

Legal Beat MARPOL Enforcement in the United States



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Blank Rome LLP's Gregory Linsin and Jeanne Grasso explain the challenges and lay out a cogent solution.

CURRENT TRENDS IN MARPOL ENFORCEMENT

The United States has long been aggressively enforcing compliance with the International Convention for the Prevention of Pollution from Ships, as amended ("MARPOL"), which is implemented in the United States by the Act to Prevent Pollution from Ships ("APPS"). Since the early 1990s, the effort has been directed at all types of registered and domestic tonnage – the full spectrum of waterborne commerce. Those entities and individuals prosecuted for MARPOL violations also span a wide spectrum of owners, operators, technical managers, masters, engineers, shoreside personnel and corporate officers.

MARPOL prosecutions commonly involve bypasses of the oily water separator or discharges of sludge overboard rather than through incineration. Few of these prosecutions involve illegal discharges in U.S. waters – virtually all involve false entries in the Oil Record Book ("ORB"). Maintaining an inaccurate ORB while in domestic waters or presenting an inaccurate ORB to the U.S. Coast Guard is a crime and a basis for prosecution, along with post-incident conduct such as obstruction of justice or false statements made to investigators following commencement of the investigation. These efforts are often viewed by the rest of the world as heavy handed, as many believe that enforcement actions for recordkeeping violations with respect to illegal discharges occurring in international waters should be the responsibility of the flag State. The United States government disagrees and has stated unequivocally that it will continue to enforce, even more aggressively, until the illegal discharges stop.

The Department of Justice ("DOJ") recently noted that 88 million gallons of oil are discharged illegally from vessels each year – more than eight times the amount spilled from the Exxon Valdez. Thus, until flag states increase serious enforcement of MARPOL compliance, the United States will likely continue to be the world's MARPOL cop.

Prosecutions continue unabated, with more than a dozen MARPOL cases prosecuted during the last 24 months, as companies fail to learn from the mistakes of others. And, the prosecutions are now yielding higher penalties, jail time and the banning of ships from United States ports.

As an example of the DOJ's persistence, Stanships Inc. and three related companies, collectively the owners and operators of the M/V

Americana, pled guilty again, in April of this year (Stanships pled guilty in a prior case in June 2010) to 32 felony counts for violations of APPS, the Ports and Waterways Safety Act and obstruction of justice. The companies will be fined \$1 million and prohibited from trading to the United States during the five-year probationary period. The individual owning the companies is also banned from owning ships trading to the United States for five years. A whistleblower's report to the Coast Guard, including cell phone photographs of the "magic pipe," kicked off this investigation, which involved illegal discharges of sludge and oily water and the failure to report a hazardous condition prior to a United States port call. In the past, it has been rare to ban ships from trading to the United States and this is the first time an owner has been banned.

While whistleblowers have been part of the seascape in APPS prosecutions for years, more than 50% of the new cases stem from whistleblowers, probably because of the lucrative rewards DOJ is requesting and courts are awarding. This can amount to as much as 50% of any penalty paid for APPS violations. Unfortunately – and because of the reward prospects, whistleblowers often ignore company policies and the ISM Code by reporting wrongdoing directly to the Coast Guard rather than through the chain of command or to the Designated Person Ashore. This serves to undermine international systems in place to deal with potential violations.

The maritime industry has had ample notice of the aggressiveness of the enforcement actions and the lucrative awards being given to whistleblowers. Industry must therefore understand the controlling laws and enforcement mechanisms and take aggressive steps to ensure compliance and reduce enforcement risks. This is particularly important in light of the recent Memorandum of Understanding between the Environmental Protection Agency ("EPA") and the U.S. Coast Guard regarding enforcement of EPA's Vessel General Permit, which includes numerous recordkeeping and other requirements.

DEVELOPING A CULTURE OF COMPLIANCE

Many vessel owners and technical managers have become more proactive regarding MARPOL compliance as the pace of enforcement has increased. In some instances, enhanced compliance measures have been imposed by the courts in the United States following a port State MARPOL enforcement action. In other situations, companies have elected proactively to strengthen their compliance regimes, recogniz-

ing both the escalating environmental requirements and to minimize the risks of becoming the target of a MARPOL enforcement action.

These efforts can take the form of equipment upgrades or technical changes in engine rooms in an effort to prevent improper discharges. Uneven in their effectiveness (at best), technical improvements can be beneficial but experience has repeatedly demonstrated that environmental compliance is dependent primarily on (a.) the ship's complement, (b.) the degree of shoreside management oversight employed and perhaps most importantly, (c.) the strength of the overall corporate compliance culture.

For these reasons, many companies have dedicated increased resources to improving management practices designed to foster and enhance environmental compliance aboard their ships. These include:

- **Enhanced Compliance Training** - Frequent crew rotations and the unpredictability of future vessel assignments present a daunting challenge to the vessel manager attempting to develop a sustainable compliance culture aboard its ships. A number of companies have concluded that enhanced training programs for both engineering officers and unlicensed crewmembers are an important tool for communicating the company's commitment to rigorous compliance standards. To be effective, such training must be repeated periodically and regularly updated based on changing conditions.

- **Open Reporting System** – Information has value. For this reason, some companies have decided to augment the DPA reporting system under their Safety Management System by providing open hotlines or anonymous electronic reporting options to crew members whereby they can alert shoreside management of environmental deficiencies or violations aboard a ship. A few companies have even instituted an internal monetary reward system for crew members who provide accurate information regarding environmental problems.

- **Audit Program** – Most shore-based companies that are faced with the challenge of complying with complex regulatory systems also rely on periodic audits to evaluate the company's level of compliance and to identify opportunities for improvement. Maritime companies are also recognizing that a periodic audit program is a critical element of a robust environmental compliance program. Some have developed internal audit teams and others have concluded that third-party auditors provide a more objective assessment. To further improve the reliability of audit findings, some companies arrange for a percentage of the audits to be conducted on an unannounced basis.

- **Role of Superintendent** – Periodic shipboard visits by the manager's technical superintendent is a vital component of any environmental compliance system. Because of their detailed knowledge of the ship and familiarity with the engineering officers and crewmembers, super-

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intendents should have a greater ability than port State control inspectors to identify conditions in the engine room that raise environmental compliance issues. Superintendents should be given clear and unequivocal guidance that, if any such conditions are identified during their attendance on a ship, the company's shoreside management must be promptly and thoroughly informed of the conditions, the conditions must be remedied, and the compliance risks must be thoroughly understood.

- **Internal Investigations** – If information is developed from any source, whether it be

through the open reporting system, audit findings, or a superintendent's observations, that suggests an intentional MARPOL violation has occurred or is on-going aboard a vessel, careful consideration should be given to engaging outside counsel to conduct an immediate internal investigation to develop a complete factual record and to provide legal advice concerning any corrective actions or reporting obligations that may exist. Seizing the initiative in the development and management of such information can help to control the potential negative consequences of any identified MARPOL deficiency, while strengthening the company's overall environmental compliance program.

REVIVING THE ROLE OF THE FLAG STATE

The maritime environmental enforcement program in United States ports over the past several years has significantly distorted the MARPOL compliance and enforcement regime that is embodied in the Law of the Sea Convention ("UNCLOS") and in the MARPOL Convention itself. For many reasons, both UNCLOS and MARPOL vest primary responsibility for oversight of environmental compliance in the Maritime Administration of the flag State. From the issuance or endorsement of a vessel's International Oil Pollution Prevention certificate, to the development and distribution of ORB's, to annual vessel inspections and renewals of Documents of Compliance, the flag State is intended to have primary, on-going responsibility for ensuring compliance with environmental requirements and, if a deficiency is identified, evaluating what corrective action or enforcement response may be warranted.

The central role for the flag State with respect to compliance with environmental responsibilities parallels the range of other oversight responsibilities for vessel operations under international conventions that are vested with the flag State, all of which flow logically from an Administration's comprehensive knowledge of and relationship with a vessel's owners and technical managers. While port and coastal states are authorized under both UNCLOS and MARPOL to perform port State control inspections or to investigate and consider enforcement actions for pollution events occurring in their territorial waters, under

both conventions these functions are secondary to the primary environmental compliance assurance role reserved to the flag State.

Early MARPOL enforcement cases brought by the United States were generally consistent with the international regulatory regime in that the cases brought against foreign flag ships were based on discharges of oil or plastic wastes that occurred in U.S. territorial waters. Over the years, “mission creep” has vastly expanded the scope of U.S. MARPOL enforcement program to the point where it is now wholly irrelevant where the alleged improper discharges occurred. In fact, none of the recent MARPOL enforcement cases brought in the United States have involved allegations of intentional pollution in U.S waters. Rather, in its role as port State, the United States has arrogated unto itself the primary compliance assurance role that was intended by international law to be performed by the flag State. This situation has developed over time due to a number of factors which include substantial financial awards for whistleblowers, the comparative passivity of major Administrations with respect to MARPOL compliance assurance and enforcement and finally, the reluctance of vessel owners and managers to discuss information regarding MARPOL compliance issues with the Administration and to resolve those issues in that forum.

This distorted MARPOL enforcement pattern can and should be corrected. Vessel owners and managers, working to identify MARPOL compliance issues themselves by utilizing the management techniques outlined above, will be in a better position to determine how and under what terms the compliance issue will be resolved. For example, presume a situation where a rogue Chief Engineer aboard a ship ignores company’s MARPOL compliance policies and directed discharges of oily mixtures through the use of a “magic pipe.” If the vessel’s owner and its manager are not attentive to this situation, they are ceding significant authority to potential whistleblowers on board the ship, who will then collect evidence to document the violation and wait until they arrive at a United States port to disclose the information to the Coast Guard. Under this scenario, the ability to investigate the allegations and determine an enforcement resolution has been yielded entirely to United States authorities.

If, however, the information regarding this MARPOL violation was first obtained by the vessel’s shoreside management before it was packaged by the whistleblowers and reported to the United States, the vessel’s manager would be in a position to approach the Administration and develop a resolution based on the flag State’s judgment concerning any required corrective action or, if warranted, appropriate enforcement response. If warranted, corrective entries could be made in the vessel’s ORB. This approach has the benefit of being consistent with the intended compliance assurance regime under MARPOL and UNCLOS and, for a number of reasons, would be far more likely to result in a balanced and measured resolution that would be advantageous to the vessel’s owner. Additionally, unless the discharges in question had occurred in United States territorial waters, it would preclude further enforcement action by the United States.

CONCLUSION

The challenge of managing environmental compliance issues aboard vessels will only grow more difficult in the coming years. There are concrete steps that operators can take, as discussed above, to address these challenges intelligently and place themselves in a position to reduce the expanding enforcement risks.

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