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

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Our oceans and coasts are among the chief pillars of our nation's wealth and economic well-being. Yet our lack of full understanding of the complexity of marine ecosystems, and our failure to properly manage the human activities that affect them, are compromising the health of these systems and diminishing our ability to fully realize their potential.[1]

I. Introduction

Each year, up to 810,000 tons of oily waste are intentionally and illegally dumped into the world's oceans by commercial vessels.[2] As a consequence, seabird populations are reduced,[3] the habitats for slow-

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[1] UNITED STATES COMM'N ON OCEAN POL'Y, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 32 (2004) [hereinafter OCEAN COMM'N].

[2] *See* JOINT GRP. OF EXPERTS ON THE SCIENTIFIC ASPECTS OF MARINE ENVTL. PROT., REPORT AND STUDIES NO. 75: ESTIMATES OF OIL ENTERING THE MARINE ENVIRONMENT FROM SEA-BASED ACTIVITIES 15 (2007); David P. Kehoe, United States v. Abrogar: *Did the Third Circuit Miss the Boat?*, 39 ENV'T LEWIS & CLARK L. REV. 1, 3 (2009); *cf.* OCEANA, THE DUMPING OF HYDROCARBONS FROM SHIPS INTO THE SEAS AND OCEANS OF EUROPE—THE OTHER SIDE OF OIL SLICKS 3 (2003) [hereinafter OIL SLICKS] (estimating that approximately 666,000 tons of oil are illegally dumped each year).

[3] *See* Kees (C.J.) Camphuysen, INT'L FUND FOR ANIMAL WELFARE, CHRONIC OIL POLLUTION IN EUROPE 6, 21 (2007) (explaining how hundreds of thousands of untreated seabirds, including penguins, can die from a "small spot of oil on their feathers" since oil reduces the insulating properties of feathers and ultimately causes hypothermia); FRANCIS WIESE, WORLD WILDLIFE FUND CAN., SEABIRDS AND ATLANTIC CANADA'S SHIP-SOURCE OIL POLLUTION 3 (2002) (noting that an estimated 300,000 birds are killed each year in the Atlantic Canada waters from illegal oil pollution); *see also* Lieutenant Commander David O'Connell, *Port State Control–International Cooperation on Marine Pollution Enforcement*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD

moving shellfish such as clams, oysters, and mussels are poisoned,[4] and fish—if not killed by the harmful toxins of the oil—lose the ability to reproduce, reproduce deformed offspring, or upon ingestion of the oil, create even more toxic substances.[5] Separately, mammals, reptiles, and amphibians whose natural habitats are either in or close to coastal waters either suffocate to death from oil ingestion or die from eating wildlife previously poisoned by oily waste.[6]

For the human population, the decline of biodiversity in the marine environment cannot be overstated.[7] In the United States, millions of people rely on the marine environment for employment in commercial fishing,[8] tourism, and recreation.[9] In fact, it is estimated that "[m]ore than $1 trillion, or one-tenth, of the nation's gross domestic product (GDP) is generated within nearshore areas . . . ."[10] Worldwide, the marine environment serves as an important indicator of water quality and ecosystem health.[11] Most importantly, the marine environment—of which it is estimated that 95% remains unexplored[12]—contains organisms vital to conducting scientific research and producing

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J. OF SAFETY AND SEC. AT SEA 60 (Summer 2009); Andrea Thompson, *The Science and History of Oil Spills*, LIVESCIENCE.COM (Apr. 23, 2010, 11:54 AM), http://www.livescience.com/environment/oil-spill-faq-100423.html ("[S]ea otters, which depend on their clean fur coats to stay warm, can also become hypothermic . . . ."); Kehoe, *supra* note 2, at 3.

[4] *See Illegal Oil Discharge in European Seas*, U.N. ENVTL. PROGRAMME BULL., No. 7 (Feb. 2006), *available at* http://www.grid.unep.ch/product/publication/download/ew_oildischarge.en.pdf [hereinafter UNEP BULL.].

[5] *See id.*; *see also Oil Spills: Impact on the Ocean*, WATERENCLYCOPEDIA.COM, http://www.waterencyclopedia.com/Oc-Po/Oil-Spills-Impact-on-the-Ocean.html (last visited Jan. 24, 2012) [hereinafter *Oil Impact*] (oil pollution causes declines in marine biodiversity because it interrupts the food chain to both marine and land-based life).

[6] *See Oil Impact*, *supra* note 5.

[7] *See* Louis A. Helfrich et al., *Sustaining America's Aquatic Biodiversity—Why Is Aquatic Biodiversity Declining?*, VA. COOP. EXTENSION (May 1, 2009), http://jpubs.ext.vt.edu/420/420-521/420-521.html (discussing how "[a]though aquatic biodiversity has been declining . . . species extinction rates have gone from about one species per year over the past 600 million years to hundreds of species per year in recent times").

[8] *See* OCEAN COMM'N, *supra* note 1, at 31–32 (noting that the U.S. commercial fishing industry's total value exceeds $28 billion annually; Americans consume more than four billion pounds of seafood per year).

[9] *Id.* at 31 (over two million jobs exist in tourism and recreation near U.S. coasts).

[10] *Id.*

[11] *See* Helfrich et al., *supra* note 7 (noting that a fishery's decline could indicate a water pollution problem).

[12] *See* OCEAN COMM'N, *supra* note 1, at 35.

pharmaceutical products that presently treat human diseases and illnesses such as cancer, osteoporosis, and liver failure.[13]

To stop the devastating effects of intentional and illegal vessel pollution, during the past two decades the Coast Guard, in conjunction with the Department of Justice (DOJ), has launched an ambitious crusade against parties responsible for such acts.[14] In fact, DOJ estimates that within the last ten years vessel owners, operators, and crew members have been sentenced to over $216 million in fines and twenty years of total incarceration.[15] But despite the Coast Guard and DOJ's best efforts, the number of environmental crimes involving illegal vessel pollution is not declining.[16] Rather, as global seaborne commerce continues to increase,[17] so too does the number of vessels that intentionally and

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[13] *Id.* at 32–35. A multitude of other scientific applications presently exist for marine organisms, including the production of nutritional supplements, medical diagnostics, cosmetics, agricultural chemicals (pesticides and herbicides), enzymes, and chemical probes for disease research. *See id.* at 338–42.

[14] *See* U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, series, para. 9.A (2010) [hereinafter MLEM] (For Official Use Only manual) (copy on file with author) (stating that the Coast Guard, working in concert with DOJ, is dedicated to "vigorous enforcement of environmental laws"); *see also* Raymond W. Mushal, *Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1124 (2009) (detailing DOJ's prosecution of vessel pollution cases); Andrew W. Homer, Comment, *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, 150 (2007) (discussing DOJ's aggressive criminal prosecution of vessel pollution cases to "cast as broad a net as possible in bringing such charges" against noncompliant vessel owners, operators, and crew members).

[15] *See* Ignacia Moreno, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at the 2011 Priorities for the Environmental and Resource Division in Washington, D.C. (Jan. 13, 2011) (transcript available at http://www.justice.gov/enrd/opa/pr/speeches/2011/enrd-speech-110113.html); *cf.* Lieutenant Commander John Reardon, CG-0941, U.S. Coast Guard & Lieutenant Commander David O'Connell, CG-0941, U.S. Coast Guard, Presentation at the U.S. Naval Justice School: Environmental Crimes for the Missions Lawyer 10 (Sept. 16, 2010) (noting that since the Coast Guard began referring vessel pollution cases to DOJ, an estimated $300 million in criminal fines and thirty-eight years of jail time have been awarded to offenders).

[16] *See* Mushal, *supra* note 14, at 1124 ("The [vessel pollution] cases do tend to be rather similar to one another, but they just keep coming."); Kehoe, *supra* note 2, at 41 ("Despite . . . substantial criminal fines and the publicity that accompanies them, the Coast Guard continues to discover and refer new vessel cases on a steady and frequent basis . . . . Unfortunately, the level of noncompliance . . . remains high . . . .").

[17] *See* RESEARCH AND INNOVATIVE TECH. ADMIN., U.S. DEP'T OF TRANSP., FREIGHT TRANSPORTATION: GLOBAL HIGHLIGHTS 46 (2010) (discussing how global maritime trade grew about three percent each year in the last decade—partly due to the increase in internet shoppers and implementation of just-in-time inventory practices—which led to

illegally dumps oily waste into the world's oceans.[18] Indeed, in 2010 the Coast Guard referred twenty-one vessel pollution cases to DOJ[19]—a number nearly twice the past decade's annual average of twelve.[20]

Part II of this article discusses the "who, what, when, why, where, and how" of intentional and illegal vessel pollution. Part III describes the international and domestic laws that the United States uses to prevent, deter, and criminalize acts of vessel pollution. Then, Part IV explains the Coast Guard's authority to investigate criminal acts of vessel pollution and highlights the integral roles that Coast Guard Port State Control teams and judge advocates perform during a vessel pollution investigation.

Finally, Part V argues that the Coast Guard's current practice—the referral of nearly all intentional and illegal acts of vessel pollution to DOJ for criminal prosecution—must be revised. Specifically, as illustrated in the May 2010 vessel pollution case of Motor Tanker (M/T) Wilmina,[21] the Coast Guard must begin administratively banning vessels responsible for acts of intentional and illegal vessel pollution from entering U.S. waters. Such a shift in Coast Guard practice, while retaining discretionary authority to refer recidivists or egregious acts of

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an increased reliance on commercial vessels to meet growing consumer demands) [hereinafter RITA HIGHLIGHTS].

[18] Over 99,000 vessels currently operate in the world's oceans. *See* INT'L MAR. ORG., INTERNATIONAL SHIPPING AND WORLD TRADE FACTS AND FIGURES 11 (Oct. 2009) [hereinafter IMO FACTS]; *see also* John Vidal, *Health Risks of Shipping Pollution Have Been 'Underestimated,'* GUARDIAN (London), Apr. 9, 2009, http://www.guardian.co.uk/environment/2009/apr/09/shipping-pollution/print. Of the world's fleet, approximately 10%–15%, intentionally and illegally pollute the oceans with oily waste each year—which equates to at least 5,000–7,500 environmentally noncompliant vessels. *See* ORG. FOR ECON. CO-OPERATION AND DEV., COST SAVINGS STEMMING FROM NON-COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL REGULATIONS IN THE MARITIME SECTOR 4 (2003) [hereinafter OECD REPORT].

[19] *See* E-mail from Lieutenant Commander John Reardon, Judge Advocate, CG-0941, U.S. Coast Guard, to author (Jan. 4, 2011, 14:16 EST) [hereinafter Reardon e-mail] (on file with author).

[20] *See* U.S. COAST GUARD, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES COAST GUARD 13 (2010) [hereinafter JAG REPORT], *available at* http://www.jaa.org/templates/files/2010-annual-report-final-.pdf ("The first half of 2010 saw a significant uptick in the number of environmental cases referred to . . . [DOJ].").

[21] In the matter of M/T Wilmina, the Coast Guard—rather than refer the case to DOJ for criminal prosecution—administratively banned M/T Wilmina from entering U.S. waters for three years and revoked its certificate of compliance. *See* Press Release, U.S. Coast Guard, Coast Guard Restricts Norwegian-flagged Wilmina from U.S. Ports for Three Years (May 27, 2010) [hereinafter Coast Guard Ban] (on file with author).

vessel pollution to DOJ, will better address a crime that is motivated as much by economics as it is by environmental ambivalence. To bolster and clarify the Coast Guard's authority to administratively ban such vessels, Appendices A and B offer proposed revisions to the Ports and Waterways Safety Act[22] (PWSA) and the Coast Guard's implementing regulations of PWSA found in Title 33 Code of Federal Regulations (CFR) Part 160, respectively.

II. The Rhyme and Reason behind Intentional and Illegal Vessel Pollution

"Oil . . . [is] essential for the operation of most sea-going vessels."[23] Oil serves as fuel, lubrication for the ship's machinery, and as cargo ensuring the global supply of energy.[24] As 99,000 commercial vessels transit the world's oceans each year,[25] "[t]he drone of [their] diesel engines[26] and complex systems produce a steady supply of waste oil, dripping, collecting, and mixing with the water below, thereby creating an oily wastewater cocktail."[27]

A. Oily Waste: How It Is Generated and Its Harmful Effects

Onboard most large vessels, two types of oily waste are generated: bilge slops and sludges.[28] Bilge slops are typically generated from small pipe leaks that accumulate in the vessel's machinery spaces, condensation by air cooling systems, engine room cleaning, and drains from engine room sinks.[29] On average, a typical vessel accumulates up to

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[22] 33 U.S.C. §§ 1221–1236 (2006).
[23] *See* OECD REPORT, *supra* note 18, at 11.
[24] *Id.*
[25] *See* IMO FACTS, *supra* note 18, at 11.
[26] "The world's biggest container ships have 109,000 horsepower engines which weigh 2,300 tons." Vidal, *supra* note 18.
[27] Lieutenant Christopher Coutu, *Tackling the Oily Water Separator Issue*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 11 (Winter 2004–2005).
[28] *See* UNEP BULL., *supra* note 4.
[29] *See* Ken Olsen, *Wastes and Machinery Space Maintenance*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 19 (Winter 2004–2005).

twenty-nine cubic meters[30] of bilge slops per month, and in some instances, up to twenty cubic meters of bilge slops per day.[31] Bilge slops contain refined crude oil; consequently, bilge slops are highly toxic to living organisms in the marine environment.[32]

The second type of oily waste generated aboard large vessels is sludge. Sludge is primarily generated from heavy fuel or marine diesel fuel used to power the ship's engines.[33] Since heavy fuel is the "dirtiest of all fuel sources available,"[34] and because it contains contaminants that are not removed during its initial refining process,[35] vessels must first direct the heavy fuel through centrifuges to purify the oil prior to it entering the vessel's engines.[36] On average, up to two percent of a vessel's heavy fuel becomes sludge during the purification process.[37] To the marine environment, sludges are less toxic than bilge slops;[38] however, sludges take longer to dissolve than bilge slops[39] and contain dioxins and heavy metals that have dramatic effects on wildlife.[40] For example, the viscidity of sludges is easily capable of smothering living organisms.[41]

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[30] A cubic meter is a measurement of volume equivalent to a space one meter long, one meter wide, and one meter high. *See What is Cubic Meter and w/m?*, OCEAN FREIGHT USA, http://www.oceanfreightusa.com/shipref_cbm.php (last visited Jan. 23, 2012).
[31] *See* Olsen, *supra* note 29, at 19. Consequently, bilge slops must be pumped out or they can affect the vessel's stability. *See* OECD REPORT, *supra* note 18, at 12–13.
[32] *See* Thompson, *supra* note 3 (noting that the toxicity from oil can kill organisms through inhalation or by absorption into the skin).
[33] *Id.*
[34] *See* OECD REPORT, *supra* note 18, at 6, 52. In fact, heavy fuel, often referred to as "low-grade ship bunker," has up to 2,000 times the sulfur content of diesel fuel used in United States and European automobiles. *See* Vidal, *supra* note 18. When heavy fuel is used, it is estimated that fifteen of the world's largest vessels emit as much air pollution as the world's 760,000,000 automobiles. *Id.*
[35] *See* Olsen, *supra* note 29, at 20.
[36] *Id.*
[37] *See* UNEP BULL., *supra* note 4.
[38] *See* Thompson, *supra* note 3.
[39] *Id.*
[40] *See* UNEP BULL., *supra* note 4.
[41] *See* Thompson, *supra* note 3.

B. Disposing Oily Waste and the Obstacles to Environmental Compliance

On average, vessels operate twenty-four hours a day for 280 days per year[42] and therefore generate an enormous amount of oily waste.[43] How vessels dispose of this waste depends on whether the oily waste is bilge slops or sludges. Accumulated bilge slops are normally directed to bilge water holding tanks,[44] where they are stored until the vessel's crew: (1) off-loads the bilge slops at port facilities;[45] (2) discharges them overboard—after being processed through an oily water separator;[46] or (3), incinerates them along with other ship-generated wastes.[47] Sludges are normally directed to sludge tanks, where they remain until the vessel's crew either off-loads the oily waste at a port facility or burns the sludges via an incinerator or auxiliary boiler.[48]

1. Off-Loading Oily Waste at Port Facilities

The costs associated with off-loading oily waste provide less scrupulous vessel owners and operators with ample incentive to pollute. Financially, it is estimated that the proper disposal of oily waste costs a vessel owner—depending on the size of the ship, its age, number of days at sea, and how well it is maintained—anywhere from $55,000 to $150,000 per year.[49] On a new or well-maintained vessel, these amounts account for 3.5%–6.5% of the ship's operating costs.[50] On an older or less-maintained vessel in a tight economic market, those costs account for 9%–15% of the ship's operating costs.[51]

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[42] *See* Vidal, *supra* note 18; *see also* Dr. Jean-Paul Rodrigue, *Ports, Maritime Transportation and the Global Economy*, HOFSTRA UNIV., http://people.hofstra.edu/jean-paul_rodrigue/downloads/Ports%20and%20Maritime%20Trade.pdf (last visited Mar. 20, 2012) ("[G]lobal trade is more than a matter of capacity, it is also concerned [with] the timeliness and reliability of the distribution.").

[43] A vessel that burns approximately 11,880 gallons of heavy fuel per day will accumulate up to 238 gallons of sludge. *See* Coast Guard Office of Maritime and Int'l Law, Missions Law Course: Environmental Crimes 11 (2010) [hereinafter CG Missions Law] (copy on file with author).

[44] *See* Coutu, *supra* note 27, at 11; Olsen, *supra* note 29, at 20.

[45] *See* Coutu, *supra* note 27, at 11.

[46] *Id.*

[47] *See* Olsen, *supra* note 29, at 20.

[48] *See* OECD REPORT, *supra* note 18, at 6.

[49] *Id.* at 5. In addition, capital, maintenance, and repair costs for a vessel's environmental equipment typically range around $30,000. *Id.*

[50] *Id.*

[51] *Id.* at 5, 51.

In addition to the financial incentive to pollute, the inadequacy of port waste reception facilities is equally problematic and forces vessel owners and operators to make a Hobson's choice between illegally discharging oily waste or retaining it onboard until the vessel's safety[52] and stability are placed at risk.[53] In many countries, waste reception facilities are inadequate because: (1) they are inoperable; (2) they are operable but incapable of off-loading large amounts of oily waste; (3) they were built only to satisfy international regulatory requirements—not to actually off-load oily waste; or (4) they are operable, but facility managers are simply unwilling to accept oily waste for the normal costs associated with off-loading the oily waste.[54]

To complicate matters even further, vessel operators work within an operating budget and against a demanding schedule.[55] Off-loading oily waste during port calls delays the vessel's departure and arrival times,[56] and of course, the vessel's owner or operator must pay additional fees to port waste reception facilities to off-load oily waste.[57] In addition, dockage fees increase for each day a vessel remains in port to off-load oily waste.[58] In the United States, depending on the port and the size and type of the vessel, dockage fees range between $4,000 and $15,000 per day.[59]

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[52] *See Marpol Annex I: Regulations for the Prevention of Pollution by Oil*, GARD AS, 20 (Apr. 2010), http://www.gard.no/ikbViewer/Content/72338/Marpol%20April%202010.pdf [hereinafter GARD REPORT] ("Blocking the overboard pipe from the main bilge pumps should never be done, as this would seriously affect the safety of the vessel . . . ."); *see also* OECD REPORT, *supra* note 18, at 13.

[53] *See* OECD REPORT, *supra* note 18, at 12–13, 40.

[54] *Id.* at 41; *see also* UNEP BULL., *supra* note 4 (describing how the low value of oily waste offers little incentive to the port state to treat and refine it).

[55] *See* OECD REPORT, *supra* note 18, at 40–42; Kees, *supra* note 3, at 58 (listing "overworked crews" as one of several reasons why crew members intentionally discharge oily waste); Vidal, *supra* note 18.

[56] *See* OECD REPORT, *supra* note 18, at 40–42.

[57] *See* Richard A. Udell, Senior Trial Attorney, U.S. Dep't of Justice, INTERTANKO Criminal Vessel Enforcement (Mar. 21, 2005), www.intertanko.com/.../presentations/INTERTANKOLESSPHOTOS.UDELL.PPT (PowerPoint presentation providing overview of U.S. enforcement of vessel pollution).

[58] *See* UNEP BULL., *supra* note 4. In addition, vessels are prohibited from off-loading sludges while loading or unloading cargo. *Id.*

[59] *See* E-mail from Michael Chalos, Senior Partner, Chalos, O'Connor, LLP, to author (June 1, 2011, 09:13 EST) [hereinafter Chalos e-mail] (on file with author) (Chalos O'Connor, LLP is a law firm that specializes in maritime, admiralty, and environmental law.).

2. The Oily Water Separator

An oily water separator (OWS) is "self-describing."[60] Although an OWS is a complicated piece of environmental equipment that incorporates oil sensing probes, solenoid valves,[61] check valves,[62] a pump, and other critical components (Figure 1), an OWS has one simple purpose—to separate oil from water taken from a holding tank.[63] Once the oily waste is separated, an oil content monitor (OCM) (often referred to as an oil content meter) ensures that the oil content in the clean bilge water is below international and domestic standards (detailed in Part III below), and then the OWS system allows the clean bilge water to be discharged overboard.[64] If, however, the OCM indicates that the oil content in the processed bilge water is above international and domestic standards, the processed bilge water is returned to the holding tank until it is reprocessed, incinerated, or off-loaded.[65]

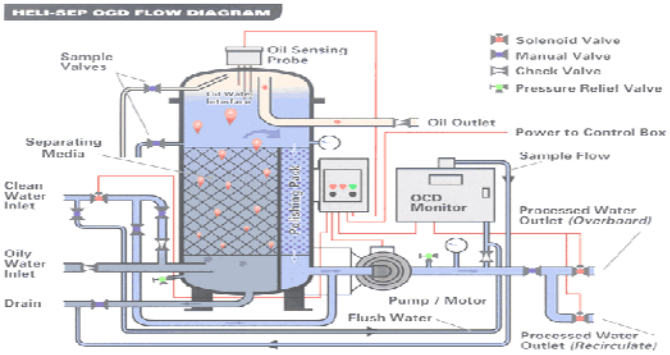

Figure 1. Diagram of an Oily Water Separator[66]

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[60] R. Michael Underhill, *Part I: Dumping Oil, Cooking the Books, and Telling Lies: The False Statements Act as Applied to Marine Pollution*, 15 U.S.F. MAR. L.J. 271, 276 (2003).

[61] A solenoid valve converts electrical energy into mechanical energy; once converted, the valve is either opened or closed to control the amount of flow. *See Definitions*, VALVE INFO CTR., http://industrialvalveresource.com/info-center/category/definitions.html (last visited Jan. 23, 2012).

[62] Check valves are valves installed in the piping system that allow flow in one direction only. *Check Valves*, SPIRAX SARCO LTD., http://www.spiraxsarco.com/resources/steam-engineering-tutorials/pipeline-ancillaries/check-valves.asp (last visited Jan. 23, 2012).

[63] *Id.*

[64] *See* Olsen, *supra* note 29, at 20.

[65] *Id.*

[66] *Heli-Sep Oily Water Separator*, SEPARATION EQUIP. CO., INC., http://www.separationequipment.com/helisep.htm (last visited Jan. 23, 2012).

Financially, because new and larger vessels can easily cost over $100 million to build,[67] the costs of acquiring and maintaining an OWS are not necessarily prohibitive.[68] Nevertheless, capital, maintenance, and repair costs for an OWS quickly add up.[69] A new OWS ranges from $10,000 to $100,000, depending on the complexity of the model purchased and whether it has the capacity to self-clean.[70] Additionally, the cost of training crew members to operate an OWS system ranges from $3,000 to $5,000 per year.[71] Finally, OWS maintenance costs, to include periodic checks, washings, and filter replacements, fall between $3,000 to $15,000 per year.[72]

Practically, most OWS systems are fraught with operational and technical challenges. First, operating the OWS requires manpower—typically accounting for at least one crew member's time and attention during an eight-hour watch.[73] Second, the OCM must be correctly calibrated for the OWS to function properly.[74] If for instance the OWS is misreading the level of oil being processed through the OCM, the OWS will automatically shut down[75] and sound an alarm.[76] Third, chemicals contained in certain cleaning detergents commonly used in the engine room—which also collect in the vessel's bilge water holding tanks—foul the OWS system's filters and render the OWS inoperable.[77]

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[67] IMO FACTS, *supra* note 18, at 10.
[68] *See* OECD REPORT, *supra* note 18, at 18 (noting that when "[a]morti[z]ed over the OWS's lifetime . . . , the cost for many simpler [OWS] systems is not that high").
[69] *Id.*
[70] *Id.*; *cf.* Chalos e-mail, *supra* note 59 (indicating that some OWS systems now cost more than $150,000; a good OWS system generally costs between $40,000–$80,000).
[71] OECD REPORT, *supra* note 18, at 18.
[72] *Id.*; *see also* Chalos e-mail, *supra* note 59.
[73] *See* OECD REPORT, *supra* note 18, at 18; Kees, *supra* note 3, at 58. For cost-cutting vessel owners who choose to "retrofit" existing OWS systems rather than replace them with newer and more costly OWS systems, the level of manpower is increased two-fold because retrofitted OWS systems originally designed to meet lower levels of discharge purity often fail. *See* Homer, *supra* note 14, at 151.
[74] *See* OECD REPORT, *supra* note 18, at 19.
[75] *See id.*; Olsen, *supra* note 29, at 20.
[76] *See* OECD REPORT, *supra* note 18, at 19; *cf.* Telephone Interview with Lieutenant Commander Brian Province, Chief, Investigations and Inspections Div., Atlantic Area, U.S. Coast Guard (Feb. 4, 2011) [hereinafter Province Interview] (stating that only newer OWS systems can simultaneously shut down and sound an alarm).
[77] *See* OECD REPORT, *supra* note 18, at 19.

C. Other Motivations for the Illegal Discharge of Oily Waste

While the primary impetus for vessel pollution is economic,[78] other motivations exist for why vessel owners, operators, and crew members pollute the world's oceans with oily waste. First, despite increased environmental awareness as well as criminal penalties for the noncompliant, some mariners remain ambivalent about the adverse environmental effects of vessel pollution,[79] while other mariners dismiss the importance of environmental equipment because they have no impact on the vessel's ability to navigate.[80] Some mariners do not believe they will be caught and convicted,[81] while other mariners succumb to corporate or financial pressures to "look the other way."[82] Regrettably, industry ambivalence and top-down pressures continue to influence not just the foreign commercial fleet but also domestic mariners[83] and even a few Coast Guardsmen.[84]

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[78] *See* Reardon & O'Connell, *supra* note 15, at 5 ("In their simplest terms[,] environmental crimes are economic crimes."); *see generally* OECD Report, *supra* note 18; Homer, *supra* note 14; Kehoe, *supra* note 2; Underhill, *supra* note 60.

[79] *See* OIL SLICKS, *supra* note 2, at 11 ("[T]he lack of scruples of some individuals and companies[] mean that every year[] millions of tons of hydrocarbons are dumped in our oceans.").

[80] *See* OECD REPORT, *supra* note 18, at 44.

[81] *See id.* at 47.

[82] *See* Homer, *supra* note 14, at 152 ("Chief engineers, masters, and other key personnel are often given financial incentives, by way of performance bonuses, for running at or below the vessel's projected operating budget."); Gillian Whittaker, *Shipping Is Easy Target*, TRADEWINDS.NO (May 7, 2005, 8:08 AM), http://www.codus-law.com/news/shipping-easy-target.pdf ("Often there is a bad environmental culture among seafarers and it is hard to change their attitudes and ways, ..."); Ken Olsen, *Someone Will Report*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 49 (Winter 2004–2005) ("Shipboard peer pressure, . . . may contribute to a person's willingness to [pollute]."); e-mail from Jeanne Grasso, Partner, Blank, Rome LLP (June 3, 2011, 16:30 EST) [hereinafter Grasso e-mail] (on file with author) (Blank, Rome LLP maintains an environmental law division that specializes in environmental enforcement and litigation (civil, criminal, and administrative proceedings.)) (stating that vessel pollution occurs in part because of ego and associated fear of being perceived as incompetent; additional factors include the installation of inoperable equipment, difficulty and time to maintain and operate the equipment, and "crew members not having or taking the time to deal with challenging equipment").

[83] *See* Press Release, Dep't of Justice, Louisiana Vessel Company to Pay $2.1 Million in Penalties (Nov. 4, 2010) (on file with author) (American vessel owner whose vessel was contracted by the National Science Foundation subsequently convicted of vessel pollution); Press Release, Dep't of Justice, Former Chief Engineer of Louisiana Vessel Company Sentenced for Falsifying Oil Record Book (Jan. 12, 2011) (on file with author) (chief engineer sentenced to two years probation and $5,000 fine for lying to Coast Guard).

Second, though "government responsibility and enforcement [of environmental laws] is vested primarily in the flag state,"[85] the emergence of "flags of convenience ships"[86] has "rendered the quality of the world's fleets and their crews more problematic."[87] In 2009, the International Maritime Organization (IMO) reported:

> The ownership and management chain surrounding any particular vessel can embrace many countries; it is not unusual to find that the owners, operators, shippers, charterers, insurers[,] and the classification society, not to mention the officers and crew, are all of different nationalities and that none of these [individuals or entities are] from the country whose flag flies at the ship[']s stern.[88]

Consequently, flags of convenience ships, or ships "that fly the flag of a country other than the country of ownership,"[89] allow vessel owners to choose "open registry" countries whose only interest in overseeing the vessel's activities is to collect registration fees.[90] And although proponents of the open registry system cite to the cost savings to vessel

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[84] *See* United States v. Ander (Commander, Atlantic Area Aug. 24, 2010) (Coast Guard Cutter Eagle, Atlantic Area Aug. 14, 2010) (First Class Petty Officer convicted at special court-martial of three specifications of dereliction of duty for discharging oily waste into international and U.S. waters during 2009); Memorandum from Vice Admiral D.P. Pekoske, Vice Commandant, to Distribution, subject: Final Decision Letter on the Pollution Incident Aboard CGC RUSH, Honolulu, HI, 2006 (11 May 2010) [hereinafter RUSH Memo] (citing a "disregard for . . . a key [Coast Guard] mission: environmental enforcement" and "a significant amount of stress" as two of the factors for why a Coast Guard warrant officer directed subordinate crew members to illegally discharge approximately 3,000 gallons of bilge waste into the Honolulu Harbor).

[85] OCEAN COMM'N, *supra* note 1, at 238.

[86] The list of states that offer open registration to foreign vessel owners has also been dubbed the "black list." *See* OCEANA, REPORT OF THE EUROPEAN COMMISSION ON THE MONITORING OF ILLICIT VESSEL DISCHARGE 3 (2001) [hereinafter OCEANA REPORT]

[87] *See* OECD REPORT, *supra* note 18, at 8.

[88] *See* IMO FACTS, *supra* note 18, at 38.

[89] *See What do FOC's Mean to Seafarers*, INT'L TRANSP. WORKERS' FED'N, http://www.itfglobal.org/flags-convenience/sub-page.cfm (last visited Jan. 23, 2012) [hereinafter Flags of Convenience].

[90] *See* OCEAN COMM'N, *supra* note 1, at 239; *see also* Shaun Gehan, Case Note, 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) (citing Liberia and Luxemburg—states with little or no coastline that face little or no threat of coastal pollution—as prime examples of flags of convenience that have a disincentive to enforce environmental laws against substandard vessel owners registered by their countries).

owners and the new employment opportunities created for seafarers,[91] the advent of open registries has in some instances led to low seafarer wages, poor onboard conditions, inadequate food and clean drinking water, and long periods of work without proper rest.[92] These conditions, coupled with the vessel owner's ability to easily change vessel registry to another state, make it easier for irresponsible owners to avoid environmental enforcement actions.[93]

D. The Crime: Where, When, and How Vessels Discharge Oily Waste

To reduce the chances of getting caught, vessels most often illegally discharge their oily waste outside of any port, flag, or coastal state's territorial seas,[94] "along regular shipping routes[95] or in an area of recent oil accidents"[96] at nighttime.[97] The polluter's reasons for choosing these locations and time are straightforward. First, vessel polluters believe they will avoid detection and punishment by polluting outside of a country's jurisdiction.[98] Second, vessel polluters often successfully avoid detection by mixing their oily waste with accident residues already on the ocean's surface along regular shipping routes.[99] Third, the discharge of oily waste at night reduces the ability of many states to positively identify oil sheens on the ocean's surface and the offending vessel.[100]

To actually move oily waste from the inside to the outside of a vessel, crew members use many different methods to commit intentional

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[91] *See* OECD REPORT, *supra* note 18, at 8.
[92] *See* Flags of Convenience, *supra* note 89.
[93] *See* OCEAN COMM'N, *supra* note 1, at 239.
[94] *Id.* at 47.
[95] Although the discharge most often occurs outside a state's territorial zones, at least in Europe—where the coastlines are so complex—it is normal for local nationals to often see their beaches "dotted for miles by thick, sticky tar balls" as a result of vessel pollution. *See* OCEANA REPORT, *supra* note 86, at 3.
[96] UNEP BULL., *supra* note 4.
[97] *See* OECD REPORT, *supra* note 18, at 47; OIL SLICKS, *supra* note 2, at 11.
[98] *See* OECD REPORT, *supra* note 18, at 47; UNEP BULL., *supra* note 4.
[99] *See* UNEP BULL., *supra* note 4.
[100] *See* OECD REPORT, *supra* note 18, at 47. *But see* Kehoe, *supra* note 2, at 7 (describing the Coast Guard's ability to detect oil spills at night by using "Forward Looking Infrared Radar"). Since aerial surveillance remains technically and financially unfeasible for most countries, spaceborne surveillance through the use of synthetic aperture radar (SAR) is now being explored. OCEANA REPORT, *supra* note 47, at 4. Still, satellite imagery costs $4,000 per photo and is unaffordable for most states. Kees, *supra* note 3, at 58 (highlighting the problems of implementing effective global surveillance of the shipping industry).

and illegal vessel pollution.[101] First, and by far the most common, crew members divert bilge slops away from the OWS to an overboard discharge port by using a bypass hose or pipe.[102] As seen in Figure 2, a bypass hose is nothing more than a hose with flanges attached to each end. These flanges are attached to piping leading from the bilge water holding tank to the vessel's overboard discharge piping.[103] The bilge slops are then channeled through the bypass hose with the assistance of a pump.[104] Since flexible bypass hoses are easily spotted, crew members often build "hard bypass piping" (Figure 3) that appears, at first glance, to be part of the OWS system.[105]

Figure 2. Photo of a "Flexible" Bypass[106]

[101] The list of pollution methods discussed in this article is not exhaustive; crew members use a number of "clandestine methods" to illegally discharge oily waste. *See* Missions Law, *supra* note 43, at 1–13 (describing how incinerators are filled with clean diesel fuel to falsely give the impression of proper operation during testing, piping is manipulated, and cooling and sewage system discharge ports are improperly fitted); *see, e.g.*, Press Release, Dep't of Justice, Ship Crew Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation (Apr. 22, 2010) (on file with author) (crew member directed oily waste to vessel's center fuel tank then illegally discharged it overboard).

[102] *See* OECD REPORT, *supra* note 18, at 41; *see also* Kehoe, *supra* note 2, at 6; Press Release, Dep't of Justice, Ship Serial Polluter Ordered to Pay $4 Million for Covering up the Deliberate Discharge of Oil and Plastics (Sept. 21, 2010) [hereinafter M/V Iorana] (on file with author); Press Release, Dep't of Justice, Cargo Ships' Chief Engineer Sentenced for Violating Pollution Prevention Act (Aug. 17, 2010) (on file with author); Press Release, Dep't of Justice, Ship Management Firm Pleads Guilty and is Sentenced for Violating Federal Pollution Law (June 7, 2010) [hereinafter M/T Chem Faros] (on file with author); Press Release, Dep't of Justice, Operator of Commercial Ship Inspected in Port of Tampa Fined $725,000 for Oil-Pollution Related Crime (May 21, 2010) [hereinafter M/T Kerim] (on file with author).

[103] *See* CG Missions Law, *supra* note 43, at 1–7.

[104] *Id.*

[105] *See id.* at 3.

[106] Reardon & O'Connell, *supra* note 15, at 41.

Figure 3. Photo of a "Hard" Bypass[107]

Second, crew members "trick" the OWS into believing that it is processing effluent in conformity with international and domestic regulatory standards.[108] To accomplish this, crew members continuously "flush" the OCM with fresh water while they illegally discharge bilge slops overboard through the OWS.[109] In this instance, the "flushing" of the OCM prevents the OWS from sounding its alarm or automatically shutting down.[110] Third, "crew members attach hoses to the sludge pumps and pump [the contents inside] the sludge tanks directly overboard."[111] Vessel owners and operators save an estimated $12.8 million each year just by illegally dumping sludges.[112]

III. The International and Domestic Laws Enacted to Combat Vessel Pollution

In 1969 and 1970, Thor Heyerdahl, a world-renowned explorer and archeologist, sailed the Atlantic Ocean in two papyrus rafts.[113] During

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[107] *Id.* at 29.
[108] *See* CG Missions Law, *supra* note 43, at 10–11.
[109] *Id.* at 10–11.
[110] *Id.*
[111] Kehoe, *supra* note 2, at 6.
[112] OECD REPORT, *supra* note 18, at 13.
[113] *Thor Heyerdahl Expeditions and Archaeology of the Pacific Peoples*, GREATDREAMS.COM, http://www.greatdreams.com/thor.htm (last visited Mar. 20, 2012) [hereinafter Heyerdahl Expeditions]. Thor Heyerdahl is most famous for his 101 day "Kon-Tiki" expedition in 1947, during which he and five others safely transited 4,300 miles across the Pacific Ocean in an aboriginal balsa raft. *See* THOR HEYERDAHL, KON-TIKI (1950).

his first voyage in the "Ra," a raft fifteen meters long, Heyerdahl traveled 2,700 nautical miles across the Atlantic Ocean.[114] During his second voyage in the "Ra II," a raft twelve meters long, Heyerdahl successfully traveled 3,270 nautical miles across the Atlantic Ocean from Morocco to Barbados.[115] By doing so, Heyerdahl proved to the world that modern science underestimated the long-forgotten aboriginal technologies of sea voyage by crafts made only of reed; regrettably, along his legendary ocean voyages Heyerdahl encountered globs of oil, tar, and plastics stretching from the coast of Africa to South America.[116]

A. The International Convention for the Prevention of Pollution from Ships

Three years after Heyerdahl's second voyage, the International Maritime Organization (IMO), a specialized agency of the United Nations responsible for the prevention of pollution by ships,[117] responded to the widespread pollution that Heyerdahl found floating on the Atlantic Ocean's surface. In 1973, IMO drafted a treaty called the International Convention for the Prevention of Pollution from Ships (MARPOL 73).[118] Five years later in 1978, IMO drafted the Protocol of 1978, a treaty that modified MARPOL 73.[119] Together, Annex I of each of these two treaties comprise "MARPOL 73/78" and represent the first significant international effort to regulate the commercial fleet and prevent vessels from committing intentional and illegal acts of pollution.[120]

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[114] *Heyerdahl Expeditions*, *supra* note 113.
[115] *Id.*
[116] *See* DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Protection%20of%20the%20Marine%20Environment (last visited Jan. 23, 2012) [hereinafter *Sea Perspective*].
[117] *See* INT'L MAR. ORG., *Introduction to IMO*, http://www.imo.org/About/Pages/Default.aspx (last visited Jan. 23, 2012).
[118] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1983 U.N.T.S. 184 (entered into force Oct. 2, 1983) [hereinafter MARPOL].
[119] Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1983 U.N.T.S. 62 (entered into force Oct. 2, 1983).
[120] *See* Homer, *supra* note 14, at 153 (characterizing MARPOL 73/78 as one of the "most important . . . devices" governing vessel pollution); Nicholas H. Berg, Comment, *Bringing it all Back Home: The Fifth and Second Circuits Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels*, 34 TUL. MAR. L.J. 253, 255 (2009) ("MARPOL [73/78] has since been ratified by nations that represent the vast majority of the world's shipping interests.").

In MARPOL 73/78, specific guidelines were established for all tanker vessels (tankers)[121] 150 gross tons (GT) and above and all ships 400 GT and above to either maintain onboard or discharge oily waste. Most notably, MARPOL 73/78 sets forth the following requirements: (1) undergo surveys[122] to ensure the functionality of its oil discharging equipment;[123] (2) maintain a valid international oil pollution prevention certificate (IOPP)—again, to confirm the oil discharging equipment's specifications and functionality;[124] (3) adhere to strict oil discharging requirements outside designated special areas;[125] (4) adhere to even stricter oil discharge restrictions or prohibitions inside special areas;[126] and (5), maintain an oil record book (ORB) that documents every overboard discharge of bilge water that accumulates in machinery spaces.[127] Separately, MARPOL 73/78 mandates that signatories maintain port facilities capable of off-loading the vessel's oily waste.[128]

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[121] Unlike other "ships" used to transport almost any type of cargo, "tankers" are generally defined as a class of vessels that exclusively transport bulk amounts of oil or hazardous materials. *See* 46 U.S.C. § 2101(39) (2006); MARPOL, *supra* note 118, annex I, reg. 1(4).

[122] Surveys are undertaken every five years by either the flag state or a classification society. *See* OECD REPORT, *supra* note 18, at 14.

[123] MARPOL, *supra* note 118, annex I, reg. 4(1)(c).

[124] *Id*. reg. 5; *accord* Lieutenant Commander Ryan Allain, *USCG Inspectors and Industry Working Together for a Cleaner, Greener Environment*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 11 (Winter 2008–2009). Vessel owners must have IOPPs reissued every five years. *See* MARPOL, *supra* note 118, annex I, reg. 4(1)(b).

[125] *See* MARPOL, *supra* note 118, annex I, reg. 9. Specifically, regulation 9(1)(a)(v) prohibits new tankers from discharging oily mixtures unless the effluent is less than 1/30,000 water to oil, and regulation 9(1)(b)(iv) prohibits all other vessels from discharging oily mixtures unless the effluent is less than 100 parts per million of oil. *Id.* Consistent with regulation 16(7) and as a general baseline, the Coast Guard prohibits any vessel from discharging effluent that contains fifteen parts per million of oil or more. 33 C.F.R. § 151.10 (2011).

[126] MARPOL, *supra* note 118, annex I, reg. 1. A "special area" is defined in MARPOL as a "sea area where for recognized technical reason in relation to its oceanographical and ecological condition . . . special mandatory methods for prevention of sea pollution by oil is required." *Id.* reg. 1(10). For a list of the ten internationally recognized "special areas" under MARPOL 73/78, Annex I, see INT'L MAR. ORG., *Special Areas U nder Marpol*, http://www5.imo.org/SharePoint/mainframe.asp?topic_id=760 (last visited Jan. 23, 2012).

[127] MARPOL, *supra* note 118, annex I, regs. 20.2(a)(xii), 20.2(b)(iv).

[128] *Id.* reg. 12.

The spirit and intent of MARPOL 73/78—and most importantly its regulatory framework—remain as relevant today as the day both treaties took effect on October 2, 1983. Presently, 151 states have ratified MARPOL 73/78.[129] (Those 151 states make up 98.91% of the world's gross shipping tonnage.)[130] In the United States, MARPOL 73/78 was ratified by the Senate on August 12, 1980.[131] Today, MARPOL 73/78 is codified in federal law, that is, the Act to Prevent Pollution from Ships (APPS),[132] and the Coast Guard, by delegation of authority from the Department of Homeland Security (DHS),[133] enforces MARPOL 73/78 through APPS and corresponding regulations found in Title 33 of the CFR.[134]

B. The United Nations Convention on the Law of the Sea

In the midst of the twentieth century technological revolution, the world's oceans became a traffic jam of sorts for sea mining activities that yielded anything from oil and tin to metals and diamonds, deep sea submarine exploration, large-scale commercial fishing activities—including fisheries by one state's vessels within another state's territorial seas, maritime disputes over territorial sovereignty between states, and of course, continued intentional and illegal acts of oil pollution.[135] To address these problems, the United Nations (around the same period MARPOL 73/78 was drafted and signed) convened the Third United Nations Conference on the Law of the Sea.[136] After nearly a decade, the United Nations drafted the Convention on the Law of the Sea of 1982 Treaty (UNCLOS).[137]

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[129] For a complete list of MARPOL 73/78 signatories, see INT'L MAR. ORG., *Status of Conventions by Country*, http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (follow hyperlink for "Status of Conventions summary") (last visited Jan. 23, 2012).
[130] *Id.*
[131] INT'L MAR. ORG., *IMO Documentation*, https://imo.amsa.gov/au/public/parties/marpol78.html (last visited Mar. 20, 2012).
[132] 33 U.S.C. §§ 1901–1915 (2006).
[133] Memorandum from Dep't of Homeland Sec., to U.S. Coast Guard, subject: Delegation to the Commandant of the U.S. Coast Guard 0170.1, sec. 2, para. 77 (June 20, 2003) [hereinafter DHS Memorandum].
[134] *See* 33 C.F.R. §§ 151.01–29 (2011).
[135] *See Sea Perspective*, *supra* note 116.
[136] *Id.*
[137] U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994) [hereinafter UNCLOS]; *see also* Berg, *supra* note 120, at 258.

In the context of intentional and illegal vessel pollution, UNCLOS has been dubbed the "constitution of the oceans"[138] and is significant for various reasons. First, UNCLOS represents a reaffirmation by the international community to conserve the ocean's living resources and protect and preserve the marine environment.[139] Second, UNCLOS creates a jurisdictional framework for the world's oceans. Specifically, UNCLOS identifies the "territorial seas" (TS) as waters extending twelve nautical miles from a state's low-water baseline,[140] the "contiguous zone" (CZ) as waters between twelve and twenty-four nautical miles from a state's low-water baseline,[141] the "exclusive economic zone" (EEZ) as waters extending two hundred nautical miles from a state's low-water baseline,[142] and the "high seas" (HS) as waters beyond a state's EEZ.[143] Third, UNCLOS provides investigative and enforcement guidance to flag, port, and coastal states that identify acts of vessel pollution.[144] Specifically, UNCLOS promotes the "law of the flag doctrine," or concept that a vessel's "flag state"—or state to which the vessel claims its sovereignty—has the right of first refusal to investigate intentional and illegal "dumping"[145] violations and punish those responsible.[146]

With the exception of provisions pertaining to seabed mining[147] and the "law of the flag doctrine,"[148] UNCLOS is largely viewed by the

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[138] *See* Gehan, *supra* note 90, at 169 (quoting Agustin Blanco-Bazan, Senior Deputy Dir., Legal Affairs, IMO, Address at the IMO Interface with the Law of the Sea Convention at the Twenty-Third Annual Seminar of the Center Ocean Law and Policy, Univ. of Virginia School of Law (Jan. 6–9, 2000), *available at* http://www5.imo.org/SharePoint/mainframe.asp?topic_id=406&doc_id=1077).

[139] *See* UNCLOS, *supra* note 137, pmbl. & arts. 192–219.

[140] *Id.* arts. 3, 5.

[141] *Id.* art. 33.

[142] *Id.* arts. 55–57.

[143] *Id.* art. 86.

[144] *Id.* pt. XII, § 6.

[145] "Dumping" is defined as any deliberate disposal of wastes or other matter from vessels, aircraft, platforms, or other man-made structures at sea. *Id.* art. 1(5)(a)(i).

[146] *Id.* arts. 217(1), 218(2); *accord* Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923) (rejecting "law of the flag doctrine" where foreign merchant ships were illegally transporting alcohol into the United States).

[147] *See* INTL & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 142 (2011) [hereinafter OPLAW HANDBOOK].

[148] *See* United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1372–74 (S.D. Fla. 1998) (rejecting argument that Liberia, as flag state, had sole right to enforce violation of false ORB violation possibly committed outside U.S. waters but discovered in U.S. waters); United States v. Jho, 534 F.3d 398, 406 (5th Cir. 2008) (holding that the "law of the flag doctrine" is chiefly applicable to vessels on the high seas).

United States as customary international law.[149] Notably, for the past two decades, U.S. presidents made several unsuccessful bipartisan efforts to have UNCLOS ratified by the Senate.[150] Separately, the United States—in accordance with the territorial boundaries created in UNCLOS—claimed sovereignty over its TS to twelve nautical miles,[151] its CZ between twelve and twenty-four nautical miles,[152] and its EEZ up to 200 nautical miles.[153] Moreover, in recent judicial decisions, federal courts have acknowledged that UNCLOS is properly considered customary international law.[154] Finally, the Coast Guard identifies UNCLOS as "among the most important treaties for [the] protection of the marine environment."[155]

C. The Act to Prevent Pollution from Ships

> I am pleased to sign into law . . . the "Act to Prevent Pollution from Ships," which addresses a number of environmental issues related to intentional and accidental pollution . . . .
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> . . . .

[149] *See generally* JAMES H. DAVENPORT, 16 BUSINESS ORGANIZATIONS WITH TAX PLANNING 240F.02 (2010) ("UNCLOS remains pending before the U.S. Senate without accession. Notwithstanding this fact, UNCLOS continues to be regarded as the accepted statement of the international law of the sea."); Berg, *supra* note 120, at 259 ("The widespread international acceptance of UNCLOS, along with the approval of the executive branch, has raised the question of whether UNCLOS has become customary international law . . . .").

[150] *See* OPLAW HANDBOOK, *supra* note 147, at 142–43 ("On October 7, 1994, President Clinton submitted [UNCLOS] . . . to the Senate for its advice and consent. On February 25, 2004, and again on October 31, 2007, the Senate . . . voted to send the treaty to the full Senate with a favorable recommendation for ratification."); *see also* COUNCIL ON FOREIGN RELATIONS, *Transcript of Hillary Clinton's Confirmation Hearing* (Jan. 13, 2009), http://www.cfr.org/publication/18225/transcript_of_hillary_clintons_confirmation_hearing.html.

[151] Proclamation No. 5928, 3 C.F.R. 547 (1989); 33 C.F.R. § 2.22 (2011).

[152] Proclamation No. 7219, 64 C.F.R. 48,701 (1999); 33 C.F.R. § 2.28 (2011).

[153] Proclamation No. 5030, 3 C.F.R. 22 (1983); 33 C.F.R. § 2.30 (2011).

[154] *See* United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 632 (E.D. Tex. 2006), *rev'd on other grounds*, 534 F.3d 398 (5th Cir. 2008); United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998).

[155] *See* MLEM, *supra* note 14, para. 9.B.1; *see also* 9 U.S. COAST GUARD MARINE SAFETY MANUAL, COMDTINST M16247, at 1-1 (25 Aug. 1997) ("An excellent example of [treaties becoming customarily international law] is the United Nations Convention for the Law of the Sea . . . with respect to traditional uses of the oceans . . . .").

> The United States has been and will continue to be a leader in urging the adoption of international maritime safety and environmental standards. My signing [APPS] is a mark of our determination to protect the marine environment from pollution.[156]

By signing APPS into federal law on October 21, 1980, President Carter codified the regulations set forth in MARPOL 73/78.[157] As a consequence, President Carter gave the Coast Guard unambiguous legal authority to investigate vessel pollution[158] committed by U.S. commercial vessels anywhere and by foreign-flagged commercial vessels within the navigable waters of the United States.[159]

In accordance with APPS, the Coast Guard has the following additional authorities when investigating suspected acts of vessel pollution. First, the Coast Guard can detain or revoke the clearance of vessels whose equipment does not substantially comply with the vessel's IOPP.[160] Second, the Coast Guard, upon request to the U.S. Customs and Border Protection (CBP),[161] may effect the detention of any foreign-flagged commercial vessel whose equipment does not substantially agree with the vessel's IOPP[162] or whose crew members are suspected of committing an APPS violation.[163] Third, the Coast Guard may allow a previously detained vessel to leave port if the vessel files a bond or other surety satisfactory with the Coast Guard.[164] Fourth, APPS, per DHS

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[156] Presidential Statement on Signing the Act to Prevent Pollution from Ships Law, 16 WEEKLY COMP. PRES. DOC. 2379 (Oct. 21, 1980).

[157] John Woolley & Gerhard Peters, *Act to Prevent Pollution From Ships Statement on Signing H.R. 6665 Into Law*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=45342 (last visited Mar. 20, 2012); *see also* Jeff B. Curtis, Comment, *Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story?*, 15 ENVTL. L. 679, 701 (1985). Of particular note, Act to Prevent Pollution from Ships (APPS) codified the requirement to preserve an ORB on board for a period of three years. *See* MARPOL, *supra* note 118, annex I, reg. 20(5).

[158] *See* 33 U.S.C. §§ 1901(a)(11), 1907(b–c) (2006).

[159] *See id.* § 1902(a)(1–2).

[160] *Id.* § 1904(e)(2).

[161] 46 U.S.C. § 60105 (2006) authorizes the release of detained vessels upon receipt of a bond or other financial security. However, it is the U.S. Customs and Border Protection (CBP), not the Coast Guard, who possesses this authority. *See id.* § 91.

[162] *See id.* § 1904(f)(1).

[163] *See id.* § 1908(e).

[164] *Id.* Interestingly, since MARPOL 73/78 does not discuss bonds or surety, it appears that a vessel's ability to have a detention lifted by filing a bond or other surety is rooted not in MARPOL but rather UNCLOS. *See* UNCLOS, *supra* note 137, art. 226(1)(b) ("If

delegation,[165] allows the Coast Guard to implement regulations whose genesis is MARPOL 73/78.[166] Practically, those regulations, set forth in the CFR, put the commercial fleet on constructive notice of MARPOL 73/78's regulations and the criminal and civil penalties vessel polluters can incur under APPS.[167]

For DOJ, APPS provides prosecutors (post-Coast Guard investigation) with a breadth of discretion to address acts of intentional and illegal vessel pollution. Most importantly, APPS gives DOJ discretion to charge vessel owners, operators, and crew members criminally.[168] In this instance, vessel owners, operators, and crew members can each be convicted of a Class D federal felony.[169] For each APPS violation, a Class D felony is punishable by up to six years imprisonment[170] and a fine of up to $250,000 for an individual[171] or $500,000 for a corporation.[172]

Third, and perhaps the most damaging to the environmentally noncompliant, APPS gives courts, upon conviction of the guilty parties, the authority to award up to half of any fine to persons giving information leading to the conviction.[173] Consequently, APPS's "whistle[-]blower provision" provides crew members earning $12,000 per year with a major financial incentive to report acts of vessel

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[an] investigation indicates a violation of applicable laws . . . for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.").

[165] DHS Memorandum, *supra* note 133.

[166] *See* 33 U.S.C. §§ 1902(e), 1903(c)(4)(A).

[167] *See* 33 C.F.R. §§ 151.01–29 (2011).

[168] *See* 33 U.S.C. § 1908(a).

[169] *Id.* Vessel owners and operators may be prosecuted for MARPOL 73/78 violations committed by crew members, if the crew members' acts are committed within the scope of their employment and while under the belief that such acts benefit the company. *See, e.g.*, United States v. Petraia Maritime, Ltd., 2007 WL 6150150, at *1 (D. Me. May 17, 2007); *see also* MLEM, *supra* note 14, at 9–8; Jeanne M. Grasso & Gregory F. Linsin, *Environmental Criminal Enforcement: A Record-Setting Year in Review, Troubling Trends, and Future Opportunities*, BLANK ROME LLP (Feb. 2008), http://www.blankrome.com/index.cfm?contentID=37&itemID=1508 (last visited Jan. 23, 2012).

[170] *See* 18 U.S.C. § 3581(a)(4) (2006).

[171] *See id.* § 3571(b)(4).

[172] *See id.* § 3571(c)(3). Another alternative action the APPS provides separate and distinct from criminal enforcement is the option of levying administrative civil penalties against vessel owners, operators, and crew members; this action is brought by the Coast Guard, not DOJ. *See* 33 U.S.C. § 1908(b).

[173] *See id.* § 1908(a).

pollution.[174] At the same time, APPS's whistle-blower provision provides DOJ with a cooperating witness (albeit a witness with a monetary incentive to testify) that it can use as either pretrial leverage or as live testimony at trial.[175]

D. The False Statements Act and other General Criminal Laws

A discussion of the False Statements Act[176] (FSA) and other general criminal laws such as Obstruction of Agency Proceedings,[177] Tampering with a Witness,[178] Conspiracy,[179] and Falsification of Agency Records in Federal Investigations[180] may appear "out of place . . . because [they are] neither international law nor marine pollution law."[181] However, in the context of environmental enforcement, such laws have become as relevant—if not more relevant—than APPS in the Coast Guard and DOJ's continued efforts to deter and hold accountable vessel owners,

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[174] Chalos E-mail, *supra* note 59; *cf.* Province Interview, *supra* note 76 (noting that some crew members earn as little as $235 per month excluding overtime wages, or approximately $2,820 per year).

[175] *See, e.g.*, United States v. Kassian Mar. Navigation Agency, Ltd., No. 3:07-cr-00048-HLA-MCR (M.D. Fla. filed Aug. 29, 2007) (two $230,000 awards and two $20,000 awards given to whistle-blowers); United States v. Sun Ace Shipping Co., No. 2:06-cr-00705-SDW, slip op. at 2 (D.N.J. Dec. 7, 2006) ($200,000 split evenly between three whistle-blowers); United States v. M.K. Ship Mgmt. Co., Ltd., No. 2:06-cr-00307-WHW, judgment at 2 (D.N.J. filed Aug. 10, 2006) ($200,000 split between two whistle-blowers); United States v. Wallenius Ship Mgmt., No. 2:06-cr-00213-JAG, Judgment, at 4 (D.N.J. filed Oct. 16, 2006) ($250,000 split between four whistle-blowers); Kehoe, *supra* note 2, n.77; Press Release, Dep't of Justice, Shipping Company and Senior Crewmembers Convicted of Covering up Oil Pollution (Dec. 2, 2010) (on file with author) (two $125,000 whistle-blower awards given).

[176] 18 U.S.C. § 1001 (2006). A violation of the FSA is punishable by fine and up to five years imprisonment. *Id.* § 1001(a). To sustain a conviction under the FSA, the government must prove the following elements: (1) a statement; (2) falsity; (3) materiality; (4) specific intent; and (5) agency jurisdiction. *See* United States v. Lawson, 809 F.2d 1514, 1517 (11th Cir. 1987); United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998).

[177] 18 U.S.C. § 1505. This statute is punishable by fine and up to five years imprisonment. *Id.*

[178] *See id.* § 1512. Depending on the stage of the proceeding, whether violence is used, and other factors, convictions under this statute are punishable by 3–30 years imprisonment. *Id.*

[179] *See id.* § 371. This statute is punishable by fine and up to five years imprisonment. *Id.*

[180] *See id.* § 1519. This statute is punishable by fine and up to twenty years imprisonment. *Id.*

[181] Berg, *supra* note 120, at 262.

operators, and crew members who intentionally and illegally discharge oily waste.[182]

Specifically, in comparison to the APPS, the FSA and other general criminal laws possess several legal and tactical advantages for DOJ prosecutors. First, these general criminal laws allow for enforcement of environmental laws beyond the TS jurisdictional limitation contained in the APPS.[183] Second, these laws lack the nexus requirement the APPS maintains with regard to the falsification of an ORB and the vessel's illegal discharge. In other words, under the FSA a court could sustain a conviction for a false ORB without the Government ever proving that an illegal discharge occurred.[184] Third, U.S. prosecutions brought pursuant to the FSA and other general criminal laws present less international comity concerns than prosecutions brought pursuant to the APPS.[185] Finally, the FSA and other general criminal laws authorize higher guideline base offense levels and enhancements for jail time than those

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[182] *See* Kehoe, *supra* note 2, at 31–36 (Kehoe, an Assistant U.S. Attorney (AUSA), details the advantages of charging vessel polluters under the FSA instead of APPS); Mushal, *supra* note 14, 1124 (Mushal, an AUSA, describes how parties who falsify the ORB are prosecuted under APPS and the FSA); Underhill, *supra* note 60, at 273–286 (Underhill, an AUSA, highlights the use of the FSA to prosecute vessel polluters).

[183] *See* 33 U.S.C. § 1901(a)(7) ("'[N]avigable waters' include the territorial sea of the United States (as defined in Presidential Proclamation 5928 of December 27, 1988) and the internal waters of the United States."); *see also* United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358, 1363–65 (S.D. Fla. 1998) (denying motion to dismiss FSA counts because FSA violations are committed when the ORB is presented to Coast Guard in U.S. waters—not when the ORB is falsified in international waters; alternatively, the extraterritoriality doctrine provides jurisdiction over offenses committed outside the United States but with an intended effect of compromising a Coast Guard function and the laws the Coast Guard enforces).

[184] *See Royal Caribbean*, 11 F. Supp. at 1371 (noting that the gravamen of the FSA charge is the misrepresentation of the ORB to the Coast Guard—regardless of whether an illegal discharge was committed).

[185] Unlike the FSA, the APPS is the implementing domestic legislation of MARPOL 73/78 and specifically requires that any action be "in accordance with international law." *See* 33 U.S.C. § 1912. According to MARPOL 73/78, evidence of discharges is to be forwarded to the flag state. *See* MARPOL, *supra* note 118, art. 6(3).

Nevertheless, just like the courts that upheld FSA counts against vessel polluters (*See* Royal Caribbean, 11 F. Supp. at 1369–74), so too have recent courts rejected MARPOL 73/78 and UNCLOS-based international comity motions in APPS prosecutions. *See* United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009); United States v. Petraia Maritime, Ltd., 483 F. Supp. 2d 34 (D. Me. 2007). Because of these recent judicial decisions, recent APPS jurisprudence has been characterized as "show[ing] little concern for international comity." Berg, *supra* note 120, at 277.

levels and enhancements under APPS.[186] Consequently, the FSA and other general criminal laws are utilized by DOJ as "a means to redress violation[s] of law . . . . [with] the side effect of thinning the ranks of midnight dumpers and cheaters . . . ."[187]

E. The U.S. Ports and Waterways Safety Program

To further promote the safe navigation of vessels, vessel safety, the protection of the marine environment, and the safety of life, property, and structures in, on, or immediately adjacent to the navigable waters of the United States,[188] Congress enacted the Ports and Waterways Safety Act (PWSA) in 1972.[189] In pertinent part, the PWSA provides for the establishment of vessel traffic services,[190] subpoena authority to Coast Guard personnel investigating marine casualties,[191] and authority to control the movement of vessels in U.S. navigable waters by Coast Guard Captains of the Port[192] (COTPs).[193]

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[186] *See* Kehoe, *supra* note 2 (arguing that the Third Circuit erred when it reversed a lower court's six-level sentence enhancement of a chief engineer convicted under the APPS while separately highlighting that the FSA and other non-maritime laws have higher base offense levels and enhancements than the APPS).

[187] Underhill, *supra* note 60, at 291.

[188] *See* 33 U.S.C. § 1221 (a)–(c).

[189] *Id.* §§ 1221–1236.

[190] *See id.* § 1223(a)(1). Vessel traffic services (VTS) consist of controlling and supervising vessel traffic through the following: reporting and operating requirements, surveillance and communications systems, routing systems, and fairways. *Id.*

[191] *See id.* § 1227.

[192] Captains of the Ports are typically sector commanders holding the rank of Captain (O-6). *See* Michael Shumaker, *The New Sector Commands*, COAST GUARD MAGAZINE, NO. 3., 2006, at 24–33. C.F.R. § 1.01–30 (2011) defines a COTP's responsibilities as follows:

> Captains of the Port and their representatives enforce[,] within their respective areas[,] port safety and security and marine environmental protection regulations, including, without limitation, regulations for the protection and security of vessels, harbors, and waterfront facilities; anchorages; security zones; safety zones; regulated navigation areas; deepwater ports; water pollution; and ports and waterways safety.

Id.

[193] *See id.* § 1223(a)(4). Specifically, the Coast Guard is authorized to specify times of entry, movement, and departure into U.S. navigable waters; establish routing schemes; establish vessel size, speed, draft limitations, and operating conditions; and, restrict vessel operations. *Id.*

Subsequent to the PWSA's enactment however, U.S. navigable waters continued to suffer environmentally from accidental and intentional tanker vessel pollution.[194] On December 15, 1976, the Liberian-flagged tanker vessel Argo Merchant grounded twenty-six miles southeast of Nantucket Island, Massachusetts, and spilled approximately 204,000 barrels of heavy heating oil.[195] Two days later, on December 17, 1976, the Liberian-flagged tanker vessel Sansinena exploded and sank in the Port of Los Angeles.[196] Nine lives were lost, over 400 boats were damaged, and approximately 30,000 barrels of oil were released into the harbor.[197]

These above incidents, along with a number of other serious groundings, collisions, and disastrous explosions during the 1970s, prompted Congress to pass the Port and Tanker Safety Act (PTSA) in 1978.[198] The PTSA, codified through amendments to the PWSA and sections located in Chapter 37 of Title 46 of the U.S. Code,[199] gives the Coast Guard broader authority than the originally codified PWSA: (1) to supervise and control all types of vessels, foreign and domestic;[200] (2) to control and monitor vessel operations in offshore waters, to include lightering operations[201] and vessel manning and pilotage standards;[202] (3) to supervise and control waterfront safety—including the responsibility to regulate fire-fighting capabilities, protect bridges and other waterfront structures, and limit access to any vessel;[203] and (4), to set conditions for tanker vessels entering U.S. ports or jurisdiction.[204]

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[194] H.R. REP. NO. 95-1384(I), at 6 (1978) [hereinafter HOUSE REPORT].
[195] *Id.*
[196] *Id.*; *see also Sansinena*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://www.incidentnews.gov/incident/6232 (last visited Mar. 20, 2012) [hereinafter *Sansinena*].
[197] *Sansinena*, *supra* note 196.
[198] *See* HOUSE REPORT, *supra* note 194, at 6.
[199] 33 U.S.C. § 1221.
[200] *See id.* § 1223; *see also* U.S. COAST GUARD MARINE SAFETY MANUAL, COMDTINST M16247, vol. VI, at 1–4 (27 June 1986) [hereinafter MSM VI].
[201] "Lightering is the act of transporting cargoes from ship to shore via a lighter vessel. Lightering involves the open water transfer of fuel from the tankers to several smaller vessels to distribute the load and reduce the draft of the tanker to an allowable entry depth." *Tanker Lightering*, GLOBALSECURITY.ORG., http://www.globalsecurity.org/military/systems/ship/tanker-lighter.htm (last visited Mar. 20, 2012).
[202] *See* 33 U.S.C. §§ 1221, 1223(a)(4); 46 U.S.C. § 3715 (2006); MSM VI, *supra* note 200, at 1–4.
[203] *See* 33 U.S.C. § 1225.
[204] *See id.* § 1228.

Specifically, § 1228(a)(1–3) of the PWSA, as amended by the PTSA, states:

> (a) In general
>
> No vessel, subject to the provisions of [C]hapter 37 of Title 46, shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel—
>
> (1) has a history of accidents, pollution incidents, or serious repair problems which, as determined by the Secretary, creates reason to believe that such vessel may be unsafe or may create a threat to the marine environment; or
>
> (2) fails to comply with any applicable regulation issued under this chapter, [C]hapter 37 of Title 46, or under any other applicable law or treaty; or
>
> (3) discharges oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party[.][205]

Unlike APPS, the FSA, and other general criminal laws, the Coast Guard, by DHS delegation of authority,[206] may criminally, civilly, *or administratively* enforce PWSA laws.[207] Specifically, COTPs maintain authority—pursuant to § 1228(A)(2)—to administratively ban tanker vessels that commit acts of vessel pollution prohibited under MARPOL 73/78 and the APPS. Section 160.107 of Title 33 of the CFR reiterates that authority and states:

> Each District Commander or [COTP], subject to recognized principles of international law, may deny entry into the navigable waters of the United States or to

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[205] *Id.* § 1228(a)(1–3).
[206] *See* DHS Memo, *supra* note 133, ¶ 70. The Coast Guard enforces the PWSA through regulations found in 33 C.F.R. §§ 160.1–320 (2011).
[207] *See* 33 U.S.C. §§ 1228, 1232 (emphasis added).

> any port or place under the jurisdiction of the United States, and within the district or zone of that District Commander or [COTP], to any vessel not in compliance with the provisions of the Port and Tanker Safety Act (33 U.S.C. [§§] 1221–1232)[208] or the regulations issued thereunder.[209]

IV. The Coast Guard's Marine Environmental Protection Mission

The Coast Guard represents one of five armed forces of the United States military.[210] Unlike the Army, Navy, Air Force, and Marine Corps, however, the Coast Guard operates within the Department of Homeland Security and is also a law enforcement agency.[211] As a law enforcement agency, one of the Coast Guard's statutory non-homeland security missions is marine environmental protection.[212]

In the context of vessel pollution investigations, the Coast Guard carries out its marine environmental protection mission primarily through its law enforcement authority set forth in 14 U.S.C. § 89, which provides, in pertinent part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty

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[208] Although the COTP's authority to deny entry to a tanker vessel is accurately captured in this CFR Section as deriving from the Port and Tanker Safety Act, the entire Chapter—"33 U.S.C. §§ 1221–1236," not "33 U.S.C. §§ 1221–1232"—is commonly referred to by Congress, the Coast Guard, and the legal community as the Port and Waterways Safety Act, not the Port and Tanker Safety Act. *See* H.R. REP. NO. 108–617, § 410, at 17 (2004) (Conf. Rep.); MLEM, *supra* note 14, app. O–20; MSM VI, *supra* note 202, at 4–1; *Codes and Rules*, THE ADMIRALTY AND MAR. LAW GUIDE, http://www.admiraltylawguide.com/codes.html (last visited Jan. 23, 2012).

[209] 33 C.F.R. § 160.107 (2011).

[210] 14 U.S.C. § 1 (2006) ("The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy.").

[211] Homeland Security Act of 2002 § 888(b), 6 U.S.C. § 468 (2006).

[212] *Id.* § 888(a)(1)(E).

> officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.[213]

A. The Coast Guard's Port State Control Program

"The [Coast Guard's] Port State Control (PSC) program began in the [United States] in 1994 when Congress . . . required the U.S. Coast Guard to hold those most responsible for substandard ships accountable, including owners, classification societies,[214] and flag [s]tates."[215] Accordingly, the purpose of the Coast Guard's PSC program is to verify that "foreign[-]flagged vessels operating in U.S. waters comply with international conventions, U.S. laws[,] and U.S. regulations"[216] and "to identify and eliminate substandard ships from U.S. waters."[217] In 2009, over 8,500 foreign-flagged vessels made at least 75,902 port calls in the United States; the Coast Guard conducted over 9,600 PSC exams on those vessels.[218]

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[213] 14 U.S.C. § 89(a) (2006). Because courts consistently uphold the Coast Guard's broad authority to conduct suspicionless searches pursuant to 14 U.S.C. § 89(a). *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983); United States v. Watson, 678 F.2d 765, 773–74 (9th Cir. 1982); United States v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980). Coast Guard boarding officers are often referred to as "super cops." *See* Greg Shelton, Note, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?*, 34 WM. & MARY J. REV. 933, 938 (1993).

[214] Classification societies are private organizations in the shipping industry that assess a vessel's condition against international and domestic environmental and safety standards as well as the classification society's internal technical standards. In addition, classification societies conduct vessel surveys to ensure that they are compliant with international and domestic laws. *See* COMM'N OF THE EUROPEAN CMTYS., ON THE SAFETY OF THE SEABORNE OIL TRADE 18 (2000).

[215] *See* Policy for Banning of Foreign Vessels from Entry into U.S. Ports, 75 Fed. Reg. 67,386 (Nov. 2, 2010) [hereinafter Ban Notice]; Policy Letter 10–03, CG-543, subject: Banning of Foreign Vessels (1 Sept. 2010) [hereinafter Ban Policy].

[216] MLEM, *supra* note 14, at 9–12.

[217] *Id.*

[218] U.S. COAST GUARD, PORT STATE CONTROL IN THE UNITED STATES ANNUAL REPORT 2 (2009) [hereinafter PSC REPORT].

Using limited allocated resources,[219] the Coast Guard carries out its PSC program by targeting the highest-risk vessels with regard to safety and the marine environment.[220] The Coast Guard identifies each high-risk vessel by using a five-factor analysis of the vessel's management, flag state,[221] classification society, history, and type.[222] After assessing these five factors, the Coast Guard gives each vessel a point total and classifies the vessel as a Priority I, Priority II, or Non-Priority vessel for purposes of undergoing a PSC exam.[223]

1.Personnel and Protocol for a Standard Port State Control Exam

A Coast Guard PSC exam is normally conducted by a port state control officer (PSCO) and a port state control examiner (PSCE)[224] who: (1) hold the rank of petty officer and occupy the rate of marine science technician[225] (MST);[226] (2) are assigned to a Coast Guard sector;[227] and (3), have completed the necessary training to conduct PSC exams.[228]

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[219] *See* OCEAN COMM'N, *supra* note 1, at 240 ("The Coast Guard currently carries out a port state control program that allocates limited inspection resources to the highest-risk vessels . . . ."). In fiscal year 2010, the Coast Guard allocated an estimated $372 million of its $11.15 billion budget toward its marine environmental protection mission. *See* U.S. COAST GUARD, 2011 POSTURE STATEMENT 44 (2011).

[220] *See* PSC REPORT, *supra* note 218, at 8.

[221] The Coast Guard maintains a list of flag states with the highest detention rates; thus, the Coast Guard awards a higher point total to vessels registered by those flag states. *See Annual Targeted Flag List*, U.S. COAST GUARD, https://homeport.uscg.mil/mycg/portal/ep/browse.do?channelId=-18374&channelPage=/ (last visited Jan. 23, 2012) (type "Annual Targeted Flag list" in the search box and then follow hyperlink for "Annual Targeted Flag list").

[222] *See* PSC REPORT, *supra* note 218, at 8.

[223] *Id.*

[224] *See* E-mail from Commander Michael Antonellis, Deputy Staff Judge Advocate, District One, U.S. Coast Guard, to author (Nov. 1, 2011, 15:53 EST) [hereinafter Antonellis e-mail] (on file with author).

[225] Although an MST performs a multitude of diverse duties, an MST's overall mission is to enforce regulations for the safety of the marine environment and port security. *See Marine Science Technician*, U.S. COAST GUARD, http://www.gocoastguard.com/find-your-career/enlisted-opportunities/enlisted-ratings-descriptions/marine-science-technician-(mst) (last visited Jan. 23, 2012).

[226] *See* Antonellis e-mail, *supra* note 224.

[227] *Id.* Presently, there are thirty-five Coast Guard sectors. Thirty sectors are located coastally throughout the continental United States. Two sectors are located in Alaska. Honolulu, San Juan, and Guam each have a sector. Shumaker, *supra* note 192.

[228] *See* Antonellis e-mail, *supra* note 224.

Typically, a PSC exam consists of multiple components[229] and begins with a review of the vessel's required safety, security, manning, and pollution prevention documentation[230]—including a review of the vessel's IOPP, ORB, and shipboard pollution emergency prevention plan (SOPEP).[231] Each document is verified for its authenticity, and then each document is scrutinized to ensure that: (1) the vessel's equipment matches the equipment listed in the IOPP;[232] (2) the ORB documents all of the vessel's oil transfers and discharges;[233] and (3) the pollution response equipment listed in the SOPEP is aboard the vessel and operable.[234]

During the second component of the PSC examination, the PSCO and PSCE (PSC Team) perform visual inspections inside the vessel and require the crew members to operate steering, safety, and environmental machinery and equipment.[235] Notably, the PSC Team assesses the general cleanliness of the vessel and inspects "the engine room and machinery spaces to verify the presence and condition of required equipment."[236] In addition, the PSC Team requires specific crew members to perform an operational test of the OWS and its OCM.[237] These operational tests are conducted to verify not just the equipment's operability but also the crew's competency to operate the OWS.[238] Finally, the PSC Team checks the vessel's sludge tank to "ensure that the level of sludge corresponds to entries made in the ORB."[239]

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[229] *See id.* ("Normal PSC examinations consist of multiple components[.] [T]hese components are happening simultaneously. These components . . . include, among other things, document review, visual inspection[,] . . . operational testing of safety [and] environmental equipment to ensure proper operation, and . . . drills.").
[230] *See* O'Connell, *supra* note 3, at 58.
[231] *See* Allain, *supra* note 124, at 74. A shipboard pollution emergency prevention plan (SOPEP) details actions to be taken by the vessel's crew in the event of an accidental outflow of oil. *Id.*
[232] *See* Allain, *supra* note 124, at 74.
[233] *Id.*
[234] *Id.*
[235] *See* Antonellis e-mail, *supra* note 224.
[236] *See* Allain, *supra* note 124, at 74.
[237] *Id.*
[238] *Id.*
[239] *Id.* Depending on the size of the type of the vessel, e.g., cruise ship, tanker, the PSC Team may also require the crew to perform fire-fighting and "abandon ship" drills. *See* Antonellis e-mail, *supra* note 224.

2. Identifying Suspected MARPOL 73/78 Violations

Most often, PSC Teams learn about vessel pollution allegations either before or during the PSC exam.[240] Before the exam, the Coast Guard may receive intelligence reports of suspected MARPOL 73/78 violations from foreign countries[241] or by Coast Guard aviation and surface assets engaged in surveillance.[242] The Coast Guard possesses aerial surveillance technology capable of capturing oil sheens on the ocean's surface during both the day[243] (Figure 4) and the night.[244]

Figure 4. Aerial Day Photo of Vessel Discharging Oily Waste[245]

During the PSC exam, the PSC Team may obtain information sufficient to support a MARPOL 73/78 violation by either noting significant discrepancies during the exam itself or by obtaining information of illegal discharges by whistle-blowers.[246] In the first

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[240] *See* Reardon & O'Connell, *supra* note 15, at 23 (noting additionally that MARPOL 73/78 violations are sometimes identified during marine casualty investigations and after voluntary disclosure).

[241] *See* Gregory F. Linsin, *Exercise of Prosecutorial Discretion in Vessel Pollution Cases*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 17 (Winter 2004–2005) ("As the vessel pollution enforcement program in the United States matures, real-time consultations among [p]ort [s]tates . . . is yielding significant enforcement benefits.").

[242] Reardon & O'Connell, *supra* note 15, at 23; *see also* Udell, *supra* note 57, at 3 (noting Coast Guard's use of remote sensing to detect illegal discharges of oil).

[243] *See* Reardon & O'Connell, *supra* note 15, at 23.

[244] *See* United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1361 (S.D. Fla. 1998) (noting the Coast Guard's use of "Forward Looking Infra-red Radar" at 3:00 AM to identify a cruise ship discharging oily waste in the Bahamian waters).

[245] Reardon & O'Connell, *supra* note 15, at 10.

[246] *See* CG Missions Law, *supra* note 43.

instance, the PSC Team identifies telltale signs of suspected MARPOL 73/78 violations, e.g., unexplained oil in the discharge piping connected to the OWS (Figure 5), sludge inside the OWS (Figure 6), a lack of crew competency to operate the OWS, recently painted flanges and worn flange bolts on OWS pipe fittings (Figure 7), ORB entries that conflict with the sounding log entries for the sludge and bilge water holding tanks, unsigned ORBs, ORBs with missing pages, or an inoperable OWS and OCM.[247]

Figure 5. Photo of Sludge inside OWS Discharge Piping[248]

Figure 6. Photo of Sludge Pumped through OWS[249]

[247] *Id.*; *see also* MLEM, *supra* note 14, at 9–11 (listing ten indicators of MARPOL 73/78 violations).
[248] Reardon & O'Connell, *supra* note 15, at 42.
[249] *Id.* at 10.

Figure 7. Photo of Worn Flange Bolts[250]

In the second instance, the PSC Team is sometimes notified of a MARPOL 73/78 violation by whistle-blowers. [251] Whistle-blowers are usually low-ranking crew members who pass handwritten notes to the PSC Team during the exam.[252] To some individuals involved with the maritime industry and legal counsel representing the interests of vessel owners and operators, whistle-blowers are considered "one of the U.S. [G]overnment's biggest weapons"[253] in vessel pollution prosecutions.[254] To the seafarer community, "'whistle[-]blower awards' [are now] well-known in the crewing community and [create] an undeniable incentive [for crew members] to report wrongdoing not to the company but to the authorities."[255]

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[250] *Id.* at 23.

[251] *See* Udell, *supra* note 57, at 9–11 (highlighting the successful prosecutions of twelve vessel pollution cases initiated by whistle-blowers).

[252] *Id.*; *see e.g.*, M/T Chem Faros, *supra* note 102 (during PSC exam, a whistle-blower with limited English writing skills passed the following note to a PSC team, "Good morning sir, I would like to let you know this ship discharging bilge illegally using by magic pipe, if you want to know illegal pipe there in work shop five meters long with rubber. Sir, I hope if you don't mind. We have a security for our safety").

[253] Whittaker, *supra* note 82; *accord Whistle[-B]lowers Awarded $250,000 for Reporting Illegal Discharge of Oil at Sea*, BLANK ROME LLP (Jun. 2005), http://www.blankrome.com/index.cfm?contentID=37&itemID=61 (last visited Jan. 23, 2012) (detailing how the location of two bypasses was revealed to Coast Guard examiners by four whistle-blowers, ultimately leading to obstruction of justice convictions for the vessel's operator, captain, chief engineer, and second engineer).

[254] In one attorney's opinion, "[W]histle[-]blowers have been said to be motivated to use the U.S. whistle[-]blower program for self-serving purposes of revenge and exacting large monetary rewards." *See US Prosecution of Suspected MARPOL Violations—Whistle[-]blowers: Are They Really Reliable?*, CHALOS, O'CONNOR & DUFFY LLP, http://www.chaloslaw.com/us-prosecution-marpol-violations.html (last visited Jan. 23, 2012).

[255] *See* GARD REPORT, *supra* note 52.

3.Expanding the Exam to Support a Future Criminal Referral

Once clear grounds are identified to show that the vessel, its equipment, or its crew do not correspond substantially with the regulations of MARPOL 73/78, the Coast Guard takes several steps to expand and enhance its examination under 14 U.S.C. § 89(a)[256] and prepare a potential case package for DOJ's consideration.[257] First, the PSCO requests additional investigative assistance from the Sector Commander.[258] Typically, the Sector Commander directs additional marine and pollution investigators to join the PSC Team.[259] Separately, the Sector Commander requests investigative assistance from the Coast Guard Investigative Service (CGIS).[260] Finally, the Sector Commander notifies the servicing district legal office of the ongoing and now expanded examination.[261]

Once aboard, the expanded PSC Team starts collecting critical evidence to reconcile the apparent discrepancy or corroborate that at least one MARPOL 73/78 violation was committed.[262] Since crew members often log illegal activity aboard the vessel's computers, the PSC Team requests CGIS—who maintains computer forensics resources—to mirror the vessel's hard drive.[263] Separately, photographs are taken and key documents such as the ORB, sounding logs, and OWS alarm records are

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[256] It is well-settled that the Coast Guard possesses broad authority to board and inspect any vessel in U.S. waters without a warrant or consent under 14 U.S.C. § 89(a) (2006). *See* United States v. Petraia Mar., Ltd., 483 F. Supp. 2d 34, 41 (D. Me. 2007) (affirming Coast Guard's authority to inspect and search vessel suspected of MARPOL 73/78 violations without a warrant or consent); *see also* United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (dismissing argument that any ulterior motive of customs officers strips federal law enforcement of its authority to conduct warrantless searches of foreign-flagged vessels).

[257] *See* Policy Letter 06–01, COMDT (G–PCV), subject: Guidance for the Enforcement of MARPOL Annex I during Port State Control Examinations (20 Jan. 2006) [hereinafter PSC Policy] (detailing Coast Guard procedures for expanding PSC exam after identifying suspected MARPOL 73/78 violations).

[258] *See id.* at 9.

[259] *See* CG Missions Law, *supra* note 43, at 4–5.

[260] *See* MLEM, *supra* note 14, at 9–4 ("The request for Special Agent assistance on a case-by-case basis must be made through the unit's [c]ommanding [o]fficer.").

[261] *Id.* ("The [Staff Judge Advocate] is responsible for providing advice on marine environmental law cases with the potential for criminal prosecution.").

[262] *See* PSC Policy, *supra* note 257, at 7–9.

[263] *See* CG Missions Law, *supra* note 43, at 16 ("A ship's computer often contains important evidence . . . .").

seized.[264] Next, oil samples are obtained from bypasses, sludge tanks, bilge water holding tanks, and any other place where oil is retained.[265] (These oil samples are forwarded to the Coast Guard's Marine Safety Laboratory, and each sample is tested to determine if the oil recovered from the bypass matches the oil in the vessel's holding tanks.)[266] Finally, each crew member is interviewed, and if possible, statements are obtained.[267]

B. The Coast Guard Judge Advocate's Role in Vessel Pollution Cases

In the Coast Guard, nine "district" commands geographically oversee the navigable waters of the United States.[268] Each district is commanded by a flag officer and maintains a legal office comprised of a staff judge advocate (SJA) and subordinate judge advocates (JAs).[269] Of the 253 military and civilian attorneys currently employed by the Coast Guard, forty-four JAs are assigned to district legal offices.[270] In the context of vessel pollution cases, district JAs provide real-time advice to field units, facilitate DOJ referrals on behalf of the District Commander, and sometimes serve as Special Assistant U.S. Attorneys (SAUSAs) during criminal prosecutions.[271]

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[264] *Id.* at 13–16 (listing twenty types of evidence often collected during an expanded PSC exam).
[265] *Id.* at 14–15.
[266] *Id.* The Marine Safety Laboratory, located in New London, Connecticut, is capable of "fingerprinting" oils using gas chromatography, infrared spectroscopy, and gas chromatography–mass spectrometry. *See Oil Analysis Methodology*, U.S. COAST GUARD, http://www.uscg.mil/hq/cg5/msl/oil.asp (last visited Jan. 23, 2012).
[267] CG Missions Law, *supra* note 43, at 16–17. In many instances, crew members are advised to invoke their Fifth Amendment right to remain silent. *See Suspected MARPOL Violations in the United States—The Human Cost*, CHALOS, O'CONNOR & DUFFY LLP, http://www.codus-law.com/publications/human-cost.pdf (last visited May 31, 2011) ("All . . . crew members should invoke their Fifth Amendment privilege . . . .").
[268] *See Units*, U.S. COAST GUARD, http://www.uscg.mil/top/units/ (last visited Jan. 23, 2012).
[269] *See* JAG REPORT, *supra* note 20, at 8, 27–41.
[270] *Id.* at 7, 27–41; e-mail from Lieutenant Commander Scott Herman, Deputy Staff Judge Advocate, District Eight, U.S. Coast Guard, to author (Jan. 26, 2011, 12:18 EST) (on file with author).
[271] JAG REPORT, *supra* note 20, at 7, 27–41; *see also* Captain William Baumgartner et al., *Environmental Enforcement Actions*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY AND SEC. AT SEA 6–10 (Winter 2004–2005).

1. Advising the Command and Notifying DOJ

> [U]nique to vessel pollution investigations is the mobility of the vessel and its crew and the resulting time pressures this creates with respect to the conduct of an investigation. *This timing factor places a high premium on early and intensive consultation among . . . [PSC Team] personnel, the . . . [d]istrict [l]egal [o]ffice, and the [f]ederal [p]rosecutor*.[272]

Once a PSCO expands a PSC exam and requests additional assistance to investigate a MARPOL 73/78 violation, district JAs play a pivotal role during both the examination and referral phases.[273] First, district JAs provide advice day and night on "the securing of critical documentary evidence (e.g., ORB, sounding logs, etc.), the proper collection of necessary physical evidence (e.g., mirror-imaging a hard drive), and the identification of crew members who [] directed the illegal activity or who have been eyewitnesses to the violations."[274]

Next, district JAs work closely with the Sector Commander to detain the vessel under 33 U.S.C. § 1908(e). District JAs educate the Sector Commander (acting within the authority of a COTP) about CBP's authority under 46 U.S.C. § 91 to detain the vessel.[275] Additionally, district JAs discuss with the Sector Commander the effects of any decision to detain the vessel—including urgent efforts by the vessel owner and operator's counsel to negotiate surety that will authorize the vessel's release.[276] Finally, district JAs often prepare or review letters that are sent to the vessel, vessel's owner, and the vessel's operator notifying them of the detention and the COTP's basis for the detention.[277]

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[272] Linsin, *supra* note 241, at 18 (emphasis added).
[273] *See* JAG REPORT, *supra* note 20, at 8, 27–41 (describing the various roles district JAs performed during the investigation, referral, and prosecution phases of vessel pollution cases during 2010).
[274] Linsin, *supra* note 241, at 18; *see also* CG Missions Law, *supra* note 43, at 1–17 (describing the various legal responsibilities of a district JA during a vessel pollution case).
[275] *See* Reardon & O'Connell, *supra* note 15, at 56 (discussing the mechanics involved with detaining a vessel and the accompanying letters that are sent to the vessel's owner and operator).
[276] *See* CG Missions Law, *supra* note 43, at 18 ("[T]he surety agreement mechanism provides an opportunity for shipping companies to continue to use their ship for their economic business.").
[277] *See* Reardon & O'Connell, *supra* note 15, at 56.

Commonly, district JAs—on behalf of the Sector Commander—communicate directly with CBP to effect the detention.[278]

Finally, since the Coast Guard's Office of Maritime and International Law Prevention Department (CG–0941) is the primary interface between district JAs and DOJ's Environmental Crimes Section (DOJ-ECS),[279] district JAs immediately notify CG-0941 of the ongoing PSC exam.[280] Upon making this notification, district JAs are introduced to DOJ prosecutors (either assigned to DOJ-ECS or a local U.S. attorney's office) who ultimately decide whether to accept the referral for criminal prosecution.[281] At this point, district JAs closely interact with DOJ prosecutors; district JAs brief DOJ prosecutors on the status of the examination, the evidence collected so far, outstanding evidence that needs to be collected, and the potential timeline for if or when the District Commander may refer the case.[282]

2. Negotiating the Surety Agreement

A district JA's authority to negotiate surety agreements contributes to "the Coast Guard's ability to effectively assist DOJ prosecutorial efforts and was created due to the special transitory nature of foreign vessels."[283] The overriding purpose of a surety agreement is "to provide [the government with] security for payment of the maximum penalty . . . imposed for the violation, as well as [to set] other conditions that place the government in the same legal and practical condition as if the vessel's clearance [is] withheld."[284] Surety agreements are negotiated by the district JA on behalf of the COTP.[285]

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[278] *See id.*
[279] *See* MLEM, *supra* note 14, at 9–6.
[280] *See id.* (CG–0941 acts as "a clearinghouse for information about environmental prosecutions and [is] a source of expertise . . . .").
[281] *See* Linsin, *supra* note 241, at 14–17.
[282] *Id.* at 17. It is important to note that the DOJ's acceptance of a Coast Guard referral serves as a "bright line" for when the Coast Guard's investigative authority under 14 U.S.C. § 89(a) ceases—despite any interaction district judge advocates have with DOJ during the PSC exam. *See* CG Missions Law, *supra* note 43, at 51.
[283] CG Missions Law, *supra* note 43, at 18.
[284] MLEM, *supra* note 14, at 9–15.
[285] *See* CG Missions Law, *supra* note 43, at 18.

Putting aside the obvious major business incentive of getting the CBP detention lifted,[286] surety negotiations provide the vessel's owner and operator with several benefits. First, the vessel's owner and operator learn how many MARPOL 73/78 violations have been identified and can assess the overall strength of the government's case.[287] Additionally, surety negotiations provide the vessel's owner and operator with an exact number of crew members it needs to fly to the United States to safely man and ready the vessel to sail.[288] Finally, a signed surety agreement signals the end of the $4,000–$15,000 per day additional dockage fees, up to $10,000 per day in armed security guard costs,[289] and the added costs of crew provisions and fuel needed to keep the vessel's engines powered.[290]

However, despite the financial and operational advantages afforded to vessel owners and operators who quickly secure surety agreements, district JAs and legal counsel (Parties) who represent the vessel owners and operators often engage in lengthy and contentious surety negotiations.[291] First, the Parties negotiate the dollar amount of the surety.[292] Second, district JAs identify which crew members are relevant to a DOJ prosecution.[293] Typically, relevant crew members remain in the

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[286] *Id.* ("[T]he surety agreement mechanism provides an opportunity for shipping companies to continue to use their ship . . . .").

[287] For example, counsel for the owner and operator may learn from the district JA if a whistle-blower is involved and what evidence (e.g., falsified ORBs, bypasses, etc.) was seized. *See* Antonellis e-mail, *supra* note 224.

[288] Often, several crew members are identified to remain in the United States while the vessel's owner and operator scurries to find qualified replacements to be flown to the United States on very short notice; once aboard, the Coast Guard vets the new crew members' qualifications and competence. *Id.*

[289] In CBP or the Coast Guard's discretion, the vessel owner and operator may be required to ensure that the vessel's crew does not leave the ship. *See* Chalos e-mail, *supra* note 59.

[290] Chalos e-mail, *supra* note 59.

[291] *See, e.g.*, Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, *4–6 (S.D. Tex. May, 19, 2010) (noting parties' inability to agree to surety provisions during twelve-day period; specifically, the surety amount, the number of crew members to be retained, and the time the crew members were to remain in the United States); *see also* CG Missions Law, *supra* note 43, at 64 ("[The] [m]ost contentious terms will be [the] amount of the surety and [the] length of obligations for crewmembers [sic]."); Chalos e-mail, *supra* note 59 (the Coast Guard's surety demands require "the 'putative defendant' to fund its own prosecution"); Grasso e-mail, *supra* note 82 (the Coast Guard demands surety far beyond what Congress intended 33 U.S.C. § 1908(e) to cover).

[292] MLEM, *supra* note 14, at 9–15. Typically, for each APPS violation, the Coast Guard seeks the maximum dollar amount of any potential criminal fine, that is, $500,000 per violation. *Id.*

[293] *Id.*

United States throughout DOJ's prosecution.[294] Third, the Parties negotiate the amount of time crew members are required to remain in the United States while they receive total wages, lodging, per diem, and medical care that is paid for by the vessel's owner and operator.[295] Finally, the Parties negotiate issues of service of process, stipulations of vessel ownership and operation, and authentication of certain documents.[296]

3. Referring the Case Criminally to DOJ

"The discretion to . . . refer a [vessel pollution] case for criminal prosecution is part of the discretion exercised under the Coast Guard's law enforcement mission . . . ."[297] The decision to refer a case is vested in the cognizant district commander[298] and made "in those situations that best serve the American public by promoting compliance with the law, protecting the public health and welfare, and safeguarding the marine environment."[299] Prior to referral, the Coast Guard does not consider fixed thresholds as the sole basis to pursue criminal sanctions;[300] rather, the Coast Guard's decision to refer a vessel pollution case "is based on two general measures, significant environmental harm and culpable conduct."[301]

Accordingly, the District Commander—in consultation with the SJA[302]—considers several factors prior to referring a vessel pollution case to DOJ.[303] First, the District Commander assesses the overall

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[294] Because foreign crew members remain away from their home countries and their families until no longer needed to testify, DOJ prosecutes every vessel pollution case in an expedited timeframe. *See* Gregory F. Linsin, Senior Litigation Counsel, U.S. Dep't of Justice, Maritime Midnight Dumpers 13 (Oct. 4, 2007), www.marpoltraininginstitute.com /Maritime%20Dumpers%20Marpol%20US.pdf).

[295] *See* MLEM, *supra* note 14, at 9–17.

[296] *See id.*

[297] *Id.*

[298] 33 C.F.R. § 1.07 (2011); MLEM, *supra* note 14, at 9–17.

[299] MLEM, *supra* note 14, at 9–17.

[300] *See id.*; *accord* Baumgartner et al., *supra* note 271, at 8 ("There is no ready-made matrix for enforcement, and good judgment will always be a part of [the Coast Guard's] enforcement strategy.").

[301] MLEM, *supra* note 14, at 9–17.

[302] *See id.* at 9–4 (outlining the SJA's responsibilities during an environmental crimes case, including providing advice to the District Commander and coordinating the referral with DOJ).

[303] *See id.* at 9–17.

strength of the evidence to support a criminal prosecution.[304] For instance, if a whistle-blower alerted the Coast Guard to the MARPOL 73/78 violation, all independent evidence is assessed because of the whistle-blower's financial incentive to possibly fabricate evidence.[305] Second, the District Commander considers the operational impact of supporting a criminal prosecution.[306] In two recent prosecutions, courts rejected expert testimony proffered by Coast Guard personnel in the field of ship operations, procedures, record-keeping requirements,[307] and chemical analysis.[308] Consequently, the District Commander weighs and considers judicial precedent, the strength of the case, and the obligation to release field personnel to travel and testify prior to making the decision to refer the case.[309]

Separately, IMO has expressed serious concern about the fair treatment of seafarers in the context of domestically-based vessel prosecutions.[310] As a result, IMO promulgated guidance "to ensure that seafarers are treated fairly following a maritime accident and . . . that detention is for no longer than necessary."[311] Since Coast Guard personnel serve daily as advisors to the IMO, and the Coast Guard's Chief of Office (Chief of Office is the correct term?) and Maritime and International Law serves as the head of a U.S. delegation to IMO's legal committee,[312] the District Commander considers the impact of a referral on the vessel's crew members[313] alongside domestic and international

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[304] *Id.*; Baumgartner et al., *supra* note 271, at 8.

[305] *See* Udell, *supra* note 57, at 10 (noting that when whistle-blowers are involved in the investigation, "[a]llegations are usually confirmed by multiple witnesses, documents, and physical evidence"); *see generally* United States v. Fleet Mgmt. Ltd., 2008 U.S. Dist. LEXIS 34970, at *18 (E.D. Pa. Apr. 29, 2008) (noting defense theory that the whistle-blower fabricated allegations for financial gain and "to sabotage the defendant").

[306] MLEM, *supra* note 14, at 9–17 ("The determination to [pursue criminal sanctions] . . . involves . . . prioritizing the use of available resources.").

[307] *See Fleet Mgmt. Ltd.*, 2008 U.S. Dist. LEXIS 34970, at *20 (rejecting chief petty officer's expert reports and testimony as unreliable and based on insufficient facts and data).

[308] *See* United States v. Mylonakis, No. 4:09–cr–00492 (S.D. Tex. Apr. 28, 2010), *available at* http://www.chaloslaw.com/engineer-acquitted-magic-pipe.html (striking testimony of Coast Guard Marine Safety Laboratory chemist as "confusing and irrelevant").

[309] MLEM, *supra* note 14, at 9–17.

[310] Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident, IMO Res. A.987(24) (Dec. 1, 2005) [hereinafter IMO Resolution].

[311] *Id.*

[312] *See* JAG REPORT, *supra* note 20, at 11–13.

[313] *See generally* MLEM, *supra* note 14, at 9–7 (noting the passing of IMO resolutions and the "potential impacts on foreign relations" during pollution incidents).

seafarer claims that the U.S. Government "criminalizes seafarers" during MARPOL 73/78-related prosecutions.[314]

V. M/T Wilmina: Lessons Learned for Today and Tomorrow

On May 4, 2010, the Norwegian-flagged, 260 meter long, 44 meter wide, and 149,775 deadweight tonnage[315] motor tanker vessel Wilmina[316] (Figure 8) arrived in the U.S. port of Corpus Christi, Texas, to discharge a cargo of crude oil.[317]

Figure 8. Photo of Motor Tanker Wilmina[318]

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[314] *See* COLIN DE LA RUE & CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT 1073–14 (2d ed. 2009) (noting that coastal and port states commonly detain seafarers pending the resolution of very lengthy state prosecutions); Rev. James D. Von Dreele, Vice President, N. Am. Mar. Ass'n & Exec. Dir. of the Seamen's Church Inst. of Phila. and South Jersey, Address at the International Maritime Organization's World Maritime Day Forum: Criminalization on the High Seas (Oct. 25, 2007) (advocating for the "decriminalization" of vessel pollution investigations; highlighting how foreign crew members remain away from their homes and families for up to ten months, live in remote motels, have difficulty receiving daily allotments, are forced to eat a foreign diet, and are often represented by legal counsel hired by the vessel's owner and operator); *Fair Treatment of Seafarers*, EIGHT UP, http://www.eightup.co.uk/eight-causes/fair-treatment-of-seafarers/ (last visited Jan. 23, 2012) (commenting that the "criminalization of seafarers" leads to detrimental morale aboard vessels as well as adverse efforts to recruit quality seafarers).

[315] As defined, "Deadweight tonnage refers to the carrying capacity of a vessel. Deadweight tonnage can be figured by taking the weight of a vessel which is not loaded with cargo and subtracting that figure from the weight of the loaded vessel." *See Deadweight Tonnage Definition*, ABOUT.COM, MARITIME, http://maritime.about.com/od/Glossary/g/Definition-Of-Deadweight-Tonnage.htm (last visited Jan. 23, 2012).

[316] *Wilmina*, MARINETRAFFIC.COM, http://www.marinetraffic.com/ais/shipdetails.aspx?MMSI=248922000 (last visited Mar. 20, 2011) [hereinafter *Wilmina*].

[317] Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, at *1 (S.D. Tex. May, 19, 2010); *accord* Memorandum from Chalos, O'Connor & Duffy on Ban of M/T Wilmina to Coast Guard District Eight (Aug. 25, 2010) [hereinafter COTP Appeal] (on file with author).

[318] *Wilmina*, *supra* note 316.

Upon arrival, the Coast Guard conducted a standard PSC exam and initially found no safety or environmental deficiencies aboard M/T Wilmina.[319] After off-loading its cargo and undergoing the PSC exam, M/T Wilmina prepared to sail to Mexico to load a cargo of crude oil that was destined for Spain.[320]

A. Why the Coast Guard Banned M/T Wilmina

On the evening of May 4, 2010, a crew member notified the Coast Guard that M/T Wilmina illegally discharged oily waste while en route to Corpus Christi; consequently, the Coast Guard immediately returned to M/T Wilmina and began an expanded PSC exam.[321] During the secondary exam, Coast Guard personnel found inconsistencies in the vessel's ORB, an inoperable OWS, sludge in the ship's overboard discharge piping, and a bypass hose with oil inside.[322] In addition, the vessel's master and chief engineer were unfamiliar with the vessel's safety management system and the record-keeping requirements associated with OWS alarm printouts.[323] Finding sufficient evidence to support APPS violations, the COTP effected M/T Wilmina's indefinite detention on May 5, 2010.[324]

On May 7, 2010, a district JA and legal counsel for M/T Wilmina's owner and operator began negotiating terms to a proposed surety agreement.[325] From the outset, the Parties disagreed on the amount of the surety,[326] the number of crew members necessary to support a DOJ prosecution,[327] and the amount of time each crew member was required to remain in the United States.[328] During negotiations, M/T Wilmina

[319] *See* COTP Appeal, *supra* note 317, at 3.
[320] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *4.
[321] Coast Guard Ban, *supra* note 21.
[322] *Id.*
[323] *Id.*
[324] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *2–3.
[325] *Id.* at *3–6.
[326] *Id.* at *3–5. The Coast Guard initially sought an amount of $1.5 million; M/T Wilmina's owner and operator would only agree to an amount of $500,000. *Id.*
[327] *Id.* The Coast Guard sought the removal of twelve crew members (of the M/T Wilmina's twenty-five member crew); M/T Wilmina's owner and operator agreed to pay lodging, subsistence, per diem, and medical coverage for six crew members. *Id.*
[328] *Id.* at *3–6. The Coast Guard demanded that the twelve crew members remain in the United States for "an unspecified and unlimited time," whereas the M/T Wilmina's owner and operator sought a "limited period of time" provision. *Id.*

incurred daily fees for dock space, fuel, and provisions that totaled $242,054 within twelve days.[329] In addition, the detention prevented M/T Wilmina from completing a voyage that would have generated $809,912 in revenue.[330]

Frustrated by the surety negotiation impasse, M/T Wilmina's owner and operator petitioned the Southern District of Texas for relief on May 14, 2010.[331] Specifically, M/T Wilmina's owner and operator requested that the Court "fix" the surety agreement so that the CBP detention could be removed.[332] Finding no basis to assert subject matter jurisdiction, the Court dismissed the petition on May 19, 2010.[333]

Presented with a foreign-flagged vessel with environmental discrepancies and a surety negotiation impasse,[334] on May 21, 2010, the COTP—pursuant to 33 U.S.C. § 1228(a)(2)—banned M/T Wilmina from entering the port of Corpus Christi for three years.[335] On May 27, 2010, the Coast Guard's Office of Vessel Activities (CG-543) took the additional and "ground-breaking"[336] step of banning M/T Wilmina from entering any U.S. port for three years.[337] M/T Wilmina's ban was hailed as "the first such 'administrative remedy' used against alleged violators of [U.S.] laws, instead of criminal prosecutions that usually cost owners millions of dollars and force crews to remain in the [United States] for several months, with some of them potentially going to jail."[338] In CG-543's notification letter, the Coast Guard provided M/T Wilmina with the opportunity to reenter U.S. ports after one year under two conditions: (1) M/T Wilmina's owner and operator implement an environmental

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[329] *Id.* at *4. In fact, by the time M/T Wilmina departed Corpus Christi, the vessel's owner and operator estimated that it incurred $894,730 in total expenses. *See* COTP Appeal, *supra* at 317.
[330] *Wilmina*, 2010 U.S. Dist. LEXIS 49172, at *4.
[331] *Id.* at *2.
[332] *Id.* at *1–2.
[333] *Id.* at *11.
[334] *See generally id.* at *2–6.
[335] Coast Guard Ban, *supra* note 21. It is possible that the parties' inability to sign a surety agreement was not the sole basis for the COTP's decision to administratively ban M/T Wilmina; on May 18, 2010, law enforcement authorities began investigating the whistle-blower, who was eventually indicted, for possession of child pornography. *See* United States v. Pabillar, No. 2:10CR00623 (S.D. Tex. dismissed Oct. 12, 2010).
[336] Rajesh Joshi, *Wilmina Owner to Challenge 3-Year Ban*, SAFE SEAS (May 28, 2010, 5:10 PM), http://safewaters.wordpress.com/2010/05/28/tankers-wilmina-owner-to-challenge-3-year-ban/.
[337] Coast Guard Ban, *supra* note 21.
[338] Joshi, *supra* note 336.

compliance plan (ECP); and (2), the ECP is approved by the Coast Guard.[339]

B. Why Administrative Bans Best Answer the Vessel Pollution Problem

The United States is the world's largest economy and leading importing nation.[340] As recently as 2008, the United States accounted for twenty-three percent of the world's GDP and thirteen percent of the value of world merchandise imports.[341] Presently, the United States receives exports from more than two hundred countries.[342] In addition, one container in every ten carrying global trade is bound for or originates in the United States, accounting for ten percent of worldwide container traffic.[343] Logically, the United States, through the Coast Guard's PSC program, can significantly influence the level of environmental stewardship in the global maritime community.

1. Vessel Banning Effects in the Maritime Community

From the maritime industry's perspective, a vessel ban has major adverse consequences that compel increased environmental compliance. Specifically, vessel owners and operators suffer significant stigma as a result of their vessels being banned from trading in U.S. waters.[344] Accordingly, vessel owners and operators are less likely to be hired by

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[339] Coast Guard Ban, *supra* note 21.
[340] RITA HIGHLIGHTS, *supra* note 17, at 2.
[341] *Id.* at 16 ("Crude oil, petroleum products, passenger motor vehicles, electrical machinery, and electronics are among the top imports by value.").
[342] *Id.* at 2.
[343] RESEARCH AND INNOVATIVE TECH. ADMIN., U.S. DEP'T OF TRANSP., AMERICA'S CONTAINER PORTS 8 (2009) [hereinafter RITA STATS].
[344] *See Current Awareness Bulletin*, INT'L MAR. ORG. BULL., Jun. 2010, at 4), *available at* http://www.imo.org/KnowledgeCentre/CurrentAwarenessBulletin/Documents/CAB%20164%20June%202010.pdf; COTP Appeal, *supra* note 317, at 10. For a sampling of internet news articles that instantly reported M/T Wilmina's ban in the international maritime community, see Joshi, *supra* note 336; *Port State Control Recent Detentions*, INTERSHIP NAVIGATION TRAINING CTR. (Jun. 3, 2010), http://isntc.org/?q=node/440; *Coast Guard Restricts Norwegian-Flagged Wilmina from U.S. Ports for Three Years*, CIB PUBL'NS (Jun. 1, 2010), http://cibpubs.com/Members/Archieves10/06_01_2010__3.shtml; Eoin O'Cinneide, *Awilco Fights U.S. Ship Ban*, TRADEWINDS.NO (May 31, 2010, 5:47AM), http://www.tradewinds.no/casualties/article560426.ece; *USCG Bans Norwegian-Flagged Wilmina from* [sic] *for Three Years*, MARINELINK.COM (May 28, 2010), http://www.marinelink.com/news/norwegianflagged-wilmina334403.aspx.

charter parties to move profitable cargo.[345] Second, a vessel ban results in incredible financial losses. In the matter of M/T Wilmina, the vessel's owner and operator estimated that they lost $1,815,000 in potential profits from just May 4, 2010, to August 25, 2010.[346] Dissecting that number even further, M/T Wilmina suffered over $500,000 in lost profits per month; overall, the M/T Wilmina will suffer $18 million in lost revenue during its three-year ban.[347] Not surprisingly, right after being banned from U.S. waters, M/T Wilmina's owner and operator touted future environmental compliance measures by announcing in its press release:

> [W]e are continuing to analyze the incident and a lot of work is focusing on how we in the best possible way can eliminate the risk for ever [sic] again being exposed to a similar incident. This will encompass new technical arrangements, improved procedures and routines[,] and increasing and documenting the environmental awareness for the crew . . . .[348]

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[345] COTP Appeal, *supra* note 317, at 10.

[346] *Id.* These losses are the result of M/T Wilmina being unable to secure freight rates available to similarly-situated tanker vessels that can call U.S. ports. *See* Chalos e-mail, *supra* note 59. When a vessel cannot call U.S. ports, a tanker vessel is forced to move cargo from "second-tier" oil majors that pay up to fifty percent less in "per day" or "per voyage" freight rates. Telephone Interview with Lieutenant Commander Brian Province, Chief, Investigations and Inspections Div., Atlantic Area, U.S. Coast Guard (Jan. 24, 2011).

[347] In the present global market—where rising oil prices and a tightening of global credit lines negatively influence freight rates and developing countries' abilities to afford maritime transportation costs—a vessel's financial solvency is exacerbated when it can't trade in the United States. *See* RITA HIGHLIGHTS, *supra* note 17, at 46 ("[O]il price fluctuations seriously impact[] freight carriers."); *see also Global Shipping Industry in Dire Straits on Mid-east, Africa Unrest*, MAR. SUN NEWS (Mar. 7, 2011), http://www.maritimesun.com/news/global-shipping-industry-in-dire-straits-on-mid-east-africa-unrest/ ("The global shipping industry is facing tough times as [it] brace[s] for mounting negative factors including high oil price[s], unrest in the Middle [E]ast[,] and [the] oversupply of vessels."); United Nations Conference on Trade & Dev., How are Maritime Freight Rates Affected by Rising Oil Prices? (Apr. 27, 2010), http://www.unctad.org/Templates/StartPage.asp?intItemID=5410&lang=1; United Nations Conference Nations Nations Conference on Trade & Dev., Challenging Times Ahead for the Shipping Industry (Dec. 8, 2009), http://www.unctad.org/Templates/StartPage.asp?intItemID=5242&lang=1.

[348] Press Release, Awilco & Wilhelmsen Marine Serv. AS, USCG Allegation Concerning Violation of MARPOL Regulation (May 28, 2010) (on file with author).

To some in the maritime community, the level of financial loss derived from a vessel ban may appear excessively harsh.[349] However, such a statement fails to account for the elimination of "front-end" costs typical in cases the Coast Guard refers to DOJ. For example, if a vessel is banned, the vessel's owner and operator no longer must: (1) post a bond as part of a surety agreement (typically in the range of $500,000 to $1.5 million),[350] (2) pay per diem, lodging, and medical expenses for half of the vessel's crew who must remain in the United States,[351] (3) pay travel costs to replace half of the crew in order to get the vessel sailing again,[352] and of course, (4) incur legal fees during the DOJ prosecution.[353] Put another way, when vessels are banned, vessel owners and operators no longer become self-proclaimed "putative defendants"[354] since they are no longer required to fund DOJ's prosecutions. More importantly, the vessel's owner and operator—assuming they have an interest in repairing their reputations and reducing the ban in years from three to one—can shift the costs it never incurred at the "front-end" to immediately invest in new environmental equipment and implement a Coast Guard-approved ECP.

2. Vessel Banning Advantages to the Coast Guard and DOJ

Consistent with and in furtherance of the Coast Guard's PSC objective to "identify and eliminate substandard ships from U.S. waters,"[355] administrative bans provide for swift and harsh penalties; at the same time, administrative bans re-emphasize the U.S. commitment to environmental stewardship in the marine environment.

a. Bans Hold the Unscrupulous Immediately Accountable

In 2010, DOJ secured its first plea against a vessel's owner, operator, or crew member, on average, eight months after the Coast Guard

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[349] Legal counsel for M/T Wilmina's owner and operator dubbed the Coast Guard's "legal machinery" as "draconian" after M/T Wilmina was banned. *See* Joshi, *supra* note 336.
[350] *See id.*
[351] *See* Chalos e-mail, *supra* note 59.
[352] *Id.*
[353] *See* OECD REPORT, *supra* note 18, at 50.
[354] Chalos e-mail, *supra* note 59.
[355] MLEM, *supra* note 14, at 9–12.

identified the MARPOL 73/78 violation.[356] Contrast that timeline to the time required to effect a vessel ban—where once the deficient environmental equipment is repaired or the offending crew member is replaced, the vessel is expelled within a week.[357]

b. Bans Compel the Greedy to Change their Financial Strategy

As evidenced by M/T Wilmina's ban, the financial impact of administrative bans—as opposed to the average court fines levied after a successful DOJ prosecution—is very severe.[358] In 2010, DOJ reported four cases where fines were levied against polluters operating foreign-flagged vessels.[359] Those fines—skewed because one vessel was a recidivist[360]—totaled $6,475,000, or $1,618,000 per case. Compared to the financial losses accrued by M/T Wilmina over just a three-month period ($1,815,000), a vessel ban's adverse financial consequences dwarf those levied after a successful DOJ prosecution.[361] More importantly, the

[356] Press Release, Dep't of Justice, Shipping Company and Senior Crewmembers [sic] Convicted of Covering up Oil Pollution (Dec. 2, 2010) [hereinafter M/V Avenue Star] (on file with author) (from offense to plea thirteen months elapsed); M/V Iorana, *supra* note 102 (from offense to plea six months elapsed); M/T Chem Faros, *supra* note 102 (from offense to plea two and a half months elapsed); M/T Kerim, *supra* note 102 (from offense to plea fourteen months elapsed); Press Release, Dep't of Justice, Ship Crew Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation (Apr. 22, 2010) [hereinafter M/V Lowlands Sumida] (on file with author) (from offense to plea six months elapsed). This eight month average becomes significantly larger if the case goes to trial or has a significant motion practice. *See* United States v. Fleet Mgmt. Ltd., 2009 WL 2581710, at *1 (E.D. Pa. Aug. 20, 2009) (motion to suppress statements decided over two years after date of offense, i.e., January 24, 2007); United States v. Petraia Maritime, Ltd., 2007 WL 6150150, at *1 (D. Me. May 17, 2007) (crimes committed on December 14, 2004; jury verdict rendered on May 17, 2007).

[357] The M/T Wilmina did not leave port for nineteen days, but that is because the Coast Guard—as evidenced by its efforts to secure a signed surety agreement—initially sought to refer the case to DOJ. *See* Wilmina Shipping AS v. United States, 2010 U.S. Dist. LEXIS 49172, *1–5 (S.D. Tex. May, 19, 2010).

[358] *See* OECD REPORT, *supra* note 18, at 6 ("A deterrent fine should at a very minimum be equal to the costs avoided through noncompliance.").

[359] *See* M/V Avenue Star, *supra* note 356; M/V Iorana, *supra* note 102; M/T Chem Faros, *supra* note 102; M/T Kerim, *supra* note 102; M/V Lowlands Sumida, *supra* note 356.

[360] *See* M/V Iorana, *supra* note 102. In this case, the vessel's owner agreed to pay a $4 million fine due to the fact this was the vessel's second MARPOL violation in three years; moreover, the second offense involved the same chief engineer who perpetrated the first offense—after the vessel owner re-hired him. *See id.*

[361] At the same time, such harsh pecuniary effects will result in greater deterrence because the amount of the losses more closely equate to the costs saved from noncompliance, see OECD REPORT, *supra* note 18, at 6, 52, which can total up to $12.8

harsh pecuniary effects of a vessel ban force vessel owners and operators, who presently consider the occasional fine from getting caught polluting as the "cost of doing business,"[362] to immediately change their business practices.

c. Bans are Efficient

Under § 1228 of the PWSA,[363] COTPs can immediately expel tankers in violation of MARPOL 73/78, APPS, and any other international or domestic law without the delay and uncertainty associated with a criminal prosecution. No administrative hearing is required prior to a COTP's decision to ban a vessel; the only mechanism available to an aggrieved party seeking relief from a ban is to file a written appeal with the COTP.[364] If the COTP denies relief, the aggrieved party can petition the COTP's decision in writing to the District Commander, the Area Commander, and finally, CG-543.[365] Notably, a vessel owner and operator's right to file a written appeal occurs after the ban has taken place—not before.[366]

d. Bans Still Provide for International Awareness of the Unscrupulous

Regardless of whether the vessel is administratively banned or a case is referred for criminal prosecution, the Coast Guard's notification procedures with other port states remain the same. Specifically, the Coast Guard already shares and receives information directly with IMO and foreign countries about "major control actions" (i.e., denials of entry, expulsions, or detentions) the Coast Guard imposes on foreign-flagged

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million per year just for the illegal dumping of sludges. *See supra* note 112 and accompanying text.

[362] *See* Kehoe, *supra* note 2, at 41 ("[T]he corporate operators of these vessels are either willing to take the risk of getting caught in order to continue to keep compliance costs low as a way of doing business . . . .").

[363] 33 U.S.C § 1228 (2006).

[364] *See id.* § 1232(e); 33 C.F.R. § 160.7 (2011).

[365] *Id.*

[366] 33 C.F.R. § 160.7 (2011); *but see* COTP Appeal, *supra* note 317, at 3 (arguing that administrative bans are not authorized under 33 U.S.C. § 1228; in the alternative, administrative bans are civil actions that entitle the aggrieved parties to a hearing per Section 1232(a) of the PWSA).

vessels.[367] In addition, the Coast Guard supports the use of Equasis, an international database that shares the results of every PSC exam performed by participating member states.[368] Equasis is free-of-charge and accessible to anyone with an e-mail address.[369] For example, in the matter of M/T Wilmina, any port state, or any person, can access Equasis to learn the tanker's size, total crew, and its port state examination history—including its detention history.[370]

e. Bans are Consistent with Current U.S. Government Policy

A change in current Coast Guard practice, that is, an increased use of vessel bans in MARPOL 73/78 cases, while retaining its discretionary authority to refer select vessel pollution cases to DOJ, is consistent with current Coast Guard policy, it conserves Coast Guard and DOJ resources, and it allows the Coast Guard and DOJ to focus their efforts on those cases involving recidivists or egregious acts of vessel pollution.

First, as a matter of general policy, the Coast Guard employs no rigid requirements when deciding whether to refer a vessel pollution case to DOJ. [371] Instead, the Coast Guard considers severe environmental harm and a long history of misconduct as two bases for referral[372] then selects the best legal tool to deter future similar conduct.[373] In the case of M/T Wilmina—in accordance with its overarching marine environmental

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[367] *See* PSC REPORT, *supra* note 218, at 23; Grasso & Linsin, *supra* note 169 (noting that the basis for the Coast Guard's 2007 investigation of Overseas Shipping Group was a communication made by Transport Canada to the Coast Guard).

[368] *See* EQUASIS, http://www.equasis.org/EquasisWeb/restricted/About?fs=About (last visited Jan. 23, 2012).

[369] *Id.*

[370] *Wilmina Shipping Info*, EQUASIS, http://www.equasis.org/EquasisWeb/restricted/ShipInspection?fs=ShipHistory (last visited Jan. 23, 2012). The United States detained M/T Wilmina on May 4, 2010 for nineteen days for MARPOL 73/78 violations; Iran detained M/T Wilmina on November 30, 2010 for one day for four safety deficiencies. *Id.*

[371] MLEM, *supra* note 14, at 9–17.

[372] *Id.*

[373] *See* Baumgartner et al., *supra* note 271, at 10.

> The U.S. Government's overarching goal of protecting the environment is supported by Coast Guard policy and procedure for collecting and reviewing evidence, considering the conduct of a spiller, both before and after a spill, and choosing the right tool, from a wide range of tools, best suited to achieving that goal.

protection mission to keep substandard vessels from entering U.S. waters—it appears that the Coast Guard recognized the advantages of such a flexible policy when it banned M/T Wilmina. In a press release dated May 27, 2010, the Coast Guard announced:

> This action related to [M/T] Wilmina is a result of [the Coast Guard's] ongoing efforts to utilize the full range of available tools to ensure compliance with laws meant to protect the environment . . . . *Criminal prosecution is one such tool[,] but administrative alternatives, such as banning certain ships, can be extremely effective*.[374]

Likewise, the increased practice of banning vessels to encourage environmental compliance is harmonious with the Coast Guard and DOJ's intent to implement ECPs fleet-wide.[375] Supporting that initiative, at least one U.S. maritime law firm also ardently promotes the implementation of ECPs.[376] Environmental compliance plans (spell out if it starts a sentence) promote environmental compliance from the vessel owner all the way down to the lowest-ranking crew member,[377] and they reduce the possibility that DOJ will prosecute vessel owners and operators for pollution acts committed by individual crew members.[378] As set forth in CG-543's ban of M/T Wilmina,[379] future similar bans also incentivize environmental compliance since they allow for reentry into U.S. waters after one year—once an ECP is implemented and approved by the Coast Guard.

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[374] Coast Guard Ban, *supra* note 21 (emphasis added). On September 1, 2010, the Coast Guard expanded its vessel banning policy by announcing that it would ban any foreign-flagged vessel from entering U.S. waters if the vessel has a history of operating in U.S. waters in a substandard condition. *See* Ban Notice, *supra* note 215; Ban Policy, *supra* note 215.

[375] *See* Allain, *supra* note 124, at 75 (touting implementation of ECPs by convicted parties as well as "environmentally conscious" owners and operators); Udell, *supra* note 57, at 15; Linsin, *supra* note 294, at 16.

[376] *See* Grasso & Linsin, *supra* note 169 ("[T]he implementation of a robust ECP, one that incorporates elements of managerial oversight and independent verification, can improve the culture of compliance within a maritime company and can reduce the risks associated with noncompliance.").

[377] *See* Linsin, *supra* note 294, at 16 (emphasizing that corporate leadership, through environmental compliance, instills in every crew member that environmental stewardship is "a real and permanent priority of [the] organization").

[378] *See* Linsin, *supra* note 241, at 18 (noting that a corporation's dedication to a "meaningful environmental compliance plan" often dictates whether DOJ criminally charges culpable parties).

[379] *See* Coast Guard Ban, *supra* note 21.

Finally, vessel bans remove the need to dedicate Coast Guard and DOJ resources to cases where MARPOL 73/78 violations are identified.[380] Those resources include, but are not limited to, expert witnesses, additional forensic analysis, e.g., oil samples and computers, CGIS personnel, Coast Guard PSC teams testifying at hearings and trials, and district JAs serving as SAUSAs.[381] As a consequence, Coast Guard and DOJ personnel can dedicate more time and resources toward cases involving recidivists or egregious acts of pollution. Those cases tend to yield significantly higher fines, implementation of ECPs, and each matter includes a wide variety of evidence that is not necessarily whistle-blower driven.[382]

f. Bans are Harmonious with Current International Policy

Since vessel bans obviate the need to detain seafarers in the United States pending the outcome of a DOJ-based criminal prosecution, vessel bans more closely parallel IMO's resolution decreeing fair treatment of seafarers[383] and UNCLOS's requirement for the prompt release of vessels and crews.[384] Consequently, an implementation of vessel bans as standard Coast Guard practice will eliminate complaints that the United

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[380] *See* OCEAN COMM'N, *supra* note 1, at 240 (recognizing that the Coast Guard, already with limited resources, incurs a greater resource burden because of poor flag state oversight of its vessel fleet); Baumgartner et al., *supra* note 271, at 10 (identifying the vast number of Coast Guard personnel engaged in a vessel pollution investigation, referral, and prosecution); CG Missions Law, *supra* note 43, at 1 (criminal referrals are "resource intensive to investigate and prosecute").

[381] *See generally* MLEM, *supra* note 14, at 9–1, 9–18 (describing the federal, state, and local interests in an environmental crime investigation and the use of Coast Guard resources to support each investigation).

[382] *See* Press Release, Dep't of Justice, Overseas Shipholding Group Inc. Will Pay Largest Ever Penalty for Concealing Vessel Pollution (Dec. 19, 2006) (on file with author) (defendant pled guilty in six jurisdictions and ordered to pay $37 million fine; investigation commenced from tip provided to the Coast Guard by Transport Canada); Press Release, Dep't of Justice, Evergreen to Pay Largest-Ever Penalty for Concealing Vessel Pollution (Apr. 4, 2005) (on file with author) (defendant pled guilty in five jurisdictions and ordered to pay $25 million fine; investigation initiated from information provided to the Coast Guard by the Washington State Department of Ecology); Press Release, Dep't of Justice, Royal Caribbean to Pay Record $18 Million Criminal Fine for Dumping Oil and Hazardous Chemicals, Making False Statements (Jul. 21, 1999) (on file with author) (defendant pled guilty in six jurisdictions and ordered to pay $27 million—$18 million in one plea and $9 million in separate plea; investigation commenced by Coast Guard aerial surveillance team).

[383] *See* IMO Resolution, *supra* note 310.

[384] *See* UNCLOS, *supra* note 137, art. 292.

States criminalizes seafarers "caught in the middle of these pollution problems."[385]

C. Debunking Skepticism about Vessel Bans

Advocates for the referral of all intentional and illegal vessel pollution cases to DOJ argue that a shift away from criminal enforcement will empower unscrupulous vessel owners, operators, and crew members to pollute more.[386] However, this shift is not exclusive; it still incorporates the Coast Guard's discretionary authority to refer select cases. In addition, such an assertion presumes that DOJ will accept all Coast Guard's referrals—a less likely presumption if another more effective measure exists to deter and punish offenders.[387] Finally, the harsh financial consequences of a vessel ban, unlike fines levied after criminal prosecutions, are not the "costs of doing business."[388] Rather, such costs give the vessel's owner and operator two choices: (1) trade outside U.S. waters and continue to suffer the adverse consequences of not being able to trade where the highest freight rates are paid;[389] or (2), implement an ECP that allows the vessel to trade in U.S. waters after one year.[390]

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[385] Von Dreele, *supra* note 314.

[386] *See* Underhill, *supra* note 60, at 291 (advocating for more prosecutions pursuant to the FSA to deter vessel polluters); Gehan, *supra* note 90, at 183 (stating that an increased use of domestic law to counter the problem of vessel pollution has "the salutary effect of promoting the aims and spirit . . . of UNCLOS and MARPOL").

[387] *See* Linsin, *supra* note 241, at 18 ("[M]any cases referred to the DOJ are declined for criminal enforcement . . . [if] a non-criminal alternative [is] determined to be a more appropriate resolution."). In the criminal enforcement context, DOJ has also recently recognized the powerful utility of bans in vessel pollution cases. *See, e.g.*, United States v. Chang-Sig O, No. 2:06-cr-00599-SDW, Judgment, at 3 (D.N.J. filed Jan. 30, 2007) (defendant banned from seeking employment as engineer aboard any ship or motor vessel that travels in U.S. waters); United States v. Francisco M. Sabando, Jr., No. 3:07-CR-391-001 (GAG), Judgment, at 4 (D.P.R. filed Sept. 20, 2007); Kehoe, *supra* note 2, n.301; Press Release, Dep't of Justice, Shipping Conglomerate Pleads Guilty to Concealing Deliberate Pollution in "Magic Pipe" Case (Apr. 12, 2011) (four companies pled guilty and agreed to a ban of five years from trading in U.S. waters); Press Release, Dep't of Justice, Ship Captain Sentenced to 10 Months Confinement for Obstruction, Environmental and Ship Safety Violations (Oct. 15, 2009) [hereinafter M/V Theotokos] (vessel captain banned from entering United States for three years).

[388] Most fines in MARPOL 73/78-related prosecutions represent a "smaller outlay" than environmental compliance. *See* OECD REPORT, *supra* note 18, at 52.

[389] *See* COTP Appeal, *supra* note 317, at 3.

[390] *See* Coast Guard Ban, *supra* note 21.

1. Legal Authority and Judicial Precedent Supports Bans

At least one opponent of the Coast Guard's use of administrative bans believes that the PWSA provides no such authority under 33 U.S.C. § 1228.[391] However, such an argument ignores: (1) the plain language of § 1228(a), (2) the centuries of judicial precedent that support U.S. authority to subject foreign-flagged vessels to its jurisdiction while in U.S. waters,[392] (3) judicial precedent that consistently upholds the Coast Guard's authority to enforce criminal provisions of the PWSA—to include the mandatory reporting of hazardous conditions[393] and the control of a foreign-flagged vessel's movement, mooring, or anchorage,[394] and most importantly (4), the judicial precedent that supports U.S. authority to deny entry of foreign-flagged vessels from U.S. waters.[395] In *Patterson v. Eudora*, the Supreme Court noted:

> [T]he implied consent to permit [foreign-flagged vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may

[391] *See* COTP Appeal, *supra* note 317, at 3.

[392] *See* United States v. Diekelman, 92 U.S. 520, 525 (1875) ("The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923) ("The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter."); Spector v. Norwegian Cruise Line Ltd, 545 U.S. 119 (2005) (holding that the Americans with Disabilities Act applies to foreign-flagged cruise ships in U.S. waters).

[393] United States v. Canal Barge Co., Inc., 631 F.3d 347 (6th Cir. 2011) (upholding PWSA criminal convictions for failure to report a hazardous condition on board a barge carrying 400,000 gallons of benzene).

[394] United States v. Locke, 529 U.S. 89, 94 (2000) (discussing PWSA authority and the federal interest to regulate the maritime tanker transport industry—due to its "ever-present, all too real dangers of oil spills, spills which could be catastrophes for the marine environment"); Beveridge v. Lewis, 939 F.2d 859, 864 (9th Cir. 1991) (discussing the "extensive authority to regulate the anchoring, mooring, and movement of vessels" pursuant to the PWSA); Patentas v. United States, 687 F.2d 707, 712 (3d Cir. 1982) (generically discussing the PWSA as well as the government's authority to bring civil and criminal actions against persons who violate regulations under the PWSA); Llamera v. United States, 15 Cl. Ct. 593, 601 (1988) (noting that the Coast Guard did not exceed its statutory authority under the PWSA when it ordered a vessel's owner to move its vessel from an anchored position until regulatory violations aboard the vessel were corrected).

[395] Patterson v. Eudora, 190 U.S. 169 (1903) (upholding a lower court's application of provisions of "Act December 21, 1898" to British sailors engaged in trade in U.S. waters).

> be extended upon such terms and conditions as the government sees fit to impose. . . . Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this.[396]

2. Incarceration: A Viable Tool or an Inadequate Deterrent?

Undeniably, vessel bans preclude the possibility of incarceration for vessel polluters. However, as stated in Part V.B.2.e, a shift in Coast Guard practice toward vessel bans still retains discretionary authority to criminally refer recidivists and egregious acts of pollution in order to seek incarceration. Moreover, looking at the four 2010 cases reported by DOJ that involved the intentional discharge of oily waste by foreign-flagged vessels, DOJ obtained convictions and fines in each case, but no incarceration.[397] In 2009, in seven reported cases involving the intentional discharge of oily waste by foreign-flagged vessels, DOJ attained misdemeanor-level incarceration in four of the cases, with the amount of jail time among the six convicted parties averaging just over three months.[398]

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[396] *Patterson*, 190 U.S. at 178, *quoted in Cunard*, 262 U.S. at 125.

[397] *See* M/V Avenue Star, *supra* note 356; M/V Iorana, *supra* note 102; M/T Chem Faros, *supra* note 102; M/T Kerim, *supra* note 102.

[398] *See* Press Release, Dep't of Justice, Ship Operator Pleads Guilty for Concealing Pollution from Oil Tanker (Oct. 21, 2009) (on file with author) (vessel owner fined $1.25 million; no incarceration); M/V Theotokos, *supra* note 387 (vessel captain sentenced to ten months confinement); Press Release, Dep't of Justice, Liberian Ocean Shipping Company Admits Falsifying Oil Discharge Record Books (Sept. 3, 2009) (on file with author) (vessel owner fined $1.3 million; no incarceration); Press Release, Dep't of Justice, Ship Operator to Pay More than $2 Million Fine for Concealing Pollution on the High Seas (July 27, 2009) (on file with author) (vessel owner fined $2 million; two crew members sentenced to one week of incarceration and one month of incarceration); Press Release, Dep't of Justice, Korean Corporate Owner of Cargo Vessel Sentenced to Pay $2.2 Million for Conspiracy and Falsifying Records (June 5, 2009) (on file with author) (vessel owner fined $2.2 million; no incarceration); Press Release, Dep't of Justice, General Maritime Management (Portugal) Fined $1 Million for Environmental Crimes (Mar. 16, 2009) (on file with author) (vessel owner fined $1 million; two crew members sentenced to six months incarceration and three months incarceration); Press Release, Dep't of Justice, Shipping Line Pays $1.4 Million for Environmental Crimes (Mar. 10, 2009) (on file with author) (vessel owner fined $1.4 million; no incarceration).

Considering the aforementioned data, it appears that DOJ also focuses its efforts toward financially penalizing vessel owners and operators more than it seeks to incarcerate crew members discharging the oily waste.[399] Additionally, compared to the Coast Guard's ability to ban vessels and cause immediate and significant financial losses however, DOJ can only obtain sentences of incarceration after successful—and sometimes lengthy—prosecutions; during which time, offending vessels are still trading in U.S. waters while accruing enough profits to offset any future-imposed fines.

D. The Way Ahead: Bolstering the PWSA and Implementing Regulations

Tankers make up the second largest category of the world's merchant fleet.[400] However, alongside tankers sail cargo ships, bulk carriers, container ships, passenger ships, and fishing vessels.[401] Each vessel's primary source of propulsion is oil, and therefore, each type of vessel poses a significant risk to the marine environment.[402] In 2009, of the 161 ships detained for safety-related deficiencies by the Coast Guard, only eighteen were tankers.[403] Consequently, the Coast Guard must have clear statutory authority to ban all types of vessels found in violation of MARPOL 73/78, not just tankers.

Current Coast Guard Policy for Banning Vessels

On September 2, 2010, the Coast Guard issued a policy memo asserting PWSA authority to administratively ban all types of vessels—not just tankers.[404] Arguably, § 1223 of the PWSA,[405] coupled with the

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[399] *Contra* Kehoe, *supra* note 2, at 42 (arguing that prosecutions of the polluter—that result in less than a year of jail time—are worth pursuing since the crew member's engineering license and ability to obtain employment may be "severely impacted" by a U.S. conviction).

[400] *See* IMO FACTS, *supra* note 18, at 14–16.

[401] *Id.*

[402] OECD REPORT, *supra* note 18, at 41 ("Evidence of prosecution of oil pollution court cases reveal that . . . bypass pipes have been found on all types of ships, from decrepit cargoes to prestigious cruise ships."); UNEP BULL., *supra* note 4 ("Not only oil tankers, but various other cargo ships pose a constant threat of small to medium scale oil pollution from illegal dumping of oily wastes . . . .").

[403] PSC REPORT, *supra* note 218, at 2, 16.

[404] *See* Ban Policy, *supra* note 215, at 4–5, which states,

statutory language set forth in § 1232,[406] provides the Coast Guard with the requisite authority necessary to ban all types of vessels, not just tankers. And though the following analysis and research supports the Coast Guard's position, Congress should provide the Coast Guard with a clear statutory mandate to ban all types of vessels—rather than current PWSA law that provides explicit statutory authority to ban only tankers.

First, when comparing the plain language of each section's title, § 1228 discusses the COTP's authority as it relates to "Conditions for Entry to Ports in the United States"[407] whereas § 1223 discusses "Vessel Operating Requirements"[408] and § 1232 discusses "Enforcement Provisions." Just by comparison of these section titles, it is clear Congress contemplated then subsequently provided the Coast Guard with explicit authority to deny a vessel's entry in U.S. waters only in § 1228 of the PWSA.

> Nothing in this policy will restrict Commandant (CG-543) from utilizing the [ban] procedures . . . for a vessel which . . . in the opinion of the U.S. Coast Guard[,] the condition of such vessel may pose a significant risk to the safety of the vessel, crew[,] or the marine environment . . . .

[405] Section 1223(b) of the PWSA, in pertinent part, provides:

> The Secretary may order any vessel, in a port or place subject to the jurisdiction of the United States or in the navigable waters of the United States, to operate or anchor in a manner [the Secretary] directs if:
>
> (1) [the Secretary] has reasonable cause to believe such vessel does not comply with any regulation issued under this chapter or any other applicable law or treaty;
>
> (2) [the Secretary] determines that such vessel does not satisfy the conditions for port entry set forth in section 1228 of this title;
>
> . . . .

[406] Section 1232(e) of the PWSA, in pertinent part, provides:

> Denial of Entry. Except as provided in [S]ection 1228 of this title, the Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any port or place under the jurisdiction of the United States or to any vessel not in compliance with the provisions of this chapter or the regulations issued hereunder.

[407] *See id.* § 1228.
[408] *Id.* § 1223.

By process of elimination, if the Coast Guard possesses statutory authority to ban all types of vessels, that authority must be derived from either § 1223 or § 1232, or a reading of both statutes taken together. Section § 1223(b) reads in pertinent part, "The Secretary may order any vessel, *in a port or place subject to the jurisdiction of the United States or in the navigable waters of the United States*, to operate or anchor in a manner that [the Secretary] directs . . . ."[409] This provision clearly grants authority to a COTP to control a vessel's movement while the vessel is in U.S. waters.[410] Separately, § 1232 provides the U.S. Government with remedies, e.g., civil penalties, criminal penalties, in rem liability, injunction, denial of entry, withholding of clearance, *after* another provision of the PWSA has been violated.[411] Read collectively, § 1223 and § 1232 provides the Coast Guard with authority to ban all types of vessels, not just tankers.[412]

Finally, because a reading of each PWSA section may render opposing legal positions or ambiguity as to whether the Coast Guard possesses authority to administratively ban all types of foreign-flagged vessels, the Supreme Court has stated that canons of statutory interpretation are not mandatory but rather guides that can be overcome by evidence of congressional intent.[413] Upon review of congressional intent, it is clear that the Coast Guard was granted authority to deny entry to tankers in § 1228. Specifically, when the Committee on Merchant Marine and Fisheries discussed § 1228, it noted:

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[409] *See id.* § 1223(b) (emphasis added).

[410] To further underscore the point that vessel movement control in § 1223 should not be confused with denial of entry authority in § 1228, see Ray v. Atl. Richfield Co., 435 U.S. 151, 161 (1978) ("The focus of . . . 33 U.S.C. §§1221–1227 . . . is traffic control at local ports . . . .").

[411] *See* 33 U.S.C. § 1232(a)–(f) (emphasis added).

[412] As a note of caution, such an expansive view of § 1223 and § 1232, in the Supreme Court's opinion, could render the language of § 1228—and the seven prerequisite conditions that deny entry of tankers in U.S. waters—superfluous. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166–67 (2004) (where statute included an explicit "during or following condition," reading a separate sentence to eliminate such a condition would render part of the statute entirely superfluous—something "[the Court] is loath to do"). Nevertheless, the effect of a COTP's authority to control a vessel's movement in U.S. waters or ban the vessel from U.S. waters is the same—both authorities can result in a vessel's inability to trade in the United States.

[413] *See* Chickasaw Nation v. United States, 534 U.S. 84, 93–96 (2001) (rejecting argument that "every clause and every word of a statute should if possible be given effect" where particular language consists of surplus words or is repugnant to the rest of the statute).

> This Section includes, *in statutory language for the first time*, a prohibition against any vessel carrying oil or hazardous material operating in the navigable waters of the United States or transferring cargo or residue in any port or place of the United States, if such a vessel has an operational history which creates reason to believe that the vessel may be unsafe or may constitute a threat to the marine environment . . . .[414]

Likewise, when Congress discussed the expanded authorities the PTSA provides the Coast Guard, Congress made no distinction between tankers and vessels when highlighting the Coast Guard's authority to ban vessels. On February 21, 1977, Congressman Dicks noted that the PTSA "establishes a program to effectively prohibit substandard vessels from operating within the [U.S.] maritime zone, ..."[415] On May 25, 1977, Congress again discussed the PTSA's additional reach by noting that the PTSA "provide[s] clear authority . . . to bar substandard vessels from operating in U.S. waters."[416] Notably, neither discussion specified that the "substandard vessel" must be a tanker; rather, congressional intent supports a fleet-wide authority to ban vessels not in compliance with the PWSA.

Nevertheless, because prudence dictates that the Coast Guard possess a clear statutory mandate to ban all types of vessels from U.S. waters, Appendix A proposes such a revision to 33 U.S.C. § 1228. This revision incorporates the APPS into the text of § 1228, and as a consequence, the denial of entry authority granted to the Coast Guard explicitly extends to all types of vessels, not just tankers.[417] Appropriately, Appendix A roots any vessel's denial of entry in § 1228, the PWSA Section titled, "Conditions for Entry to Ports in the United States." Finally, Appendix B offers a revision to Section 160.107 of Title 33 of the CFR that clarifies the statutory authority by which COTPs may ban all foreign-flagged vessels from U.S. waters.

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[414] HOUSE REPORT, *supra* note 194, at 13 (emphasis added).
[415] 123 CONG. REC. 4779 (1977).
[416] 123 CONG. REC. 16515 (1977).
[417] To cover all types of vessels—not just tankers, Sections 1228(1)(a) and 1228(1)(a)(2) of Appendix A include the additional language "or chapter 33 of title 33" (Chapter 33 of Title 33 is the APPS.).

VI. Conclusion

> The world's maritime transport system has been an essential element in the growth of global prosperity since the first trading ships sailed several thousand years ago. . . . However, as with any industrial sector . . . , maritime transport has been the source of both spectacular releases of pollution as well as a more subdued and constant stream of waste . . . into the seas and onto the shorelines.[418]

A shift in Coast Guard practice toward more vessel bans reflects a tacit recognition that DOJ prosecutions of vessel pollution cases are not an adequate deterrent for a crime motivated primarily by financial greed. That sentiment is collectively shared[419] and supported with irrefutable data.[420] The number of vessel pollution cases is neither declining nor remaining steady; rather, vessel pollution cases are on the rise. Even worse, under current Coast Guard practice, substandard owners—as opposed to "good corporate citizens"—are rewarded for being environmentally noncompliant.[421]

The Coast Guard has in place a procedurally sound and very successful program to refer vessel pollution cases to DOJ. The Coast Guard should retain that discretionary authority for select cases. However, to strengthen the Coast Guard's marine environmental protection mission and to directly counter the economically motivated crime of intentional and illegal vessel pollution, the Coast Guard must continue to ride the forward momentum it created when it banned M/T Wilmina. The Coast Guard must shift its current vessel pollution enforcement practice from criminal referrals to administrative bans. Simultaneously, Congress must clarify the Coast Guard's PWSA authority to deny entry to all vessels, not just tankers. Finally, the Coast Guard, through its delegation to IMO's legal committee, should provide notice to the international maritime community about its movement toward vessel bans. Once these measures are implemented, vessel

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[418] OECD REPORT, *supra* note 18, at 7.

[419] *See supra* note 16 and accompanying text; *see also* UNEP BULL., *supra* note 4 ("Despite international and domestic conventions and legislation, oil dumping in the sea remains a troubling, unsolved[,] and uncontrolled environmental problem."); Grasso & Linsin, *supra* at 169; Chalos e-mail, *supra* note 59.

[420] *See supra* note 19.

[421] *See* OECD REPORT, *supra* note 18, at 4; Underhill, *supra* note 60, at 291.

owners and operators would be incredibly remiss if they fail to become more environmentally compliant. Otherwise, those same vessel owners and operators should expect to be denied entry from U.S. waters and to suffer the dire financial straits that accompany administrative bans.

Appendix A

1. 33 U.S.C. § 1228. Conditions for entry to ports in the United States:

(a) In general, no vessel, subject to the provisions of chapter 37 of title 46, or chapter 33 of title 33, shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel:

(1) has a history of accidents, pollution incidents, or serious repair problems which, as determined by the Secretary, creates reason to believe that such vessel may be unsafe or may create a threat to the marine environment; or

(2) fails to comply with any applicable regulation issued under this chapter, chapter 37 of title 46, or chapter 33 of title 33, or under any other applicable law or treaty; or

(3) discharges oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party; or

(4) does not comply with any applicable vessel traffic service requirements; or

(5) manned by one or more officers who are licensed by a certificating state which the Secretary has determined, pursuant to section 9101 of title 46, does not have standards for licensing and certification of seafarers which are comparable to or more stringent than United States standards or international standards which are accepted by the United States; or

(6) is not manned in compliance with manning levels as determined by the Secretary to be necessary to insure the safe navigation of the vessel; or

(7) while underway, does not have at least one licensed deck officer on the navigation bridge who is capable of clearly understanding English.

(b) Exceptions:

The Secretary may allow provisional entry of a vessel not in compliance with subsection (a) of this section, if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is not unsafe or a threat to the marine environment, and if such entry is necessary for the safety of the vessel or persons aboard. In addition, paragraphs (1), (2), (3), and (4) of subsection (a) of this section shall not apply if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is no longer unsafe or a threat to the marine environment, and is no longer in violation of any applicable law, treaty, regulation or condition, as appropriate. Clauses (5) and (6) of subsection (a) of this section shall become applicable eighteen months after October 17, 1978.

Appendix B

PROPOSED REGULATION.

TITLE 33: NAVIGATION AND NAVIGABLE WATERS

PART 160—PORTS AND WATERWAYS SAFETY—GENERAL
Subpart B—Control of Vessel and Facility Operations
§ 160.107 Denial of entry.
Each District Commander or Captain of the Port, subject to recognized principles of international law, may deny entry into the navigable waters of the United States or to any port or place under the jurisdiction of the United States, and within the district or zone of that District Commander or Captain of the Port, to any vessel not in compliance with the provisions of the Ports and Waterways Safety Act, as amended by the Port and Tanker Safety Act, (33 U.S.C. § 1221–1236) or the regulations issued thereunder.