

Hiding Behind the Flag: Jurisdictional
Impediments Imposed by the Law of the Flag
on the Enforcement of Violations of Annex I
of MARPOL 73/78 Pursuant to the Act to
Prevent Pollution from Ships

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NOTE

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PURSUANT TO THE ACT TO PREVENT
POLLUTION FROM SHIPS

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I. INTRODUCTION

The Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection estimates that approximately 450,000 tons of oil are intentionally jettisoned from ships into the world’s oceans

and seas each year.¹ Forty-five years ago, recognizing that such intentional discharges as well as accidental releases from ships of crude and refined oil and other petroleum derivatives into the world's oceans and seas had become an increasingly significant source of environmental pollution, the United Nations International Maritime Organization ("IMO"), a specialized agency of the United Nations responsible for regulating international shipping, promulgated the International Convention for the Prevention of Pollution from Ships ("MARPOL 73").² Five years later, the IMO adopted the Protocol of 1978 to supplement MARPOL 73 ("MARPOL 78" and, collectively with MARPOL 73, "MARPOL 73/78").³ MARPOL 73/78, which took effect on October 2, 1983, aims "to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances."⁴ Annex I of MARPOL 73/78 specifically governs pollution by oil, defined broadly as "petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products" as well as oil-contaminated wastewater released from covered ships.⁵

In spite of MARPOL 73/78 and statutes enacted by signatory states to implement it, such as the US Act for the Prevention of Pollution from Ships ("APPS"), accidental and deliberate marine oil pollution continues to occur at staggering rates. According to data compiled by the National Oceanic and Atmospheric Administration

1. GESAMP, JOINT GROUP OF EXPERTS ON THE SCIENTIFIC ASPECTS OF MARINE ENVIRONMENTAL PROTECTION, REPORT AND STUDIES NO. 75: ESTIMATES OF OIL ENTERING THE MARINE ENVIRONMENT FROM SEA-BASED ACTIVITIES 15, 60 (2007); David P. Kehoe, *United States v. Abrogar: Did the Third Circuit Miss the Boat*, 39 LEWIS & CLARK ENV. L. REV. 1, 42 (2009).

2. "MARPOL" is a portmanteau of "marine" and "pollution." International Convention for the Prevention of Pollution from Ships, Feb. 17, 1973, 1340 U.N.T.S. 184 (entered into force Oct. 2, 1983) [hereinafter MARPOL 73/78].

3. *Id.*

4. *Id.* annex I.

5. Although the definition of "oil" is broad, it is not unlimited. In *United States v. Apex Oil Co.*, 132 F.3d 1287, 1288 (9th Cir. 1997), the United States brought charges against Apex Oil Co. alleging that Apex's employees had "knowingly and willfully conspire[d] and agree[d] to discharge cargo-related oil residues," including tools used to clean petroleum storage as well as oil residues collected from their vessel's holds during vessel cleaning operations. *Id.* at 1288-89. The Ninth Circuit, invoking the rule of lenity, held that cargo-related oil residues did not fit within the meaning of "oil" regulated by MARPOL 73/78. *Id.* at 1291. For a discussion of vessels covered by MARPOL 73/78, see *infra* Part II(B).

(“NOAA”), between January 1, 2000 and April 10, 2019, more than 594,678,219 gallons of liquid hydrocarbons, including both crude and refined oil, were discharged intentionally or unintentionally from ships and offshore drilling rigs into US coastal waters, which extend only twelve miles from the nation’s shorelines.⁶ The environmental harm caused to marine ecosystems and coastal environments and economies by maritime oil discharges is unquantifiable because of its enormity.

Mishaps involving oil tankers and offshore drilling platforms, such as the grounding of the *Exxon Valdez* in 1989 and the blowout of the *Deepwater Horizon* in 2010, often result in the emission of millions of gallons of oil over a short-period of time and thus attract a great deal of media attention.⁷ Deliberate discharges of oil from cargo ships, tankers, cruise ships, fishing boats, and other marine vessels, in contrast, are smaller in scale, and therefore, more difficult to detect and trace to a specific source. Ships’ crews regularly jettison oil-contaminated wastewater surreptitiously, often under cover of darkness, in contravention of applicable treaties, laws, and regulations to save ship owners and operators the expense and inconvenience of lawful disposal.⁸ These illegal oil discharges cumulatively cause more

6. IncidentNews, *Raw Incident Data*, <https://incidentnews.noaa.gov/raw/index> [<https://perma.cc/3HMM-LSMD>]. This statistic was derived from NOAA’s raw incident data. Spills of oil into the waters of the United States were separated from spills of other chemicals. Using Microsoft Excel, a sum of the “maximum potential release” of oil in each incident since the year 2000 was calculated therefrom. The United Nations Environment Programme estimates that approximately 13,000,000 gallons of oil are illegally jettisoned into the Mediterranean Sea annually. Environmental Alert Bulletin, UNEP, Stéphane Kluser, *Illegal Oil Discharge in European Seas* (2006).

7. Substantial marine oil spills are staggeringly expensive to remediate. In the aftermath of the *Exxon Valdez* oil spill, Exxon paid approximately US\$1 billion to clean up the oil it had released into the Prince William Sound in Alaska and over US\$500 million to compensate Alaskan Natives, landowners, and commercial fishermen for the damage caused by the spill. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008). During the litigation following the spill, the United States Supreme Court vacated the initial punitive damages award of US\$2.5 billion against Exxon and limited Exxon’s punitive damages to approximately US\$500 million, holding that maritime punitive damages should not exceed the compensatory damages. *Id.* at 498. Exxon incurred costs of approximately US\$2 billion in civil fines and remediation costs as a result of the 1989 spill. See Jonathan L. Ramseur, *Oil Spills Background and Governance*, <https://fas.org/sgp/crs/misc/RL33705.pdf> [<https://perma.cc/QJ3H-Z8CR>] (last visited Apr. 19, 2019).

8. Ben Vollaard, *Temporal displacement of environmental crime. Evidence from marine oil pollution* 1, 3 (Apr. 2016) (unpublished manuscript).

ocean and sea pollution than large-scale oil releases resulting from marine accidents.⁹

Intentional releases of oil, except in emergency situations when necessary to save lives or vessels or during times of war, are prohibited by MARPOL 73/78 and, therefore, by APPS.¹⁰ However, due to jurisdictional restrictions, the US government has not been able to directly prosecute most deliberate oil discharges.¹¹ Under the “law of the flag,” unlawful actions taken by foreign-flagged vessels on the high seas¹² are outside the reach of US jurisdiction and are only subject to redress by the nations in which these vessels are registered.¹³ If the flag flown by the MARPOL 73/78 violator is a “flag of convenience,” it is highly unlikely that any criminal charges will ever be filed against its owner, operator, master, engineer, or crewmembers for unlawful oil discharges into international waters.¹⁴

Because APPS contains a savings clause, which provides that APPS does not “limit, deny, amend, modify, or repeal any other remedy available to the United States,”¹⁵ the United States, acting through the Department of Justice; the Coast Guard; the Secretary of Homeland Security, the governmental department in which the Coast Guard is located; and the Administrator of the EPA, have resorted to making indictments related to illegal discharges of oil on the high seas by foreign-flagged ships entering the territorial waters of the United States based on actions taken by the vessel’s owner, operator, master, engineer, and crewmembers individually and collectively to

9. *Id.*

10. See 33 U.S.C. § 1902(b)(2)(B).

11. See Nicholas H. Berg, *Bringing It All Back Home: The Fifth and Second Circuit Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels*, 34 TUL. MAR. L.J. 253, 256 (2009); see also Andrew 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*, 32 TUL. MAR. L.J. 149, 156 (2007).

12. Black’s law dictionary defines “high seas” as the “seas outside the territorial waters that are open to all states.” *High seas*, BLACK’S LAW DICTIONARY (10th ed. 2014). See generally Statement on United States Ocean Policy 1 PUB. PAPERS 378-79 (Mar. 10, 1983).

13. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

14. Homer, *supra* note 11, at 154. See also Shaun Gehan, *United States v. Royal Caribbean Cruises, Ltd.: Use of Federal “False Statements Act” to Extend Jurisdiction Over Polluting Incidents into Territorial Seas of Foreign States*, 7 OCEAN & COASTAL L.J. 167, 182 (2001).

15. 33 U.S.C. § 1907(f).

cover-up their Annex I violations.¹⁶ Prosecutors in the United States have been able to obtain convictions of Annex I violators, as well as sanctions including fines and incarceration, by charging them with offenses under various federal statutes relating to their cover-ups of the unlawful discharges by falsifying oil discharge records, lying to government officials, obstructing justice or agency proceedings, and conspiracy.¹⁷ In the past two decades, the US Department of Justice has levied an aggregate of almost US\$500 million in criminal penalties against approximately 140 companies that own or operate marine vessels.¹⁸ The fines and prison sentences handed down for violations of MARPOL 73/78 have not proven to be punitive enough to serve as an effective deterrent against illegal oil releases.¹⁹ Sections 2Q1.3 of the US Sentencing Guidelines governs sentencing for violations of APPS.²⁰ The Third Circuit Court of Appeals has held that this section does not allow sentences to be “enhance[d],” increasing fines or prison time, based upon violations of Annex I of MARPOL 73/78 by foreign-flagged vessels that occur in international waters.²¹

This Note explains why and how, although MARPOL 73/78 and the APPS create a comprehensive system for prohibiting deliberate releases of oil into marine environments, the law of the flag thwarts the ability of the US government to combat effectively intentional oil pollution from seafaring vessels. Part II describes the quantity of oil jettisoned by ships into the world’s oceans and seas and the detrimental effects oil causes to marine environments. Part III sets forth the parameters of MARPOL 73/78’s prohibition against intentional oil releases as well as its requirements for the installation and use of oil pollution control equipment on covered vessels. Part IV explores the incentives for ship owners, operators, masters, engineers, and crewmembers to illegally jettison oil and common methods for doing so. Part V turns to the jurisdictional limitations that the law of the flag imposes on MARPOL 73/78’s enforcement. Specifically,

16. 33 U.S.C. § 1901(a)(11); 33 U.S.C. § 1901(a)(1); Berg, *supra* note 11, at 256.

17. *See, e.g.*, United States v. Royal Caribbean, 24 F. Supp. 2d 155, 158 (D.P.R. 1997).

18. Erica E. Phillips, *U.S. Fines Cargo Ship Operator \$1 Million for Polluting Waters*, WALL ST. J. (May 11, 2018), <https://www.wsj.com/articles/u-s-fines-cargo-ship-operator-1-million-for-polluting-waters-1526056342> [<https://perma.cc/7U9Q-UBUG>].

19. *See id.*

20. U.S. SENTENCING GUIDELINES MANUAL § 2Q1 (U.S. SENTENCING COMM’N 2018).

21. United States v. Abrogar, 459 F.3d 430, 434 (3d Cir. 2006).

even though MARPOL 73/78 signatories, including the United States, may prosecute intentional oil releases that occur within their territorial waters, only flag states have jurisdiction to prosecute offenses occurring on the high seas. Ship owners, operators, masters, engineers, and crewmembers are aware of this jurisdictional impediment to MARPOL 73/78's enforcement and, therefore, if they are inclined to unlawfully jettison oil, they tend to do so in international waters. Part VI examines various US criminal statutes to which US prosecutors have turned in order to prosecute efforts by ship owners, operators, masters, engineers, and crewmembers to conceal their MARPOL 73/78 violations. Part VII describes features in the US Sentencing Guidelines that limit the criminal penalties that US courts can impose for the commission of cover-up crimes related to the illegal discharge of oil. Part VIII describes four recent prosecutions relating to the illegal jettisoning of oil to illustrate the nature and extent of ongoing MARPOL 73/78 violations. Part VIII then offers several recommendations for promoting MARPOL 73/78 compliance and deterring non-compliance. Going forward, compliance with Annex I should be made less expensive for ship owners and operators and less burdensome for ship masters, engineers, and crews. Additionally, the United States should seek to expand its jurisdiction over unlawful oil releases by foreign-flagged vessels and extend coverage of Annex I to smaller vessels. Vessels and, in some instances, entire fleets, owned by violators of Annex I should be banned from US ports. Finally, § 2Q1.3 of the US Sentencing Guidelines should be amended to make clear that the release of oil outside of the territorial waters of the United States may be considered for purposes of enhancement during sentencing. The definition of "environmental offense" should also be broadened to include any violation of MARPOL 73/78 wherever in the world it may take place.

II. THE NATURE AND EXTENT OF OIL POLLUTION FROM SHIPS

It is estimated that ten billion tons of raw materials and finished goods are transported across the world's oceans and seas by ship each

year.²² Maritime shipping is the most cost-effective way to move large quantities of raw materials and finished goods.²³ As of 2018, there were approximately 800,000 dry bulk carriers, 560,000 oil tankers, 250,000 container ships, and 6,000 ferry and passenger ships registered worldwide.²⁴ Panama, Liberia, and the Marshall Islands have the highest number of marine-vessel registrants.²⁵ All three of these nations are deemed to issue flags of convenience.

Cruise Market Watch reports that the three largest cruise ship operators, Carnival Cruise Line, Norwegian Cruise Line, and Royal Caribbean Ltd., through subsidiaries, own 314 cruise ships.²⁶ Fifty more cruise ships are “on order” for construction between 2018 and 2025.²⁷ The 2018 State of the Cruise Industry report estimates that in 2018 over twenty-seven million individuals worldwide traveled on cruise ships.²⁸ Additionally, the world’s seas and oceans are used by commercial fishing boats. The US Coast Guard reported in 2017 that there were approximately twelve million recreational vessels registered within the United States.²⁹ Some, but not all, of these vessels are ocean-going.

A. Intentional Releases of Oil from Ships

Seafaring vessels generate oil-contaminated waste during their normal operations. There are two categories of oil-contaminated waste produced during a ship’s operations: sludge oil and lubrication

22. Tony R. Walker, *Environmental Effects of Marine Transportation*, in 3 *WORLD SEAS: AN ENVIRONMENTAL EVALUATION* 505, 505 (Charles Sheppard ed., 2018).

23. *Id.*

24. U.N. Conference on Trade and Development, *Review of Maritime Transport 2018*, at 24, UNCTAD/RMT/2018 (2018), available at https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf [<https://perma.cc/L87Z-UD2Z>].

25. Jan Hoffmann, *The World Maritime Fleet in 2017*, U.N. CONFERENCE ON TRADE & DEV. (July 10, 2017), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1516> [<https://perma.cc/KFR2-6F4A>].

26. *2018 Worldwide Cruise Line Passenger Capacity*, CRUISE MKT. WATCH, <https://cruisemarketwatch.com/capacity/> [<https://perma.cc/4VS7-R2VV>] (last visited Apr. 19, 2019).

27. Florida-Caribbean Cruise Ass’n, *2018 Cruise Industry Overview*, FLORIDA-CARIBBEAN CRUISE ASS’N 2 (2018), <https://www.f-cca.com/downloads/2018-Cruise-Industry-Overview-and-Statistics.pdf> [<https://perma.cc/RV2G-5SF8>].

28. *Id.*

29. U.S. Coast Guard, *2016 Recreational Boating Statistics*, U.S. COAST GUARD BOATING (2017) <https://www.uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2017.pdf> [<https://perma.cc/G8RK-UGSR>].

oil.³⁰ Sludge oil forms when oil emitted during the operation of the vessel's engine equipment drips to the bottom of the vessel where it mixes with water, detergents, solvents, and other engine operational byproducts that have accumulated in the bilge, the lowest point of a vessel's inner hull.³¹ This mixture of water and sludge oil is often referred to as "bilge oil."³² Bilge oil remains in a ship's bilge until it is removed.³³ Spent lubricating oil, which had been used to lubricate a vessel's equipment and machinery, is held in tanks where it may be incinerated in compliance with international regulations or where it may be stored for proper disposal at port reception facilities.³⁴ Although technology exists to prevent untreated oil or oil-contaminated wastewater from being discharged from ships, this technology can be, and often is, intentionally bypassed so that untreated oil-contaminated wastewater is discharged into the world's oceans and seas where the oil has harmful effects on the marine environment.³⁵

B. The Environmental Effects of Releasing Oil into Oceans and Seas

The marine shipping industry causes various types of environmental pollution.³⁶ Ships emit greenhouse gases and discharge blackwater, greywater, and ballast water, as well as oil into the world's oceans and seas.³⁷ Blackwater is water contaminated with sewage and greywater is water "that has been slightly used,"

30. Kehoe, *supra* note 1, at 5.

31. See, e.g., *United States v. Jho*, 465 F. Supp. 2d 618, 626 (2006); Kehoe, *supra* note 1, at 5; see also *Bilge*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bilge?show=0&t=1315360637> [<https://perma.cc/3EA8-3VQ7>] (last visited May 5, 2019).

32. *Jho*, 465 F. Supp. 2d at 626.

33. Kehoe, *supra* note 1, at 5.

34. For purposes of this Note, discussions of illegal releases of "oil" refer collectively to the illegal dumping of both sludge and lubricating oil. Kehoe, *supra* note 1, at 5-6.

35. *Jho*, 465 F. Supp. 2d at 627. See *infra* Part II.B. for a discussion of the equipment that is commonly bypassed to permit untreated oil-contaminated wastewater to enter the world's oceans and seas.

36. Vollaard, *supra* note 8, at 2-4.

37. Marine shipping emits conventional air pollutants, such as sulfur oxides (SO_x), nitrogen oxides (NO_x), volatile organic compounds, carbon monoxide (CO), and black carbon. In 2012, the marine shipping industry emitted approximately one billion tons of CO₂. Vollaard, *supra* note 8, at 2-4, 7, 10, 12.

including water from kitchens and laundry.³⁸ Ballast is used to stabilize a ship, often in order to compensate for changes in the weight or location of a ship's cargo.³⁹ Ballasting and de-ballasting occur when water or weighted materials are added to or removed from oil storage tanks to keep a vessel stable.⁴⁰ Ships also accidentally or intentionally release oil, dry bulk cargo (such as coal or iron), and other hazardous noxious substances into marine environments.⁴¹

Oil pollution is of specific concern because it has destructive impacts on marine ecosystems and marine mammals and other aquatic life as well as on the residents of shoreline communities and because it is so difficult to remediate.⁴² When oil is discharged into oceans or seas, it undergoes physical, chemical, and biological weathering.⁴³ Volatile chemical compounds evaporate into the atmosphere and other organic compounds are catalyzed in photochemical reactions.⁴⁴ Bacteria may degrade certain chemical components of oil.⁴⁵ The rate of weathering depends on the chemical structure of the oil, water temperature, and the rate of mixing by currents, wind, and waves.⁴⁶ Calm weather conditions prevent the oil from mixing throughout the water column, allowing the oil to spread along the surface water, contaminating shorelines.⁴⁷ Aggressive wave action mixes and distributes the oil throughout the water column. Medium-grade oils, such as gasoline, disperse farther than dense, heavy-grade oils, which sink through the water column and are deposited into the sediment where they may persist for years to decades, depending on the environment.⁴⁸ Oil-coated sediments are dispersed and break up more quickly in regions where there are high-

38. See *Northwest Env'tl. Advocates v. U.S. EPA*, No. C 03-05760 SI, 2006 U.S. Dist. Lexis 69476, at *9 (N.D. Cal. Sept. 18, 2006).

39. See *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 835 (D.C. Cir. 2004).

40. Paul S. Dempsey, *Compliance and Enforcement in International Law – Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 465 (1984).

41. Vollaard, *supra* note 8, at 6-7.

42. See *Oil in the Ocean*, WOODS HOLE OCEANOGRAPHIC INSTITUTION (July 28, 2014), <http://www.whoi.edu/oil/deepwater-horizon/faqs> [<https://perma.cc/B7CW-3F9M>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

energy currents.⁴⁹ Oil slicks on the ocean surface, which are usually caused by medium-grade oil, pose the greatest threat to seabirds and marine mammals.⁵⁰

Seabirds are particularly susceptible to oil pollution because they pass through oil slicks when they dive into the water to forage for food.⁵¹ The oil absorbs into their feathers interfering with the feathers' natural "insulating" and "waterproofing" qualities.⁵² The seabirds must therefore exert a great deal of energy to stay warm, and often die of hypothermia or exhaustion after coming into contact with oil-contaminated water.⁵³ The same is true of marine mammals because their fur loses its insulating properties when coated with oil.⁵⁴ The ingestion of oil has been linked to a thinning of seabird eggs.⁵⁵ Although seabirds are so vulnerable to oil pollution and contamination, it is difficult to estimate the exact number of seabird casualties resulting from oil pollution because so many seabirds die on the high seas and their corpses are never discovered. It is estimated that for each dead, oil-covered sea bird discovered following a large-scale oil spill, there may be up to ten seabirds that died at sea as a result of the oil spill but whose bodies were never found.⁵⁶

Three methods are most often used to clean up large quantities of oil that are intentionally and unintentionally discharged into marine environments: burning, mechanical cleanup, and chemical dispersants.⁵⁷ If oil is going to be burned, the burning operation must be conducted slowly, and only small amounts of oil are ignited at any time to lower the risk of an explosion.⁵⁸ The US Coast Guard's On-Scene Coordinator arranges and conducts oil spill cleanup efforts.⁵⁹ Booms are used to pull oil to a safe distance away from any ships so

49. *Id.*

50. Walker, *supra* note 22, at 8.

51. Walker, *supra* note 22, at 8.

52. Walker, *supra* note 22, at 8.

53. Walker, *supra* note 22, at 7.

54. Walker, *supra* note 22, at 7.

55. Walker, *supra* note 22, at 7.

56. Walker, *supra* note 22, at 7.

57. *Exxon Valdez Spill Profile*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/emergency-response/exxon-valdez-spill-profile> [https://perma.cc/6TU4-BPAX] (last visited Apr. 17, 2019).

58. *Id.*

59. *Id.*

that shipboard oil will not be accidentally ignited.⁶⁰ Burning operations are weather-dependent and cannot be conducted effectively in the rain.⁶¹ If burning is not a feasible means of cleaning up the oil contamination, booms and skimmers may be used to try to isolate and mechanically skim and remove oil from the surface of the water.⁶² If the oil discharged into the ocean is heavy-grade, it will clog the skimmers, which are expensive and time-consuming to clean and replace.⁶³ Finally, the EPA specialists may coordinate the use of chemical dispersants and bioremediation techniques to break down discharged oil.⁶⁴ Chemical dispersants dissolve oil slicks, allowing the oil to mix with water and to degrade more quickly; however, chemical dispersants cannot always be used because the dispersants themselves can damage marine environments.⁶⁵

III. MARITIME OIL POLLUTION TREATIES AND LEGISLATION

In 1851, Congress enacted the Limitation of Liability Act,⁶⁶ which capped the liability of the owner of a vessel at the post-casualty value of the vessel plus pending freight so long as the casualty occurred “without the privity or knowledge of the owner.”⁶⁷ The possibility of exploitation of the Limitation of Liability Act became apparent in the late 1960s, following the *Torrey Canyon* oil spill. In 1967, the *Torrey Canyon*, an oil tanker owned by a California-headquartered corporation, but which flew the flag of Liberia, left Kuwait with a cargo filled with crude oil.⁶⁸ The *Torrey Canyon* was bound for Wales.⁶⁹ In March 1967, due to a navigational error, the *Torrey Canyon* struck and became impaled on a rock near the Cornish shore.⁷⁰ The *Torrey Canyon* discharged approximately 120,000 tons

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 46 U.S.C. § 30501 et seq.

67. 46 U.S.C. § 30501(b).

68. *In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 229 (S.D.N.Y. 1968); Jeffrey D. Morgan, *The Oil Pollution Act of 1990*, 5 *FORDHAM ENV. L. REV.* 1, 2 (1995).

69. *In re Barracuda Tanker Corp.*, 281 F. Supp. at 229.

70. Bethan Bell and Mario Cacciottolo, *Torrey Canyon oil spill: The day the sea turned black*, BBC (Mar. 17, 2017), <https://www.bbc.com/news/uk-england-39223308>.

of crude oil into the English Channel and contaminated approximately fifty miles of French coastline and 120 miles of Cornish coastline.⁷¹ The effects of the spill also killed at least 15,000 sea birds.⁷² The British Royal Air Force sent bombers to sink the stranded ship, but not until after the *Torrey Canyon* had already released its oil cargo into the sea.⁷³

The *Torrey Canyon* spill was the largest oil spill in the world at that time. It cost approximately US\$8 million (nearly US\$60 million adjusted for inflation) to clean up the pollution caused by the spill.⁷⁴ The *Torrey Canyon*'s liability for the oil cleanup costs, however, was limited to US\$50 (approximately US\$375 in 2019, adjusted for inflation).⁷⁵ Because the *Torrey Canyon* was scuttled, the main vessel itself was rendered valueless.⁷⁶ The Southern District of New York therefore estimated the *Torrey Canyon*'s post-casualty value at merely US\$50, the approximate value of the single surviving lifeboat.⁷⁷

A. MARPOL 73/78

The *Torrey Canyon* oil spill exposed deficiencies in existing international treaties and national laws to protect marine environments from oil pollution. Accordingly, in 1973, the IMO convened and drafted MARPOL 73.⁷⁸ Before MARPOL 73 went into effect, the IMO modified MARPOL 73 with MARPOL 78.⁷⁹ MARPOL 73/78 was not self-executing and did not become law in its signatory states until it had been implemented through domestic legislation.⁸⁰

71. *In re Barracuda Tanker Corp.*, 281 F. Supp. at 229. See also Adam Vaughan, *Torrey Canyon disaster – the UK's worst-ever oil spill 50 years on*, THE GUARDIAN (Mar. 18, 2017), <https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50th-anniversary> [<https://perma.cc/4DMY-L73L>].

72. Bell, *supra* note 70.

73. *In re Barracuda Tanker Corp.*, 281 F. Supp. at 229.

74. *Id.*

75. *Id.* at 230; *The Inflation Calculator*, WESTEGG, <https://westegg.com/inflation/> [<https://perma.cc/TVR2-X9BX>] (last visited May 5, 2019).

76. *In re Barracuda Tanker Corp.*, 281 F. Supp. at 232.

77. *Id.* at 230.

78. See MARPOL 73/78, *supra* note 2.

79. See MARPOL 73/78, *supra* note 2.

80. *See Royal Caribbean Cruises, Ltd. v. United States*, 11 F. Supp. 2d 1358, 1367 (S.D. Fla. 1998).

B. The US Act to Prevent Pollution from Ships

The United States' enactment of MARPOL 73/78 is APPS, which was signed into law by President Jimmy Carter in 1980.⁸¹ The EPA works in consultation with the Coast Guard to promulgate and enforce regulations pursuant to APPS.⁸² The Coast Guard patrols the US coastline looking for evidence of oil discharged by marine vessels using airplanes that are equipped with "Forward Looking Infrared Radar capable of detecting oil spills even at night."⁸³ Furthermore, the Coast Guard utilizes technology that can "fingerprint match" samples of oil released into the marine environment with samples collected from a ship's engine room.⁸⁴

APPS applies to "a ship of United States registry or nationality, or one operated under the authority of the United States, wherever located."⁸⁵ APPS also covers foreign-flagged ships while in the "navigable waters" of the United States.⁸⁶ "Navigable waters," for purposes of APPS, include the territorial sea of the United States, which extends out twelve nautical miles from the baseline of the US coast.⁸⁷ APPS also governs port reception facilities at any port or terminal within the United States.⁸⁸

In order to prevent oil releases into the world's oceans and seas, MARPOL 73/78 and APPS specifically regulate:

[b]allasting or cleaning of fuel oil tanks . . . [d]ischarge of ballast containing an oily mixture or cleaning water from fuel oil tanks . . . [d]isposal of oil residue . . . [d]ischarge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces . . . [b]unkering of fuel or bulk lubricating

81. H.R. 6665 - *Act to Prevent Pollution from Ships*, CONGRESS.GOV, <https://www.congress.gov/bill/96th-congress/house-bill/6665/actions> [<https://perma.cc/48T9-NT8H>].

82. 33 U.S.C. § 1908 (2018).

83. Vollaard, *supra* note 8, at 7.

84. *See* United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155, 158 (D.P.R. 1997). The US Coast Guard continues to use "fingerprint matching" to identify the source of oil found in marine environments. *See, e.g.*, United States Coast Guard News Release, *Unified command identifies oil, clean-up operations continue*, (Apr. 3, 2019), <https://incidentnews.noaa.gov/incident/9872#!542005> [<https://perma.cc/AE55-F6MY>].

85. 33 U.S.C. § 1902(a)(1) (2018).

86. 33 U.S.C. § 1902(a)(2) (2018).

87. 33 CFR § 2.22.(2019).

88. 33 U.S.C. § 1902(a)(4) (2018).

oil . . . [a]ny failure and the reasons for, of the oil filtering equipment.⁸⁹

MARPOL 73/78 and APPS require oil tankers, weighing 150 gross tons or more, and ships, weighing 400 gross tons or more, to 1) implement technology designed to regulate the amount of oil that can be discharged with waste produced during the regular operation of a vessel; and 2) to be equipped with oil-water separators (“OWS”), oil-content meters (“OCM”), and an oil record book (“ORB”).⁹⁰ OWSs reduce the amount of oil contained in a ship’s wastewater by periodically skimming oil off the top layer of oil-contaminated wastewater.⁹¹ OCMs sounds an alarm if the oil content of a ship’s effluent contains more than fifteen parts per million of oil.⁹² ORBs must document all treated and untreated discharges of oil-contaminated wastewater.⁹³ The ORB must be preserved for at least three years and must be signed by the ship’s master.⁹⁴ Annex I of MARPOL 73/78 provides that the government officials of MARPOL 73/78 signatories may inspect a vessel’s ORB while that vessel is docked at its ports.⁹⁵ The oil that is skimmed from the top of the wastewater must be stored on board the vessel and is held for disposal in a shore-side port reception facility.⁹⁶

IV. NON-COMPLIANCE WITH MARPOL 73/78 AND APPS

Ship’s masters, engineers, and crews often bypass OWSs to avoid the time and costs associated with proper storage, maintenance, and disposal at ports of the oil separated from the ship’s oil-contaminated wastewater.⁹⁷ Owners and operators of ships

89. 33 C.F.R. § 151.25(d)(1)-(6).

90. See *United States v. Abrogar*, 459 F.3d 430, 432 (3d Cir. 2006); see also *Homer*, *supra* note 11, at 153.

91. See *Abrogar*, 459 F.3d at 432; see also *Homer*, *supra* note 11, at 153.

92. See *Abrogar*, 459 F.3d at 432; see also *Homer*, *supra* note 11, at 153.

93. See *Abrogar*, 459 F.3d at 432; see also *Homer*, *supra* note 11, at 153.

94. See MARPOL 73/78, annex I, reg. 20(3), (5), *supra* note 2; see *Berg*, *supra* note 11, at 256.

95. MARPOL 73/78, annex I, reg. 20(3), (5), *supra* note 2.

96. *Homer*, *supra* note 11, at 150; MARPOL 73/78, annex I, reg. 1(1), *supra* note 2.

97. See *Homer*, *supra* note 11, at 151; see also *Benedict S. Gullo, The Illegal Discharge of Oil on the High Seas: The U.S. Coast Guard’s Ongoing Battle Against Vessel Polluters and a New Approach Toward Establishing Environmental Compliance*, 209 MIL. L. REV. 122, 129, 131 (2011).

compensate ship masters, engineers, and crew members with performance bonuses for completing a voyage below the vessel's projected operating budget.⁹⁸ With respect to shipments of cargo, owners and operators of ships also reward ship masters, engineers, and crew members for delivering the cargo ahead of schedule.⁹⁹

A. Incentives to Intentionally Release Oil from Ships

Because oil discharge standards are stringent and therefore taxing on OWSs, OWS filters and membranes frequently fail mechanically, requiring engineers to neglect their other duties and spend time repairing malfunctioning OWSs.¹⁰⁰ It is not uncommon for ships to lack the parts necessary to effectuate required repairs of their oil-pollution-control devices. Proper shore-side disposal of oil at port reception facilities is expensive and time-consuming.¹⁰¹

To minimize operating costs and to save valuable time, ships' owners, operators, and crewmembers often bypass a vessel's OWS to illegally dispose of oil.¹⁰² While corporate and on-board personnel may have numerous incentives to defy the requirements of Annex I of MARPOL 73/78, § 1908(a) provides them with a countervailing incentive to report violators. Section 1908(a) of APPS allows for compensation to be paid to whistleblowers in "an amount equal to not more than ½ of [the] fine" imposed on the vessel's owner or operator.¹⁰³

98. See CHRISTINE B.N. CHIN, *CRUISING IN THE GLOBAL ECONOMY: PROFITS, PLEASURE AND WORK AT SEA* 73 (2008); see also Homer, *supra* note 11, at 152.

99. See CHIN, *supra* note 98, at 73; see also Homer, *supra* note 11, at 152.

100. Homer, *supra* note 11, at 151; see also Gullo, *supra* note 97, at 131.

101. Homer, *supra* note 11, at 151-52; see also Gullo, *supra* note 97, at 128.

102. See Gullo, *supra* note 97, at 129, 134-35.

103. 33 U.S.C. § 1908(a) (2018).

B. Common Methods of Deceiving Oil-Pollution Monitoring and Prevention Devices

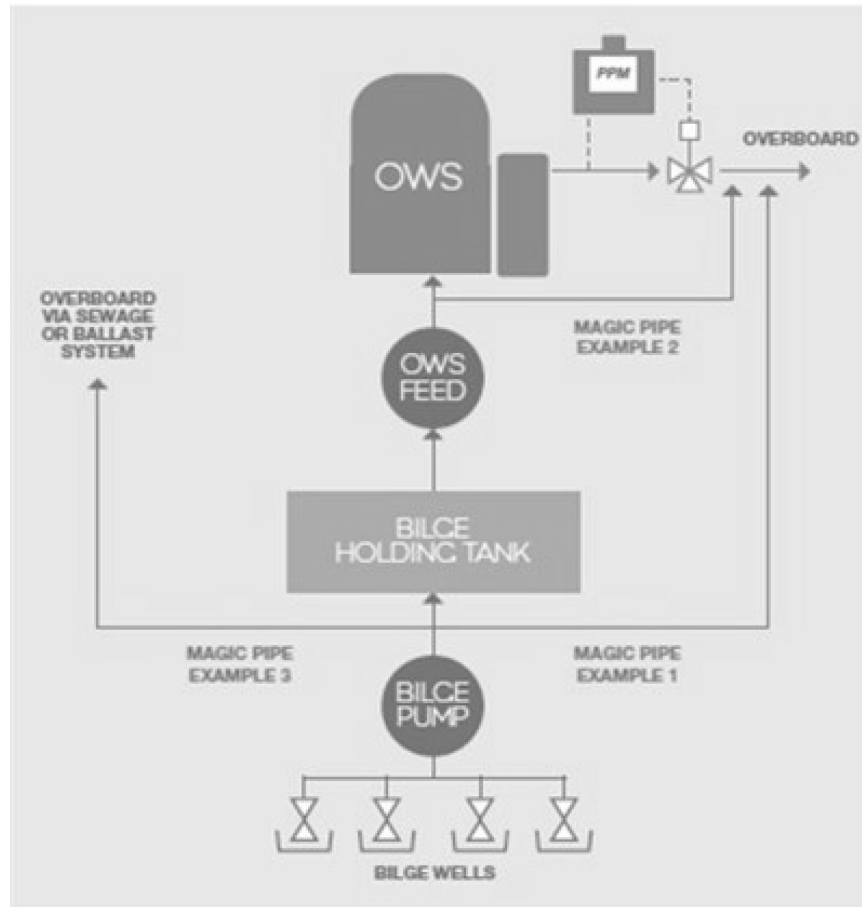


Figure 1: This diagram shows two common ways magic pipes are used to bypass a vessel's OWS.¹⁰⁴

Magic pipes may be used to bypass the bilge water holding tank by pumping water from the bilge wells directly overboard before the

104. *Magic Pipes*, NEPIA (Feb. 10, 2015), <http://www.nepia.com/insights/signals-online/ships/pollution/magic-pipes/> [<https://perma.cc/manage/create?folder=4035-48288-57901-57902>].

bilge water is stored in the bilge water holding tank.¹⁰⁵ Bilge water is stored in a bilge holding tank before it is pumped through an OWS.¹⁰⁶ Magic pipes may also be used to discharge overboard bilge water that has been stored in a bilge holding tank before that water is run through a vessel's OWS.¹⁰⁷

To deceive OCMs into registering oil discharges within acceptable parameters when they release oil-contaminated wastewater from their ships, ship engineers, with the assistance of crewmembers, resort to tricks including periodically flushing the oil-contaminated wastewater with clean water so that the oil-contaminated wastewater becomes sufficiently diluted that its concentration of oil is below fifteen parts per million when it reaches the OCM.¹⁰⁸ Ship engineers also subvert the pollution-control systems of ships by diverting the valves designed to direct oil skimmed from wastewater by OWSs and jettisoning it overboard before it reaches the ship's oil storage tanks.¹⁰⁹ Ship engineers use detachable pipes, sometimes referred to as "magic pipes," to dispose of excess oil-contaminated wastewater from a ship's holding tank into the seas and oceans.¹¹⁰ These devices received the moniker "magic pipes" because they make the oil-contaminated wastewater contained in bilge tanks "magically" disappear.¹¹¹ Magic pipes are disconnected and hidden when ships dock at ports of call so that they are not visible when the ship is boarded by government personnel for inspections.¹¹² Ship engineers employ magic pipes for a number of reasons including: to correct tank levels to match an incorrect ORB entry; to dispose of excess bilge water if bilge water holding tanks are filling up; if the engineers do not know how to operate OWS; or if OWSs are not properly

105. Mayur Agarwal, *An Overview of Sludge and Bilge Management on Board Ships*, MARINE INSIGHT (Sept. 20, 2018), <https://www.marineinsight.com/maritime-law/magic-pipe-the-mystery-of-the-illegal-activity-still-continues-on-ships/>.

106. *See id.*

107. *Magic Pipes*, *supra* note 104; *see also* Gullo, *supra* note 97, at 135-36.

108. *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 627 (E.D. Tex. 2006).

109. *Id.*

110. Ranuek Kantharia, *Magic Pipe: The Mystery of the Illegal Activity Still Continues on Ships*, MARINE INSIGHT (Oct. 9, 2017), <https://www.marineinsight.com/maritime-law/magic-pipe-the-mystery-of-the-illegal-activity-still-continues-on-ships/> [<https://perma.cc/8GT9-AGPG>].

111. *Id.*

112. *Id.*

maintained and, therefore, are not functioning.¹¹³ Ship engineers may also use magic pipes to dispose of oil-contaminated wastewater before arriving at ports in less-developed countries, which lack resources to invest in adequate port reception facilities for proper waste disposal.¹¹⁴

V. JURISDICTIONAL LIMITATIONS ON THE ENFORCEMENT OF THE OIL DISCHARGE PROHIBITION OF APPS

Section 1908(a) of APPS authorizes criminal penalties for “knowing” violations of MARPOL 73/78.¹¹⁵ A knowing violation of Annex I’s prohibition against illegally discharging oil is a Class D felony, and, hence, each violation is punishable by incarceration for not less than five years nor more than ten years.¹¹⁶ Section 1907(c)(2) of APPS provides that “while at a port or terminal subject to the jurisdiction of the United States, a ship . . . may be inspected by the [Coast Guard]” and authorizes the US Coast Guard to take “any additional action required by Article 6 of [the United Nations Convention on the Law of the Seas],” which provides that “if an inspection indicates a violation of [the United Nations Convention on the Law of the Seas], a report shall be forwarded to the [vessel’s flag state] for any appropriate action.”¹¹⁷

A. The Law of the Flag

The United Nations Convention on the Law of the Seas (“UNCLOS”) was promulgated in 1982 to establish an international legal framework with respect to the use of the high seas. Several provisions of UNCLOS govern the enforcement of MARPOL 73/78.¹¹⁸ As of March 2019, there are 168 parties and 157 signatories to UNCLOS.¹¹⁹ Although the United States is not a party to UNCLOS, the provisions of UNCLOS contain generally accepted

113. *Id.*

114. *A Corrupt Corporate Culture*, MOTORSHIP - INSIGHT FOR MARINE TECHNOLOGY PROFESSIONALS (June 12, 2018), <https://www.motorship.com/news101/ships-equipment/a-corrupt-corporate-culture/> [<https://perma.cc/HN35-9P9X>].

115. 33 U.S.C. § 1908(a) (2018).

116. 18 U.S.C. § 3559(a)(4) (2018).

117. 33 U.S.C. § 1907(c)(2) (2018); MARPOL art. 6(2), *supra* note 2.

118. UNCLOS, *supra* note 13.

119. UNCLOS, *supra* note 13.

principles of maritime law and therefore UNCLOS's provisions are considered to be customary international law by courts in the United States.¹²⁰ The Fifth Circuit has clarified that, although the United States is not a UNCLOS signatory, section 1912 of APPS, which states that "any action taken under [APPS] shall be taken in accordance with international law," means that, effectively, APPS incorporates UNCLOS "to the extent that UNCLOS reflects customary international law."¹²¹ The law of the flag, as enunciated in UNCLOS, has long been considered a customary provision of international maritime law within the United States.¹²²

Article 216 of UNCLOS, which codifies the law of the flag doctrine with respect to marine pollution by dumping, stipulates that only a vessel's flag state has authority to enforce that vessel's violations of MARPOL 73/78 unless such violation occurred within the territorial waters of another signatory of MARPOL 73/78, in which case jurisdiction is concurrent.¹²³ Article 230(2) of UNCLOS further narrows the scope of the criminal penalties provision of MARPOL 73/78 by limiting the imposition of criminal penalties with respect to intentional marine discharges of oil to "case[s] of willful and serious act[s] of pollution in the territorial sea."¹²⁴ UNCLOS does not define what constitutes "serious" acts of pollution.¹²⁵

B. Flags of Convenience

Vessel owners often choose to register their vessels in nations that issue "flags of convenience," even if the owner of the vessel has no other connection to the flag state.¹²⁶ Nations that issue flags of

120. *See* *Royal Caribbean Cruises, Ltd. v. United States*, 11 F. Supp. 2d 1358, 1369 (S.D. FL. 1998). President Bill Clinton signed UNCLOS; however, the Senate, which must confirm presidential enactment of a treaty, failed to ratify it. *See Recent Developments: A Review of Recent Developments in Ocean and Coastal Law*, 13 *OCEAN & COASTAL L.J.* 143, 149 (2007).

121. 33 U.S.C. § 1912; *see* *United States v. Jho*, 534 F.3d 398, 406-07 (5th Cir. 2008).

122. *See* *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963) (noting that it is a "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship").

123. UNCLOS, *supra* note 13, art. 216.

124. UNCLOS, *supra* note 13, art. 230(2).

125. *United States v. Royal Caribbean*, 24 F. Supp. 2d 155, 160 (D.P.R. 1997).

126. Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas*, 5 *PENN. J. INT'L LAW & POL'Y* 1, 2, (2006).

convenience generally permit registration of vessels by non-citizens, facilitate registration, charge low taxes and fees, allow ships to be manned by international crews, and impose minimal equipment and maintenance requirements on the vessels registered under their flags.¹²⁷ The monies that nations issuing flags of convenience garner from ship registries tend to be a substantial portion of their domestic revenues.¹²⁸ Moreover, ships rarely call on ports in flag-of-convenience nations.¹²⁹ Because the market for flags of convenience is lucrative and, therefore, highly competitive, it is unlikely that a flag-of-convenience state would jeopardize its relationship with its ship-registry clients by prosecuting them or the masters, engineers, or crewmembers of their ships for environmental pollution offenses.¹³⁰

C. Enforcement of Annex I's Prohibition of Intentional Releases of Oil Against Foreign-Flagged Vessels in US Territorial Waters

Vessels registered in the United States are bound by the provisions of APPS wherever in the world they are located.¹³¹ APPS therefore prohibits the knowing release of effluent contaminated with more than fifteen parts per million of oil by any US-flagged vessels, whether or not the release occurs within the territorial waters of the United States. APPS does not, however, apply to US military vessels or any other vessels in times of declared national emergencies or wars.¹³² Similarly, foreign-flagged vessels may be prosecuted by the United States if they unlawfully discharge oil into the territorial waters of the United States.¹³³

In *United States v. Royal Caribbean Cruises, Ltd.* (“*Royal Caribbean P*”)¹³⁴, Royal Caribbean Cruises, Ltd., a Liberian corporation headquartered in Miami, Florida (“Royal Caribbean”), sought dismissal of criminal charges brought against it in its capacity

127. *Id.* at 14.

128. *Id.*

129. Dempsey, *supra* note 40, at 526.

130. Dempsey & Helling, *Oil Pollution by Ocean Vessels—An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions and Coastal States*, 10 DEN. J. INT'L L. & POL'Y 37, 63 (1980).

131. 33 U.S.C. § 1902(a)(1) (2018).

132. 33 U.S.C. § 1902(b)(2)(B) (2018).

133. 33 U.S.C. § 1902(a)(2) (2018).

134. *See United States v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp. 2d 155 (D.P.R. 1997).

as the parent company of the corporate owner of the Norway-flagged cruise ship *Sovereign of the Seas* as well as against the cruise ship's chief engineer and first engineer.¹³⁵ Royal Caribbean and the *Sovereign of the Seas*'s chief engineer and first engineer were charged in connection with the intentional discharge of thirty gallons of oil into the territorial waters of the United States off the coast of Puerto Rico.¹³⁶ The US District Court for the District of Puerto Rico denied the defendants' motion to dismiss the indictments for lack of jurisdiction under the law of the flag because "the law of the flag applies only to jurisdiction over the aboard activities of ships and their personnel," but "[t]he pollution . . . being prosecuted . . . occurred outside the ship and therefore outside the jurisdiction of Norway under the law of the flag."¹³⁷

However, although the oil release at issue occurred within the territorial waters of the United States, the court held that the discharge of thirty gallons of oil did not constitute a "serious act of pollution" under UNCLOS, limiting the sanctions available for prosecutions of illegal discharges of oil, even in the territorial waters of the United States.¹³⁸ The ship's engineers charged with the illegal discharge of oil could not be incarcerated and would only be subject to monetary penalties.¹³⁹ UNCLOS stipulates that a coastal state may only impose monetary fines, and not prison sentences, when a foreign-flagged vessel violates national laws and regulations that address the prevention, reduction, and control of maritime pollution unless a

135. *See id.* at 157, 160.

136. *See id.* at 157, 160. For reference purposes, a 2019 Chevrolet Suburban has a gasoline tank capacity of 31.0 gallons. *2019 Chevrolet Suburban Features & Specs*, EDMUNDS, <https://www.edmunds.com/chevrolet/suburban/2019/features-specs/>.

137. *Royal Caribbean Cruises*, 24 F. Supp 2d at 160. The court also denied the defendants' motions to dismiss for other charges including: failing to notify the US Coast Guard of the oil discharge under 33 U.S.C. § 1321(b)(5); knowingly and willfully making false statements to United States Coast Guard officials under 18 U.S.C. § 1001 by claiming that waste oil found under the OWS came from a blown seal on a fuel oil purifier and that the OWS was working properly when the defendants knew it was not; knowingly and willfully making a false statement in writing to the US Coast Guard officials regarding the OWS in violation of 18 U.S.C. § 1001 by submitting to them a falsified ORB representing that no discharges of contaminated bilge waste were made without the use of the OWS; witness tampering in violation of 18 U.S.C. § 1512(b)(3) and § 1512(b)(1); and finally obstruction of justice in violation of 18 U.S.C. § 1512(b)(2)(B). Hence, prosecution of these related offenses were allowed to proceed.

138. *See id.*

139. *See id.*

willful and serious act of pollution is committed within the territorial waters of the coastal state.¹⁴⁰ The chief engineer and first engineer of the *Sovereign of the Seas* could not be incarcerated. Royal Caribbean, which was also under indictment for other maritime pollution offenses, ultimately entered into a plea agreement with the Department of Justice under which it agreed to pay US\$8 million to Puerto Rico.¹⁴¹ Royal Caribbean also agreed to submit to an environmental compliance plan and corporate probation.¹⁴²

D. Liability of the Officers of Corporate Owners of Vessels for Violations of APPS

Under the doctrine of *respondeat superior*, an employer may be held liable for a tortious act committed by its employee so long as the act is committed within the scope of the employee's employment.¹⁴³ The doctrine of *respondeat superior* also applies to an employer's criminal liability for crimes committed by employees related to their employment.¹⁴⁴ As is indicated by *Royal Caribbean I*, corporations may be held liable under the doctrine of *respondeat superior* for their employee's violations of APPS, the False Statements Act, and obstruction of justice or of agency proceedings.¹⁴⁵ Onshore corporate officers and employees may even be held individually liable for conspiring with on-board masters, engineers, and crewmembers to violate various provisions of APPS.¹⁴⁶

140. *Id.*

141. *See Royal Caribbean Sentenced for Fleet-Wide Conspiracy of Dumping Oil and Lying to the Coast Guard*, US DEP'T OF JUST. (Sept. 17, 1998), https://www.justice.gov/archive/opa/pr/1998/September/429_enr.htm [<https://perma.cc/MNX8-EG7C>].

142. *See id.*

143. *See generally* Christensen v. Swenson, 874 P.2d 125, 127 (Utah Sup. Ct. 1994).

144. *See* Homer, *supra* note 11, at 162 (citing *United States v. George F. Fish*, 154 F.2d 798, 801 (2d Cir. 1946)).

145. *See United States v. Royal Caribbean*, 24 F. Supp. 2d 155, 161 (D.P.R. 1997).

146. *See, e.g., Executive Charged and Corporations Plead Guilty to Pollution Conspiracy to Hide Oil Discharges at Sea*, US DEP'T OF JUST.(Aug. 22, 2002), https://www.justice.gov/archive/opa/pr/2002/August/02_enrd_487.htm [<https://perma.cc/S3SL-ZZLN>].

E. Enforcement of the Oil Pollution Act of 1990 Against Foreign-Flagged Vessels in US Territorial Waters

The United States may also prosecute ships' owners, operators, masters, engineers, and crewmembers who are involved in intentionally releasing oil into the territorial waters or inland waters of the United States under other domestic statutes. The Oil Pollution Act of 1990 ("OPA 90"),¹⁴⁷ which amended the Federal Water Pollution Control Act of 1973,¹⁴⁸ penalizes the discharge of a "harmful quantity of oil" by any vessel of any size into the inland waters of the United States, the navigable waters of the United States, or into the waters of the contiguous zone.¹⁴⁹ The contiguous zone extends out twelve miles from the baseline.¹⁵⁰ OPA 90 also prohibits any discharges of oil that "affect natural resources belonging to . . . the U.S." through the exclusive economic zone of the United States, which extends out 200 miles from the baseline.¹⁵¹

Although, like APPS, OPA 90 imposes penalties for the intentional discharge of oil from ships, OPA 90 also imposes penalties on unintentional and accidental discharges of oil from both ships and oilrigs.¹⁵² It is with respect to these unintentional oil spills that OPA 90 is most often invoked because unlawful intentional discharges of oil tend not to occur within the well-guarded territorial waters of the United States. In cases of accidental or intentional oil releases, OPA 90 caps liability for vessels weighing more than three million gross tons at US\$1,200 per gross tonne or US\$10 million, whichever is greater.¹⁵³ OPA 90 also permits the US government to recover costs incurred in the restoration of natural resources that were damaged as a result of the discharge of oil and establishes the Oil Spill Liability Trust Fund.¹⁵⁴

The Oil Spill Liability Trust Fund may cover the costs of oil removal. After the oil spill is cleaned up, the Justice Department will

147. See 33 U.S.C. § 2701 et seq. (2018).

148. See 33 U.S.C. § 1251 et seq. (2018).

149. See 40 C.F.R. § 110.3 (2019).

150. See Kehoe, *supra* note 1, at 7.

151. See 33 C.F.R. § 2.30 (2019).

152. See 33 U.S.C. § 2701(7) (2018).

153. See Sharona Hoffman, *Criminal Sanctions in Accidental Oil Spill Cases – Punishment Without a Crime*, 71 NEB. L. REV. 1033, 1041 (1992).

154. See 33 U.S.C. § 1486 (1990).

sue the liable party to recover the government's oil-spill cleanup expenditures following completion of the cleanup, even if the oil is discharged accidentally.¹⁵⁵ OPA 90 sets forth a large variety of remedies for private plaintiffs and the federal and state governments in the form of high civil and administrative fines for noncompliance with administrative orders.¹⁵⁶

OPA 90 holds the owners and operators of vessels strictly liable for the costs of removing spilled oil and for the damage even if it is caused by accidental discharges.¹⁵⁷ OPA 90 includes several complete defenses to liability for removal costs or damages. These defenses include: an act of God; an act of war; and an "act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party."¹⁵⁸ However, these defenses are not applicable to deliberate releases of oil into the marine environment.

Charges for the deliberate release in US territorial waters of oil by foreign-flagged vessels under OPA 90 are rare, but do get filed. Recently, Avin International LTD and Nicos I.V. Special Maritime Enterprises, two Greek shipping companies, were charged with failure to report discharges of oil under OPA 90 and negligent discharge of oil under OPA 90.¹⁵⁹ The *M/T Nicos IV*, a Greek-flagged vessel,

155. See Hoffman, *supra* note 153, at 1041.

156. See *id.* at 1044.

157. Judicially recoverable civil fines under OPA 90 include damages for "injury to, destruction of, loss of, or loss of use of, natural resources"; "economic losses resulting from destruction of, real or personal property"; the "loss of subsistence use of natural resources"; the "net loss of taxes, royalties, rents, fees, or net profit shares due to the injury"; damages resulting from "the loss of profits or impairment of earning capacity due to injury, destruction, or loss of real property"; and, the "net costs of providing increased or additional public services during or after removal activities." 33 U.S.C. § 2702(b)(2)(A)-(b)(2)(F) (1990).

158. The "responsible party" must demonstrate that it exercised due care and took precautions against the foreseeable acts or omissions of the third party. OPA 90's defenses are not available if the "responsible party" knows or has reason to know of the spill but fails or refuses to report it; fails or refuses to cooperate or provide assistance requested by the responsible government official with regard to the removal activity; or fails to comply with an order made pursuant to OPA 90's liability provision or made pursuant to the Intervention on the High Seas Act. See 33 U.S.C. § 2703 (a)(1)-(3); 33 U.S.C. § 2703(c).

159. See *Two Greek Shipping Companies Plead Guilty to Illegally Discharging Oil Into Texas Port Waters*, US DEP'T OF JUST. (Nov. 27, 2018), <https://www.justice.gov/opa/pr/two-greek-shipping-companies-plead-guilty-illegally-discharging-oil-texas-port-waters> [<https://perma.cc/JG5C-SJML>].

illegally jettisoned oil in the waters of the United States off the coast of Texas.¹⁶⁰ The Greek shipping companies were required to pay US\$4 million in criminal fines and to serve a four-year term of probation, during which the companies' vessels must implement environmental compliance plans.¹⁶¹

*VI. PROSECUTIONS OF CRIMES RELATING TO COVERING-UP
INTENTIONAL RELEASES OF OIL BY FOREIGN-FLAGGED
VESSELS IN INTERNATIONAL WATERS*

When it comes to foreign-flagged vessels illegally releasing oil into international waters, it's "not the crime, it's the cover-up" that gives rise to liability.¹⁶² At least one federal district court has opined that if ship owners, operators, masters, engineers, and crewmembers of foreign-flagged vessels accurately recorded their unlawful discharges of oil in their ORBs and responded honestly to all questions posed to them by US Coast Guard official regarding their illegal oil discharges on the high seas, there would be little, if anything, that the United States could do to hold them accountable for their actions.¹⁶³ In the words of the Florida Southern District Court in a case involving the submission to US Coast Guard Officials of a falsified ORB, "were the Oil Record Book accurate, in that it reflected any and all alleged illegal oil discharges, there would be no possible . . . prosecution in this action."¹⁶⁴ However, to date, no one has tested this theory.

In a series of cases beginning in the 1990s, federal district and circuit courts in the United States and its territories began upholding Department of Justice prosecutions relating to violations of APPS based upon actions taken by ship owners and operators, masters, engineers, and crew members to "cover up" unlawful discharges of oil, which themselves could not be prosecuted due to the law of the flag or other reasons. These cases upheld the right of the US

160. *See id.*

161. *See id.*

162. It is believed that this frequently used saying originated during the investigation of the Watergate scandal in the early 1970s. *See* Phillip C. Bobbitt, *Impeachment: A Handbook*, YALE L.J.F. 515, 581 (2018).

163. *See* *Royal Caribbean Cruises, Ltd. v. United States*, 11 F. Supp. 2d 1358, 1371 (S.D. FL. 1998).

164. *Id.*

government to pursue indictments for false statements made to US officials directly or via inaccurate entries or lack of required entries in ORBs under 18 U.S.C. § 1001, obstruction of justice under 18 U.S.C. § 1512(b)(2)(B), and conspiracy under 18 U.S.C. § 371.

A. False Statements Act (18 U.S.C. § 1001)

The False Statements Act criminalizes the making of a false statement to agents of the US government, including “knowingly and willfully . . . mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”¹⁶⁵ Because under the law of the flag the United States is not able to prosecute deliberate releases of oil by foreign-flagged vessels on the high seas, the United States has resorted to prosecuting efforts to conceal the deliberate, illegal discharge of oil. One of the charges upon which US prosecutors have relied in bringing criminal charges in connection with illegal marine oil releases into international waters is the presentation to US Coast Guard officers of falsified ORBs in violation of the False Statement Act.¹⁶⁶

Initially, it was unclear whether, if false ORB entries were made on the high seas, the United States had jurisdiction to prosecute such entries under the False Statements Act.¹⁶⁷ In *Royal Caribbean Cruises, Ltd. v. United States*,¹⁶⁸ (“*Royal Caribbean II*”), the Department of Justice brought charges against Royal Caribbean after Forward Looking Infrared Radar on a US Coast Guard aircraft detected Royal Caribbean’s *Nordic Empress* releasing a seven-mile long oil slick off the coast of the Bahamas.¹⁶⁹ US Coast Guard officers inspected the *Nordic Empress* when it arrived at port in Miami, but found no record of the discharge in the vessel’s ORB.¹⁷⁰ The United States referred this violation of MARPOL 73/78 to Liberia, the flag state of the *Nordic Empress*, which, not

165. 18 U.S.C. § 1001 (2006).

166. See, e.g., *Royal Caribbean Cruises*, 11 F. Supp. 2d at 1370-73.

167. See Berg, *supra* note 11, at 262.

168. See *Royal Caribbean Cruises*, 11 F. Supp. 2d 1358.

169. See *id.* at 1361.

170. See *id.*

unsurprisingly, declined to prosecute Royal Caribbean for illegally jettisoning oil off the coast of the Bahamas.¹⁷¹

The Department of Justice charged Royal Caribbean with presenting a falsified ORB to the US Coast Guard in violation of the False Statements Act.¹⁷² Royal Caribbean sought to have the indictment dismissed on several grounds, including lack of jurisdiction, because Royal Caribbean contended that any act or omission with respect to its maintenance of the *Nordic Empress's* ORB occurred on the high seas.¹⁷³ The District Court for the Southern District of Florida refused to dismiss the false-statements indictment, holding that under MARPOL 73/78, “the United States, via the United States Coast Guard, has the duty and the obligation to board and inspect ships while in port and to pursue appropriate measures to address any violations [of MARPOL 73/78].”¹⁷⁴ Because boarding and inspecting foreign-flagged ships in US ports to assess possible MARPOL 73/78 violations are “part of the regularly conducted activities of the United States Coast Guard . . . false statements made in connection with those activities . . . fall within the jurisdiction of § 1001.”¹⁷⁵ The court also found a basis for jurisdiction under the False Statements Act in the “extraterritoriality doctrine” because, although the offense of unlawfully discharging oil into the sea occurred in international waters, it compromised the US Coast Guard’s function by undermining the laws that the US Coast Guard is charged with enforcing.¹⁷⁶ The court rejected the defendant’s argument that APPS preempts the False Statements Act and ordered the defendant to pay a US\$1 million criminal fine under the False Statements Act.¹⁷⁷

B. Failure to Maintain an Accurate ORB (33 U.S.C. § 1908(a))

*United States v. Petraia Maritime Ltd.*¹⁷⁸ marks a shift toward prosecuting the failure to maintain an accurate ORB under APPS

171. *See id.* at 1362.

172. *See id.*

173. *See id.*

174. *Id.* at 1364.

175. *Id.*

176. *See id.*

177. *See Royal Caribbean Sentenced for Fleet-Wide Conspiracy of Dumping Oil and Lying to the Coast Guard*, *supra* note 141.

178. *See United States v. Petraia Maritime Ltd.*, 483 F. Supp. 2d 34 (D. Me. 2007).

rather than prosecuting defendants solely under the False Statements Act for presenting a falsified ORB to the Coast Guard.¹⁷⁹ In *Petraia*, the District of Maine adopted the magistrate's recommendation to deny the defendant's motion to dismiss the charges the United States brought against it for failure to maintain its ORB in violation of APPS.¹⁸⁰ The District of Maine did not elaborate on its rationale for so doing.¹⁸¹

*United States v. Jho*¹⁸² was the first case in which a US Circuit Court of Appeals ruled on whether the United States may prosecute foreign-flagged vessels for failure to maintain an accurate ORB under APPS. In *Jho*, whistleblowers who served on board the *M/T Pacific Ruby*, an ocean-going petroleum tanker registered in Hong Kong, informed the US Coast Guard that the tanker's chief engineer had been unlawfully discharging oil while on the high seas and that he had manipulated the ship's pollution-detection equipment to conceal the discharges.¹⁸³ US Coast Guard officials inspected the vessel while it was docked in Texas and brought a multi-count indictment against the chief engineer and the vessel's corporate owner relating to the coverup of the illegal releases of oil.¹⁸⁴

Counts 3–10 of the indictment related to the chief engineer's "knowing failure to maintain" an ORB in violation of APPS.¹⁸⁵ The chief engineer and the vessel's corporate owner filed motions to dismiss the ORB charges.¹⁸⁶ The defendants argued that the US government could not prosecute them for making false entries into an ORB because the entries were made in international waters.¹⁸⁷

The Fifth Circuit held that APPS's "requirement that an oil record book be 'maintained' . . . impos[es] a duty upon a foreign-flagged vessel to ensure that its oil record book is accurate . . . upon entering the ports of navigable waters of the United States."¹⁸⁸ The Fifth Circuit explained that if courts were not able to prosecute those

179. *See id.* at 35–36.

180. *See id.*

181. *See id.*

182. *See United States v. Jho*, 534 F.3d 398 (5th Cir. 2008).

183. *See id.* at 400.

184. *See id.* at 401.

185. *Id.*

186. *See id.*

187. *See id.*

188. *Id.* at 403.

who illegally discharged oil for failure to maintain an accurate ORB while within the navigable waters of the United States, then a ship's owners, operators, master, engineers, or crew could circumvent APPS's ORB requirements "by falsifying all of its record book information just before entry into a port or navigable waters," and this would "frustrate the government's ability to enforce MARPOL's requirements."¹⁸⁹ The Fifth Circuit also concluded that the lower court had misapplied the law of the flag doctrine. In rejecting the lower court's conclusion that the United States did not have jurisdiction over this matter, the Fifth Circuit explained that:

The law of the flag doctrine does not mandate that *anything* that occurs aboard a ship *must* be handled by the flag state. In fact, the Supreme Court has recognized that the law of the flag doctrine does not completely trump a sovereign's territorial jurisdiction to prosecute violations of its laws: "[The law of the flag doctrine] is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign."¹⁹⁰

The Environmental Crimes Division of the Department of Justice reports that Overseas Shipholding Group ("OSG"), the vessel's corporate owner, was sentenced to pay approximately US\$37 million in criminal fines including US\$9.2 million in community service payments.¹⁹¹ OSG was subject to a three-year probation period during which it was subject to an environmental compliance plan and outside audits.¹⁹² The whistleblowers were jointly awarded US\$5.25 million.¹⁹³

In *United States v. Ionia Management, S.A.*,¹⁹⁴ the Second Circuit became the second US Circuit Court of Appeals to uphold the

189. *Id.*

190. *Id.* at 406 (citing *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923)).

191. *See Tanker Company Sentenced for Concealing Deliberate Vessel Pollution*, US DEP'T OF JUST. (Mar. 21, 2007), https://www.justice.gov/archive/opa/pr/2007/March/07_enrd_171.html [<https://perma.cc/TN8H-UPBX>].

192. *See id.*

193. *See Homer*, *supra* note 11, at 161; *see also Tanker Company Sentenced for Concealing Deliberate Vessel Pollution*, *supra* note 191 (noting that twelve US\$437,500 whistleblower awards were awarded for an aggregate total award of US\$5.25 million to all twelve whistleblowers).

194. *See United States v. Ionia Management, S.D.*, 555 F.3d 303 (2d Cir. 2008).

United States' ability to prosecute a foreign-flagged vessel's failure to maintain an accurate ORB within the waters of the United States under APPS.¹⁹⁵ The chief engineer and the second engineer on the *M/T Kriton*, a 600-foot Bahamian-flagged oil tanker that delivered oil and petroleum products to various ports on the east coast of the United States, had been discharging oil-contaminated waste on the high seas using a magic pipe, which allowed the engineers to bypass the vessel's OWS.¹⁹⁶ The chief engineer and the second engineer made false entries into the ORB to cover up these illegal discharges of oil and presented this inaccurate ORB to the US Coast Guard at various US ports during inspections of the vessel.¹⁹⁷ The vessel's owner, a Greek corporation, was charged with thirteen counts under APPS.¹⁹⁸ The corporation appealed its conviction, arguing that the district court did not have jurisdiction to prosecute it under APPS for failure to "maintain" an accurate ORB because it did not make the false entries in the territorial waters of the United States, it only "possessed" the false ORB within the territorial waters of the United States.¹⁹⁹ The Second Circuit rejected this argument as out of hand and interpreted "maintain" as "impos[ing] a duty upon ships, upon entering the ports or navigable waters of the United States, to ensure that its ORB is accurate (or at least not knowingly inaccurate)."²⁰⁰ The Second Circuit also upheld as reasonable the US\$4.9 million fine that the District of Connecticut had imposed on Ionia Management, S.A. for its violations of APPS.²⁰¹

C. Obstruction of Justice and of Agency Proceedings (18 U.S.C. § 1505 and 18 U.S.C. § 1519)

A ship's owner, operator, master, engineers, or crewmembers may be charged with obstruction of justice or obstruction of agency proceedings under 18 U.S.C. § 1505—"Obstruction of proceedings before departments, agencies, and committees," or under the related

195. *See id.* at 311.

196. *See id.* at 305.

197. *See id.*

198. *See id.* at 306.

199. *Id.*

200. *Id.*

201. *See id.* at 311.

“Sarbanes-Oxley Act,” 18 U.S.C. § 1519 for offenses such as concealing a magic pipe during a Coast Guard inspection.

Section 1505 provides that whoever:

willfully withholds, misrepresents, . . . conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material . . . or attempts to do so or solicits another to do so; or [w]hoever corruptly . . . impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined under this title, imprisoned not more than 5 years . . . or both.²⁰²

For purposes of section 1505, “corruptly” means “acting with an improper purpose . . . including making a false or misleading statement,” and courts have held that presenting false documents or making false statements during an agency investigation amount to a violation of section 1505.²⁰³ The defendant does not need to successfully obstruct the agency’s proceeding, it must only attempt to do so.²⁰⁴

Additionally, section 1519, sometimes also referred to as the Enron Act because it was enacted in response to the Enron scandal of 2001, imposes fines or imprisonment for not more than twenty years, or both, on an individual who:

knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case.²⁰⁵

There are two advantages to prosecutors of charging section 1519 instead of section 1505. The “knowing” *mens rea* standard in section 1519 is a “less stringent” standard than the “corruptly” standard in section 1505.²⁰⁶ Additionally, the US government must

202. 18 U.S.C. § 1505 (2018).

203. 18 U.S.C. § 1515(b) (2018); Kehoe, *supra* note 1, at 37.

204. *See* Kehoe, *supra* note 1, at 37.

205. *See* 18 U.S.C. § 1519 (2018).

206. *See* Kehoe, *supra* note 1, at 38.

only prove that the “obstructive conduct” was “in relation to or in contemplation” of the government or agency’s investigation without the “pending proceeding” requirement of section 1505.²⁰⁷

For example, in *United States v. Sanford*,²⁰⁸ two successive chief engineers of a *F/V San Nikunau*, a New-Zealand-flagged purse-seine tuna-fishing vessel were indicted for, among other crimes connected to covering up unlawful discharges of oil in the South Pacific, violations of section 1505 and section 1519 with respect to false ORB entries.²⁰⁹ One of the two chief engineers entered into a plea agreement with the US government.²¹⁰ He admitted that “it was routine practice onboard the vessel to discharge directly into the sea oily bilge waste from the engine room . . . without using required pollution prevention equipment.”²¹¹ He also admitted to falsifying ORB entries and to lying to the US Coast Guard about OWS use.²¹²

Subsequently, the District Court for the District of Columbia denied multiple motions by the other chief engineer and Sanford Ltd., the corporate owner of the *San Nikunau*, to dismiss obstruction of justice charges, including dismissal motions based upon assertions that the charges were duplicative.²¹³ In this case, however, Sanford Ltd. was fined US\$1.9 million and ordered to pay US\$500,000 to the Fagatele Bay National Marine Sanctuary in American Samoa and the former Chief Engineer was sentenced to thirty days in prison, two years of supervised release, and ordered to pay US\$6,000 as a criminal fine.²¹⁴

207. *Id.*

208. *See* *United States v. Sanford, Ltd.*, 859 F. Supp. 2d 102 (D.C. Cir. 2012).

209. *See id.* at 102.

210. *See Former Chief Engineer of South Pacific Tuna Vessel Pleads Guilty to Covering up Environmental Crimes*, US DEP’T OF JUST. (Apr. 17, 2012), <https://www.justice.gov/opa/pr/former-chief-engineer-south-pacific-tuna-vessel-pleads-guilty-covering-environmental-crimes> [<https://perma.cc/VEA3-JQ5J>].

211. *Id.*

212. *See id.*

213. *See Sanford*, 859 F. Supp. 2d at 124.

214. *See Court hands down sentences in San Nikunau case*, MARINELOG (Jan. 14, 2013), <https://www.marinelog.com/news/court-hands-down-sentences-in-san-nikunau-case/> [<https://perma.cc/2FCK-3PHV>].

D. Conspiracy (18 U.S.C. § 371)

The individuals involved in covering up illegal oil discharges on the high seas can be charged with conspiracy under 18 U.S.C. § 371—“Conspiracy to commit offense or to defraud United States.” This statute provides that:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.²¹⁵

In *United States v. Jho*, in addition to being charged with violating § 1908(a) of APPS, the chief engineer of the *Pacific Ruby* was charged with conspiring with crewmembers and with the vessel’s corporate owner.²¹⁶ According to the prosecution, in furtherance of this alleged conspiracy, the chief engineer taught other crewmembers how to flush the OCM with freshwater in order to “trick” it into registering complying wastewater discharges and showed other crewmembers how to “defeat” the ship’s anti-pollution devices from detecting this deceptive practice.²¹⁷ The chief engineer was also charged with conspiring with the vessel’s corporate owner to fail to maintain an accurate ORB.²¹⁸ Although the conspiracy charges with respect to “defeating” the anti-pollution devices were dismissed because they occurred on the high seas, the District Court denied the chief engineer’s motion to dismiss the conspiracy charges with respect to maintaining an accurate ORB.²¹⁹ The Fifth Circuit upheld the district court’s decision as to the ORB-conspiracy counts.²²⁰

E. US Sentencing Guidelines

The US Sentencing Guidelines were enacted in 1987 to promote uniformity in criminal sentencing.²²¹ In *United States v. Booker*, the Supreme Court held that, although these sentencing guidelines are not

215. 18 U.S.C. § 371 (2018).

216. *See United States v. Jho*, 465 F. Supp. 2d 618, 627 (E.D. Tex. 2006).

217. *Id.*

218. *See id.*

219. *See id.* at 634, 645.

220. *See United States v. Jho*, 534 F.3d 398, 410 (5th Cir. 2008).

221. *See Kehoe, supra* note 1, at 14.

mandatory, federal courts must “consult” them in determining a criminal sentence.²²² The US Sentencing Guidelines create a point system of various factors that must be considered in determining sentencing ranges for defendants.²²³ The higher the level of the federal offense, the greater the fines or prison time that can be recommended during sentencing.²²⁴

Section 2Q1.3 of the US Sentencing Guidelines applies to violations of APPS.²²⁵ In *United States v. Abrogar*, the chief engineer of *M/V Magellan Phoenix*, a cargo vessel registered in Panama, plead guilty to a charge of failing to maintain an accurate ORB in violation of APPS.²²⁶ The pre-sentencing report recommended sentencing enhancement under section 2Q1.3 of the US Sentencing Guidelines for repetitive discharges of oil into the environment and for the chief engineer’s role in the ORB offense.²²⁷ The pre-sentencing report recommended a prison sentence of twelve to eighteen months and, because the chief engineer had no prior criminal history, the district court sentenced the chief engineer to a twelve-month prison sentence.²²⁸

On appeal, the Third Circuit held that 33 U.S.C. § 1908(a), which imposes criminal sanctions for “knowing” violations of MARPOL 73/78, can only be enforced against foreign-flagged vessels in the navigable waters of the United States or at ports or terminals within the United States, and that this provision specifically excludes the failure of foreign-flagged vessels to maintain accurate ORBs when these vessels are not within the waters of the United States.²²⁹ The Third Circuit concluded that, since the discharges of oil occurred outside of the waters of the United States, the releases of oil themselves could not be considered during sentencing.²³⁰ The Third Circuit also concluded that because the failure to maintain an accurate ORB did not “result” in the discharge of oil, the chief engineer’s

222. *United States v. Booker*, 543 U.S. 220, 264 (2005).

223. *See Kehoe, supra* note 1, at 14.

224. *See id.* at 16.

225. *See* U.S. SENTENCING GUIDELINES MANUAL § 2Q1.3(a) (U.S. SENTENCING COMM’N 2018); *see also Kehoe, supra* note 1, at 16.

226. *See United States v. Abrogar*, 459 F.3d 430, 433 (3d Cir. 2006).

227. *See Kehoe, supra* note 1 at 20.

228. *See id.*

229. *See Abrogar*, 459 F.3d at 434-35.

230. *See id.* at 436.

sentencing could not be enhanced under the sentencing guidelines for “resulting in” many illegal discharges of oil into the “environment.”²³¹

VII. UNLAWFUL DISCHARGES OF OIL BY FOREIGN-FLAGGED VESSELS ON THE HIGH SEAS CONTINUE

In spite of the Department of Justice’s “aggressive enforcement of federal environmental laws” primarily through charging violators with one or more cover-up criminal offenses, intentional discharges into marine environments of oil-contaminated wastewater continue unabated because the law of the flag doctrine makes it impossible for the United States to prosecute foreign-flagged vessel for releasing oil on the high seas.²³² According to Joe Poux, the Deputy Chief of the Environment and Natural Resources Division of the Department of Justice, the Environmental and Natural Resources Division has been prosecuting between ten and fifteen pollution crimes per year.²³³ The past six years have witnessed numerous major prosecutions for the deliberate discharge of significant quantities of oil in violation of APPS by foreign-flagged passenger cruise lines, chemical tankers, and cargo vessels that call on US ports. Among these are prosecutions of Princess Cruise Lines, Aegean Shipping Management, Mineralien Schifffahrt Spedition Und Transport GmbH (“MST”), and Interorient Marine Services Ltd.

In August 2013, the British Maritime and Coastguard Agency informed the US Coast Guard that ships operated by Princess Cruise Lines Ltd., a subsidiary of Carnival Cruise Lines, had been illegally discharging oil off the coast of England.²³⁴ A whistleblowing engineer on the *Caribbean Princess*, a 290-meter long cruise ship registered in Bermuda that can carry over 3,000 passengers and 1,200 crewmembers, reported to the British Maritime and Coastguard

231. *Id.* at 437.

232. *Tanker Company Sentenced for Conspiring to Conceal Hazardous Condition and Oil Pollution in Baltimore Harbor*, US DEP’T OF JUST. (Mar. 8, 2002), https://www.justice.gov/archive/opa/pr/2002/March/02_enrd_131.htm [<https://perma.cc/35W7-9PPX>].

233. See Phillips, *supra* note 18.

234. *Princess Cruise Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution*, US DEP’T OF JUST. (Dec. 1, 2016), <https://www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution> [<https://perma.cc/8DLW-K63J>].

Agency that the ship's crew was in the practice of using a magic pipe to illegally discharge oil-contaminated wastewater.²³⁵ Specifically, the *Caribbean Princess* discharged approximately 4,230 gallons of oil twenty-three miles off the coast of England.²³⁶ When the *Caribbean Princess* reached Southampton, England, the chief engineer and senior first engineer covered up the operation by removing the magic pipe and instructing their subordinates to deny its existence.²³⁷ Upon the *Caribbean Princess*'s arrival in the United States three weeks after the initial report about the unlawful oil releases off the coast of England, the US Coast Guard conducted an examination of the vessel and reported to the Department of Justice that the vessel had been illegally discharging oil-contaminated wastewater through bypass equipment since 2005, one year after the ship began operating.²³⁸ The US Coast Guard's investigation revealed that engineers had been running clean seawater through the ship's OCM to dilute the wastewater so that it contained less than fifteen parts per million of oil.²³⁹ Therefore, the oil-contaminated wastewater would not set off the OCM's alarm. The investigators noted that the magic pipe the ship's crew had been using had black oil residue contained within it.²⁴⁰

The Department of Justice also determined that the *Caribbean Princess*, and four other Princess cruise ships, had been discharging oily bilge water from overflow of the greywater tanks in the machinery space bilge.²⁴¹ Rather than processing this waste as oily bilge waste, the waste was pumped back into the greywater system, which was then discharged when the ship was on the high seas.²⁴² The Department of Justice confirmed that salt-water valves were opened every time that oily bilge water was being processed in the OWS to dilute the oil content in the wastewater so that the OCM would not stop overboard discharge due to the high oil content of the water being processed.²⁴³

235. *See id.*

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

In December 2016, the Department of Justice reported that Princess Cruise Lines plead guilty to seven felony charges, including conspiracy, obstruction of agency proceedings, and knowingly maintaining an inaccurate ORB in violation of APPS.²⁴⁴ Princess Cruise Lines was ordered to pay a US\$40 million criminal fine, the largest of its kind, and the Department of Justice imposed a five-year long probation on Carnival Cruise Lines, during which time all of Carnival Cruise Lines' subsidiaries trading within the United States are required to implement environmental compliance plans that are reviewed by a court-appointed monitor.²⁴⁵ The whistleblower was awarded US\$1 million for reporting the violation.²⁴⁶

The US\$40 million penalty imposed upon Princess Cruise Lines has not deterred other corporate operators from illegally jettisoning oil. In February 2017, the Department of Justice reported that the chief engineers of the *T/V Green Sky*, a Liberian-flagged oceangoing chemical tanker owned by Aegean Shipping Management, plead guilty to violating APPS's ORB requirements and to falsifying records.²⁴⁷ The *Green Sky* "generate[d] large quantities of oil-contaminated waste water" because it suffered from "unusual internal leaks that produced greater quantities of oily waste than a normal ship of its age."²⁴⁸ The chief engineers had modified the vessel's OWS to discharge oil-contaminated wastewater directly overboard and failed to report the *Green Sky*'s continual illegal discharge of oil into international waters and the exclusive economic zone of the United States.²⁴⁹ The chief engineers were each sentenced to one year of

244. See Judgment in a Criminal Case, *United States v. Princess Cruise Lines, Ltd.*, No. 16-20897-CR-SEITZ (S.D. Fla. Apr. 19, 2017), available at https://www.kkc.com/assets/site_18/files/apps/princess%20judgment.pdf [<https://perma.cc/N95A-LAGB>].

245. See *Princess Cruise Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution*, *supra* note 234.

246. See *id.*

247. *Two Vessel Engineers Convicted of Environmental and Obstruction Crimes after Trial. Vessel Manager Pleads Guilty to Environmental Crimes and Obstruction of Justice*, US DEP'T OF JUST. (Feb. 23, 2017), <https://www.justice.gov/opa/pr/two-vessel-engineers-convicted-environmental-and-obstruction-crimes-after-trial-vessel> [<https://perma.cc/L9YY-WJP3>].

248. *Id.*

249. See *id.*

supervised release and Aegean Shipping Management was required to pay a US\$2 million penalty.²⁵⁰

The *M/V Marguerita*, a Liberian-flagged cargo vessel, was charged with illegally releasing oil on eight occasions between June and August of 2016. The vessel's corporate operator, MST and MST's owner, Reederei MS "Marguerita" GmbH & Co. Geschlossene Investment KG, were handed a nine-count indictment for maintaining an inaccurate ORB in violation of APPS.²⁵¹ In November 2018, the Department of Justice announced that MST plead guilty to violating APPS and to obstructing justice. MST has been ordered to pay a US\$3.2 million criminal penalty and to serve a four-year probation during which its vessels will be subjected to an environmental compliance plan.²⁵²

Most recently in February 2019, the Department of Justice convicted Interorient Marine Services Ltd., the corporate owner of the *Ridgebury Alexandra Z*, for failing to maintain an accurate ORB in violation of APPS.²⁵³ The *Ridgebury Alexandra Z* is a petrochemical tanker that flies the flag of the Marshall Islands.²⁵⁴ Interorient pleaded guilty to failing to maintain an accurate ORB under section 1908 (a) of APPS.²⁵⁵ Interorient will pay a US\$2 million fine and is subject to a four-year probation term during which all Interorient vessels that

250. See David Wren, *Greek tanker engineers sentenced for their role in maritime pollution case tied to Charleston*, THE POST & COURIER (Aug. 10, 2017), https://www.postandcourier.com/business/greek-tanker-engineers-sentenced-for-their-role-in-maritime-pollution/article_f38ca180-7e00-11e7-974a-efd49221957a.html [<https://perma.cc/NY7V-VZQQ>].

251. See *German Ship Management Company and Corporate Vessel Owner Indicted for Falsification of Pollution Records*, US DEP'T OF JUST. (Aug. 22, 2017), <https://www.justice.gov/opa/pr/german-ship-management-company-and-corporate-vessel-owner-indicted-falsification-pollution> [<https://perma.cc/3UNT-6PL6>].

252. See *German Ship Operator Sentenced to Pay \$3.2 Million for Obstruction of Justice and Falsifying Official Logs to Hide Deliberate Oil Pollution*, US DEP'T OF JUST. (Nov. 2, 2018), <https://www.justice.gov/opa/pr/german-shiping-operator-sentenced-pay-32-million-obstruction-justice-and-falsifying-official> [<https://perma.cc/MA4Q-69SZ>].

253. See *Tank Vessel Operator Convicted and Sentenced for Oil Discharge Offense, Vessel Captain Indicted*, US DEP'T OF JUST. (Feb. 14, 2019), <https://www.justice.gov/opa/pr/tank-vessel-operator-convicted-and-sentenced-oil-discharge-offense-vessel-captain-indicted> [<https://perma.cc/2AWR-ZH34>].

254. See *Ridgebury Alexandra Z*, MARINETRAFFIC, https://www.marinetraffic.com/en/ais/details/ships/shipid:714415/mmsi:538005322/imo:9439785/vessel:RIDGEBURY_ALEXANDRA_Z [<https://perma.cc/F2U6-RVJX>] (last visited Apr. 22, 2019).

255. See *Tank Vessel Operator Convicted and Sentenced for Oil Discharge Offense, Vessel Captain Indicted*, *supra* note 253.

call on US port will be subjected to a Department of Justice imposed Environmental Compliance Plan.²⁵⁶ The vessel's captain was indicted by a grand jury for bypassing the vessel's OWS using a magic pipe, falsifying ORB records, obstruction of justice, and conspiracy.²⁵⁷

These prosecutions indicate that prosecutions for covering up discharges of oil on the high seas and the penalties imposed for these crimes are inadequate to deter the owners, operators, masters, engineers, and crewmembers of foreign-flagged vessels from jettisoning oil on the high seas. In addition to this ongoing problem, there remains an open question whether, with respect to deliberate discharges of oil by marine vessels within the territorial waters of the United States, there is a minimum amount of oil that must be jettisoned into US territorial waters before a crime occurs under APPS. *Royal Caribbean I* was decided while UNCLOS was still pending ratification by the Senate and was, therefore, under Article 19 of the Vienna Convention on the Law of Treaties deemed to carry the weight of law in the United States.²⁵⁸ Since the Senate did not ratify UNCLOS, it is not clear if "willful and serious" limitation remains in effect.

VIII. RECOMMENDATIONS AND CONCLUSION

Since the early 1990s, the US Department of Justice has been aggressively prosecuting vessel's owners, operators, masters, engineers, and crews for covering up illegal discharges of oil.²⁵⁹ Federal judges have imposed significant criminal fines for such violations and the US Department of Justice has been publicly reporting its prosecutions and the fines resulting therefrom on its website.²⁶⁰ Nevertheless, the US Department of Justice continues to discover and prosecute between ten and fifteen cases involving the cover-up of unlawful discharges of oil each year.²⁶¹ Even placing

256. *See id.*

257. *See id.*

258. *See* United States v. Royal Caribbean, 24 F. Supp. 2d 155, 159 (D.P.R. 1997).

259. *See* Phillips, *supra* note 18.

260. *See* Phillips, *supra* note 18; *see also* Judgment in a Criminal Case, United States v. Princess Cruise Lines, Ltd., No. 16-20897-CR-SEITZ (S.D. Fla. Apr. 19, 2017), *available at* https://www.kkc.com/assets/site_18/files/apps/princess%20judgment.pdf [<https://perma.cc/N95A-LAGB>].

261. *See* Phillips, *supra* note 18.

Carnival Cruise Lines and all of its subsidiaries on probation for five years and subjecting them to monitoring and oversight apparently was not enough to deter them from continuing to illegally jettison oil.²⁶² On April 10, 2019, Judge Patricia Seitz of the Southern District of Florida held a hearing about Carnival Cruise Line's first annual probation inspection report, which indicated that, among other environmental crimes committed during this monitoring period, there were twenty-four reported instances of the jettisoning of illegal substances, including oil.²⁶³ Judge Seitz expressed her frustration that the "people at the top are treating this as a gnat."²⁶⁴ A similar sentiment was expressed by Department of Justice Deputy Chief Poux, who lamented that "[w]e've seen brand new ships, straight from the shipyards in China, [jettisoning oil] on their way over here."²⁶⁵ Clearly, such flagrant violations of Annex I of MARPOL 73/78 are unacceptable. Both the IMO and the United States must take steps to enhance compliance with MARPOL 73/78 and APPS and to make the illegal discharge of oil more difficult from a practical standpoint, as well as unprofitable. The IMO and the United States should work together to make prosecution and severe sentences for the deliberate discharge of oil itself and any attempts to cover it up a virtual certainty.

*A. Facilitating Compliance and Impeding Non-Compliance with
MARPOL 73/78 and APPS*

Engineers and crewmembers do not always know how to operate the OWSs, OCMs, and other equipment on their vessels.²⁶⁶ Martin, Ottaway, van Hemmen & Dolan, a marine consulting firm, conducted

262. See Taylor Dolven & Caitlin Ostroff, *Carnival cruise line kept dumping sewage, oil, food waste after conviction, report shows*, ORLANDO SENTINEL (Apr. 17, 2019), <https://www.orlandosentinel.com/business/os-ne-carnival-cruise-dumping-20190417-story.html> [<https://perma.cc/72TX-UC5E>]; Taylor Dolven, *Federal judge threatens to block Carnival ships from docking at U.S. ports*, MIAMI HERALD, (Apr. 10, 2019), <https://www.miamiherald.com/news/business/tourism-cruises/article229069589.html>.

263. *Id.*

264. Associated Press, *Judge Threatens to Stop Carnival Cruise Ships from Docking in U.S. Over Waste Dumping*, TIME (Apr. 11, 2019), <http://time.com/5568651/carnival-cruise-waste-dumping/> [<https://perma.cc/Q6E8-GFLK>].

265. See Phillips, *supra* note 18.

266. See John T. Dewey, *Rethinking MARPOL Enforcement*, 75 U.S. COAST GUARD J. SAFETY & SECURITY AT SEA 54, 55 (2018).

a six-month study of members of the maritime industry to assess their knowledge of MARPOL 73/78's requirements and to ask survey-takers for their suggestions to improve shipboard oil-waste management.²⁶⁷ The survey indicated that ninety-eight percent of survey participants knew what MARPOL 73/78 was, but that only sixty-eight percent of survey-takers believed that MARPOL 73/78 Annex I regulations were effective at preventing "intentional oil pollution."²⁶⁸ The survey-takers provided recommendations about how to improve compliance with Annex I of MARPOL 73/78.²⁶⁹ These suggestions include improving on-board training, improving maritime school training, improving OWS technology so that the operation of OWS equipment is "less labor intensive" and less confusing to operate, and digitizing and automating ORB entries.²⁷⁰

The survey-takers' suggestions should be implemented. Several survey-takers reported that they opt to bypass their vessel's OWSs and OCMs because they do not know how to properly use and care for such devices.²⁷¹ All crewmembers of vessels subject to the requirements of MARPOL 73/78 should receive standardized training and should be taught how to use OWSs and OCMs of many different makes and models. Engineers should be taught how to repair such OWSs and OCMs.

Other survey-takers indicated that their vessels's oil and bilge water tanks are not large enough to hold all the oil-contaminated waste produced during long voyages at sea.²⁷² The number and/or size of oil holding tanks should be increased so that a vessel's engineers and crew are not illegally disposing of oil because oil-holding tanks

267. See Martin Ottaway, *Max1 Survey Questions*, https://martinottaway.com/wp-content/uploads/2015/08/full_list_of_max1_survey_questions.pdf [https://perma.cc/WY97-573U] (last visited May 5, 2019).

268. Martin Ottaway, *Max1 Survey Key Findings* (Aug. 21, 2015), <https://martinottaway.com/wp-content/uploads/2018/06/MAX1-SURVEY-KEY-FINDINGS-August-21-2015.pdf> [https://perma.cc/Q3V9-W82J].

269. See *id.*

270. *Id.* Survey-takers have indicated that ORB records are often made in both gallons and in metric tons. To avoid confusion, only one of these two units of measurement should be used within a given vessel's ORB.

271. See Martin Ottaway, *Max1 Survey, Selected Interim Results* (May 22, 2015), https://martinottaway.com/wp-content/uploads/2018/11/interim_survey_results_22_may_2015.pdf [https://perma.cc/644E-6P2L].

272. See *id.*

are in danger of overflowing. Vessels should also be equipped with spare parts so that engineers and crewmembers may quickly fix equipment that is not functioning properly while at sea.

Shipmasters, engineers, and crewmembers must also be disincentivized from using magic pipes for the purpose of illegally disposing of oil-contaminated wastewater. Furthermore, shipmasters, engineers, and crewmembers should be asked to pledge in writing that they will abide by MARPOL 73/78's provisions.²⁷³ A sealing system should be used for all pipe lines and flanges in OWSs and vessels in which each pipe line or flange is assigned a unique serial number so that any tampering would be immediately apparent.²⁷⁴ Vessels should be required to carry spare parts for their OCM pumps and valves and spare filters for their OWSs to ensure that these devices can remain properly functioning while at sea.²⁷⁵ Although ships' owners and operators may express concerns about the costs associated with installing such equipment on vessels or with requiring vessels to carry spare parts, these requirements would surely be less expensive than the fines imposed on ships' owners and operators for violating criminal statutes associating with covering up illegal discharges of oil into the world's oceans and seas.

B. Increasing Legal Deterrence of Intentional Oil Releases by Ships

The United States should extend its jurisdiction over unlawful oil releases by foreign-flagged vessels. If the United States were to extend its authority to prosecute illegal discharges of oil-contaminated waste water through the outer boundary of its exclusive economic zone, the United States would be better able to protect the world's marine environment from illegal releases of oil because, unlike nations issuing flags of convenience, the United States would prosecute those who illegally discharge oil into international waters if it had the jurisdiction to do so. If the United States were to extend its jurisdiction over unlawful discharges of oil by foreign-flagged vessels, it might encourage other non-flag-of-convenience-issuing nations to do the same, where possible. Furthermore, MARPOL 73/78's equipment requirements should be extended to vessels

273. See Kantharia, *supra* note 110.

274. See *id.*

275. See *id.*

weighing fewer than 400 gross tons and oil tankers weighing fewer than 150 gross tons so that MARPOL 73/78's requirements bind an even larger number of vessels to ensure that oil dumping offenses can be prosecuted by the United States in as many instances as possible.

UNCLOS limits the imposition of criminal penalties for violations of MARPOL 73/78 to cases of "willful and serious" acts of pollution. Although it is not clear whether this limitation is still applicable in the United States because the United States did not ratify UNCLOS, the "willful and serious" limitation should be eliminated entirely, and the fines imposed for such violations should reflect the quantity of oil that is illegally jettisoned. It is important not to create a loophole through which ship owners, operators, masters, engineers, and crewmembers can avoid responsibility for releasing oil, even in small quantities. The number of ships calling on US ports is enormous and the harmful effects of oil discharged in the world's oceans and seas aggregate. If owners, operators, masters, engineers, and crewmembers know that they will not be prosecuted for discharging less than a specified amount of oil into US territorial waters, a huge quantity of oil could lawfully be jettisoned cumulatively into the territorial waters of the United States.

Finally, section 2Q1.3 of the US Sentencing Guidelines should be amended to make it clear that the release of oil outside of the territorial waters of the United States may be considered for purposes of enhancement during sentencing. The definition of "environmental offense" for purposes of sentencing enhancements under the US Sentencing Guidelines should also be broadened to include any violation of MARPOL 73/78, such as the failure to maintain an accurate ORB, not just an offense that directly "results" in the illegal discharge of oil into marine environments. Additionally, the United States should continue the practice of banning not only individual ships, but also entire fleets under common ownership from entering US ports to punish the most egregious repeat offenders of Annex I of MARPOL 73/78. Ship owners, operators, masters, engineers, and crewmembers who engage in the deliberate discharge of oil into the world's oceans and seas must no longer be able to hide behind flags of convenience.