

# CRIMINAL PROSECUTIONS AND THE MARITIME INDUSTRY – A WORLD-WIDE TREND

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## ABSTRACT

*For decades, the United States has been aggressively enforcing its environmental laws. Beginning in the mid-1990s and continuing through present, this effort has been directed at the maritime industry through the U.S. Department of Justice's "Vessel Initiative." The U.S. trend is now being felt in Europe, as exemplified by the European Commission ship-pollution directive, focused on criminal enforcement. With this worldwide focus on prosecuting environmental crimes against the maritime industry, companies must take a hard look at their corporate compliance programs to minimize chances of being targeted for criminal prosecution. This paper will identify worldwide trends, discuss recent criminal prosecutions, and make recommendations on how companies can best protect themselves.*

## INTRODUCTION

For decades, the United States has been aggressively enforcing its environmental laws. Beginning in the mid-1990s, this effort has been directed at the maritime industry—owners, operators, managers, crewmembers, shoreside personnel, and corporate officers. No vessel types or employees are immune. Prosecutions often involve oil-water separator ("OWS") violations, including falsifying the Oil Record Book ("ORB"), and other illegal discharges, as well as oil spills. These efforts were largely viewed by the rest of the world as heavy handed and unnecessary. The U.S. trend, however, continues unabated into 2005, with federal prosecutors commonly using theories of liability such as false statements, obstruction of justice, and conspiracy, in addition to environmental theories of liability. Far too few companies seem to be learning from the mistakes of others.

Over the last few years, however, like the United States, many countries are using criminal enforcement as an important tool in their effort to protect the environment and achieve compliance through deterrence. The historical inclination of regulatory authorities to emphasize compliance over punishment is changing, and punishment is increasingly playing a greater role in environmental enforcement, because deterrence has not been effective. The U.S. trend is now seemingly being replicated in Europe, as exemplified by the European Commission ("EC") ship-pollution directive (the "Directive"), focused on criminal enforcement. The force behind the Directive is the view that civil liability regimes do not provide sufficient financial disincentives for ensuring compliance with environmental laws, and a criminal "hammer" is therefore necessary.

## WORLDWIDE INITIATIVES

In March 2003, the EC initiated the Directive, which provided for the imposition of criminal sanctions for those responsible for ship-source pollution. According to an EC Vice President, the "existing civil liability regimes for pollution by ships [do] not provide sufficient financial disincentives for ship owners and others involved in the transport of dangerous cargoes by sea to behave in the most responsible way." See *"The Commission Proposes Criminal Sanctions for Polluting Ships,"* which is available at <http://www.health.fgov.be/WHI3/krant/krantarch2003/kranttekstmar3/030306m12eu.htm> (March 5, 2003).

This initiative is an effort by the EC to stop the discharge of waste, including cargo residue, from ships in European Union ("EU") and international waters. Specifically, the Directive provides detailed rules for the discharge of polluting substances, including oil and chemicals, and makes any violation of those rules illegal in EU waters.

The EC's proposed Directive was considered by the European Parliament and Transport Committee in late 2004 and early 2005. In January 2005, the Transport Committee's recommendations to impose strict sanctions, including criminal penalties for ship-source discharges of "polluting substances" when the offenses are committed intentionally, recklessly, or by gross negligence, were adopted. Sanctions would be applicable to any person, including the master, owner, operator, and charterer of a ship and to the classification society, who has been found to have caused or contributed to illegal pollution. The proposed penalties include fines and imprisonment.

As the proposal makes its way through the European Parliament, several areas of dispute have arisen. For example, there has been extensive debate about whether criminal penalties for pollution offenses should be mandatory or optional. Another issue that has arisen is whether to impose unlimited liability on any person in the chain of command who is found to be responsible for negligent discharges that occur in the exclusive economic zone ("EEZ") of another member state. There seems to be a consensus of sorts, however, that criminal penalties should be available for individuals who are involved in intentional, reckless, or seriously negligent discharges in all sea areas, including the EEZ, internal waters, territorial waters, and the high seas.

This Directive has drawn much criticism from the shipping industry. In response to the Directive, the International Association of Independent Tanker Owners, the International Chamber of Shipping, the European Community Shipowners' Association, and the Oil Companies International Marine Forum submitted a joint position paper to the European Parliament highlighting potential

problems with the proposal, including concern that some of the criminal sanctions outlined in the Directive would undercut internationally agreed standards and would be in direct conflict with the International Convention for the Prevention of Pollution from Ships ("MARPOL") and the United Nations Convention on the Law of the Sea.

As a further evidence of the resolve of the EU to prevent pollution, several member states, including Germany, the Netherlands, and the United Kingdom, also have been participating in an international tripartite satellite surveillance program, which is currently focused on the North Sea. The program is intended not only to provide additional tools for detecting pollution from ships at sea, but also to serve as a deterrent to would-be polluters. Satellite surveillance technology trials have been conducted in the past to detect oil pollution; however, the capabilities are expanding. For example, images can now assist in identifying the position and number of ships or offshore installations.

The newfound aggressiveness of the EU rivals that of the United States, which has been criminally prosecuting environmental cases against the maritime industry since the early to mid-1990s and continues to do so, more aggressively than ever, through the United States Department of Justice's "Vessel Initiative." U.S. government officials warn that the Vessel Initiative will continue until the number of referrals "dwindles to zero," and have recently stated that the pollution problem is "so rampant and so pervasive within the maritime community" that it has ramped up enforcement and is prosecuting cases up and down all U.S. coasts. Prosecutors further noted that "[i]t has been the way of doing business for so long that it is going to take time to achieve our goals of deterrence. We are not done yet by any means."

## CRIMINAL PROSECUTIONS THROUGHOUT THE WORLD

As the following list of representative cases illustrates, many countries are not waiting for the Directive, but rather are prosecuting maritime cases under national environmental laws.

### Australia

- In October 2004, Japan-based Sanzo Enterprises, the owner of the *Pax Phoenix*, was fined \$85,000 Aus. after pleading guilty to discharging an oily substance at sea. Australian authorities discovered the discharge of oil through the use of satellite technology. The Australian Maritime Safety Authority then boarded the vessel and obtained oil samples, which confirmed that the *Pax Phoenix* was the source of the spill.
- In July 2004, criminal charges were filed against the operator and masters of the containership *Doria*, as well as several other companies and individuals, in connection with the vessel's oil spill in February 2003. If convicted, the companies could face fines up to \$1M Aus., and the individuals could be sentenced to seven years in jail and fined up to \$250,000 Aus.
- In July 2003, Mobil pled guilty after it caused a 50-meter wide oil spill off the Victoria coast in 1999. The company faced a fine of up to \$1 million Aus. for the spill from *Mobil's Sylvan Arrow*, allegedly caused by equipment failure.
- In February 2001, the owner of the *Bunga Teratai Satu* pled guilty for negligently grounding a container ship on the Great Barrier Reef and was fined \$400,000. The officer responsible for the grounding also pled guilty.
- In November 1999, Australia had its first successful conviction for illegally disposing of garbage pursuant to legislation implementing Annex V of MARPOL. In this case, a yacht owner observed plastic and other garbage

being thrown into a lagoon from a yacht and reported it to authorities.

### Canada

- In February 2005, a court in Nova Scotia ordered the fishing vessel *Hime Maru No. 38* to pay \$40,000 for violating the Canada Shipping Act by unlawfully discharging an oily substance into Canadian waters. Additionally, the master was found guilty of misreporting information in the ORB and failing to report a pollution incident. He was fined \$20,000. This case marks the first time a crew member has been convicted of ORB violations in Canada.
- In May 2004, a Canadian court ordered the owner of the fishing vessel *Olga* to pay a \$170,000 fine for unlawfully discharging an oily substance and failing to report the discharge in violation of the Canada Shipping Act. A Canadian Coast Guard surveillance flight first discovered the *Olga* trailing an oil slick. The fine marks the highest monetary penalty assessed for a violation of the Canada Shipping Act.
- In February 2002, Canada prosecuted the operator of the *M/V Baltic Confidence*, a Philippines-registered bulk carrier, for unlawfully discharging an oily substance in Canadian waters and the operator of the vessel pled guilty. This investigation began because an oily discharge from the ship had been sighted by a Canadian Coast Guard helicopter and a private aircraft.
- In April 2001, the operator of the *M/V Sandviken* pled guilty and was fined for unlawfully discharging an oily substance in Canadian waters. Again, the investigation was initiated after an oily discharge was detected during a routine surveillance mission.

### Denmark

- In February 2005, British shipping company Norbulk Shipping Ltd. Cooperated with Danish authorities, pled guilty to causing pollution in Danish waters, and was fined 50,000 Danish Kroner, plus 150,000 in cleanup costs.

### France

- In September 2004, the French Coast Guard observed a visible hydrocarbon wake 11 kilometers long and 40 meters wide emanating from the Panama-flagged *Atlantic Hero*. The vessel was detained by French authorities and ordered to pay a fine of 300,000 euro.
- In July 2004, the Spanish-flagged *Casablanca* was detained at the French port of LeHavre awaiting judicial action after it was observed trailing an oil slick 6.5 meters long by 40 meters wide.
- In July 2004, French Coast Guard officials observed the Greek-flagged *Captain Diamantis* trailing an oily wake 2.8 kilometers long and 30 meters wide. The vessel was ordered to proceed to the French port in Brest; however, it reportedly refused the order and continued on its route. The vessel's operator, Diamlemos Shipping, claims that the master did not intend to flee French authorities, but continued on its voyage after waiting thirty hours for the outcome of negotiations between French and Greek authorities, which did not resolve the issue. French prosecutors maintain that they can institute proceedings against the master or arrest the ship on its next voyage in French waters.
- In June 2004, French authorities detained the United Arab Emirates-flagged container ship, *Khaled Ibn Al Waleed*, after customs investigators photographed an oil slick 18 kilometers long by 50 meters wide behind the vessel in France's Mediterranean waters. A 500,000 euro fine was

imposed and a 12-month prison sentence on the ship's captain was deferred.

- In June 2004, the master of the Cyprus-flagged *Pantokratoras* was fined 500,000 euro for oil pollution off the French Atlantic Coast. The fine was twice the normal level for such an offense; however, the amount was increased because the master failed to stop the ship when ordered to do so by the French navy.
- In April 2004, French prosecutors sought a 250,000 euro fine against the master of the St. Vincent and Grenadines-flagged bulk carrier, *Nicholas M.*, for his role in causing an oil slick. Prosecutors claim the pollution was the result of modifications to the ship's waste treatment system, which allowed waste to be discharged directly into the sea rather than stored on board.
- In August 2003, the captain of the Bulgarian-registered cargo ship, *Dobrudja*, was prosecuted after dumping oil in the Bay of Biscay. A patrol aircraft spotted a slick in the water and samples taken from the ship's hold confirmed that the *Dobrudja* was to blame. The captain was ordered to pay a record fine of 200,000 euro.

These recent prosecutions likely result from France's establishment of three regional court jurisdictions in 2003 at Marseilles, Brest, and Le Havre in an effort to aggressively prosecute ship-owners who are involved in pollution incidents.

#### Pakistan

- In April 2004, eight crewmembers from the *Tasman Spirit* were released after they had been arrested and detained for eight months in Pakistan in connection with the grounding of the vessel, which resulted in an oil slick near the Karachi Port. The crewmembers' release followed months of negotiations involving the vessel's insurer, the Government of Greece, the EU, the international maritime community, and the United Nations International Maritime Organization. The crewmembers have agreed to return to Pakistan for court proceedings if necessary.

#### Thailand

- In December 2002, the government filed a complaint against the operators of the tanker *Sky Ace* and the cargo ship *Kota Wijaya*, which collided and spilled diesel. A criminal prosecution is ongoing.
- In January 2002, the captain of the *Eastern Fortitude* was sentenced to six months in jail for failing to promptly report an oil spill after the ship hit a rock and spilled diesel.

#### United Kingdom

- In August 2002, the owner and captain of the fishing vessel *St. Jacques II* made history by being the first "third party" to be prosecuted for causing pollution by a tanker. The spill resulted from a collision in the English Channel between the fishing vessel and the *Gudermes*. The "polluter pays" principle was applied as the collision was caused by the fishing vessel.
- In November 2000, the owners of the shuttle tanker *Stena Alexita* were prosecuted for violating pollution laws. The owners were fined and forced to pay cleanup costs after being photographed discharging oily water overboard during routine operations, where there was a breakdown in ship's procedures.
- In August 2000, the owner of the containership, *Coastal Bay*, was fined for spilling diesel oil after grounding on a Welsh beach. The owner was found guilty of failing to implement a safe watch keeping system.

#### United States

The criminal prosecutions of the maritime industry in the United States over the last ten years are too numerous to mention. In 2002 alone, there were 10 overall prosecutions of vessel cases, resulting in 21 guilty pleas—10 for companies and 11 for individuals. Eight of the 11 individuals were either detained for a lengthy period of time in the United States or were sentenced to jail for a period ranging from three months to one year. The fines paid by the ten companies exceeded \$25 million, and most companies were required to implement a court-supervised environmental compliance plan ("ECP"). The majority of cases in 2002 involved bypassing OWSs, falsifying the ORBs, and making false statements to government agents, *e.g.*, lying to the U.S. Coast Guard.

Of particular note was the case brought against *M/V Khana and M/V Sohoh* and their owners/operators Boyang Maritime, Boyang Limited, Oswego Limited, and Trans-Ports International. The four companies pled guilty in Alaska and paid a \$5 million fine relating to bypassing OWSs, falsification of logbooks, and obstruction of justice. The captain and two chief engineers pled guilty to false statements, obstruction of justice, and witness tampering and were sentenced to six months, six months, and eight months in prison, respectively; and a member of the board of directors and two senior shoreside managers also were indicted for conspiracy and obstruction of justice for their roles in bypassing the OWSs and encouraging crewmembers to lie about it. All three are considered fugitives.

This trend continued into 2003, with seven overall prosecutions, resulting in eight guilty pleas—five for companies and three for individuals. Jail terms for the three individuals ranged up to two years, and over \$4 million in fines were assessed on the companies. The year 2003 closed with numerous indictments pending and cases being investigated.

Despite the number of prosecutions, the significant fines, and unprecedented prison sentences, vessel owners and operators seemingly are not learning from the mistakes of others as this disturbing trend continued unabated through the present. Notable prosecutions in 2004 include:

- *M/V Guadalupe*—In January 2004 in New Jersey, OMI Corporation pled guilty to preparing false documents in an effort to cover up an illegal oil discharge from the *Guadalupe* and agreed to pay a \$4.2 million fine. The captain and chief engineer on the *Guadalupe* had also pled guilty in 2002 to submitting false ORBs to the U.S. Coast Guard after the second engineer reported the illegal dumping to a local police department when the ship docked in New Jersey. The whistleblower was awarded a record \$2.1 million for disclosing the unlawful conduct—the largest bounty ever paid to a whistleblower under the Act to Prevent Pollution from Ships.
- *Bouchard Transportation Company*—In March 2004 in Massachusetts, the company pled guilty to Clean Water Act and Migratory Bird Treaty Act violations related to an oil spill from the barge *Bouchard B-120*, towed by the tugboat, *Evening Tide*. Bouchard agreed to pay a fine of \$10 million, institute numerous operational restrictions, and implement an environmental compliance plan, which provides for external audits.
- *Spring Drake*—In April 2004 in Oregon, following a U.S. Coast Guard inspection, the ship's owner and manager pled guilty to obstruction of justice and false statements, and were ordered to pay a \$2 million fine. Additionally, the chief engineer pled guilty to making false statements and was sentenced to serve one month in prison.
- *M/S Hoegh Minerva*—In June 2004 in Washington, Hoegh Fleet Services, A/S was ordered to pay a \$3.5 million fine after pleading guilty to seven felony counts, including

obstruction of justice and false statements relating to illegal discharge of waste oil into the ocean. The chief engineer also pled guilty in 2003 to obstructing the U.S. Coast Guard's investigation. According to the plea agreement, the chief engineer instructed crewmembers to bypass the OWS and took steps to conceal evidence of the bypass activity from U.S. Coast Guard inspectors by making false and fraudulent entries in the vessel's ORB. The chief engineer agreed to cooperate with the government's investigation of Hoegh Fleet Services, and in return, he was sentenced to only 30 days in prison, followed by two years of supervised release. \$300,000 of the company's fine was awarded to the crewmember who reported the illegal discharge to the U.S. Coast Guard.

- *Kent Navigator*—In September 2004 in Maine, two chief engineers from the freighter *Kent Navigator* pled guilty to creating and presenting a false ORB to the U.S. Coast Guard. Each was sentenced to two years probation and a \$3,000 fine.
- *HAL Maritime Ltd.*—In December 2004, HAL Maritime Ltd., an affiliate of Holland America Line ("HAL"), pled guilty to negligently discharging untreated sewage into Juneau Harbor. The plea cost HAL Maritime Ltd. \$700,000 in fines and restitution. HAL Maritime also is required to spend and additional \$1.3 million to implement a focused ECP, as HAL is already subject to Carnival Corporation's ECP, which resulted from its 2002 guilty plea.

Even more surprising after almost a decade of OWS prosecutions, 2005 is shaping up to be a banner year, with eight guilty pleas already entered as of mid-February 2005 for various pollution-related violations.

- *M/V Katerina*—The chief engineer pled guilty to obstruction of justice for concealing an OWS bypass from the U.S. Coast Guard and instructing crewmembers to remove and conceal the bypass pipe. He faces up to twenty years in prison. The captain and second engineer later pled guilty to obstruction of justice. DST Shipping, Inc., the ship's parent company, also pled guilty to obstruction of an official proceeding and failure to maintain an accurate ORB. A \$500,000 fine is anticipated. These guilty pleas will likely bring the five-month saga of the *Katerina* to an end. The 13 crewmembers that have been held as material witnesses by federal authorities in California since September when the ship was detained will be returned to the Philippines. The vessel was released last year with a new captain and crew, after repairs were made and a bond was posted.
- *John G. Lemos*—Royno Shipping, owner of the *Lemos* (a Cypress-flag bulk carrier), P&A Shipping, operator of the *Lemos*, and Joey Lebuna, chief engineer of the *Lemos*, were indicted on January 13, 2005 in Oregon on charges alleging that they impeded a federal investigation by falsifying the *Lemos*' ORB and bypassed the OWS in violation of the Clean Water Act and MARPOL. P&A Shipping pled guilty and was ordered to pay a \$500,000 fine for falsifying the ORB. In addition, P&A Shipping must also establish an ECP for all ten vessels in its fleet. This investigation stemmed from a routine Port-State Control inspection of the *Lemos*, which led to a joint criminal investigation by the U.S. Coast Guard and Environmental Protection Agency. A federal search and seizure warrant was executed on the *Lemos* and evidence was presented to the Grand Jury three days later.
- *Turismo Nautico Del Mar De Cortes*—The operator of the *Topaz* pled guilty in Puerto Rico, agreed to pay a \$100,000 fine, and will be restricted from operating in U.S. waters for three years for bypassing the OWS.

- *M/V Cygnus*—Fujitrans, operator of the *Cygnus*, pled guilty in Oregon to violations regarding fraudulent ORB entries. The vessel's assistant engineer was earlier sentenced to two-years probation and deported to South Korea, while the chief engineer spent three months in prison for making false ORB entries. The company was ordered to pay \$2 million, was placed on three years' probation, and required to institute an ECP. The former crewmember who reported the violations was awarded \$360,000.
- *SunCruz VI* and JAB America, Inc.—The former owner of the *SunCruz VI* pled guilty in Florida to discharging garbage into U.S. waters. Crewmembers had been observed discharging plastic bags of garbage into the water as the ship transited Florida waters. This and several other casino ships have since been sold to new owners, who have agreed to institute a court-supervised ECP.

#### Venezuela

- In May 2000, the master of the *Nissos Amorgos* was convicted in *absentia* and sentenced to 16 months in prison after a 1997 oil spill in the Maracaibo Channel as a result of a grounding.

#### CONCLUSION

The maritime industry has been put on notice that countries throughout the world will not tolerate pollution as the prosecutions discussed above have ranged throughout all corners of the United States and the world. And, the prosecutions have involved almost every type of vessel—from ferries to tankers to car carriers to general cargo ships to cruise ships to tugs and barges—and resulted in numerous crewmembers, as well as shoreside personnel, going to jail and hefty fines. With the aggressiveness of the enforcement actions, the lucrative awards being given to whistleblowers in the United States under the Act to Prevent Pollution from Ships, and the development of satellite and other new technology, the number of prosecutions initiated worldwide undoubtedly will increase.

As criminal enforcement continues to gain momentum throughout the world and the threat of criminal liability increases, the maritime industry must recognize that failure to comply with environmental laws places their companies and employees at risk of criminal prosecution. It is critical that the industry understand the controlling laws and enforcement mechanisms in the countries in which they do business and take aggressive steps to ensure compliance.

As a further means of guarding against (or better defending) enforcement actions, companies should: (1) establish a comprehensive environmental compliance program; (2) assign a high-level employee to oversee environmental compliance; (3) develop procedures for effective communication with subordinates; (4) conduct regular audits of operations for environmental compliance, promptly correct deficiencies, and keep good records; (5) promptly address complaints of employees and others, even if they seem insignificant, and circle back with those employees; (6) establish a confidential mechanism for employees to report suspected violations without fear of retribution; (7) train employees regarding the environmental compliance program; and (8) train employees on how to deal with investigators, including training employees on their rights, responsibilities, and obligations.

Two important lessons—(1) bad things can happen to good companies; and (2) investing in compliance is much more economical than defending an enforcement action.

**BIOGRAPHIES**

Jeanne Grasso is a Partner at Blank Rome, specializing in maritime and environmental law. She has extensive experience with issues confronting facilities, vessels, and cargo owners on an international, federal, and state level. Ms. Grasso's environmental practice commonly includes crisis management, conducting internal investigations, handling enforcement actions, including grand jury and other investigations, and compliance counseling.

Allison Fennell is an associate at Blank Rome who has significant experience in conducting internal investigations as well as representing individuals and corporations in connection with criminal proceedings and enforcement actions.

