

CRIMINAL PROSECUTIONS FOR MARPOL VIOLATIONS IN THE UNITED STATES

Since the late 1990's shipowners have paid well over USD\$330 million in fines for criminal convictions resulting from MARPOL violations in the United States. Over that same period of time, crew members, shoreside managers and other individuals have been convicted and sentenced to an aggregate of over forty years in prison for the same violations. In addition to the criminal convictions and fines, these types of violations result in significant costs associated with vessel detentions, legal fees, compliance plans and bans on trading in U.S. ports even in situations where shoreside managers were not aware that crew members on vessels were violating MARPOL.

Over the past few years, the United States government has stepped up efforts to aggressively pursue prosecutions of all types of MARPOL violations including illegal discharges of oil, air emissions violations and improper disposal of garbage. The United States government is also now expanding its investigations of these types of violations beyond cargo vessels to now include Mobile Offshore Drilling Units and fishing vessels. Recent cases have involved prosecutions for discharges of oily water not just from machinery spaces, but also from hydraulic lines or other oily machinery found in bow thruster spaces and deck spaces.

The federal government believes that shipowners and managers are simply not doing enough to prevent MARPOL violations on their vessels. As a result, fines for first time offenses are increasing and it is common for such fines to be between \$2 million and \$5 million. In addition, the government is unsympathetic to the fact that most owners have substantial compliance plans, training and internal auditing procedures in place. Essentially, the government believes that a company was not doing enough to prevent violations if a violation occurred, regardless of the circumstances.

The U.S. Coast Guard inspects foreign vessels for MARPOL compliance when it carries out Port State Control Inspections on these vessels. Coast Guard inspectors are trained to look for signs tampering with the Oil Water Separator ("OWS"), associated piping, sounding logs and the Oil Record Book. They also search for evidence suggesting the use of hoses or pipes that could be used in conjunction with portable pumps. If the Coast Guard finds any evidence of problems with pollution prevention equipment or documentation, it will initiate a full-scale criminal investigation including interviews of crew members and the disassembly of piping and valves connected to the bilge systems.

The U.S. government's investigative powers are broad and can often result in significant delays and inconvenience to a shipowner. Vessels can be delayed for weeks while the government conducts its initial investigation. Before a vessel is allowed to depart, the Coast Guard will demand a "security agreement" which will include a large surety bond as well as additional requirements for the detention of crew members in the United States, wages and expenses for crew members remaining in the United States, and agreements regarding documentary and computer evidence from the company and vessel. Recent decisions by the courts in the United States have held that the Coast Guard has nearly unlimited discretion in setting the terms of a "security agreement." If a shipowner wants to challenge the reasonableness of the terms of a "security agreement" it must provide sixty days notice to the government prior to instituting a lawsuit. During this time, the vessel would remain detained in port. In other words, a shipowner must agree to whatever terms the government demands unless it is willing to have a vessel detained for several months while the issue is contested.

In the past, shipowners or managers could avoid prosecution by showing the government that MARPOL violations resulted from independent actions by individual crew members in violation of company policies. Companies could show that they had robust training programs related to MARPOL and that crew members were educated on the requirements of MARPOL. In fact, the sentencing guidelines in the United States specifically state that a corporate compliance program can not be expected to prevent any violation. However, the government more recently has refused to accept this type of evidence instead insisting that if the company had an effective compliance program violations would have been avoided or detected earlier.

MARPOL violations are felony crimes in the United States. In addition, there are numerous other laws that are used to prosecute MARPOL violations. These laws make a shipowners or managers directly responsible for the actions of crew members aboard the vessels who may bypass pollution prevention equipment, make false record book entries, make false statements during Coast Guard interviews, destroy evidence or attempt to dissuade other crew members from telling the government what has occurred.

If a shipowner or manager is convicted for MARPOL violations, the penalties are severe. Aside from the costs associated with the investigation and defense of a MARPOL prosecution, owners or managers will incur significant costs after the conviction. Typically, the convicted company will be placed on probation for between three and five years. During that time the company will be required to implement an environmental compliance plan that includes multiple sets of outside auditors at the company's expense. Audits will occur while vessels are in port or underway. Compliance plans also require additional procedures, training and record keeping in an effort to prevent future violations. In some instances, companies have been banned from trading in U.S. ports for the entire period of probation which can have a disastrous impact on business.

Individual crew members or shoreside managers are also prosecuted for MARPOL violations. These individuals can be convicted and imprisoned for lying to government investigators, obstruction of justice, and witness tampering in addition to charges for actual violations of MARPOL. All of these criminal charges are felonies under U.S. law.

Shipowners and managers should take every precaution to prevent MARPOL violations on their vessels. These types of violations can occur on any ship regardless of the training and policies in place. Even companies that have the most stringent MARPOL compliance programs have been subsequently convicted based upon the improper conduct of rogue employees. Shipowners and managers should continue to train and communicate the importance of MARPOL compliance to their employees.

An issue that frequently complicates MARPOL investigations for shipowners or managers is a delay in retaining legal counsel to assist. Many times a vessel is detained and the Coast Guard is allowed to conduct interviews for several days before a company fully realizes the scope of the problem. Foreign crew members often make false statements during these initial interviews which results in the basis for additional criminal charges. Coast Guard investigators do not inform crew members of their legal rights or the importance of telling the truth during interviews. Therefore, it is suggested that shipowners or managers faced with a Coast Guard MARPOL investigation immediately retain legal counsel to assist the company and crew during the initial investigation. This can prevent unnecessary problems and potential criminal charges at the outset.

Shipowners or managers who detect a potential MARPOL violation on one of their vessels that is in U.S. waters or that will call in a U.S. port should retain counsel and consider making a voluntary disclosure of the violation to the government. The Coast Guard has a Voluntary Disclosure Policy which can protect vessel interests from the threat of a prosecution if the disclosure meets the criteria of the Policy. Under the Policy, the Coast Guard will not refer a self-detected and disclosed MARPOL violation to the Department of Justice for prosecution. A company can only make a voluntary disclosure of a similar violation once every three years for the same vessel or once every five years for a pattern of violations for a multiple vessel fleet. The company must cooperate with any subsequent Coast Guard investigation and take steps to ensure that no future violations occur. After an initial disclosure is made, owners or managers are allowed a period of time to complete an investigation and prepare corrective actions to remedy the problem. Many shipowners and managers have been able to take advantage of the Coast Guard's Voluntary Disclosure Policy in instances where their own internal MARPOL compliance program has detected a violation.

Of equal importance, the United States Environmental Protection Agency ("EPA") also has a Voluntary Disclosure Policy. The EPA Policy is similar to the Coast Guard Policy in many respects. However, the EPA Policy also allows a nine month grace period for the detection of violations on newly acquired vessels or facilities. Therefore, owners who acquire new vessels or facilities should intensely audit new acquisitions during this time period in an effort to detect potential violations. If violations are discovered, owners should retain counsel to assist with the voluntary disclosure. Companies considering acquiring new vessels or facilities should also contact outside auditors and legal counsel to consider whether a voluntary disclosure may be appropriate. Unfortunately, many owners are unaware of the "new owner" provisions of the EPA policy and fail to take advantage of it until it is too late.

In summary, the United States government has recently increased its efforts to prosecute MARPOL violations. Shipowners and managers must vigorously strive to ensure that their MARPOL compliance programs are enforced and proactive. If shipowners or managers unfortunately are faced with the detention of a vessel for a MARPOL investigation in the U.S. they should immediately retain counsel to advise them accordingly.

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