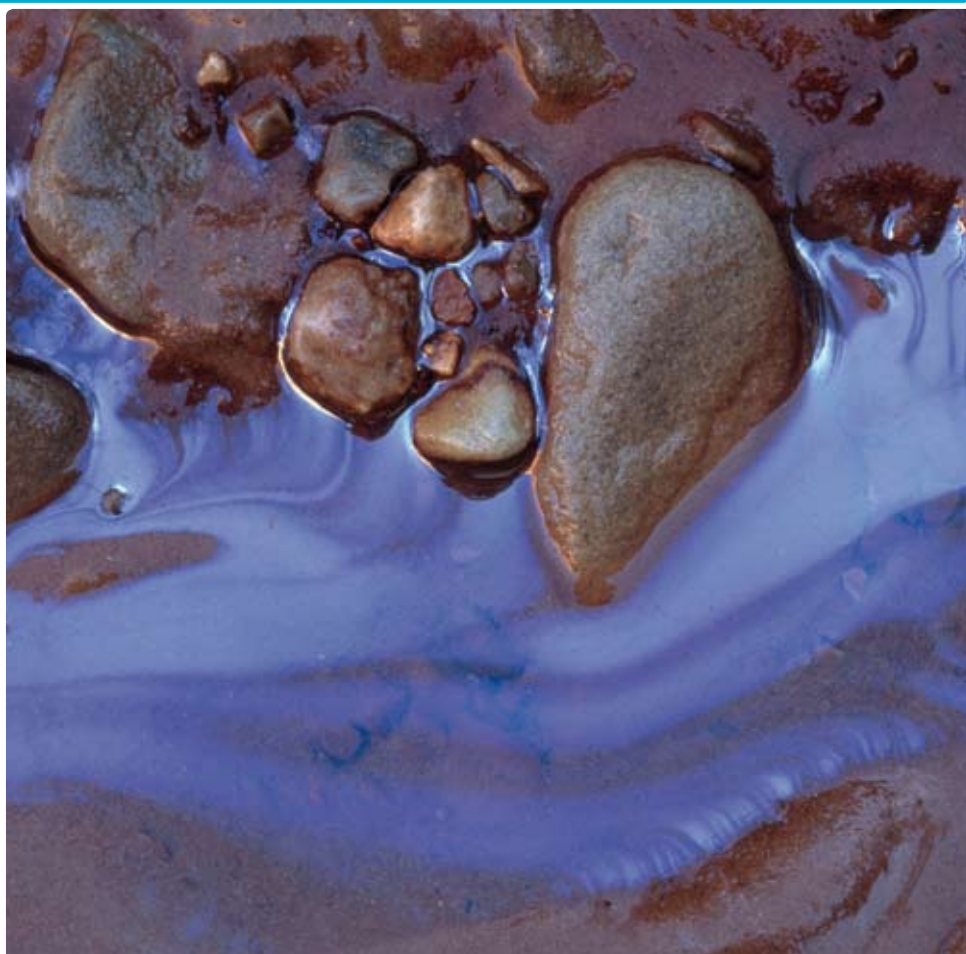

Marpol Annex I

Regulations for the prevention
of pollution by oil

A selection of articles previously
published by Gard AS



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Introduction

The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes and has been updated by amendments through the years.

The Convention includes regulations aimed at preventing and minimising pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes:

Annex I Regulations for the Prevention of Pollution by Oil

Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk

Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form

Annex IV Prevention of Pollution by Sewage from Ships

Annex V Prevention of Pollution by Garbage from Ships

Annex VI Prevention of Air Pollution from Ships

States Parties must accept Annexes I and II, but the other Annexes are voluntary.

Annex I: Prevention of pollution by oil

The 1973 Convention maintained the oil discharge criteria prescribed in the 1969 amendments to the 1954 Oil Pollution Convention, namely, that operational discharges of oil from tankers are allowed only when all of the following conditions are met:

- the total quantity of oil which a tanker may discharge in any ballast voyage whilst under way must not exceed 1/15,000 of the total cargo carrying capacity of the vessel;
- the rate at which oil may be discharged must not exceed 60 litres per mile travelled by the ship; and
- no discharge of any oil whatsoever must be made from the cargo spaces of a tanker within 50 miles of the nearest land.

An oil record book is required, in which is recorded the movement of cargo oil and its residues from loading to discharging on a tank-to-tank basis.

In addition, in the 1973 Convention, the maximum quantity of oil permitted to be discharged on a ballast voyage of new oil tankers was reduced from 1/15,000 of the cargo capacity to 1/30,000 of the amount of cargo carried. These criteria applied equally both to persistent (black) and non persistent (white) oils.

The 1973 Convention recognised the "load on top" (LOT) system which had been developed by the oil industry in the 1960s. On a ballast voyage the tanker takes on ballast water (departure ballast) in dirty cargo tanks. Other tanks are washed to take on clean ballast. The tank washings are pumped into a special slop tank. After a few days, the departure ballast settles and oil flows to the top. Clean water beneath is then decanted while new arrival ballast water is taken on. The upper layer of the departure ballast is transferred to the slop tanks. After further settling and decanting, the next cargo is loaded on top of the remaining oil in the slop tank, hence the term load on top.

An important feature of the 1973 Convention was the concept of "special areas" which are considered to be so vulnerable to pollution by oil that oil discharges within them have been completely prohibited, with minor and well defined exceptions. This involves the fitting of appropriate equipment, including an oil discharge monitoring and control system, oily water separating equipment and a filtering system, slop tanks, sludge tanks, piping and pumping arrangements.

Secondly, new oil tankers are required to meet certain subdivision and damage stability requirements so that, in any loading conditions, they can survive after damage by collision or stranding.

The Protocol of 1978 made a number of changes to Annex I of the parent convention. Segregated ballast tanks

(SBT) are required on all new tankers of 20,000 dwt and above. The Protocol also required SBTs to be protectively located that is, they must be positioned in such a way that they will help protect the cargo tanks in the event of a collision or grounding.

Another important innovation concerned crude oil washing (COW), which had been developed by the oil industry in the 1970s and offered major benefits. Under COW, tanks are washed not with water but with crude oil the cargo itself. COW was accepted as an alternative to SBTs on existing tankers and is an additional requirement on new tankers.

Drainage and discharge arrangements were also altered in the Protocol, regulations for improved stripping systems were introduced.

Some oil tankers operate solely in specific trades between ports which are provided with adequate reception facilities. Some others do not use water as ballast. The TSPP Conference recognized that such ships should not be subject to all MARPOL requirements and they were consequently exempted from the SBT, COW and CBT requirements. It is generally recognised that the effectiveness of international conventions depends upon the degree to which they are obeyed and this in turn depends largely upon the extent to which they are enforced. The 1978 Protocol to MARPOL therefore introduced stricter regulations for the survey and certification of ships.

The 1992 amendments to Annex I made it mandatory for new oil tankers to have double hulls – and it brought in a phase-in schedule for existing tankers to fit double hulls, which was subsequently revised in 2001 and 2003.

A revised Annex I was adopted in October 2004 and entered into force on 1st January 2007 and provides a more user friendly and simplified Annex I.

Shipping industry guidance on the use of Oily Water Separators Ensuring compliance with MARPOL

The global shipping industry is committed to a zero tolerance approach to any non-compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL). In particular, the industry is committed to strict adherence to International Maritime Organization (IMO) requirements concerning the use of Oily Water Separators and the monitoring and discharge of oil into the sea.

National maritime authorities with responsibility for the environmental protection of their coastlines quite properly adopt a similarly strict approach to the enforcement of MARPOL.

Companies and seafarers need to understand that even the most minor violations of MARPOL will be detected by the authorities. In addition to large fines amounting to literally millions of dollars, both company management and seafarers can be liable to criminal prosecution and imprisonment for any deliberate violation of MARPOL requirements or falsification of records.

The following industry guidelines are intended to highlight some of the issues concerning the use of oily water separators (OWS) and to remind company management, and shipboard personnel, how they can act to prevent MARPOL infringements.

Ship operators have ultimate responsibility for establishing a compliance culture within their companies, and it is important that every effort is made to ensure that seafarers do not engage in any illegal conduct in the mistaken belief that it will benefit their employer. Every seafarer should be made fully aware of the severe legal consequences, both for the company and the seafarers themselves, of even minor non-compliance with environmental rules.

At first glance, the following advice may appear to contain nothing new; for the vast majority of shipping companies, these are issues which should already be fully addressed by their Safety Management Systems, as required by the International Safety Management (ISM) Code. Nevertheless, it is strongly recommended that the following guidance is carefully analysed by company management, and that a firm message of zero tolerance of non-compliance with MARPOL is circulated as widely as possible amongst seagoing personnel.

Ensuring compliance with MARPOL

Shipping companies should:

- Ensure that the ISM Safety Management System* is used to good effect
- Conduct internal and external audits on environmental compliance and act upon the findings, in full compliance with the ISM Code
- Require accountability on environmental compliance issues within the shore-side and shipboard management team
- Minimise waste leakage through good housekeeping and maintenance
- Make the best use of the available technology
- Establish a realistic operating budget for environmental compliance
- Provide meaningful and targeted training in environmental awareness and MARPOL compliance
- Provide specific and targeted training in oily water separator (OWS) operation
- Recognise the value of open communication with the crew
- Verify compliance through appropriate physical inspection, operational tests and document analysis
- Reward compliance and address potential non-compliance.

Technical approaches

General

Shipping companies should consider:

- Installing the latest equipment, or an upgrade in capability, if existing equipment does not perform to requirements
- Upgrading related equipment to minimise the production of waste
- The advantages of the pre-processing of waste
- Increasing tank capacity for waste where possible
- Modifying systems to facilitate in-port testing of treatment systems

- Implementing the periodic testing of the oil discharge monitoring equipment
- The use of cleaning agents consistent with equipment capability.

Control devices

Shipping companies should consider:

- Fitting uniquely numbered environmental tags on flanges to prevent unauthorised by-passing
- Using seals on overboard valves and cross-connections
- Installing strategically placed placards concerning compliance with MARPOL on board ship
- Fitting surveillance cameras
- Using tamper resistant recording systems, alarms and printouts to verify equipment operation, valve position, flow, OWS ppm, incineration, ship's position etc.
- Installing locked boxes or cages over monitoring equipment
- Fitting interlocks to prevent falsification of monitoring equipment inputs
- Using meters to record equipment running time for all engine room pumps.

Management approaches Role of shore management

Shipping companies should:

- Assign environmental responsibility to senior management and ship superintendents, Masters and Chief Engineers on board ships
- Ensure adequacy of internal audits and implementation of corrective actions
- Review maintenance records and procedures, log entries and handover notes
- Monitor workloads imposed by the operation and maintenance of oily water separators, and assess the impact on crew priorities
- Analyse waste streams to determine content, volume, means and capacity for storage, and estimate realistically the cost of treatment and disposal

- Ensure that the operating budget for waste removal and spare parts is adequate
- Establish comprehensive check lists for inspections/audits
- Verify that tests have been performed to ensure the continued correct operation of oily water separators
- Discuss findings and concerns with all levels of the engineering department
- Explore the potential gains from the installation of new technology.

Training

Shipping companies should:

- Ensure that training, whether shipboard, in-house or from an outside authority, is specific on relevant MARPOL requirements
- Consider supplementary training on MARPOL issues
- Document the training and assess its relevance
- Establish formal policy documents and procedures on MARPOL compliance and training.

Audits and inspections

Shipping companies should:

- Ensure that audits target the correct operation and maintenance of oily water separators
- Ensure that audits are designed to investigate environmental compliance
- Use a comprehensive audit check list and try to investigate beyond the check list
- Conduct unannounced inspections
- Verify:
 - routine maintenance
 - internal record keeping policies
 - the accuracy of records by cross-referencing
 - the progress of training
 - that written policies are available
- Test equipment under routine operational conditions
- Interview crew members
- Produce written audit reports
- Conduct post-audit meetings
- Ensure senior management review the audit reports
- Track audit findings until corrective action is complete.

The role of senior management on board the ship

General

The Master, Chief Engineer and senior officers in the engine department should:

- Promote awareness that any attempt to circumvent MARPOL requirements is totally unacceptable
- Determine the most appropriate procedures to maintain equipment and systems
- Minimise and if possible eliminate leakage through good housekeeping
- Correctly maintain the oil record book (ORB) and the record of discharges of oily water separator effluent into the sea
- Ensure that all routine shipboard and ISM safety meetings include time to discuss a specific agenda item on environmental matters
- Use sign on/off check lists for duty personnel.

Use of Oily Water Separators

The Master, Chief Engineer and senior officers in the engine department should:

- Instruct users of OWS equipment and verify the standard achieved
- Verify that maintenance schedules are being followed
- Ensure that audits include operational tests and a reconciliation of records
- Ensure that scheduled tank sounding logs are maintained and signed for
- Keep records of verification of correct operation through testing at sea
- Ensure that on board spares are adequate to meet the demand
- Create a culture where complacency in operation and maintenance standards is unacceptable.

Record keeping

The Master, Chief Engineer and senior officers in the engine department should:

- Ensure that all entries in the tank sounding log, ORB (oil record book[†]) and incinerator logs are completed by the crew member who performed the task
- Ensure that the ORB is examined and signed by the Chief Engineer and/or the Master
- Require signatures from those conducting overboard discharges and operational tests
- Ensure that ship familiarisation procedures verify that company environmental policy and operability of equipment are understood and followed
- Require the status of pollution prevention equipment to be

recorded in the handover notes of the responsible engineer and the Chief Engineer

- Record the independent verification of the correct operation of the oil discharge monitoring equipment
- Raise awareness of the need for an open chain of command and accurate record keeping that can be substantiated with Port State Control.

Tracking waste and maintenance

The Master, Chief Engineer and senior officers in the engine department should:

- Conduct analyses of waste disposal records
- Compare waste output to volumes purchased
- Compare waste disposal records with maintenance records
- Remove disincentives to off-loading waste, or purchasing additional material or parts related to safety and the environment.

The following publications may also be helpful:

*Guidelines on the Application of the IMO International Safety Management (ISM) Code (published by ICS/ISF)

†Guide for Correct Entries in the Oil Record Book (published by Intertanko).

Shipping industry guidance on the use of Oily Water Separators
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An electronic version of this leaflet is available at
www.marisec.org/ows

New Pollution Regulations in China - FAQs

Gard News 197,
February/April 2010

Gard News presents answers to some frequently asked questions regarding the new Chinese regulations on prevention and control of marine pollution.

On 9th September 2009 the Chinese State Council of the People's Republic of China (PRC) promulgated the Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships (Regulations). The Regulations will come into effect on 1st March 2010.¹

General

What is the purpose of the Regulations?

The Regulations are intended to establish comprehensive rules governing oil pollution prevention, response and clean-up within PRC waters, updating/replacing the previous pollution regulations promulgated on 29th December 1983.

What is the scope of the Regulations?

The Regulations cover any ship-sourced pollution and any ship-related operation that causes or may cause pollution damage in the internal waters, territorial waters and the contiguous zones, exclusive economic zone and continental shelf of the PRC and all other sea areas under the jurisdiction of the PRC (wherever the pollution occurs).

What do the Regulations cover?

The Regulations cover a wide range of issues, such as the discharge and reception of oil pollutants; dumping of waste and permissions for dumping; oil pollution response planning; oil spill clean-up arrangements reporting and emergency handling of pollution incidents; investigation and compensation of pollution incidents; supervision of the loading, lightening and discharging of polluting hazardous cargoes; and penalties for contravening any requirement of the Regulations.

The Regulations also introduce a compulsory insurance regime for certain vessels and a domestic ship oil pollution compensation fund.

Pollution liability

Under the Regulations who is liable for pollution damage?

The party causing the pollution to the marine environment is liable for the pollution damage. If the pollution was wholly caused by intentional act or fault of a third party, then that third party is liable (Article 50).

Do the Regulations provide for a limit of liability?

Yes. The limit of liability is calculated according to the PRC Maritime Code, which follows the 1976 Limitation Convention in respect of any international ships of 300 GT or above. However, as to marine pollution within Chinese territorial waters caused by ships carrying persistent oil in bulk (including persistent hydrocarbon mineral oil), the limitation of liability is calculated pursuant to the relevant international conventions ratified or acceded by China (Article 52), including the 1992 CLC Convention and the 2001 Bunker Convention.²

Do the Regulations provide for any defences to/exemptions from pollution liability?

Yes. Under Article 51, a party is exempt from liability for pollution if the pollution damage was wholly caused by (1) war; (2) natural disaster of an irresistible nature; or (3) negligence/wrongful act of government authority in exercising its responsibility for the maintenance of lights or other navigational aids in the exercise of that function and if the pollution could not be prevented even though timely and proper measures were taken.

Compulsory Insurance

Why is compulsory insurance required?

The PRC is a state party to the 1992 CLC Convention and the 2001 Bunker Convention. The liability provisions in the Regulations largely mirror those contained in those Conventions, which provide for strict liability of the owner³ for pollution damage arising from the carriage of persistent oil by sea (1992 CLC) and strict liability of the shipowner⁴ for pollution damage caused by spills of bunker oil (2001 Bunker Convention). These Conventions make insurance mandatory for certain vessels.

Who do the Regulations require to maintain compulsory insurance?

The owner of any ships (except ships of less than 1,000 GT and not carrying oil cargo) navigating in the PRC governed waters is required to maintain insurance for oil pollution liability or to have other appropriate financial security in place in accordance with the relevant subsidiary legislation/byelaw to be promulgated by the PRC government (Article 53).

Under the Regulations who is an approved insurer in the PRC?

The Maritime Safety Administration (MSA) will determine and publish a list of competent insurance providers that will be qualified to provide the necessary insurance cover. Gard currently is on a list of approved insurers issued by MSA.

What amount of insurance is required for the compulsory insurance?

Not less than the limitation as calculated under the PRC Maritime Code, which adopts the same calculation as under the 1976 Limitation Convention,⁵ or in accordance with the relevant international Conventions which PRC adopted or ratified (for example, the 1992 CLC and the 2001 Bunker Convention) (Article 53).

Ship Oil Pollution Compensation Fund

The Regulations refer to a "Ship Oil Pollution Compensation Fund" - What is it?

A domestic fund to which receivers (and their agents) of persistent oil cargoes transported by sea to a Chinese port must contribute (Article 56). Note that PRC is not a state party to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

How will the Ship Oil Pollution Compensation Fund be administered and used?

This is not included in the Regulations, but the detailed rules as to how the funds are collected, used and administered will be jointly formulated by the Finance Department and the Administrative Department of

Communications of the State Council (Article 56).

Clean up contracts/Clean-up costs
The Regulations require that clean-up contracts be agreed in advance of entering a PRC port - who is required to enter into the contracts?

The operator of any ship carrying polluting and hazardous liquid cargoes in bulk and any other vessel above 10,000 GT is required to have a pollution clean-up contract with an approved pollution response company (Article 33).

To whom do the Regulations refer when they say "operators"?

Article 33 of the Regulations does not define "Operator".

What companies has the MSA approved as local clean-up contractors with whom an operator must contract?

The MSA currently is considering contractors for approval in various Chinese ports and it is expected that in the near future further legislation will be issued concerning approvals. It is expected that the legislation will cover both the terms of the clean-up contracts into which operators must enter and the MSA-approved contractors.

Indications are that there will be four "levels" of contractors based upon the capability of the contractor to respond to spills of different size and extent. The additional implementing legislation is expected to clarify with which contractors, in terms of "levels", operators will need to contract (for example with reference to operators' type of trade and size of vessel operated).

Do the Regulations set a deadline by which operators who call at a PRC port must contract with an approved clean-up contractor of the appropriate "level"?

The clean-up contracts are required to be in place prior to the vessel's operations or entry into/departure from the Chinese ports (Article 33). Because the Regulations will become effective on 1st March 2010, any vessel intending to call at China should conclude the contracts before 1st March 2010.

If after 1st March 2010 a ship of an operator calls at a PRC port without previously having concluded the clean-up contract, do the Regulations provide for any "punishment" of the operator?

Yes. The operator will be subject to a fine of between RMB 10,000 (about USD 1,465) and RMB 50,000 (USD 7,325) (Article 68).

Generally, a breach of the Regulations can result in one of a series of possible fines. Depending upon the facts, the fines can range from RMB 10,000 (about USD 1,465) to RMB 500,000 (about USD 73,250). Logically, each breach may result in a fine.

Under the Regulations, who is liable for any clean-up costs incurred by the MSA?

Where the MSA has taken action in response to pollution, before the ship involved in a pollution incident may sail the ship must pay the MSA's costs or must provide a relevant financial guarantee (Article 42). The MSA may detain the vessel while investigating any such incident.

What type of guarantee is required? An IG Club LOU? An LOU/guarantee from a PRC insurer? A PRC bank guarantee?

This is unknown at the moment, but the International Group of P&I Clubs (IG) is seeking clarification.

On board emergency response plans

Do the Regulations require any form of emergency response plans?

Shipowners, operators or managers must maintain emergency response plans for the prevention and control of marine pollution, and have the plans approved by MSA (Article 14). It is generally understood that a MARPOL SOPEP (Shipboard Oil Pollution Emergency Plan) will be sufficient to meet this requirement.

Others

What is the ship's report obligation set out in the Regulations?

If a ship has caused or will probably cause pollution within the territorial waters of the PRC, or beyond the territorial waters of the PRC but that has caused or may cause pollution to the territorial waters in the PRC jurisdiction, the incident must be reported to the local MSA. The accident report should contain the following information (Articles 37 and 38):

- The ship's name, nationality, call sign or number;
- The name and address of the owner, operator or manager of the ship;
- The time, place, weather and sea condition of the accident;
- Preliminary determination of the cause of the accident;
- The type, quantity, stowage location, etc., of the pollutant on the ship;
- The degree of the pollution;

- The pollution control and/or pollution removal measures adopted and to be adopted and the situation of the control of the pollution and any salvage requirements; and

- Any other information as required by the Administrative Department of Communications of the State Council.

Will the PRC be providing any explanations of the Regulations and details as to how they will be implemented?

The IG understands that the MSA is drafting further implementing legislation to give effect to a number of the provisions contained in the Regulations. The further legislation is expected to include information concerning the requirement to contract with approved pollution response companies and the requirement to maintain insurance or other financial security to cover liabilities arising from oil pollution damage. It is expected that when further details and/or legislation is issued Gard and other IG Clubs will as appropriate issue further circulars.

Whom should I contact if I have further queries?

Any further enquiries can be sent to GardNewsEditor@gard.no.

Footnotes

- 1 See Gard's Member Circular No. 7/2009, Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships.
- 2 See also comments to the question "Why is compulsory insurance required?", below.
- 3 Defined as the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.
- 4 Defined as including the registered owners, bareboat charterers, managers and operators.
- 5 See comments to the question "Do the Regulations provide for a limit of liability?", above.

US law – Criminal prosecutions of MARPOL violations

The Second Circuit Court of Appeals confirms US jurisdiction to criminally prosecute ship operators for crew violations of MARPOL.

The Second Circuit Court of Appeals has joined the Fifth Circuit Court of Appeals in confirming that shipowners and operators may be criminally prosecuted and held vicariously liable for entering US waters with false entries in the Oil Record Book (ORB) designed to hide discharges of waste oil in violation of MARPOL. On 20th January 2009 a three-judge panel ruled in the case *United States v. Ionia Management*¹ that the Act to Prevent Pollution from Ships (APPS), the US version of the MARPOL Convention, "imposes a positive duty on the subject ships to ensure that their oil record books are accurate (or at least not knowingly inaccurate) upon entering the ports or navigable waters of the United States".

Ionia was the ship manager of the tanker KRITON, which delivered oil products to various US east coast ports. At the trial the jury found that the engine room crew under the direction of the chief engineers routinely discharged waste oil into international waters by bypassing the oily water separator and made entries in the ORB to make it appear that the vessel was in compliance. The jury also determined that senior engine room personnel obstructed justice by directing junior crew members to lie to the Coast Guard and by destroying evidence. The company was convicted under the rule of vicarious criminal liability, meaning that there was no proof required that the company management was aware of any of the criminal activity on board the vessel.

The Second Circuit followed the Fifth Circuit's decision in *United States v. Jho*² in holding that the crime under APPS is the failure to "maintain" the ORB.³ Both courts found that maintenance of the ORB implies a duty upon a foreign flag vessel to ensure that the entries are accurate and that this is a continuing duty that applies when the vessel calls at US ports. The MARPOL treaty provides for flag state jurisdiction for compliance within

international waters. The court ruled that because the failure to maintain the ORB occurs within US waters, the US as port state has jurisdiction to prosecute the company and the individuals and that there is no positive duty under international law for the port state to refer the matter to the flag state.

Vicarious corporate liability is here to stay

The Second Circuit also considered arguments made by amici curiae⁴ that urged the court to review the standards for corporate vicarious criminal liability. Vicarious liability of a corporation for acts of its agents or employees is well known within the civil law under the rubric "respondeat superior": let the master answer. It is well established within tort principles that the employer is responsible to pay compensation when an employee's negligence harms another. This is so even when the employee has acted against corporate policy and instructions, as long as the act leading to the injury can be said to be within the employee's scope of employment. Amici attacked the wholesale incorporation of the respondeat superior principle into the criminal law on the ground that APPS did not provide for corporate vicarious liability and, absent specificity in the statute, criminal conviction requires some form of intent at least on the part of the corporate management.

The Ionia jury was instructed that "a corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform". As is the norm in this type of case, the illegal discharges were in contravention of company policy and the management company was not aware of the illegal discharges or the false entries in the ORB. Indeed, as the result of a prior conviction, Ionia had a court-approved compliance plan at the time of the alleged violations.

The Second Circuit affirmed the jury's guilty verdict against the company because the operation of the engine room and record keeping were clearly within the scope of employment for

the engine room crew. Further, based upon expert testimony put forward by the government, the Second Circuit held that the jury was entitled to find that the bypassing and false entries were performed for the benefit of the company based on the extra time and expense involved in properly disposing of the oily waste water.

Finally, the court rejected the argument made by amici that the government was required to prove within its case that Ionia lacked effective policies and procedures to deter and detect the criminal acts of its employees. The court held that the lack of an effective environmental compliance plan is not an element of proof for the government but instead an effective plan is a defence available to the defendant in showing that the crew member at issue was not acting for the benefit of the company and within the scope of employment.

The Federal Appellate system in the United States is divided into twelve Circuits with each of the Circuit Courts of Appeal responsible for interpreting the federal law within the cases brought before it, subject only to review by the Supreme Court.⁵ The Second and Fifth Circuits are considered to be leaders in matters of maritime law and their decisions are frequently followed in the other Circuits deciding similar questions. Thus, it is now without doubt that the owner and operator of any vessel entering US waters with an inaccurate ORB are vulnerable to criminal investigation and, if it is shown that the entries were made for the purpose of hiding discharges in violation of MARPOL, the owner and operator will be subject to criminal prosecution and vicarious liability for criminal acts of crew members resulting in severe fines, onerous probation terms and prolonged disruption of their operations. Lack of knowledge of crew non-compliance is no defence. A jury may consider a company's compliance efforts but, in itself, those efforts are not an absolute defence. Rather, the compliance efforts are facts that may be considered by the jury in determining whether the crew was acting "to benefit" the company. Compliance efforts are also relevant

and mitigating factors considered by a court in determining the proper fine after conviction.

Corporate responsibility for environmental compliance requires a vigorous and proactive approach

For many years, Gard has been warning members about the severe penalties for violations of MARPOL through circulars, Gard News articles and seminar presentations. This risk is not just in the US but includes European port and flag states as well. Despite such warnings by Gard, other Clubs and shipping associations, shipowners and operators continue to be charged for vicarious liability for record keeping violations masking illegal discharges. The US prosecutors offer a reward in the form of a portion of the fine to crew members who report violations. So-called "whistleblower rewards" are now well-known in the crewing community and an undeniable incentive to report wrongdoing not to the company but to the authorities. Gard has repeatedly advised members that in order to minimise risk they must implement a vigorous environmental compliance programme and actively audit compliance aboard their vessels. Gard recommends that members benchmark their programme against the guidance document prepared by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) "Industry Guidance on Environmental Compliance – A Framework for ensuring compliance with MARPOL".⁶ The guidance document includes such topics as management responsibility, corporate and individual responsibility, training, awareness and competence, waste stream analysis and budget, technical equipment, control devices, documentation, internal reporting, external reporting and audit systems. While each company must compose and execute its own environmental compliance programme in conformity with its culture and needs, all programmes should address the components set out in the ICS/ISF framework.

In introducing the framework, ICS and ISF acknowledge the prosecution of companies, particularly in the US, for MARPOL violations and comment that "prosecuting authorities have identified the absence of a systematic approach to identifying and managing compliance with environmental requirements as a common failure". An effective compliance plan with demonstrable crew training in proper use of the pollution prevention equipment and company environmental policy will, as the Second Circuit has indicated in the *Ionia* decision, provide a defence to vicarious corporate criminal liability in rebutting the contention that an illegal discharge and false record keeping were for the "benefit" of the company and within the "scope of employment".

The guidance is relevant to preventing all forms of pollution but can be read in conjunction with the "Shipping Industry Guidance on the Use of Oily Water Separators", also published by ICS/ISF. Gard recommends both documents to members. Both can be found at www.marisec.org/environmental-compliance.

The MARPOL requirement that oily waste water be processed by an oily water separator and discharges properly recorded in an ORB were first implemented in 1983, more than 25 years ago. MARPOL is one of the most widely subscribed international treaties with virtually all of the maritime nations as signatories. The risks of violation of the treaty requirements have been very well publicised by the P&I Clubs as well as other shipping organisations. No prudent ship operator can send ships to sea today without an environmental compliance plan that includes proper crew training and regular audits.

It is important to remember that the mere institution of a compliance plan alone will not exonerate an owner/operator from culpability for MARPOL/ APPS violations. The shipowner and operator must be proactive in ensuring that their environmental polices are

understood and followed by personnel serving aboard their ships. While many ship operations can be sub-contracted, liability for proper performance remains with the owner and operator. Regular, documented on-board audits of shipboard environmental compliance with oversight by senior shore side management are an absolute necessity for effective compliance efforts. Vigorous and proactive management of shipboard environmental compliance will in most instances prevent practices leading to prosecution in the US and, in the event a crew member does violate company policy, will provide the owner and operator with the best defence available under APPS to corporate vicarious liability for the wrongful actions.

Further information

For more information about MARPOL violations in the US readers should refer to:

Gard News articles:

- US law – Oil record book violations (issue No. 192);
- The greening of the deep blue sea – Corporate environmental compliance today (issue No. 191);
- US Coast Guard formal policy on voluntary disclosure of MARPOL violations (issue No. 189);
- Oily water separator bypass in the US – The tables are turned (issue No. 189);
- ICS/ISF guidance on environmental compliance (issue No. 189);
- US Coast Guard new Oil Record Books (issue No. 188);
- MARPOL Annex VI – New risks and challenges for owners and charterers (issue No. 187);
- Waste management – From oily water to plastics (issue No. 186);
- US law – MARPOL violations in the US (issue No. 184);
- MARPOL Annex VI – Solving the low sulphur issue (issue No. 184);
- Recent changes in US regulations (issue No. 182);
- Oil and water don't mix (issue No. 180);

Footnotes

1 United States v. *Ionia* Management S.A., No. 07-5801-cr, 08-1387-cr (2d Cir. 2009), 2009 U.S. App. LEXIS 902 (decided Jan. 20, 2009); 2009 AMC 153.

2 United States v. *Jho*, 534 F.3d 398 (5th Cir. 2008). The *Jho* decision is discussed in the article "US law – Oil record book violations" in Gard News issue No. 192.

3 The Act to Prevent Pollution from Ships is intended to implement the MARPOL Convention but the requirement to "maintain" the ORB is not explicit in MARPOL. Rather, the MARPOL regulations refer to making full and complete entries and keeping the ORB for examination for at least three years following the last entry. See "Implications of the *Jho* Doctrine", by Dennis Bryant, Senior Maritime Counsel, Holland and Knight, August 2008 at www.marinelink.com.

4 *Amicus curiae* (plural *amici curiae*) is a legal Latin term, literally translated as "friends of the court" and refers to someone who volunteers to advocate a position before a court even though they were not a party to the case itself. In the *Ionia* case a number of business and legal defence associations were amici, namely: Chamber of Commerce of the United States, Washington Legal Foundation, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers and New York State Association of Criminal Defense Lawyers.

5 Review by the US Supreme Court is discretionary and relatively rare.

6 See article "ICS/ISF guidance on environmental compliance" in Gard News issue No. 189.

- Pollution – Ships, crews and shore side management face ever-increasing fines and prison sentences (issue No. 175);
- Environmental crime – Myths and reality (issue No. 167);
- The United States Ocean Dumping Act (issue No. 159);
- Discharge of oil prohibited (issue No. 152).

Loss Prevention Circulars:

- New Permit Requirements for Vessels

- US Environmental Protection Agency (No. 16-08);
- US Coast Guard – Formal policy on voluntary disclosure of MARPOL violations (No. 13-07);
- Environmental crime – Oil water discharges off the East Coast of Canada (No. 14-02);
- Environmental Crime – Myths and Reality (No. 05-02);
- Oily water separation and discharge: Discharge of oil prohibited (No. 07-01);
- Oily water separation and discharge:

Risk of oil pollution versus vessel's safety (No. 06-01).

P&I Member Circulars:

- International Convention for the Prevention of Pollution from Ships 73/78 MARPOL – Oily Water Separators (No. 03/05).

ICS/ISF guidance on environmental compliance

Gard News 189,
February 2008/April 2008

ICS and ISF publish guidance for ensuring compliance with MARPOL.

The International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) have published a new leaflet: "Shipping Industry Guidance on Environmental Compliance – A framework for ensuring compliance with MARPOL". The framework is intended to be used by shipowners and operators as a template for review of company environmental compliance programmes. The framework is supported by BIMCO, Intertanko, Intercargo, OCIMF and SIGTTO.

The guidance document includes such topics as management responsibility, corporate and individual responsibility, training, awareness and competence, waste stream analysis and budget,

technical equipment, control devices, documentation, internal reporting, external reporting and audit systems. While each company must compose and execute its own environmental compliance programme in conformity with its culture and needs, all programmes should address the components set out in the ICS/ISF framework.

In introducing the framework, ICS and ISF acknowledge the prosecution of companies, particularly in the United States, for MARPOL violations and comment that "prosecuting authorities have identified the absence of a systematic approach to identifying and managing compliance with environmental requirements as a common failure". The framework is a tool for companies to use in reviewing

their own practices and determine any additional steps that may be needed to ensure compliance with environmental protection obligations. The guidance is relevant to preventing all forms of pollution but can be read in conjunction with the "Shipping Industry Guidance on the Use of Oily Water Separators", also published by ICS/ISF. Gard commends both documents to members. Both can be downloaded at www.marisec.org/environmental-compliance.

Oil and water don't mix

By Captain Helge Oliverson, Project Manager,
Norwegian Training Center, Manila

Gard News 180,
November 2005/January 2006

Introduction

Everybody knows that oil and water don't mix. But in the maritime industry separating oil from water is not a simple matter, although it is a very important one. Any breach of MARPOL 73/78 can have severe consequences for the shipowner and the officers and crew involved. Failing to separate one from the other could pollute the world's bodies of water and cost shipowners and responsible officers a lot of money in fines, or even land them in jail.¹ In tonnage terms, the most important pollutant resulting from shipping operations is oil.

The Norwegian Training Center - Manila

(NTC-M), which was established in 1990 to provide relevant training to Filipino seafarers serving on its members' ships, has joined with Hoegh Fleet Services to create a five-day course entitled "Bilge Water/Waste Oil Operational Management". The course is supported with training material from Gard.

Contents of the course

The course is designed for marine deck officers and marine engine officers and provides participants with an effective refresher on waste oil management. Aside from reminding them of the details of bilge water and waste oil management, the course aims to heighten their awareness of the need to be responsible officers, especially in dealing with waste matters that can pollute the sea. This is in line with NTC-M's key objective to improve the human factor in ship operations.

The contents of the course are as follows:

Theoretical upgrading and awareness

The course covers applicable marine pollution laws and regulations extensively. Among the regulations is MARPOL 73/78. This is one of the most important global conventions for the prevention of pollution from ships. It governs the design and equipment of ships, establishes a system of certificates and inspection and requires states to provide reception facilities for the disposal of oily waste and

chemicals. In addition, MARPOL 73/78 requires water from engineering spaces to pass through the oily water separator (OWS) before discharge to meet the requirement of the 15 ppm limit to the oil content of water that can be discharged to the sea. A corollary to the requirement to separate oil from water before discharge is the requirement for all vessels to maintain a sludge tank to store oil wastes. Sludge generated by the OWS must either be incinerated or pumped ashore.

MARPOL 73/78 has six annexes. Annex I details regulations for the prevention of pollution by oil. A very important regulation under this Annex is the requirement that every ship should have an Oil Record Book, which should have accurate and complete daily records of relevant machinery space operations. Proper use of the Oil Record Book is emphasised in the course. Another important regulation covered in the course is the outcome of the 49th session of the IMO Marine Environment Protection Committee (MEPC49).

Practical training and exercises

The course has six practical exercises that take the participants through the stages of bilge water and waste oil management. For this purpose, a laboratory has been set up inside the premises of NTC-M simulating all the components that make up a bilge water/waste oil management system. The laboratory simulates a bilge well where bilge water and waste oil accumulate, an oily bilge holding tank with a separated oil tank containing mostly oil and a bilge holding tank containing mostly water and an OWS that filters oil from water down to less than 15 ppm (the permitted amount of oil in water that can be thrown overboard), a separate oil tank, an incinerator waste tank and a holding tank to port facilities. The exercises focus on the OWS systems and operation. The heart of the system – or, should we say, kidney or liver – is the OWS, which takes care of filtering oil from water. As such, the course stresses that the OWS should not be overly taxed. As a person should not take excessive levels of alcohol so as not to destroy the liver, marine deck officers

or marine engine officers in charge of waste oil management should not feed excessively oily water to the OWS.

The system of waste oil management is designed to separate oil from water in the oily bilge holding tank so that the water fed to the OWS will no longer contain so much oil. However, knowing from experience that this system is prone to malfunction due to human negligence, NTC-M has designed a support sub-system called physical separation, composed of cascading tanks of differing elevations. Using the well-known fact that oil floats above water, the cascading tanks capture water that settles below each tank and forward the oilier portion to the succeeding tanks. Only the water captured in this process is finally fed to the OWS for further filtration. In this way, the effect of possible human negligence is reduced in the process and the OWS is not taxed excessively. This will of course prolong the life of the OWS.

Conclusion

The Bilge Water/Waste Oil Operational Management Course has been warmly received by the industry since it was introduced as a pilot course by NTC-M in 2004. Attendance has always been very good. Now that Bilge Water/Waste Oil Operational Management is offered as a regular course, NTC-M hopes it will be able to contribute to protecting the environment from oil pollution, having a positive impact on the human factor in ship operations.

Environmental Crime – Myths and Reality

Loss Prevention Circular
No. 05-02

Prosecutions of shipowners and crewmembers in the United States criminal courts for environmental crimes have recently hit the headlines in both industry and general news media. The purpose of this article is to explain the background for the spate of high profile criminal investigations and prosecutions as well as to explode the myths that may lead some in the industry to wrongly conclude that they have little or no exposure for similar treatment.

The regulatory background

To put it in simple terms, the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) provides that oily water discharge from bilges shall not exceed 15 parts per million (ppm) unless the discharge is necessary for securing the safety of the ship or saving life at sea. MARPOL 73/78 further requires ships to process oily water in an oily water separator and to monitor the discharge with detection and an alarm system that shuts off discharge in the event it exceeds 15 ppm while triggering an alarm.

MARPOL 73/78 further requires the ship's crew to maintain an Oil Record Book (ORB) and to record discharges, both those meeting the 15 ppm requirement and those exceeding it (for example, in an emergency). Port State control authorities may inspect the ORB. In the United States, the United States Coast Guard (USCG) does port State inspections for compliance with MARPOL 73/78. MARPOL 73/78 is implemented in the various signatory countries by domestic legislation. MARPOL 73/78 regulations call for administrative proceedings and fines and penalties for violation. It is the flag state that administers the penalty provisions under domestic regulations.

Shipboard practice

Oily water that collects in the engine room bilges was often pumped overboard in international waters before MARPOL 73/78 became effective in 1983. At the time of implementation, the technology for oily water separation was less effective than it is today. The bilge tank capacity tended to be small and the OWS were inefficient in processing the oily water.

Since the MARPOL requirements have been in force and to save themselves time and trouble in dealing with the less effective older units, some creative engineering crewmen have devised ways to circumvent the OWS or the monitoring equipment in order to discharge oily water overboard. According to government allegations in the US investigations, this has been done by either piping around the OWS or flushing the oil content meter with seawater to push more water through the meter and fool it into registering oil content at less than 15 ppm. This is not to suggest that many crewmen fail to comply with environmental requirements. But for those few that do, the sanctions for the shipowner or operator can be devastating.

Myths, Dangerous Half Truths and Painful Reality

We now turn to some widely held but incorrect assumptions about violation of MARPOL regulations with respect to the current criminal prosecutions in the United States for environmental crimes.

Myth: "Violation of MARPOL in International Waters is of interest only to the Flag State."

It is true that the convention contemplates that enforcement actions will be taken by the Flag state, that is, where the vessel is registered. This does not mean, however, that the authorities in the United States are uninterested in policing worldwide violations of international pollution laws. Read on.

Myth: "The United States has no jurisdiction to prosecute without pollution in U.S. waters."

Wrong. Recent criminal prosecutions have not involved pollution of US waters. MARPOL 73/78 requires that entries be made in the ORB for discharges. The ORB is routinely reviewed during port State inspections conducted by the USCG. If the crew has bypassed the OWS or flushed the sensors and discharged oily water overboard but recorded the discharges as "clean" the company may be charged with violation of US law for presenting a materially false document to a US authority. This is a crime under general criminal law in the United States

and provides jurisdiction in the federal criminal court over both the individuals involved and the company.

Myth: "The penalty for bypassing the OWS is a \$5,000 administrative fine under MARPOL"

This is a dangerous half-truth. In the United States the crime charged is presenting a false ORB and the maximum fine against the company under the US criminal sentencing guidelines is \$500,000. This fine may be doubled if the violation resulted in financial gain for the company. For example, Carnival Cruise Line in a plea agreement recently accepted an \$18,000,000 fine for presenting false ORBs on six of its ships.

Additionally, crew involved may be prosecuted individually and put in jail! The maximum penalty upon conviction for individuals is five years incarceration and \$250,000 in fines.

Myth: "The P & I Club will reimburse the fine under its cover for pollution"

Gard's Protection and Indemnity cover, like that of all Clubs in the International Group, is a named risk cover. The risks covered are set out in Gard's Statutes and Rules. Gard's Rule 38 – "Pollution" expressly excludes fines. Gard's Rule 47 – "Fines" covers fines and penalties imposed upon a Member by any court tribunal or other authority of competent jurisdiction for or in respect of the accidental escape or discharge of oil. Intentionally bypassing the OWS or flushing the sensors and pumping oily water overboard is not considered by the Association to be accidental.

Gard's pollution and fines rules were clarified and narrowed in policy year 2000 in line with a model rule adopted by the International Group of P & I Clubs. Thus, under the current rules, no Club in the International Group covers fines as a matter of right for intentionally pumping oily water containing 15 ppm overboard or for falsification of an Oil Record Book.

A final word of Warning

The USCG has intensified its focus on Oily Water Separators and Oil Record Books, specifically looking for violators.

The USCG inspections involve both large operators and single ship companies. USCG Inspectors aided by other state and federal agencies look for evidence of bypass piping, including wear patterns indicating removal of fittings or even fresh painting to cover wear patterns. If there is suspicion of bypassing, the crew may be detained for questioning under Grand Jury Subpoena, the ship records and equipment will likely be seized and vessel detained.

The only effective way to avoid investigation and prosecution is not to violate the MARPOL 73/78

requirements in the first place. That means the company must have a well-monitored environmental compliance program including ship audits, upgrading of equipment as required and training. If caught up in an investigation, the shipowner will need to immediately obtain advice of qualified criminal counsel. One of the biggest mistakes that can be made is to destroy or conceal evidence in a criminal investigation for to do so will bring additional criminal charges of obstruction of justice.

The single most frequent port State detention deficiency item for vessels

covered by Gard is the result of oily water separation, overboard discharge and oil record book anomalies. As a result, Gard released two loss prevention circulars on environmental and safety concerns regarding oily water separation (Loss Prevention Circular 05-01 and 06-01). Please see the Gard website at www.gard.no for copies of these circulars.

Oily water separation and discharge: Risk of oil pollution versus vessel's safety

Loss Prevention Circular No. 06-01

Introduction

As part of our overall loss prevention activities, Gard Services regularly monitors port State detentions from the Paris Memorandum of Understanding (MoU), Tokyo MoU and United States Coast Guard (USCG). In 2000, there was a total of 131 detentions of ships entered in the Gard P&I portfolio. Oily water separation and discharge related items were the single most frequent deficiency cited. Similar results were also observed in the detention of vessels entered in the Gard Marine portfolio for 2000 (147 detentions and the second most cited deficiency). We are not satisfied with these figures. As a result, we believe it is necessary to revisit this issue for Gard Services Members and Clients.

The article "Discharge of oil prohibited", which appeared in Gard News issue No. 152 (December 1998/February 1999) (also reproduced as Gard Loss Prevention Circular 07-01) warned against the implications of pumping oil and oily bilge water overboard, and was followed by another article on the same topic in Gard News issue No. 155 (September 1999/November 1999), titled "Risk of oil pollution versus vessel's safety". The

present circular contains a summary of that second article, which we hope will assist Members and Clients in staying vigilant in light of the potential costs associated with an incident, fines, port State detentions and the safety implications related to oily water separation and discharge.

Environmental and safety matters

During condition surveys of vessels, the Association normally notes that Masters and Chief Engineers enforce a strict policy regarding pumping of bilge water, in order to avoid any oil spill. Port State control officers inspect engine room pipelines and oily water separating equipment to ensure compliance with the MARPOL regulations. Fines and detentions are not popular. To guard against accidentally pumping overboard engine room bilge water which has not been cleaned, shipside valves are sometimes chained and padlocked or lines are even blind flanged, all in an effort to reduce the risk of an oil spill. At times, such remedies are requested by port State control officers, and are willingly installed by the ship's crew.

All efforts to avoid polluting the seas and coastal areas are appreciated,

of course, but it should be noted that there is also an overriding issue involved: the safety of the vessel in an emergency situation. In case of water ingress and flooding of the engine room or the cargo holds, the vessel needs a fully working and readily operational bilge pumping system. Therefore, the overboard connections from the bilge pump should not be blocked by locked hand wheels, blank flanges or by removed spool pipes. It should be noted that SOLAS, Chapter II-1, Regulation 21, as well as relevant Class rules, require a vessel to be equipped with a bilge pumping system that should be operational under all practical conditions. In case of a sudden flooding of the engine room, the bilge pumping system must be able to be started without undue delay.

So is there a problem in complying with both MARPOL and SOLAS? Not really, if one keeps in mind that the MARPOL 73/78 regulations are meant for non-emergency operational situations. In Annex I of MARPOL 73/78, Regulation 9 deals with the control of oil discharge and Regulation 10 covers methods for prevention of oil pollution from ships within a special area, but Regulation 11 provides exceptions from both, in the



Oily water separator.



case of an emergency. The exceptions under Regulation 11 are the following: "Regulation 9 and 10 shall not apply to:

Oily water separator

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur."

In view of Regulation 11, MARPOL and SOLAS are not in conflict with each other and it is important that all authorities inspecting a vessel for compliance with MARPOL understand this.

Blocking the overboard pipe from the main bilge pumps should never be done, as this would seriously affect the safety of the vessel and would be in conflict with SOLAS and Class requirements. In the interest of the coastal States, at times port State control officers seem to pay more attention to the MARPOL regulations than to the corresponding SOLAS regulations. A conflict of interest may occur when the bilge pump of a vessel is also used for ballast water and in some cases even for emptying a sump tank. Oil remains in the pipeline may not be large in quantity, but will put harbour authorities on full alert if inadvertently pumped overboard with ballast water. In some such cases port State authorities have required blanks inserted in the pipeline or the locking of valve handles. This may secure against oil pollution, but as pointed out, may

Overboard line for cleaned bilge water from the oily water separator. The hand wheel has been chain locked by the vessel's Chief Engineer at the request of port State control authorities. A seal has also been fitted to the chain.



Overboard valve for main bilge/ballast line. The hand wheel has been fitted with a chain and padlock at the request of the port authorities. This is not a good practice as the vessel's bilge pumping system is no longer readily operational.

reduce the safety of the ship in an emergency situation.

On the other hand, there should be no excuse for pumping oil overboard through pumps serving a dual purpose. It should always be ensured that all pipelines, whether used for clean bilge or ballast water, are free from oil contamination prior to using the bilge/ballast pumps for direct overboard discharge. Such verification should be included in the operational procedures.

It should also always be clear to a vessel's crew that sludge tanks, waste oil tanks and oil drain tanks are not allowed to have any direct connection overboard (MARPOL 37/78 Annex I, Regulation 17(3)), and that the content of such tanks must be discharged to reception facilities ashore through the standard discharge connection required (MARPOL 37/78 Annex I, Regulation 19), if not disposed of in an incinerator on board. If required by harbour authorities, pipelines from such tanks may be closed off to prevent oil pollution, but not the overboard pipeline from the main bilge pump.

In case Members face conflicting requirements from various authorities concerning the issues addressed above, they should always consult the vessel's Class Society, which has approved the vessel's bilge pumping system and normally has also issued the International Oil Pollution Prevention Certificate. In any case, all changes to a vessel's bilge system should always be informed in advance to the vessel's Class Society, for proper approval.

MARPOL Annex I new Chapter 8 - STS operations

**Gard News 200,
November 2010/January 2011**

Amendments to Annex I of MARPOL to prevent marine pollution during some ship-to-ship (STS) oil transfer operations are expected to enter into force on 1st January 2011.

Tankers of 150 GT and above involved in STS operations will be required to have on board by the date of the first periodical survey after 1st January 2011 (but not later than 1st April 2012)

an STS operations plan approved by the ship flag administration, describing how STS operations are to be conducted.

Further information is available from www.imo.org.

The finer points of oil pollution

Gard News 157,
March/May 2000

Fines are monetary impositions made by a competent court, tribunal or authority in respect of breach of, or non-compliance with, any law or regulation. Whether the fine is referred to as administrative, civil or criminal, all are penal in nature, irrespective of the exact words used.¹ A penalty is generally defined as punishment for an offence, but given the level of fines and attitude to their defence in some countries, there is sometimes a feeling that other motivations may exist.

Whilst a fine can also act as a necessary and important deterrent, fairness is sometimes brought into question when it is apparent that certain cases are being made examples of, perhaps for political reasons and/or because this is expected in an ever more environmentally friendly world. Of course, in some cases the authorities take a fair and reasonable approach. This approach, however, varies enormously, irrespective of the facts of a case. In a recent case, where there was quite extensive oil pollution, a harbour master imposed an on-the-spot

fine of a few thousand US dollars on the Master.² In the US prosecutions are often complicated and protracted,³ with large amounts involved. In Italy a legal peculiarity permits payment of what can best be described as a donation to avoid prosecution.

P&I COVER

It is important to understand that the Association's cover for fines is strictly controlled, and in addition to the limitations set out in the Statutes and Rules,⁴ a Member's conduct is, in each case, closely considered. Clearly, there is an important duty on any organisation not to condone or encourage the breaking of laws, but on the other hand, most pollution incidents are not caused intentionally, the majority result from human error.⁵

STRICTER ATTITUDE

Oil pollution fines are no longer limited to the offence of the spill itself, and as will be discussed below, in some jurisdictions fines now exist for failed and/or late notification, and non co-operation with the authorities. In

addition to this wider scope, pollution fines have recently been the subject of a stricter attitude in many countries.

In 1997 Greece increased its maximum fine for polluting the marine environment and breaching related legislation to GRD 250 million (around USD 738,400) in serious cases.

In September 1997 the UK increased its maximum fine for the offence of discharging an oily mixture into the sea (which is unlimited if the case is referred to a higher court) five fold from GBP 50,000. A recent case resulted in the maximum level of GBP 250,000 being imposed.⁶

In 1997 the US imposed punitive damages of USD 5 billion in respect of the EXXON VALDEZ spill (currently under appeal) and more recently penalties of USD 9.5 million for a spill off Rhode Island in January 1996.

More often than not, the fine itself is only part of the actual cost involved. Security demands to cover possible



Factual and accurate reporting is very important.

prosecutions are now commonplace, even for the smallest of spills, and often owners are faced with non-negotiable demands for cash security or bank guarantees. Such demands are particularly costly when they cause the ship to be delayed. Delays can also result from on board investigations by the authorities, who have detention powers available under national laws and relevant international conventions. There is also the cost of attending any legal proceedings, which may involve crew witnesses and invariably lawyers. If the court imposes a fine, the guilty party may also be faced with having to pay the costs of the authority bringing the prosecution. One should also not forget the hidden cost of possible adverse publicity.

Whilst the Association is always on hand to give advice, and where appropriate, assistance, a general guide is outlined below as to what should be borne in mind in terms of potential pollution fines and when a spill occurs or is alleged to have originated from an owner's vessel.

NOTIFICATION

No matter how small the spill, the applicable and designated coast state authorities must be notified at the earliest opportunity.⁷ Failed or late reporting will often result in a larger fine⁸ and polluters can no longer expect not to be caught. Increased co-operation between states with regard to surveillance⁹ and improved "fingerprinting" techniques are just two of the factors involved in the increased number of prosecutions being witnessed world-wide. The recent US case concerning the vessel *COMMAND* illustrates the lengths the US authorities are now prepared to go to seek justice. After fingerprinting the vessel's oil to an illegal discharge in San Francisco Bay in September 1998, the vessel was pursued by a US aircraft and Coast Guard cutter and boarded in Panama. Penalties of USD 9.3 million were subsequently imposed.

There is also the obligation on ships and offshore units to report, without delay, any observed event at sea involving a discharge of oil or the presence of oil.¹⁰ It should be noted that some legislation permits prosecution of both the Master and owner for failure to notify. This should be borne in mind particularly by Masters who might assume that their owners would be carrying out the notification (and vice-versa).

Factual and accurate reporting is also very important, primarily so as to avoid misleading the authorities and/or potentially hampering any spill

response efforts. For example, it is often found that the amount of oil spilled is underestimated. There is also a danger the authorities could infer that there is an attempt to cover up the true amount spilled. Care should also be taken to avoid making admissions of responsibility/liability, particularly in circumstances such as collisions or bunkering, where the source of the spill may be uncertain.

CO-OPERATION

Whilst genuine disagreement with the authorities may arise, for example, as to the source of the spill and response methods employed, co-operation should be extended as much as possible. The authorities may also want to investigate the cause of the spill and again co-operation should be afforded. Depending on the circumstances it may be advisable to arrange legal representation for the owner and/or Master/crew. Guidance should be sought from the Association via the local correspondent.

The US Oil Pollution Act of 1990 (OPA 90)¹¹ expressly provides for fines in respect of the failure to co-operate, and in most other states one could expect a larger fine in case of such failure. The appointment of a marine surveyor or spill expert (as the case warrants), with local knowledge and contacts, will likely be of assistance in resolving any disagreement, but if this assistance is not available it may be advisable (depending on the circumstances) to limit action to issuing a protest, so as to avoid hampering the response efforts.

OWN INVESTIGATION AND EVIDENCE

The appointment of a surveyor/expert should be considered to assist in investigating and gathering information at the scene (such an appointment may be inevitable, for example, to explain technical aspects in court). Even if the spill is small, the cost involved is far outweighed by the risk of not obtaining contemporaneous evidence. Such evidence can be vital if it becomes necessary to challenge the evidence of the authorities and to support any defences or mitigating arguments available (see below). One will also appreciate that, following a spill, the Master and crew will likely have many other and often more important things to do than collecting evidence. Inevitably, however, there will be occasions when a surveyor can not attend before evidence may be lost, particularly, for instance, when the vessel spills at sea. In such circumstances the Master and his crew have to act themselves (nothing should pre-empt safety and environmental concerns) and in view of this, the sort of information required is outlined below.



Some of this information should form part of the vessel's standard reporting requirements.

- (1) An estimation of the amount of oil spilled.
- (2) The type of oil spilled.
- (3) The date and time the spill occurred or was first reported on board (and by whom).
- (4) The position of the spill (e.g., latitude and longitude, berth, etc.).
- (5) Details of whom the spill was notified to, by whom, when and with what information.
- (6) A description of any slicks (e.g., direction of movement, length, breadth and appearance) against time.
- (7) Details of any alleged/reported/observed pollution damage.
- (8) Details of any risks of pollution damage (e.g., to beaches, marinas, etc.).
- (9) Details of response and clean-up measures.
- (10) Details of weather and tide/current.
- (11) Details of initial investigations into source and cause.

If the source of the spill is not certain, properly labelled and sealed samples of all oils on board and of the spilled oil should be retained for future comparative analysis. Depending on the circumstances, it may be advisable to have an independent surveyor obtain these samples in the presence of the state authority representative, so as to avoid disputes regarding credibility. Details of other possible spill sources in the vicinity may also be valuable and a record should be made of the type, position, movements, and work of the object observed against time.

To support the information mentioned above, it is important to retain relevant documentary evidence, e.g., ullage/sounding and maintenance records. Photographic and/or video records will also be of significant value.

OIL RECORD BOOKS

It is perhaps worth mentioning here that on numerous occasions during the investigation into a spill, the vessel's log and record books have been found to be incomplete and/or wrong. Being one of the first items to be inspected by the authorities, the Oil Record Book (ORB),¹² is a particular source of errors and omissions. This book is a requirement of the International Convention for the Prevention of Pollution from Ships (Marpol) 1973 (as amended), which most maritime states are parties to.¹³ Most of these states are aware that, under the convention, they have the power to take penal action for any failure to keep the Oil Record Book up to date and accurate. More often than not fines are imposed, sometimes against both the Master and owner, and in many states these are by no means small.¹⁴

LETTERS OF RESPONSIBILITY

Letters of responsibility should not be confused with letters of undertaking, which are offered for the purpose of security. A letter of responsibility is usually sought to obtain at least an admission of liability. Letters of responsibility are becoming a usual requirement of many authorities before releasing the ship/crew, and it is advisable to consult the Association or its correspondents before any signature is added. If the Association is not consulted, potentially damaging admissions may be made. In some circumstances even the most innocent remark can be misconstrued and it

may be very difficult to overcome this at a later date. The same applies to reports made pursuant to internal investigations into a pollution incident. Copies of such reports are often requested by authorities to assist in their investigations, and if these are not disclosed because they contain potentially damaging information, adverse inferences may be drawn.

THE PROSECUTION PROCESS

If an owner is invited to an interview or to assist an authority with its investigations, or if a notification of a prosecution is received, it is advisable to contact the Association and seek immediate legal advice. It may be that the legislation under which the prosecution is being brought is not applicable or that other more lenient legislation is applicable. As previously mentioned, defences are available, and in some cases action may be limited to issuing a formal warning - this was achieved in a recent case handled by the Association in the UK and the Member's proper investigation, co-operation and honesty were key factors. Fines can often be reduced if there are good arguments in mitigation, and if claimed costs can be shown to be unreasonable - it has been known for some authorities to try and recover some costs which are arguably not directly attributable to the spill, like for example the whole cost of a surveillance aircraft's routine flight.

The amount of the fine usually depends on a number of factors, such as the

size of the spill, the type of oil spilled, the environmental sensitivity of the area, the effects of the spill (e.g., environmental/property damage and economic impact), co-operation with authorities, previous offences/spills, investigative efforts, steps taken to prevent re-occurrence, financial hardship, response and clean-up measures, and whether a guilty or not guilty plea is made. Hopefully, there will be a number of these factors, which can be relied upon as mitigation. Exposure may also be reduced, in cases where the owner and Master are prosecuted, if the authorities can be persuaded to drop their prosecution against the Master.¹⁵

To conclude, it is now the case that, with more fines being pursued, more vigorously, and for increasing amounts, an alleged polluter can no longer run the risk of not being caught and/or not being prepared for prosecution. No matter how small the spill or how confident owners may be that they are not to blame, the above steps should be considered. Whilst in some instances the authorities may appear unconcerned, this does not mean they will not pursue a fine when the ship, or her sister, next visits the port. ■

1 See pages 442 and 443 of the Gard Handbook on P&I Insurance.

2 The case was featured in Gard News issue No. 154 in the article "P&I incidents - Bunkering - How not to do it".

3 See for instance "P&I incidents - The criminal aspect of oil spills in the US" in Gard News issue No. 155.

4 Rule 47 has recently been amended and is effective as of 20th February 2000. Under paragraph 1c, the Association shall cover "...fines imposed upon the Member in respect of the accidental escape or discharge of oil or any other substance, provided that the Member is insured for pollution liability by the Association under Rule 38, and subject to the applicable limit of liability under the P&I entry in respect of oil pollution risk." Under paragraph 2c the Association may, in its sole discretion, cover whole or in part "...any fine imposed not upon the Member but the master or Crew member of the Ship or on any other servant or agent of the Member or on any other party, provided that the Member has been compelled by law to pay or reimburse such a fine or that the Association determines that it was reasonable for the Member to have paid or reimbursed the same."

5 The International Maritime Organization estimates that 90 per cent of pollution incidents are due to human error, the remaining 10 per cent generally considered to be due to some type of technical or mechanical fault. For further information see Gard's Handbook on Marine Pollution, Second Edition, pages 255 onwards.

6 The fine was reduced on appeal to GBP 25,000.

7 This information should be contained in the vessel's Shipboard Oil Pollution Emergency Plan (SOPEP) or equivalent emergency response documentation and checks should be made to ensure that the information is correct and up to date.

8 Section 4301 of the US Oil Pollution Act of 1990 expressly states that an organisation can be fined up to USD 500,000 and an individual up to USD 250,000 for such a failure.

9 Surveillance aircraft now use specialist radar equipment, which enables them to detect oily mixtures on the sea surface at night.

10 Article 4 of the Oil Pollution Preparedness, Response and Co-Operation Convention 1990.

11 Section 4301.

12 The ORB must be provided for ships over 400 GT and above and for oil tankers of 150 GT and above. The book has two parts: part I deals with machinery space operations and part II deals with cargo and ballast operations and need only be carried on oil tankers. The book lists various operations (e.g., the discharge of bilges), the details of which must be recorded against the signature of an officer. The Master also signs each completed page of the book.

13 The main part of Marpol 73/78, which includes the ORB requirements under Annex 1, has been accepted by 100 states, accounting for approximately 93 per cent of the world's gross tonnage. For further information see Gard's Handbook on Marine Pollution, Second Edition, pages 98 onwards.

14 It should be noted that Rule 47.2.b.vi of the Association's Statutes and Rules excludes cover for fines resulting from the non-compliance with the provisions of Marpol.

15 The attitude of the UK authorities appears to be that a ship's Master would usually only be prosecuted if the offence arose from the Master's personal fault or negligence and if the Master was acting against the owner's instructions.

Bunker spills

Gard News 165,
February/April 2002

Every vessel needs bunkers. Some are run by fuel oil, others by gas oil, and some need both for their machinery. In addition, vessels need lubricating oils and hydraulic oils. The oils are normally taken on from barges or shore connections through hoses. Hydraulic oils or lubricating oils may be taken on in drums.

Seamen know these things. They know how to plan the bunkering operation, how to follow the routines set out in the vessel's safety programme. They know how to calculate their need for bunkers and how to order. They know how to hook up the bunker barge and how to connect the hoses to their manifolds. And they know how to monitor the bunkering operations.

And yet, bunkering spills do happen. Over the last 20 months, 350 pollution incidents have been registered in the Gard system. Many of these cases (165) have been reported merely for precautionary reasons and are not expected to cost anything. Of the remaining cases, the majority is expected to cost Gard between USD 100 and USD 100,000 each. There are also a few cases expected to cost more than USD 100,000 each, of which three are expected to cost more than USD 1 million. The most expensive will cost somewhere around USD 25 million.

It is true that not all of these incidents involve bunker spills. However, the majority of the 165 no-cost cases involve minor spills during bunkering operations - spills so minuscule that they would not, some years ago, have been reported to Gard at all. It is also true that the majority of the remaining cases relates to bunker spills one way or the other and this article will analyse some of these events to provide a picture of what happens, and how a mishap is treated in different countries around the globe.

United States

The vessel was bunkering in Oregon. It appeared that the engineer in charge of the operation had unscrewed an ullage pipe cover to be able to check the quantity in the particular tank. Unfortunately, as often happens, a "blurb" forced a small quantity of oil to come out of the hole, and five litres

reached the sea. The costs paid by Gard reached USD 3,000, in addition to what the member had to pay under the agreed deductible. How could this have been avoided? First of all, were the scuppers plugged? No. So, whose fault is this? Is there a routine on the vessel for plugging the scuppers when bunkering? Somebody must be responsible for that job and it should be set out in the safety programme. It is essential that the responsibility for doing a job be allocated to a specific individual - not in order to be able to blame somebody when something goes wrong, but in order to make sure that the job gets done. Could the "blurb" have been avoided? A "blurb" is most often caused by an air pocket being trapped between the beams underneath the tanktop depending on the trim of the vessel. It is essential that the person in charge is aware of what trim the vessel has, and what can happen in certain circumstances. Hence, it is better to stop the operation one or two centimetres short and avoid the very expensive oil being lost overboard. [5litres = USD 3,000; i.e., 1 ton = about USD 750,000]. Another way of trying to avoid the oil slipping overboard is of course to have absorbent material ready near to every opening from which oil could possibly escape - not only by the manifold.

Another vessel was bunkering in Texas. In order to be able to follow the operation a manhole had been taken off. Despite such a precaution, the tank was filled faster than expected and 1,000 litres were reported to have reached the surrounding waters. The product was heavy fuel oil, and the vessel's response plan under OPA 90 was activated. Everything went well in the end, but the operation, including QI (Qualified Individual), OSM (Oil Spill Manager), oil spill response company, US Coast Guard, etc., cost USD 180,000. How could this have been avoided? Obviously, by closer monitoring of the operation. The person responsible for the operation should not be distracted by having to do other things simultaneously.

What about the bunkering speed? Quite often it is said that nobody monitored an operation from the shoreside, or that shoreside monitoring was sloppy, and

that the speed was excessive compared to what had been agreed. How can that be proved afterwards? Is there evidence that the vessel had told shore personnel to slow down? It has to be remembered that it is the spiller who is the responsible person and who shall have to pay in the first place. Under OPA 90 the spiller can only avoid responsibility if he can show, by a preponderance of evidence, that somebody else, not being at all related to him, was the sole cause of the oil discharge.

None of the cases mentioned above involved criminal investigation of the responsible crewmember or company. However, nowadays it is quite likely that the Coast Guard will look closely into the vessel's routines and safety programmes whenever a spill occurs. If they find that something is not in accordance with rules and regulations, e.g., MARPOL 73/78, the FBI may be informed about the case and start a criminal investigation. This means that criminal lawyers may have to be appointed to defend the master, chief engineer and others, and, if non-compliance is grave enough, the shipowning or operating company. At this stage Gard and its local correspondents have to step aside because of the attorney/client privilege aspect.

Japan

A vessel was transferring oil internally into the settling tank. Unfortunately the tank overflowed and some oil found its way into the sea through the airpipe. Whenever there is a pollution incident in Japan the Maritime Police will start investigating to find the culprit of the mishap. Such investigation may take some hours, but it may also take days, and in the meantime the vessel is not allowed to leave the port. After having interrogated the chief engineer and other engineers it was found that the second engineer was the wrongdoer. The investigation took two days, which meant that the operators of the liner vessel involved, being on a tight schedule, had all sorts of problems with their customers. Criminal proceedings started and bail of USD 10,000 had to be put up for the second engineer, with a promise that he should come back to Japan for trial at a later date. If he does not show up when called upon to do so,

the bail will be cashed in favour of the Japanese authorities.

The spill in this case was miniscule. In other cases clean-up costs will be added to the bail costs.

Ukraine

Heavy fuel oil had leaked into the tunnel of a vessel, and the tunnel was emptied overboard in Ukrainian waters. An unspecified quantity of oil escaped. The system in Ukraine is to impose a fine and any clean-up costs on the vessel. A table is used to assess the amount of the fine. In this case, since the quantity discharged was unknown, USD 3.1 million had to be paid.

Of course, the original reason for this mishap was a structural fault allowing the oil to enter the tunnel. But who decided to empty the tunnel overboard? Could that have been done otherwise?

Singapore

After having touched the dock, a hole appeared in a bunker tank of a vessel. Approximately 27 MT escaped into the sea. The cost of clean-up reached USD 465,000.

Another case involved a fractured ballast line passing through a bunker tank. In this case the quantity of oil was unspecified but the mishap was detected and stopped quite rapidly. The cost of clean-up reached USD 33,000.

Singapore is quite effective when it comes to combating spills. A lot of money has been put into their

contingency plans and there is plenty of equipment which can be used in the area. Still, with all the islands and the sea currents in the Straits, clean-up operations of some magnitude do not come cheap. In addition, the Prevention of Pollution of the Sea Act (PPSA) imposes criminal liability for, amongst other things, the following:

- discharge of any oil or oily mixture from any ship into Singapore waters;
- failure to report any actual or probable discharge of any oil or oily mixture into Singapore waters; and
- failure to properly maintain oil record books on board a ship.

It should be noted that the Singapore High Court has held that the prohibition on discharge of oil and oily mixtures from ships is a strict liability offence. In other words, the offence is committed the moment there is a discharge of any oil or oily mixture irrespective of whether there is fault, and the state of mind of the offender is irrelevant. Only certain limited defences are available.

These are some of the penalties under the PPSA:

- for discharge of any oil or oily mixture from a ship, a fine of between SGD 1,000 and SGD 1 million, or imprisonment not exceeding two years, or both;
- for failure to report any actual or probable discharge of any oil or oily mixture, a fine not exceeding SGD 5,000;
- for failure to properly maintain oil record books, fines ranging between SGD 5,000 and SGD 10,000, or imprisonment not exceeding 12 months, or both.

While imprisonment for an offence under the PPSA is rare, in a recent case involving a VLCC, the master was sentenced to three months imprisonment and fined SGD 400,000 for the discharge of oil and oily mixtures from the ship. On another charge of failing to properly maintain the oil record book, the master was imprisoned for 10 months.

Imprisonment is not covered by the P&I Club. Neither is a fine for having contravened Marpol or other regulations or for having committed a criminal act.

Turkey

During bunkering, an unspecified quantity of heavy fuel oil escaped through a manifold valve which had not been checked. A fine for USD 45,000, based on the size of the vessel, was imposed.

One wonders how it is possible to forget to check that other manifold valves are closed. However, this case is one of many involving just such a cause of pollution. Are routines and safety programmes unsatisfactory, or are the individuals in charge reckless?

The human element

The reader will have noted that in the cases mentioned above the human element has been of relevance. It is a fact that very often the human element is the cause of mishaps. So what is this "human element"? It usually seems to consist of the individual who does not do what he should under certain circumstances. Rather than checking the ullage of the tank he goes aft to have a cigarette. Rather than checking the safety programme he feels he is so experienced he knows how to handle this operation. Rather than making sure that the scuppers are plugged or the manifold valve on the other side of the vessel is closed, he feels that somebody else should be responsible for those things so he does not bother. Rather than showing interest in doing a good job, he feels that the master or the chief engineer does not appreciate what he does anyway, so why bother?

There are so many excuses for behaving carelessly. Not all of them can be mentioned here. But what can be done to try and avoid mishaps caused by sloppy behaviour? Should one have the careless individual replaced? Is there any guarantee that the replacement will not behave in the same way after a while? There appears to be no easy answer to these questions. But it seems that companies that have closer ties to their crew members, that offer them the option to come back to the same vessel or other company vessels after a vacation period, have less mishaps than



Fines are only covered if the escape or discharge of oil is accidental.

companies that do not. But people are different and what is good for one may not be good for another. Still, making the crew member feel he is part of the company in which he serves can only have a positive effect.

The cover

The cover provided is set out in Rule 38.1 of Assuranceforeningen Gard's 2001 Statutes and Rules:

"Rule 38 Pollution

1. The Association shall cover:

a. liabilities, costs and expenses (excluding fines) arising in consequence of the discharge or escape from the Ship of oil or any other substance or the threat of such discharge or escape."

It should be noted that the rule covers pollution caused both by oil and other substances. Hence, it is a very wide cover. The cover responds equally where oil is spilt during bunkering or a chemical cargo overflows from the tank during loading. It should also be noted that the substance must have been discharged or have escaped from the ship. This means that the cost of cleaning up the vessel's deck after an overflow is not recoverable.

The rule says that "liabilities, costs and expenses" are covered. Liabilities in this context mean legal liabilities.

Fines are not covered under Rule 38.1, but under Rule 47, which will be considered later.

To give a picture of actual liabilities which are covered under Rule 38.1, let us examine a specific section of OPA 90:

"Sec 1002. Elements of Liability

(a) In General: (...) each responsible party for a vessel (...) from which oil is discharged, (...) is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) Covered Removal Costs and Damages

(1) Removal Costs - The removal costs referred to in subsection (a) are (A) all removal costs incurred by the United States, a State, or an Indian Tribe (...), and (B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan. (...)"

Removal costs are costs incurred in removing the oil from the sea or land, marsh areas, soiled boats, beaches, docks, and so on. They include the cost of boats and people, safety equipment for people and other equipment, storage and hauling of waste to a dump yard or place for incineration, including the cost of getting a permit as a waste generator to haul the waste to the site of

destruction or storage.

"(...) (2) Damages - The damages referred to in subsection (a) are the following:

(A) Natural Resources - Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee."

This paragraph is of vital importance whenever there is a spill of some significance in the US. It should be noted that those who can formulate a claim under this paragraph are the federal or state authorities, or Indian tribes. It should also be noted that "reasonable" costs of assessing the damage are recoverable. Unfortunately, it does not say who should decide on what are "reasonable" costs.

Natural resources in this context are for instance birds, sea otters and fish. One of the intricate points from the Club's perspective is the "loss of use of" aspect. In one case some years ago the shipowner was found liable to the trustees for approximately USD 12million because people were not allowed to visit a beach for about 2 weeks while clean-up was being undertaken there.

There are further elements of liability described in the OPA 90, but these are beyond the scope of this article. However, the US is not the only country imposing strict liability on an offender. Singapore is mentioned above, but most countries with interest in shipping have the same attitude, although not, perhaps, to the same extent as the US.

The second Rule of particular interest in respect of pollution is Rule 47.1.c:

"Rule 47 Fines

1. The Association shall cover fines or other penalties imposed upon a Member (or imposed upon a third party whom the Member is legally obliged to reimburse or whom the Member reimburses with the agreement of the Association) by any court, tribunal or other authority of competent jurisdiction for or in respect of any of the following: (...) c. the accidental escape or discharge of oil or any other substance or threat thereof, provided that the Member is insured for pollution liability by the Association under Rule 38, and subject to the applicable limit of liability under the P&I entry in respect of oil pollution risk."

It should be noted that not only fines imposed upon the member as shipowner are covered under this rule. If the member is legally obliged to reimburse a crewmember, for instance,

for a fine imposed on that person, it may also be covered. Where the member is not legally liable to reimburse the fine, but wishes to do so for other reasons, he could still apply for cover. It is then up to the discretion of the Club whether to provide cover or not.

It should also be noted that for a fine to be covered under Rule 47 there must have been an accidental escape. Rule 38 mentions nothing about the escape having to be accidental. So it could happen that even though the Club would cover clean-up and other costs related to a spill, cover would not be provided for a fine if the escape had not been accidental. From a practical point of view, the provision in Rule 47 is there in order to exclude fines where a deliberate action from those on board has caused a pollution incident. It does not matter whether the fine is imposed upon the vessel or any of the crew responsible for the deliberate action. This means that a fine imposed because of a deliberate and unauthorised pumping of bunkers or bilge water overboard would not be covered. On the other hand, a fine imposed upon the vessel or a crewmember due to an accidental over-bunkering would be covered.

Civil fines do not create problems for the cover provided the above requirements are fulfilled. Criminal fines, however, do create problems. Although it might seem from a shipowner's or a seaman's perspective to be totally insane to be criminally charged because, for instance, some oil gets in the water after an incident, many countries today do have legislation under which the individual will be charged. The US and Singapore are examples mentioned before. Fines (or imprisonment) in such cases are not covered under the Rule set out above.

Conclusions

- Use your brain when you are in charge of or part of a bunkering operation.
- Know what you are doing.
- Check valves once more, even if it is not your responsibility.
- Check that scuppers and absorbent material are in place.
- Make sure that there is good communication with the bunker supplier.
- Make sure the bunker supplier is going to deliver the quantity you ordered.
- Remember that a fine may cost you dearly.
- Remember that your family may not be able to visit you in prison.

US Coast Guard formal policy on voluntary disclosure of MARPOL violations

Gard News 189,
February 2008/April 2008

A formal policy on voluntary disclosure of MARPOL violations has been issued by the United States Coast Guard.

The United States Coast Guard (USCG) has issued a formal policy on voluntary disclosure which applies to MARPOL violations that may result in prosecution of owners and operators of foreign flag vessels in the United States. The policy is similar to existing policies of other US government agencies, including the US Justice Department, in describing the factors that will be considered in evaluating a violation for possible criminal investigation or prosecution. These policies require that companies have in place a compliance management system to prevent, detect and correct violations of environmental regulations. The "Shipping Industry Guidance on Environmental Compliance", published by ICS/ISF,¹ would appear to address all of the requirements for a compliance management system as contemplated by the USCG policy.

If a company promptly and voluntarily discloses a violation to the USCG discovered within the company's environmental compliance plan, including ship audits, and the disclosure

otherwise meets the requirement of the USCG policy, the USCG may exercise discretion not to recommend to the US Justice Department prosecution of the company. The policy does not apply if there is a pattern of prior violations, or if the violation would likely have been discovered by the USCG. The full policy document can be found at www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf.

Recall that under US law foreign flag shipowners and operators can be and often are prosecuted for entry into US waters with a false oil record book that conceals discharges of oily wastes that have taken place outside US waters. Discharges in violation of MARPOL in international waters are violations that are subject to the law of the flag state but the United States does not have jurisdiction to prosecute foreign flag operators for the discharge itself because the vessels were outside US waters at the time of the discharge. According to the "Industry Guidance on Environmental Compliance", "non-compliance with MARPOL regulations should be reported to the vessel's flag administration. In the event of the discovery of evidence of intentional discharges of waste, the

flag administration must be notified immediately and a request for an investigation should be initiated".

If the vessel trades to the United States, the vessel owner or operator may, in addition to the flag state, also consider reporting the discovery and the correction of any false entries in the oil record book to the USCG in order to comply with the voluntary disclosure policy. In deciding whether to report to the USCG, prudence suggests foreign flag owners and operators should seek immediate legal advice from a lawyer familiar with the USCG and Justice Department policy guidelines and MARPOL criminal prosecutions in general.

Gard's Loss Prevention Circular No. 13-07, which can be found at www.gard.no, contains details of the policy.

¹ See article "ICS/ISF guidance on environmental compliance" above.

Oily water separator bypass in the US - The tables are turned

Gard News 189,
February 2008/April 2008

US Coast Guard prosecutes one of its own staff for alleged oily water separator bypass.

For some time now the shipping press has contained cautionary stories of the ferocity with which the authorities in the US pursue shipping companies, usually foreign companies and their employees, for alleged oily water separator bypasses. Usually, the accused is faced with a range of allegations, the main one often being the entry of false information in the vessel's oil record book. If the alleged discharge overboard has taken place outside US waters, the vessel can not be prosecuted for that act under US law, but it can be prosecuted under MARPOL. Flag states are responsible for prosecuting MARPOL violations.

However, the situation is different when the alleged discharge overboard is said to have happened inside US waters. In such circumstances, the full weight of the US legal system can be brought to bear on the accused. Somewhat embarrassingly for the Coast Guard, one of their own seafarers is facing allegations that he knew of and

authorised the direct discharge (i.e., not through the oily water separator) of bilge waste overboard into Honolulu harbour.

The individual in question was a Main Propulsion Assistant (MPA) – presumably an engineer – aboard a USCG cutter. It seems that some of his shipmates complained (anonymously) that they had been ordered by the MPA to pump into the harbour approximately 2,000 gallons of bilge waste without using the oily water separator (OWS). In May 2006, the complaint was investigated by the US authorities. They interviewed engineer colleagues of the MPA, who stated that they had taken part in the operation described above. Evidence was also obtained that untreated bilge water had been discharged overboard on ten previous occasions, when the vessel was off Central and South America.

It is understood that the MPA initially denied the allegations, but later confessed that he had been aware of what was going on, but had turned a blind eye to it. The MPA has been indicted on charges of obstruction of

justice and making a false statement in connection with the release of oily bilge water into Honolulu Harbour. If convicted, he faces a sentence of up to five years in prison on each count. It is understood that the investigation is continuing and that, depending on its outcome, the MPA could face further charges from federal and the State of Hawaii authorities, fines and/or lawsuits. It seems that, as his employer, the Coast Guard itself may also face charges, fines and/or lawsuits.

There are many who feel that the US authorities are over-zealous and punitive in their pursuit and treatment of seafarers accused of bypassing the OWS and it is not known whether the MPA was taken from the vessel in handcuffs and escorted by armed officers, but it would, at least, appear that they do not have one rule for their own people and one rule for everyone else.

US Coast Guard – Formal policy on voluntary disclosure of MARPOL violations

The United States Coast Guard has issued a formal policy on voluntary disclosure that applies to MARPOL violations that may result in criminal prosecution of owners and operators of foreign flag vessels in the United States. The policy is similar to existing policies of other U.S. government agencies and the US Justice Department in describing the factors that will be considered in evaluating a violation for possible criminal investigation or prosecution.

These policies require companies to have in place a compliance management system to prevent, detect and correct violations of environmental regulations. If implemented, the Shipping Industry Guidance on Environmental Compliance published by International Chamber of Shipping (ICS) and International Shipping Federation (ISF) would appear to meet all the requirements for a compliance management system as set out in the USCG policy. The shipping industry guidance can be downloaded at: www.marisec.org/environmental-compliance

The USCG voluntary disclosure policy states that if a company promptly and voluntarily discloses a violation discovered within the company's environmental compliance plan including ship audits to the Coast Guard, and the disclosure otherwise meets the requirement of the Coast Guard policy, the Coast Guard will not recommend prosecution of the company. However, it is important

to note that such decisions will be case-specific, and ultimate discretion on whether or not to undertake a criminal investigation still rests with the US Coast Guard. The Coast Guard investigates violations and can refer matters to the Justice Department for further investigation, typically through the use of a Grand Jury. The Coast Guard policy now makes it clear that the Coast Guard may recommend leniency in certain cases before the matter goes to the Justice Department.

Other important requirements stated in the policy are:

- The violation must be discovered and identified before the Coast Guard or any other government agency likely would have identified the problem either through its own investigative work or from the information received through a third party;
- The violation must be reported in writing within 21 days of discovery;
- The violation (or a related violation) has not occurred previously within the past three years involving the same vessel and has not occurred within the past five years as part of a pattern involving multiple vessels owned or operated by the same entity.

Under US law, foreign flag shipowners and operators can be and often are prosecuted for entry into US waters with a false oil record book that conceals

discharges of oily wastes which have taken place outside of US waters. Discharges in violation of MARPOL in international waters are violations that are subject to the law of the flag state but the United States does not have jurisdiction to prosecute foreign flag operators for the discharge itself because the vessels were outside of US waters at the time of the discharge. According to the Industry Guidance on Environmental Compliance, "non-compliance with MARPOL regulations should be reported to the vessel's flag administration. In the event of the discovery of evidence of intentional discharges of waste, the flag administration must be notified immediately and a request for an investigation should be initiated".

If the vessel trades to the United States, the vessel owner or operator may also consider reporting the discovery and the correction of any false entries in the oil record book to the Coast Guard in addition to the flag state, in order to comply with the voluntary disclosure policy. In deciding whether to report to the Coast Guard, prudence suggests foreign flag owners and operators should seek immediate legal advice from a lawyer familiar with the Coast Guard and Justice Department policy guidelines and MARPOL criminal prosecutions in general.

The official document can be found at: www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf

US law - MARPOL violations in the US

Gard News 184,
November 2006/January 2007

The Third Circuit Court of Appeals rules in favour of a seaman in a prosecution for MARPOL violations.

On 18th August 2006 the United States Court of Appeals for the Third Circuit issued its decision in the case of *United States of America v. Noel Abrogar*.¹ This was the first time an appellate court has considered the sentence of a foreign seaman convicted of violations of the Act to Prevent Pollution from Ships (APPS), the United States' version of the MARPOL Convention.

Mr Abrogar, a citizen of the Philippines, served as chief engineer aboard the *MAGELLAN PHOENIX*, a Panamanian-flag vessel. Mr Abrogar admitted by plea agreement that he knew that those under his command had on occasion discharged oily water direct to the sea and he admitted he made false entries in the vessel oil record book to conceal the violations. Following the plea agreement a district court judge sentenced Mr Abrogar to serve one year and a day in federal prison for failure to maintain an accurate oil record book, a crime under APPS.

Those convicted in the federal courts of the United States are sentenced to fines and imprisonment according to Federal Sentencing Guidelines that assign points to certain types of conduct for the purpose of guiding the sentencing judges. Here the conduct that provided enhancement was "the ongoing, continuous or repetitive discharge, release or emission of a pollutant into the environment".

Mr Abrogar's counsel appealed the sentence on the ground that the district court had improperly enhanced the criminal penalty based on government's assertion that a six-point enhancement should be applied for the acts of discharge that had occurred in international waters. Mr Abrogar argued on appeal that the enhancement should not be applied since the discharges, while clearly MARPOL violations, were not violations of US law.

In analysing the scope of MARPOL and APPS, the court found that Congress did not make every violation of MARPOL by every person a crime under US law. To the contrary, under APPS "Congress and the Coast Guard created criminal liability for foreign vessels and personnel only for those substantive violations of MARPOL that occur in US ports or waters. Stated differently, a MARPOL violation is only an offence under US law if that violation occurs within the boundaries of US waters or within a US port."

The Third Circuit held that the district court could not consider the MARPOL violations that occurred outside US waters in its sentence calculation because these were not offences under US law and the acts were not conduct relevant to Mr Abrogar's failure to maintain the oil record book while in US waters. Hence the court determined that the sentence as imposed was too harsh and sent the case back to the district court for re-sentencing. It should, however, be noted that implied in the court's ruling is the recognition

that, as soon as a foreign-flagged vessel with a faulty Oil Record Book crosses into US waters, an APPS violation has occurred, even though the entries were made outside US waters.

The decision is important to seamen charged with or facing charges in the US for MARPOL violations. The decision must be followed by the district courts in the Third Circuit and is persuasive authority for the other federal courts.² The Third Circuit decision should not be read as implying that seamen and non-US flag shipowners can avoid penalties simply by correctly recording illegal discharges in the oil record book.³ Flag states do have jurisdiction to punish MARPOL violations in international waters and are increasingly likely to impose hefty fines for deliberate discharges.

¹ Case No: 06-125 (3d Cir.) decided 18th August 2006, not yet reported. The full text of the decision is available at www.ca3.uscourts.gov/opinarch/061215p.pdf.

² There are 11 numbered federal appellate courts plus the District of Columbia (Washington D.C.). The Third Circuit takes appeals from the district courts in Pennsylvania, New Jersey, Delaware and the US Virgin Islands.

³ Those vessels flying the US flag are subject to jurisdiction under APPS for violations within international waters as well as US ports and coastal waters.

MARPOL Annex I – Concentrated inspection campaign and US Coast Guard Policy letter

Loss Prevention Circular
No. 04-06

Introduction

Port state control detentions, investigations, fines and prison sentences demonstrate the considerable challenges that still exist in complying with MARPOL Annex I. Conflicts have also regularly arisen between inspectors and ship's crew due to the inconsistent practices of the control officers. This underlines the need for improved mutual understanding and proper procedures.

Several important developments in this respect are outlined in this circular.

Co-ordinated Concentrated Inspection Campaign (CIC)

The maritime authorities of the Paris MoU countries have begun a concentrated inspection campaign focusing on the implementation of requirements for preventing marine pollution from ships (MARPOL 73/78, Annex I). The inspection campaign will end on 30 April 2006. This campaign will be carried out in parallel with a similar campaign by the authorities of the Tokyo MOU countries. Shipowners and operators should expect every port state control inspection to include scrutiny of the oily water separation equipment as well as the record keeping required for that equipment under MARPOL and in compliance with international standards.

As reported in other Gard publications, some inspections have revealed illegal by-passes of the oil the vessel's filtering system and illegal overboard connections from sludge tanks have also been found. During the campaign, port state control officers will focus on 13 selected items of inspection. The list of the 13 items in the CIC in the Tokyo MOU region can be found at: www.tokyo-mou.org. If deficiencies are found, the port state control officer will conduct an in-depth investigation into other aspects of the MARPOL legislative area, including operational performance by the responsible crew.

USCG – enforcement of MARPOL Annex I

As a measure to implement a Coast Guard wide consistent application of the MARPOL Convention the U.S. Coast Guard has issued a Policy Letter, "Guidance for the Examination of MARPOL Annex I During Port State Control Examinations". This letter advises its port state control officers on how they should conduct port state control examinations to enforce MARPOL Annex I. The emphasis is on the oily water separator (OWS), the oil content monitor (OCM), and the oil record book (ORB). The letter provides details on what to look for and how to conduct various tests. The information in this document will be of great value to chief engineers, masters, and shore side management. Shipowners and

operators should compare their internal procedures and training regimes with this letter on a regular basis to ensure that the ship is in full compliance with the applicable requirements and that the crew members are prepared to demonstrate this when inspected, whether by the U.S. Coast Guard, another port state administration or during an internal inspection carried out by the shipowner to ensure compliance.

The Policy Letter can be downloaded at: <http://www.uscg.mil/hq/g-m/moc/pol0601.pdf>

Conclusion

Lack of proper training and inoperative equipment are two common grounds for detentions by PSC. The above mentioned campaigns should be used as tools by shipowners to emphasize the importance of complying with MARPOL. It is important to remember that this responsibility rests with every individual involved in the operation or management of the vessels both on the ship and ashore. Deliberate breaches of MARPOL can result in heavy fines and severe penalties including possible jail sentences when discovered by PSC authorities. All shipowners and operators are expected to have a zero-tolerance policy for deliberate pollution, and to communicate this clearly to their crews and have systems in place to insure compliance.

Recent changes in US regulations

Gard News 182,
May/July 2006



Gard News has a look at recent changes and updates in the application of US regulations.

Gard's Loss Prevention Circulars No. 01-06 (New regulations in the US) and 03-06 (United States – Advance Passenger Information System (APIS). International Carrier Bond requirement)¹ discuss important changes and updates in the application of regulations for vessels operating in and near the United States. All owners/operators with ships operating in US waters should be aware of these changes and ensure that vessels comply lest they be detained by the US Coast Guard or other government entity, or denied entry into US waters.

Chemical testing following "serious marine incidents"

The US Coast Guard has revised the rule found in 46 CFR 4.0-2 regarding

alcohol and drug testing following a "serious marine incident" (SMI) to take effect on 20th June 2006. Gard's Loss Prevention Circular No. 01-06 deals with the new requirement in detail and provides a link for additional information: <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-24375.pdf>.

The new rule requires that marine employers have a sufficient number of both alcohol and drug testing devices readily accessible for each individual involved in an SMI unless other arrangements can be made to have the testing done within two hours of the occurrence for alcohol and within 32 hours for drugs. Due to the nature of usual ship operations it seems unlikely, in most instances, that the requirement for alcohol testing can be met via shore side service providers. Therefore

it would be prudent for shipowners/operators to supply their vessels with a sufficient quantity of testing devices to test the entire crew and other incidental personnel who may be on board at the time of a reportable occurrence.

A recent case has come to Gard's attention wherein the local Coast Guard insisted on the alcohol and drug testing procedure to be followed prior to 20th June 2006, the effective date of the new regulation. Owners and operators are cautioned to immediately take steps to amend and update their operating manuals to reflect the new requirements.

Marine casualties - Added reporting requirements

The US Coast Guard has added a new category² to the list of reportable marine casualties which involve "significant harm to the environment".

This new category came into effect on 17th January 2006. This requirement places the burden on the vessel owner/operator/crew to immediately report any event which affects or has the potential to harm the environment of US waters (or, in the case of US flag vessels, any such casualty worldwide).

Significant harm to the environment is described as a discharge or probable discharge of oil, hazardous substances, marine pollutants or noxious liquid substances into waters subject to the jurisdiction of the US including the Exclusive Economic Zone (EEZ).

US Coast Guard Marpol Annex I - Policy Letter

Required reading for all vessel owner/operators should be the recently published Policy Letter from the US Coast Guard entitled "Guidance for the Examination of Marpol Annex I during Port State Control Examinations" which sets out new inspection and testing procedures to be followed by Coast Guard personnel performing Port State inspections.

Following the recent successes in criminal prosecution of shipboard and shore side personnel for irregularities in vessel records (in particular the oil record book) these new guidelines

provide additional guidance and a checklist to inspecting personnel in order to apply the requirements in a uniform manner and to alert inspectors to areas/situations which should lead to further investigation. We believe it would be prudent for Gard members to circulate these guidelines and checklists to their crew and shore side personnel responsible for vessel compliance with pollution regulations. Furthermore, it would be advisable for the crew and operations staff to review the checklist prior to every entry of vessel into US waters.

The following link to the US Coast Guard provides direct access to the document: www.uscg.mil/hq/gm/moc/docs.htm.

Increased liability for hazardous substances discharge - New Jersey

The State of New Jersey recently passed legislation which requires the increase of the limitation of liability fund for owners and operators of vessels from which hazardous substances are discharged into New Jersey waters to USD 1,200 per gross ton with a vessel limit of USD 50 million. This reflects a substantial increase from the prior New Jersey limitation of USD 150 per gross ton.

Enforcement of garbage discharge regulations

It has recently come to Gard's attention that the US Coast Guard and the Justice Department are reviewing the record-keeping on board vessels with respect to the overboard discharge of garbage into the marine environment. It is expected that these entities will be thoroughly checking these records in a method similar to those used with the OWS inspections, that is, the US will enforce international regulations for violations outside US waters based on the presentation of false record-keeping to US Coast Guard personnel.

Vessel owners and operators should review the applicable law and ensure that the record-keeping on board their vessels is in compliance with international requirements.

Useful US Coast Guard website

The following website provides useful information for maritime interests regarding documents and materials available under the US Freedom of Information Act (FOIA): <http://cgmix.uscg.mil>.

¹ Gard's Loss Prevention Circulars are available from www.gard.no under "Publications/Circulars".

² See 70 Federal Register 74669, 16th December 2005.

The United States Ocean Dumping Act

Gard News 159,
September/November 2000

Ocean dumping is a topic that has been the subject of a good deal of public scrutiny over the last several years. Traditionally, when considering restrictions on ocean dumping in the United States the vessel operator may have customarily looked to the widely adopted provisions set forth in MARPOL 73/78. These guidelines, as drafted by the International Maritime Organization, were adopted and implemented in the United States in 1980 as part of the Act to Prevent Pollution from Ships (APPS). However, it may not be widely known that these guidelines are superseded by a more stringent regulatory scheme known as the Ocean Dumping Act (ODA) that became law in the United States in 1972 and for which the Environmental Protection Agency (EPA) has been an absentee enforcer.

Until recently, the EPA's involvement in marine matters has been limited but it appears that this may be changing. The Ocean Dumping Act, which "prohibits the transporting of any material from the United States for the purpose of dumping it into ocean waters", was enacted to establish a "no tolerance" policy prohibiting all ocean dumping of waste from the US and was crafted in such a way as to allow the EPA substantial latitude should it decide to police the regulation. Moreover, and perhaps most importantly, the language "for the purpose of" essentially gives the EPA the right to initiate legal action even if it is found that the vessel simply acted with an intention to dump waste material from the US, which itself constitutes a violation. In such cases the EPA has the discretion to commence civil or criminal litigation against violators and, at the extreme, punishment can result in the forfeiture of the vessel.

The ODA regulation is straightforward. Material prohibited from being dumped is classified as "waste". Material becomes waste when it no longer has a specific purpose in the transportation of goods. An illustrative example is the function of dunnage in the bracing of steel cargo. Wood used for this purpose is "dunnage" when being used to secure the steel in transit. If the steel is discharged in the US, then

the dunnage no longer serves a useful purpose and becomes "waste" from the US. "Material" is defined as matter of any kind, including but not limited to solid waste, garbage and other waste.

The US Coast Guard Captain of the Ports offices have traditionally been tasked with enforcement of ocean dumping regulations; however, historically personnel in these offices have themselves seldom been aware of ODA regulations or their supervisory role in enforcing them. In fact, on at least one occasion a vessel requested clarification from the US Coast Guard concerning dumping of material permitted by Marpol 73/78 and received permission to do so, only to discover that such action would violate the Ocean Dumping Act. The EPA have investigated and later initiated proceedings against the vessel and its crew.

It is for this reason that when contemplating the dumping of waste from the US into ocean waters upon departure from a US port the Ocean Dumping Act should be given particular consideration. At a seminar in New York hosted by Trimar Defense Services, Gard's general correspondent for the US, and attended by the Chief of the Maritime Safety and Environmental Protection for the US Coast Guard Office of Maritime Law, it was established that the USCG Captains of the Ports are to be briefed as to the ODA regulations. The Coast Guard plans to submit a new regulation for commentary by the public, intended to make clear that the provisions found in the ODA will always take precedence and that the APPS will be revised and updated to reflect this change. Once the regulation is in place, the US Coast Guard will remain the agency charged with its enforcement. Nevertheless, the EPA retains the right to become involved in an investigation at any time and in a supervisory capacity.

It should be noted that the EPA has typically abstained from an active involvement in maritime matters, and that Marpol 73/78, Annex V, while permitting the overboard discharge of certain ship-generated waste, strongly recommends that disposal be

undertaken at port reception facilities. Moreover, the EPA advises that a vessel forced to discharge waste as the result of an emergency situation endangering the vessel or the lives of the crew could become the subject of an investigation but will generally be absolved of liability. Because the US government has wide discretion in deciding whether or not to investigate, much less prosecute ("prosecutorial discretion") possible statutory violations and because the EPA only recently has shown interest in ODA in the context of blue water merchant shipping, it is difficult to categorically say to what situations and how vigorously the US Coast Guard or EPA may decide to apply the Ocean Dumping Act. It is hoped that the Coast Guard's expected publication of a new regulation and public comment thereafter will result in clarifying the intentions of the Coast Guard (and of the EPA).

The ODA regulation can be reviewed in its entirety at www4.law.cornell.edu/uscode by referring to Title 33, Sections 1401 to 1415.

Pollution - Ships, crews and shore side management face ever-increasing fines and prison sentences

Gard News 175,
August/October 2004

Pollution violations are being treated extremely seriously by prosecutors in North America.

Headlines in print and broadcast media continue to trumpet larger and more severe fines as well as prison sentences being imposed on violators of US and Canadian environmental and criminal laws. These prison sentences¹ and fines extend to the masters and crews of vessels as well as to shipowners and operators. The US and Canadian governments, through their respective Departments of Justice, place an ever-increasing importance on the uncovering of violators and imposition of harsh sentences.²

The Canadian Parliament is considering a law that will give extra enforcement powers to the officers of Environment Canada, a branch of the Canadian government, due to the perception that judges are not imposing sufficiently high fines on ships found to have polluted. The US Department of Justice was recently quoted as saying that waste oil deliberately discharged by vessels exceed pollution from major casualties and that the decision "to pollute" is always an economic issue. The apparent perception of the Department of Justice that shipowners and their crews believe it is cheaper to pollute than to properly dispose of waste material is offered as justification for more aggressive pursuit and punishment of violators. According to sources knowledgeable in this arena, shipowners can expect more crew arrests and longer detention of vessels along with multi-million dollar demands for posting of security.

The basis for many investigations and prosecutions is the improper "bypassing" of oily water separators and discharging oily water directly to the sea. These improper discharges are not accurately recorded in the oil record book in violation of MARPOL which (except in emergency circumstances) requires oily water to be treated and discharges to be recorded in the oil record book. MARPOL, as enacted by flag and port states, includes fines and penalties for discharging oily waste in international waters. At least in the US, the alleged crime may be for the



Oily water separation and discharge: risk of criminal penalties.

presentation of a false document (the oil record book) to a US official (the US Coast Guard) or obstruction of justice by destroying evidence of bypassing. These crimes may carry much higher fines and penalties under domestic law than violation of MARPOL itself.

Canada

Prior to February 2002 the highest fine imposed on ship source pollution (a strict liability offence under Canadian law) was CAD 40,000 for an offence involving the discharge of 2,361 litres of an oily substance in October 2001. Four months later, the owner of a bulk carrier pleaded guilty to discharge of the substantially lower quantity of 850 litres and was fined CAD 125,000. This case was soon matched by a fine of CAD 125,000 for the discharge of an oily water mixture of 92 litres. In these cases the Crown and defence counsel jointly recommended settlement amounts, which were later accepted by the judges handling the cases.

In June 2003 a vessel in Halifax Harbor was fined CAD 100,000 and made to pay clean-up expenses of CAD 80,000 in satisfaction of offences for the discharge of 4,300 litres and subsequent failure to report the offence.

In a more recent case involving a bulk ship's discharge of 227 litres of an oily substance in March 2004 the Crown failed to reach an agreement with the owners and submitted evidence to the court that the appropriate range of fine would be CAD 100,000 to 125,000. In noting that the defendant was an environmentally responsible company and that the pollution involved was unintentional the judge set the fine at CAD 60,000. The judge, however, characterised the offence as a "crime" rather than a regulatory violation.

The Canadian government has introduced and is fast tracking enactment of legislation relative to ship-source pollution which if passed into law will increase the maximum fines on conviction to CAD 300,000 on summary conviction and CAD 1 million on indictment as well as provisions for imprisonment of individuals.³ This legislation will allow Canadian officials to board and inspect without warrant any ship in Canada's 12-mile territorial sea or the 200-mile Exclusive Economic

Zone. Although not stated in the Bill, it is believed that the Oil Record Book will be one of the documents the boarding officers will be examining. Furthermore, the boarding officers, subject to the consent of the Attorney General of Canada, will have the power to direct a ship into a Canadian port and issue detention orders if they believe the ship has committed an offence against the (Canadian) Migratory Birds Convention Act, 1994 or the Canadian Environmental Protection Act, 1999.

United States

In an incident during October 2002 involving a Korean chief engineer, a prison term of one year was imposed for making false statements to government investigating personnel.

Another Korean chief officer was sentenced to six months in prison for the violation of the US Clean Water Act and for making false statements during February 2003.

July 2003 saw a Taiwanese operator sentenced for two felony violations after the falsification of records following the illegal dumping of 20 tons of oily wastes over a period of months. The company was ordered to pay USD 750,000 for the offence and was required to develop an Environmental Compliance Program as well as being placed on four years probation.

During February 2004 a Filipino officer was sentenced to prison for felony violations involving falsifying documents and covering up evidence during a US Coast Guard investigation.

In March 2004, an operator of 38 vessels pleaded guilty to seven felony counts, which included obstruction and making false statements to federal officials. A proposed fine of USD 3.5 million, the implementation of an Environmental Compliance Program for all vessels trading in US ports as well as a four-year probation term await a federal court's sentencing decision.

During the past two years, five companies involved in shipping as well as four vessel engineers have pleaded guilty in Washington State and have been required to pay USD 5 million in criminal fines connected with the documentation of waste oil disposal while at sea.

An operator of ocean-going vessels pleaded guilty in April 2004 to a felony violation for improperly documenting the handling of oily wastes. A criminal fine of USD 200,000 was imposed with a further requirement for a comprehensive Environmental Compliance Program for the operator's fleet of 28 ships. An escrow deposit of USD 50,000 was also required for the purposes of funding the development, implementation and monitoring of the plan.

All owners and operators should be alert to the seriousness of North American prosecutors in dealing with pollution violations and may wish to give full consideration to the establishment of Environmental Compliance Programs with proper follow-ups built into the programs. Some legal advisors believe the voluntary establishment of an Environmental Compliance Program prior to an event similar to those mentioned in this report may serve to reduce the chances of a prison sentence (or probation) and may give a basis for an application to moderate major fines. It should be remembered that prison sentences and fines could be imposed on vessel owners, crews and shore side responsible parties. Department of Justice prosecutors frequently pursue individuals with the "highest level of knowledge" for the intentional violations and seek to impose harsh penalties at the uppermost level in the hope that this will serve as a deterrent to other parties.

In the event that a pollution event in the US or Canada may involve possible falsification of records then the retention of criminal counsel for all those who may be held culpable is highly recommended.

1 Which are allowed under Canadian law but which to date have only been imposed in the US.

2 See article "Environmental crime – Myths and reality" in Gard News issue No. 167.

3 The decision concerning which offence to pursue is made by the Crown prosecutor and is based on the circumstances of the offence. The most important determinant is the severity of the alleged offence. The majority of cases to date have been prosecuted by summary conviction and the imprisonment penalty has yet to be enforced.

Environmental crime - Oily water discharge off the East Coast of Canada

Introduction

The Government of Canada recently increased its commitment to the protection of wildlife and the environment on the Canadian east coast through increased surveillance of vessels entering Canadian waters and illegally discharging oily water. The discharge of oily water is of particular concern during the months of November to January when migratory birds, who are especially susceptible to these oily water discharges, are in Canadian east coast waters.

Recent incidents have shown that shipowners and ship managers should continue to take considerable precautions to prevent non-accidental discharges of oily water. Pollution fines for hundreds of thousands of Canadian dollars have been handed down.

The problem

The illegal discharge of oily water in non-compliance with MARPOL 73/78 is a problem that continues to concern the maritime industry. The problem tends to be particularly acute off of the coast of eastern Canada during the months of November to January. Many vessels transit closer to shore to take advantage of the ice covers that form during the winter. The discharge of oil has had a significant impact on migratory birds that transit through the area during the winter months. It is estimated that as many as 300,000 seabirds are killed on the Canadian Atlantic east coast annually. Such devastation has led the Canadian authorities to focus their attention and resources on prevention of such incidents and the prosecution of violators.

Canadian response to this problem

The Canadian authorities have enhanced their monitoring of vessels through the use of surveillance and ship-traffic monitoring to catch violators. This includes both air and sea surveillance, and satellite technology. For example, recent satellite technology such as RADARSAT has improved marine surveillance by the use of Synthetic Aperture Radar. This radar can pierce cloud cover both day and night. In addition, significant fines are being handed down to

violators caught discharging oily water in Canadian territorial waters.

Recommendations

Oily water separation related problems and associated fines can create significant problems for both seafarers and companies. Therefore, please consider the following recommendations:

- Gard Service' Protection and Indemnity cover, like that of all Clubs in the International Group, is a named risk cover. The risks covered are set out in Gard P&I's Statutes and Rules. Gard's Rule 38 – "Pollution" expressly excludes pollution fines. Gard's Rule 47 – "Fines" covers fines and penalties imposed upon a Member by any court, tribunal or other authority of competent jurisdiction, for or in respect of the accidental escape or discharge of oil.
- The oily water separator installed on board must be of an approved type and function properly.
- The oil content meter, the monitoring device and the alarm/automatic-stopping device must function correctly.
- Reduce the oil leakages to the bilges by collecting oil in drip trays and gutters draining into a waste oil tank. Ensure that the drain pipes from the gutters are not clogged by deposits or rags. It is, therefore, important that crew does not leave rags or other material in drip trays and gutters.
- Oil sludge from engine rooms must not to be pumped overboard. If not disposed of in an incinerator, the oil must remain on board until discharged to shore-based reception facilities.
- Accurately record all information required to be entered in the Oil Record Book. All handling of waste oil must be recorded, including quantities sent for incineration to shoreside reception facilities, and to sludge

tank through separation. If any equipment is not operating correctly, such information must be recorded and proper precautions taken to prevent discharge. Oil Record Books are routinely inspected by port State control authorities. Detention of the vessel and/or fines may result if the Oil Record Book is incomplete or has been tampered with.

For more information, guidance and recommendations on oily water separation related issues, please refer to Gard Services Loss Prevention Circular 05-02, Environmental Crimes— Myth or reality?, Loss Prevention Circular 06-01, Oily water separation and discharge: Risk of oil pollution versus vessel's safety, and Loss Prevention Circular 07-01, Oily water separation and discharge: Discharge of oil prohibited. For more information on the impact of oil discharge in Canadian waters, please see the World Wildlife Fund report "Seabirds and Atlantic Canada's Ship-Source Oil Pollution" at the following website address: www.wwf.ca/en/news_room/pdf/02_09_24_seabirdsreport.pdf.

Pollution - The hard line taken by the French criminal courts on oil discharge from ships

By Oliver Purcell and Guillaume Brajeux, Holman Fenwick & Willan (Paris)

Gard News 176,
November 2004/January 2005



There is growing public interest in environmental issues in France.

There has recently been considerable press coverage of the attitude adopted by French prosecutors in relation to oil discharge from ships, and reports of increasing fines ordered by French criminal courts.

Introduction

Whilst the law has recently changed, and in particular has significantly increased the level of fines which can be awarded by the courts, the principal change is probably in the attitude adopted by French prosecutors, who are now applying powers which they have arguably always had.

The change in attitude results from growing public interest in environmental issues, and from increasing public discontent with marine pollution. Recent casualties, such as the ERIKA and the PRESTIGE, have not only generated public

outrage, but finally caused politicians to take certain measures.

New approach

The recent changes in the law which have generated the most interest from the press do not concern oil pollution resulting from casualties (such as those mentioned above), but rather pollution resulting from the discharge of oil or oily residues from ships, whether voluntary or accidental (but unrelated to a marine casualty). The French authorities have been relatively slow in taking effective measures to deal with such pollution; they are in effect now trying to catch up for time previously lost.

The manner of achieving this has been twofold:

1. By tinkering with jurisdictional rules, greater responsibility has been given to local prosecutors in Le Havre (for the

English Channel), Brest (for the Atlantic), and Marseille (for the Mediterranean), who are now using all their powers, in particular that of detaining ships. This has proved to be a much more effective way of securing the payment of fines, and provides publicity intended both to demonstrate to the public that government policy is being applied, and to deter the shipping community from causing pollution in French waters.

2. Maximum fines have been considerably increased. The categories of persons who may be found liable to pay the fine have also been broadened to include ship operators and the "real" or effective owner or manager of a vessel; however, the courts have to date not had to apply these changes, intended to facilitate payment of the fine, wherever a ship has been detained and an owner has paid cash into court in order to secure payment of the fine.

Power over EEZ

France's power to exercise control over not only its territorial waters but also over its Exclusive Economic Zone (EEZ)¹ results both from the 1982 Convention on the Law of the Sea and from MARPOL Conventions.

Pursuant to the Convention on the Law of the Sea, a state has jurisdiction over both its territorial waters and its EEZ, for certain purposes. Pursuant to article 4(2) of MARPOL:

"Any violation of the requirements of the present convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that party.

Whenever such violation occurs, the party shall either:

- (a) cause proceedings to be taken in accordance with its law; or
- (b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred." (our emphasis)

Thus pursuant to international conventions, the French courts and criminal prosecution authorities are entitled (and even obliged) to ensure compliance with international rules on the prevention of oil pollution within their jurisdiction, which includes for these purposes France's EEZ.

Prohibition

The basic rule under Rule 9 of MARPOL is as follows:

"... any discharge into the sea of oil or oily mixtures from ships to which this Annex applies shall be prohibited except where all the following conditions are satisfied: ...

- (b) from a ship of 400 gross tonnage and above ...
 - (i) the ship is not within a special area;
 - (ii) the ship is proceeding en route;
 - (iii) the oil content of the effluent does not exceed 15 parts per million (ppm); and
 - (iv) the ship has in operation equipment as required by Regulation 16 ..."

Regulation 10 of MARPOL specifies that, within special areas, any discharge is prohibited; as far as France is concerned, these special areas are the Mediterranean and the English Channel and its approaches.

Outside special areas, only discharge not exceeding 15ppm is authorised, provided the ship is operating equipment which complies with Regulation 16; the latter is oil filtering equipment (oily water separator) which will ensure that any oily mixture discharged into the sea after passing

through the system has an oil content not exceeding 15ppm.

Increased surveillance

Whilst some pollution cases have occurred in the Mediterranean, the vast majority have arisen in the Atlantic, usually midway along a line drawn between Finisterre (in Spain) and Ouessant (in Brittany); this is one of the principal routes for all sea traffic to or from Northern Europe, and is well within France's EEZ. This is the main area patrolled on a regular basis by French Customs aircraft, although Navy aircraft or other authorities also patrol the area, and have similar powers.

The Customs officer or other authorities on board these aircraft will follow what they consider to be slicks or traces of oil. If they locate a vessel which they consider to be the cause or origin of pollution, they will contact such vessel, inform the master of the fact that his vessel appears to be discharging oil or oily residues, and seek information on the vessel and her future destination.

Response

If a vessel is contacted or spots a Customs or Navy aircraft in the vicinity, a number of practical steps may be taken:

- The master and chief engineer should check that the oily water separator equipment is functioning correctly;
- If the vessel is operating its oily water separator, and this is functioning properly (and thus discharge is less than 15ppm), the vessel should not stop discharging when the aircraft flies overhead;
- The master should respond immediately to any VHF call;
- The master should ask for a thermographic image and/or for samples of any alleged slick to be taken;
- The master should encourage the authorities to come on board at the next port of call;
- Nothing should be modified in the engine room;
- The owners or managers should compile evidence that the vessel regularly uses discharging facilities in ports;
- The owners or managers should arrange for a joint survey of the vessel with the authorities at the next port.

Evidence

The authorities will invariably also take photographs. These photographs, together with the official report drawn up by the officer on duty, will constitute the principal (and often exclusive) evidence upon which the prosecution will rely to pursue a criminal action against a master.

Under article L218-28 of the French Environment Code, reports prepared by certain sworn officers of the state, including Customs agents, constitute proof of the events related therein until such time as their contents are disproved. This provision in effect reverses the burden of proof which normally applies in criminal matters; as a result of this provision, the accused has the burden of proving that the vessel was not polluting, rather than the reverse.

The prosecution may also rely on other evidence, for example that there were no other vessels in the vicinity, that discharge seemed to stop as soon as the Customs aircraft flew overhead, or that the Oil Record Book is not properly kept (this list is obviously not exhaustive). Nevertheless, it is essentially the official report prepared by Customs, together with the photographs taken, which form the main evidence on which French criminal courts have found vessels to be guilty of breaches of the relevant MARPOL regulations.

The photographs taken are quite often of poor or questionable quality; this has not, however, prevented the French courts from considering such evidence to be sufficient for a finding of guilt. The reason for this is that the majority view of experts who attended discussions which led to the signing of the Bonn Agreement² considered that residues with less than 15ppm oil content would not be visible from the sky, whereas residues with an oil content in excess of 15ppm would be visible. This simple but relatively arbitrary approach has convinced a number of courts that the evidence before them showed oil pollution, rather than simply showing the trace left by the wake of a vessel or other natural phenomena such as the effect of wind on the water's surface.

Detention

Prosecutors have also now taken the initiative of ordering vessels suspected by Customs officers to be polluting to deviate to the nearest French port. Pursuant to article L218-30 of the Environment Code, prosecutors have this power, and may require payment into court (to secure payment of the future fine, the presence of the master at the criminal action and payment of any damages awarded to civil claimants) before allowing the vessel to sail. The level of security required by prosecutors is often indicative of the level of fine which they may seek from the courts.

Increased fines

The "Perben 2" law,³ which came into force in March 2004, increased the

potential fine to EUR 1 million, or the value of the vessel, or four times the value of cargo on board and freight. To date, the maximum reported fine ever ordered has amounted to EUR 500,000; however, further increases can be expected.

The new provisions have also extended the categories of persons who may be ordered to pay the fine, to include an owner, operator, or the effective owner or manager of a vessel. Whilst the trend had been for owners to be joined as co-accused, this practice may disappear if prosecutors systematically detain vessels to obtain security for payment of the fine. In this respect, it should be remembered that a vessel may be detained as the instrument of the alleged offence, irrespective of the person or entity which may subsequently be pursued.

Whilst other methods of enforcement are available once a judgment has been rendered, it appears that the future

practice will be for prosecutors to take the preventive measure of ordering a vessel into the nearest French port. Failure to comply with such orders from the French authorities exposes a master (and in certain circumstances owners) to an additional fine.

Two additional points should be mentioned:

– We have considered above the most common cases, namely oil discharge within France's EEZ, and the fines which are payable. If discharge occurs within France's territorial waters, a foreign master will also face the risk of imprisonment (French masters face this risk even in France's EEZ).

– Other interested parties, such as environmental associations, may join in the criminal action as civil claimants. The damages which they are usually awarded remain for the time being relatively modest, but are likely to increase in the future. The court in Marseille has very recently awarded EUR 18,000 to each such claimant.

Conclusion

It should be borne in mind that President Chirac has made the fight against oil pollution one of the three priorities of his presidency. The above changes in approach reflect this shift in policy, and ship owners or operators can expect that ever-increasing levels of fines will be sought by prosecutors. Courts should, however, be encouraged to take a more balanced or better informed view of all the evidence available; for the time being, however, acquittals remain rare. Caution must therefore be exercised.

1 200 nautical miles from base lines as defined by the 1982 United Nations Convention on the Law of the Sea, signed at Montego Bay.

2 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, 1983.

3 A French law on organised crime and delinquency, named after the French justice minister, Dominique Perben.

New exclusive economic zone in the Baltic Sea

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A new exclusive economic zone established in Finland may reduce the number of illegal oil discharges and dumping from ships.

Finland has established an exclusive economic zone (EEZ), which came into effect in February 2005. This area consists of the part of the sea immediately adjacent to the territorial waters, which reach up to 12 nautical miles from the Finnish coast. The outer limits of the EEZ meet the outer limits of the corresponding zones of the neighbouring states. The Baltic Sea is now covered by contiguous zones as all other coastal states established their EEZs already in the 1980s and 1990s. As a result, one can not now enter or leave Russian ports on the eastern end of the Gulf of Finland without passing through an area that is in the control of other states.

The United Nations Convention on Law of the Seas (UNCLOS)¹ grants coastal states jurisdiction in EEZs with regard to, inter alia, the protection and preservation of the marine environment.² UNCLOS also provides³ that, where there is clear evidence that a vessel navigating in the EEZ or territorial sea has committed a violation of applicable international standards for the prevention of pollution resulting in a discharge causing or threatening significant pollution, the state can inspect or detain the vessel. Where there are clear grounds for believing a vessel has committed such a violation in the EEZ, the coastal state can require information from the vessel to establish whether it has in fact occurred.

The authorities expect illegal oil discharges and dumping from ships to decrease as a result of the extended

powers to intervene. This applies in particular to the fresh authority which extends to foreign vessels as they can now be charged for environmental crimes committed in the contiguous zone. The authorities are entitled to use necessary enforcement measures including the detention of the vessel.

Lately, there have been positive developments in the Baltic Sea concerning pollution from vessels. Illegal discharges observed have decreased over the last five years, but still around 300 oil discharges were spotted in 2003.

1 Article 56.

2 Article 211 (5) and (6) and 220.

3 Article 220 (5) and (6).

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