (c)(6), (see, discussion of Responsible Corporate Officer, below at paragraph 6).

D. The Rivers and Harbors Act

Under section 407 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, *et seq.*, any discharge of refuse of any kind from a vessel into navigable waters of the United States is prohibited. A violation of the Act is a misdemeanor. 33 U.S.C. § 411. The courts have taken a broad view of what constitutes "refuse" under the Act, and the Act has been extended to a discharge of oil or petroleum. Violation of the Act is a strict liability offense, which does not require proof of either intent or negligence. Accordingly, a person can be convicted of a misdemeanor violation under the Act based solely upon proof that the person placed a banned substance into navigable waters of the United States.

E. The False Statements Act

Under 18 U.S.C. § 1001, providing a false statement to the U.S. Government is illegal. To sustain a conviction for a violation of the Act, the Government must show: (1) that a statement or concealment was made; (2) the information was false; (3) the information was material; (4) the statement or concealment was made "knowingly and willfully;" and (5) the statement or concealment falls within the executive, legislative or judicial branch jurisdiction.

Falsity through concealment is found to exist where disclosure of the concealed information is required by a statute, government regulation, or form. Also, a false statement about, or concealment of any prohibited discharge satisfies both the Act to Prevent Pollution from Ships or the Clean Water Act, since both impose the duty to report. Likewise, a false entry in a vessel's oil record book has been the grounds for numerous felony indictments.

F. Sarbanes-Oxley Act of 2002 (Obstruction of Justice Section)

Prosecutors in the United States have recently commenced utilizing the Sarbanes-Oxley Act of 2002, 18 U.S. C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"). This is a powerful new law enforcement tool that exposes a wrongdoer to a prison term of up to 20 years. The threat of charging an engineering officer under this section, rather than 18 U.S.C. § 1001 (the False Records Act) which has a lower potential jail time provision, is generally for the purpose of frightening such individual into confessing that the alleged OWS by-passing was in fact done, and, preferably, with the knowledge and consent of the vessel owner and/or operator.

## G. Responsible Corporate Officer Doctrine

Under the "Responsible Corporate Officer Doctrine," criminal liability for violations of environmental laws can be imposed on corporate managers or officers who were in a position to know about and prevent a violation, even if they did not actually commit the alleged crime. A person can be held liable as a responsible corporate officer based upon the persons' ability or authority to influence the corporate conduct that constituted the violation. In the past, the United States has used this doctrine to convict high-level officers of corporations, including presidents of corporations, for violations of environmental laws committed by lower-level employees.

Generally, there are three requirements that must be satisfied to impose liability under the doctrine. First, the individual must be in a position of responsibility, which allows the person to influence corporate policies or activities. Second, the person, by reason of his corporation position, could have prevented or corrected actions that constituted the violation. Third, the individual's actions or omissions must have facilitated the violation.

The Responsible Corporate Officer Doctrine has been applied in the context of violation of environmental laws. There is certainly a potential for individual criminal exposure for violations by corporate officials for violations of which they have knowledge and the authority to prevent. Knowledge of the facts can be inferred in many cases, requiring only that the government establish that the person had the authority and capacity to prevent the violation, and failed to do so.

## H. Perjury/Providing False Information to Government Representatives

Criminal laws of the United States provide for severe penalties for providing false information to a government representative, and similarly, providing false testimony under oath to a Grand Jury. Similarly, influencing or attempting to influence the testimony of another, or destruction or alteration of evidence are viewed under United States law as extremely serious, and would result in extremely serious criminal consequences to any individual crewman or others involved in such activities.

## I. Witness Tampering

U.S. authorities vigorously investigate and prosecute individuals and corporations suspected of tampering with witnesses in connection with an on-going investigation of pollution and/or illegal discharge incidents. Under 18 USC § 1512, anyone who knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with the intent to hinder, delay or prevent the communications to a law enforcement officer or a judge of the United States of information relating to the commission, or the possible commission, of a federal offense, shall be fined or imprisoned up to ten (10) years, or both.

## J. Conspiracy

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, pursuant to 18 USC § 371 each shall be fined or imprisoned up to five (5) years or both.

### **Recommendations for Owners/Operators/Managers and Shipboard personnel to avoid and respond to U.S. authorities inspections and criminal investigations**

1. Owners/Operators/Managers and Shipboard personnel ***must***, at all times, obey all international and U.S. environmental regulations, especially, Marpol;
2. As a matter of practice and procedure, all flanges and fittings should be removed from any flexible hoses or other piping maintained on board vessels, so as to avoid creating wrongful suspicion of an illegal by-pass of the oily-water separation equipment;
3. Any flanges or fittings located at or near the oily-water separating equipment and overboard discharge valves, which may exist as original or modified construction, but are not used as a matter of course should be blanked off;
4. All bilge waste oil/water handling and treatment equipment should, at all times, be maintained in good working order and operated properly, as intended by the manufacturers of such equipment. This equipment includes all bilge tanks, valves, flanges and piping, Oily Water Separator, the Oil Content Meter, the Incinerator, all pre-heating tanks and equipment, the overboard discharge valves and piping, switches, etc;
5. All soundings and Incinerator use records must be accurately maintained and logged at all times;
6. All entries in the Oil Record Book ***must be truthful***, and in compliance with MARPOL requirements;
7. All shipboard personnel ***must be truthful*** and forthcoming during all port state inspections;
8. Owners/Operators/Managers ***must not*** attempt to influence officers and/or crew as to their discussions with the authorities, other than to insist that the officers and crew are ***honest*** and ***forthright*** with all authorities;

9. Legal assistance, including criminal counsel, ***must be engaged as soon as possible*** in order to assess the situation and provide advice to Owner, Operator/Managers, Officers and Crew, including engaging individual counsel for all officers and crew, as necessary and appropriate. In this regard, the written procedures issued to vessels by the Owner/Operator/Manager must direct the Master and/or Chief Engineer to immediately notify the responsible individuals of any Coast Guard or law enforcement investigation on board the vessel. The P& I Club, as well as, its local P&I correspondent should also be notified immediately for assistance and the appointment of counsel to protect the interests of the Owner, Operator/Manager and crew.
  
10. Under United States constitutional law, no one on board a vessel can or should be forced to speak to an investigating law enforcement officer if there is a possibility that such person may incriminate himself by doing so. As a matter of policy, shipowning companies, operators and/or managers should ensure that crews are not coerced by company officials or law enforcement personnel to give statements to law enforcement officials on the scene. Each crewmember (and, indeed, any corporate personnel that is a target of a criminal investigation) is entitled to consult with separate counsel of his or her choice (usually appointed by the criminal counsel in charge of the defense of the Owner and Operator) and to have such counsel present when being interviewed by law enforcement officials.

Owners, Operators/Managers should feel free to contact us with any questions or comments regarding the above.

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