

1-1-2003

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Recommended Citation

James B. Nelson, *Alternative Sentencing Under the MARPOL Protocol: Using Polluters' Fines to Fund Environmental Restoration*, 10 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 1 (2004)
Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol10/iss1/1

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**Alternative Sentencing Under
the MARPOL Protocol:
Using Polluters' Fines to
Fund Environmental
Restoration**

By James B. Nelson *

The international community has long recognized that vessel pollution is a major cause of global ocean degradation. Based on that understanding, coastal nations adopted the MARPOL Protocol in 1973 to regulate and police vessels' discharge of oil, chemicals, garbage and sewage. In 1980 Congress enacted the Act to Prevent Pollution from Ships, which applied the MARPOL rules to all U.S. flagged vessels and foreign flagged vessels operating or docked within U.S. jurisdiction. The Act provides many "tools" to punish polluting vessels including fines and imprisonment, suits in rem against the vessel itself, and a citizen suit provision. Enforcement of the Act most often results in a sizeable fine awarded to the United States government, which is deposited into the General Fund. Recently, however, federal prosecutors have begun seeking "Community Service" fines that divert part of the awarded fine to environmental organizations for research and restoration on the effects of oil discharge in marine ecosystems. This Comment calls for nationwide implementation of "Community Service" fine provisions in all prosecutions under the Act given the strong public policy benefits in favor of using fine monies to restore the environment as opposed to diverting the entire sum to the General Fund.

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I. The Intended Effect of the MARPOL Protocol as Implemented by the Act to Prevent Pollution from Ships

A. The History Behind the MARPOL Protocol and its Application in the United States

The International Convention for the Prevention of Pollution from Ships, known more commonly as the MARPOL Convention, was drafted in London on November 2, 1973, as part of an international effort to prevent the discharge of oil, chemicals, sewage and garbage.¹ The MARPOL Convention was based on coastal nations' recognition of the significant environmental damage caused by vessel pollution as well as the failure of previous international attempts to regulate it effectively.² The MARPOL Convention was intended as a "first step" in adding teeth to international regulation—the agreement was not binding on signatory states, and the United States did not ratify the Convention.³

1. International Maritime Organization, INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS 1973, AS MODIFIED BY THE PROTOCOL OF 1978 RELATING THERETO (MARPOL 73/78), available at http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#7 ["IMO Website"] (last visited April 12, 2004).

2. *Id.*

3. *Id.*

4. *Id.*

5. IMO Website, *supra* note 1, at http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#6 (last visited April 14, 2004); see also generally INTERNATIONAL MARITIME ORGANIZATION, MARPOL 73/78: ARTICLES, PROTOCOLS, ANNEXES, UNIFIED INTERPRETATIONS OF THE INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, 1973, AS MODIFIED BY THE PROTOCOL OF 1978 RELATING THERETO (1992).

The 1973 MARPOL Convention was amended by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.⁴ The International Maritime Organization coordinated the 1978 Protocol in response to numerous oil tanker accidents in 1976–77.⁵ The 1978 Protocol absorbed the 1973 Convention and approved measures affecting tanker design and operation.⁶ The combined instrument is commonly known as the MARPOL Protocol, or MARPOL.⁷

The MARPOL Protocol is made up of six provisions: Annex I regulates pollution by oil; Annex II regulates pollution by noxious liquid substances; Annex III regulates pollution by harmful substances in packaged form; Annex IV regulates pollution by sewage; Annex V regulates pollution by garbage; and Annex VI regulates air pollution.⁸ Though the United States signed MARPOL in 1978, it initially agreed only to comply with Annexes I and II.⁹ The United

6. *Id.*

7. *Id.*

8. *Id.* For a more detailed look at the MARPOL Protocol Annexes see Andrew Griffin, MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?, 1 IND. J. GLOBAL LEGAL STUD. 489, 494–512 (1994) (discussing the mechanics and enforcement of Annex I and critiquing its effectiveness); Jeff B. Curtis, *Vessel Source Pollution and MARPOL 73/78: An International Success Story?*, 15 ENVTL. L. 679, 693–710 (1985) (discussing the mechanics and enforcement of the MARPOL Protocol and critiquing its effectiveness). For a detailed look at the influence of international law on domestic environmental laws see generally Dorit Talitman, Alon Tal & Shmuel Brenner, *The Devil is in the Details: Increasing International Law's Influence on Domestic Environmental Performance—The Case of Israel and the Mediterranean*, 11 N.Y.U. ENVTL. L. J. 414 (2003).

9. IMO Website, *supra* note 1, at <http://www.imo.org/Conventions/mainframe.asp?>

States later agreed to comply with Annex V as well.¹⁰

B. The Act to Prevent Pollution from Ships (APPS)

Congress passed the Act to Prevent Pollution from Ships (APPS) in 1980, solidifying American commitment to the MARPOL regulations.¹¹ APPS essentially requires that all ships¹² either flagged in the United States or operating in United States territorial waters comply with Annexes I, II, and V of the MARPOL Protocol.¹³ APPS also applies to any ship

docked at “any port or terminal in the United States.”¹⁴ Except for those ships explicitly excluded under the MARPOL Protocol itself, the only ships that are exempt from APPS are vessels “owned or operated by the Department of the Navy.”¹⁵ Similarly, APPS does not apply during “a time of war or declared national emergency.”¹⁶ APPS authorizes the Secretary of the department in which the United States Coast Guard is operating¹⁷ to promulgate further regulations of vessel discharges consistent with the MARPOL requirements.¹⁸ Under APPS, it is a

topic_id=258& doc_id=678#7 (last visited April 12, 2004); Curtis, *supra* note 8, at 700–02.

10. *Id.*

11. 33 U.S.C. §§ 1901–14 (2000).

12. “Ship” is defined under APPS as a “vessel of any type whatsoever, including hydrofoils, air-cushion vehicles, submersibles, floating craft whether self-propelled or not, and fixed or floating platforms.” 33 U.S.C. § 1901(a)(10). “Submersible” is further defined as “a submarine, or any other vessel designed to operate under water.” *Id.* § 1901(a)(11). This broad definition appears to apply APPS, and therefore the MARPOL Protocol, to virtually any craft designed to operate on water—commercial vessels and pleasure craft alike.

However, APPS later limits the Secretary’s regulations to oceangoing vessels. *Id.* § 1903(a). An oceangoing vessel is defined as a ship that “(1) is operated under the authority of the United States and engages in international voyages; (2) is operated under the authority of the United States and is certificated for ocean service; (3) is operated under the authority of the United States and is certificated for coastwise service beyond three miles from land; (4) is operated under the authority of the United States and operates at any time seaward of the outermost boundary of the territorial sea of the United States . . . ; or (5) is operated under the authority of a country other than the United States [within the territorial seas of the United States].” 33 C.F.R. § 151.05 (2003). “The regulations do not apply to American-flagged

ships operating exclusively in internal waters, including the Great Lakes.” *Id.* §§ 151.09(b)(2)–(3).

13. 33 U.S.C. § 1902.

14. *Id.* § 1902(a)(4).

15. *Id.* §§ 1902(b)(1)–(2). This exception includes Naval Auxiliary vessels and Military Sealift Command vessels. However, Navy vessels are not completely exempt from MARPOL standards. Section 1902(e)(1) requires the Secretary of the Navy to “develop and, as appropriate, support the development of technologies and practices for solid waste management aboard ships owned or operated by the Department of Navy, including technologies and practices for the reduction of the waste stream generated aboard such ships, that are necessary to ensure the compliance of such ships with Annex V to the Convention” *Id.*

16. *Id.* § 1902(b)(2)(B).

17. The United States Coast Guard currently operates under the Department of Homeland Security. For more information on the Coast Guard’s authority and duties *see* United States Coast Guard Website at <http://www.uscg.mil> (last visited April 12, 2004).

18. 33 U.S.C. § 1903(b)(2). All references to “the Secretary” in the APPS currently refer to the Secretary of the Department of Homeland Security. *Id.* § 1901(a)(9); *see also supra* note 17. As part of his authority, the Secretary is charged with promulgating “any necessary or desired regulations to carry out the provisions of the MARPOL Protocol” *Id.* § 1903(b)(1). Coast Guard regu-

federal crime to knowingly violate APPS, MARPOL, or regulations promulgated by the Coast Guard pursuant to its authority.¹⁹

Further, APPS places an affirmative duty on the master—or other person in charge—of any vessel subject to APPS to report any “discharge, probable discharge, or presence of oil” while the vessel is within the navigable waters of the United States.²⁰ APPS places the same duty to report on persons in charge of seaports and oil handling facilities within United

States jurisdiction.²¹ In order to accommodate the duty to report, the Secretary is required to cooperate with other parties to the MARPOL Protocol;²² utilize “all appropriate and practical measures of detection and environmental monitoring;” and establish procedures for reporting violations and accumulating evidence.²³ The Secretary must investigate all alleged APPS violations upon receipt of evidence, and has the authority to issue subpoenas (both *ad testificandum* and *duces tecum*) as part of his investigation.²⁴ Should any party subject to the Secretary’s subpoena

lations must be clear, and must not hold persons liable for acts that are standard industry practice without providing clear notice of the acts’ illegality. *See* United States v. Apex Oil Co., 132 F.3d 1287, 1291 (9th Cir. 1997) (noting that “[t]he line to be drawn in this complex and comprehensive area of environmental protection was supposed to be drawn by an agency with expertise on the subject: it was incumbent on that agency to draw the line in language that the common world will understand.”) (internal quotation and citation omitted).

19. 33 U.S.C. § 1907(a). There are several other federal statutes under which a vessel’s discharge of oil could also be prosecuted. For example, the Clean Water Act as modified by the Oil Pollution Act in 1990, 33 U.S.C. § 1251–1387, makes it a felony to knowingly discharge harmful quantities of oil or hazardous substances into the waters of the United States, and makes it a misdemeanor to do so negligently. Similarly, the Ocean Dumping Act, 33 U.S.C. § 1401–45, regulates the dumping of material into the ocean through a permitting system which only allows dumping pursuant to EPA or Army Corps of Engineers permits. APPS is generally regarded as the preferred statute for illegal oil discharge prosecutions, because APPS/MARPOL contains the most detailed sets of regulations concerning the discharge of oil in the normal operation of vessels. Furthermore, APPS has a further geographic reach than the CWA—APPS applies into international waters for American-flagged vessels.

States jurisdiction.²¹ In order to accommodate the duty to report, the Secretary is required to cooperate with other parties to the MARPOL Protocol;²² utilize “all appropriate and practical measures of detection and environmental monitoring;” and establish procedures for reporting violations and accumulating evidence.²³ The Secretary must investigate all alleged APPS violations upon receipt of evidence, and has the authority to issue subpoenas (both *ad testificandum* and *duces tecum*) as part of his investigation.²⁴ Should any party subject to the Secretary’s subpoena

20. 33 U.S.C. §§ 1906(a), (b)(1)–(2). The master or other person in charge of the vessel shall report “the particulars of such incident without delay and to the fullest extent possible” to the “appropriate officer or agency of the government of the country in whose waters the incident occurs . . . U.S. ships [shall also report to] the nearest Coast Guard Captain of the Port . . .” 33 C.F.R. §§ 151.15(a), (c)–(d).

“The report shall be made whenever an incident involves—(1) a discharge other than as permitted under this part; or (2) A discharge permitted under this part by virtue of the fact that—(i) it is for the purpose of securing the safety of a ship or saving life at sea; or (ii) it results from damage to the ship or its equipment; or (3) the probability of a discharge referred to in paragraphs (1) or (2) of this section.” *Id.* § 151.15(e). “Each report shall contain—(1) the identity of the ship; (2) the time and date of the occurrence of the incident; (3) the geographic position of the ship when the incident occurred; (4) the wind and sea condition prevailing at the time of the incident; (5) relevant details respecting the condition of the ship; and (6) a statement or estimate of the quantity of oil or oily mixtures discharged or likely to be discharged into the sea.” *Id.* § 151.15(f).

21. 33 U.S.C. § 1906(b)(3).

22. IMO Website, *supra* note 1, at http://www.imo.org/Conventions/Mainframe.asp?topic_id=258&doc_id=678#7 (last visited April 14, 2004).

23. 33 U.S.C. § 1907(a).

24. *Id.* § 1907(b).

refuse to comply, the Secretary may seek the Attorney General's assistance to compel compliance in the appropriate United States District Court.²⁵

The Secretary also has the authority to inspect any ship at an American port relating to an alleged APPS violation.²⁶ However, vessels may only be inspected to verify whether or not the vessel violated APPS—an investigation is warranted only if “the requesting party has furnished sufficient evidence to allow the Secretary reasonably to believe that a discharge has occurred.”²⁷ If, upon investigation, the inspecting officer believes that the vessel violated APPS/MARPOL, he then submits a report to the Secretary for further action.²⁸

25. *Id.*

26. *Id.* § 1907(c)(2)(A)–(B). Inspections may be carried out if the Secretary has received evidence of an alleged violation, or if another party to the MARPOL Protocol requests an investigation “as to whether the ship may have discharged a harmful substance *anywhere* in violation of the MARPOL Protocol.” *Id.* § 1907(c)(2)(B) (emphasis added).

27. *Id.* § 1907(c)(2)(B).

28. *Id.*

29. 33 C.F.R. § 151.04(c).

30. 33 U.S.C. § 1908(a). For an individual violator, the base offense level for such violations is 6, which, if the defendant has no prior criminal history, would yield imprisonment for 0–6 months. U.S.S.G. §2Q1.3. The base offense level, and subsequently the term of imprisonment, is increased significantly if one of six aggravating factors is also found. *Id.*). Whenever possible, the government prosecutes the discharging vessel's Chief Engineer under this section. Prosecuting the Chief Engineer is part of the government's goal of alerting the shipping industry and the public alike that members of the Engine Room crew will be held liable for illegal discharges and encouraging companies to weigh the “long term” costs of violating the law

C. The Criminal and Civil Penalties for Violating APPS

The knowing violation of MARPOL, APPS, or the Coast Guard regulations constitutes a class D felony.²⁹ Violators are sentenced under United States Sentencing Guideline (U.S.S.G) § 2Q1.3.³⁰ In addition to imprisonment under the U.S.S.G., the Secretary may assess fines for the violation of Coast Guard regulations promulgated pursuant to APPS authority.³¹ Under APPS' whistleblower provision, the trial judge has the discretion to divert up to one half of the defendant's fine to any informant whose information leads to a conviction.³²

A civil penalty not to exceed \$25,000 may also be imposed if, after notice and

against the “short term” costs of proper waste oil treatment. Note, however, that the Sentencing Guidelines only apply to individuals, i.e., crew members personally engaged in either oil discharge or a conspiracy to conceal an oil discharge. *Id.* When corporations are prosecuted for APPS/MARPOL violations the maximum penalty is \$500,000 or twice the gross pecuniary gain derived from the crimes or twice the gross pecuniary loss caused to the victims of the crime, whichever is greater. 18 U.S.C. § 3571(c)(3), (d) (2000).

31. “A person who violates MARPOL 73/78, the Act, or the regulations of this subpart is liable for a civil penalty for each violation, as provided by 33 U.S.C. § 1908(b)(1). Each day of a continuing violation constitutes a separate violation.” 33 C.F.R. § 151.04(a). “A person who makes a false, fictitious statement or fraudulent representation in any matter in which a statement is required to be made to the Coast Guard under MARPOL 73/78, the Act or the regulations of this subpart, is liable for a civil penalty for each statement or representation, as provided by 33 U.S.C. § 1908(b)(2).” *Id.* § 151.04(b).

32. 33 U.S.C. § 1908(a); 33 C.F.R. § 151.04(c). This provision is part of the court's final judgment, and is often included in a plea agreement.

an opportunity for a hearing, the Secretary finds that an APPS violation has occurred.³³ If the Secretary finds that the person “made a false, fictitious, or fraudulent statement or representation in any matter in which a statement or representation is required to be made . . . [the person] shall be liable to the United States for a civil penalty, not to exceed \$5,000 for each statement or representation.”³⁴

Under the civil penalty provision, a separate offense occurs for each day of a continuing violation.³⁵ The Secretary must issue a written notice of the amount of civil penalty imposed and the penalty must be based on “the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.”³⁶ As with the criminal whistleblower provision, the Secretary has the

authority to divert no more than one half of the defendant’s total fine to any party who provides information leading a civil penalty assessment.³⁷ Defendant’s failure to pay a civil fine may be referred to the Attorney General for collection in any United States District Court.³⁸

APPS further authorizes the United States to proceed *in rem* against the violator’s vessel when either a civil or criminal case is brought.³⁹ Should defendant fail to pay his fine, the United States may force the sale of defendant’s vessel to satisfy the judgment. An *in rem* proceeding is one of the hallmarks of American Admiralty Law—the basic theory is that the vessel may be held responsible for the actions of its owner, master or crew.⁴⁰ Furthermore, the Secretary may refuse to allow a vessel alleged to have been used during a MARPOL violation to leave port.⁴¹ Nonetheless, the vessel owner may avoid such a seizure by posting a

33. 33 U.S.C. § 1908(b).

34. *Id.* § 1908(b)(2). See also *infra* Pt.III.B., false statements can also be prosecuted under 18 U.S.C. § 1001.

35. *Id.* § 1908(b); 33 C.F.R. § 151.04(a).

36. 33 U.S.C. § 1908(b).

37. *Id.*

38. *Id.* § 1908(c).

39. “A ship operated in violation of the MARPOL Protocol . . . or the regulations thereunder is liable *in rem* for any fine imposed under subsection (a) of this section or civil penalty assessed pursuant to subsection (b) of this section, and [the Secretary] may proceed against it in the United States district court of any district in which the ship may be found.” *Id.* § 1908(d); 33 C.F.R. § 151.04(d).

40. See DAVID W. ROBERTSON, STEVEN F. FRIEDEL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES, 69–83, 121–26 (Carolina Academic Press 2001). For an interesting look at

the history of Admiralty *in rem* proceedings see William Tetley, Symposium: Admiralty Law at the Millennium, *Arrest, Attachment, and Related Maritime Procedures*, 73 TUL. L. REV. 1895, 1905–39 (1999) (comparing *in rem* arrest procedures in the United Kingdom, United States and Canada). For an examination of the Constitutionality of the Admiralty *in rem* proceeding see generally Constance M. Walker, *Due Process and Rule C: The Constitutionality of the Admiralty In rem Action*, 6 MAR. LAW. 249 (1981).

41. 33 U.S.C. § 1908(d). The government ordinarily files an *in rem* action and serves a warrant of arrest on the vessel. Such a seizure ensures that the owner, master or crew of the vessel (often citizens of foreign nations) will appear to answer the allegations of violation. Also, if the vessel fails to pay any judgment, then the judgment can be executed against the vessel if it remains in custody, or the judgment can be executed on any bond posted by the vessel. The seizure of a vessel is very expensive for the owner of a vessel engaged in maritime commerce.

bond in an amount satisfactory to the Secretary.⁴² If a vessel used in an alleged APPS violation is registered in a foreign country that is also a party to the MARPOL Protocol, the Secretary may refer the matter to the government of the flag country.⁴³ This action would be taken *in lieu* of an investigation in the United States.

APPS also provides a private right of action to any person adversely affected by a violation of the statute.⁴⁴ Such a person may bring an action:

(1) against any person alleged to be in violation of the [APPS] provisions or regulations issued hereunder; (2) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary; or (3) against the Secretary of the Treasury where there is alleged a failure of the Secretary of the Treasury to take action [in securing a bond] under section 1908(e)⁴⁵

However, there is one major restriction on the private right of action under section 1910(a)—such a suit may only be

brought if the Secretary has failed to adequately enforce APPS or the Coast Guard regulations.⁴⁶ Citizen suits may not be brought, for example, simply because the plaintiff feels that the punishment was not harsh enough.

Venue under section 1910(a) is proper in the United States District Court for the judicial district where either: the port or offshore facility from which the pollution occurred is located; or the vessel, its owner or its operator may be found. As a default, venue is always proper in the United States District Court for the District of Columbia.⁴⁷ In a suit under section 1910(a), the District Court Judge may award litigation costs—including reasonable attorney's fees—to the prevailing party (including the federal government).⁴⁸ Finally, both the Secretary and the Attorney General have explicit authority to intervene in a suit under section 1910(a) if they are not named as parties of record.⁴⁹

II. THE ONBOARD MECHANICS OF WASTE OIL POLLUTION

The most common form of APPS/MARPOL violation involves the discharge of waste oil (also known as sludge) through an engine room bypass.⁵⁰ Such discharges are possible if the vessel's crew

42. The bond amount is generally set at the level of fine that is most likely to be imposed if the allegation is proven, but the amount of the bond can be negotiated between prosecutors and defense attorneys.

43. *Id.* § 1908(f). This action also requires the Secretary to consult with the Secretary of State.

44. *Id.* § 1910(a).

45. *Id.* Section 1910(a) does not appear to confer the authority to pursue *in rem* jurisdiction

against the vessel. A citizen suing under section 1910(a) is limited to *in personam* actions.

46. *Id.*

47. *Id.* § 1910(c).

48. *Id.* § 1910(d).

49. *Id.* § 1910(e).

50. David G. Dickman, *Criminal Enforcement of Environmental Laws: New Developments Affecting the Maritime Industry*, 1 BENEDICT'S MAR. BULLETIN 102 (Second Quarter 2003).

utilizes a “bypass hose”⁵¹ to modify the engine room mechanics, allowing the discharge of sludge through the overboard valve into the ocean.⁵² A brief explanation of engine room mechanics is necessary to put waste oil discharge into context.

Seagoing vessels take on a substantial amount of bunker fuel before leaving port.⁵³ Bunker fuel, which is considered “dirty” by the time it reaches a vessel,⁵⁴ is stored in Fuel Oil Storage Tanks located on the vessel’s “center line” just above the keel.⁵⁵ Because bunker fuel is “dirty,” the vessel must process the fuel before it can

be burned in the main engine. The first stage of bunker fuel processing is to draw the fuel through a strainer, which removes large sediments.⁵⁶ Once strained, the fuel is pumped into the Settling Tank—also known as the “day tank”⁵⁷—where finer sediments and water settle out of the fuel.⁵⁸ Once the fuel has settled it is pumped through a purifier where enmeshed discs oscillate the fuel to separate any water and impurities that may still be in solution with the fuel.⁵⁹ The purifier discharges water and sediment to the Fuel Oil Sludge Tank,⁶⁰ and purified fuel is pumped to the Service Tank where

51. Engine Room bypasses are typically constructed from flexible rubber hose, but may also be constructed with hard pipe to create a more perfect “fit” with the vessel’s bilge system. Interview with Marine Engineer Valerie Scott, Vessel Inspector, Washington Department of Ecology Spills Program – Prevention Section, in Portland, Oregon. (Dec. 2, 2003).

52. *Id.* MARPOL Annex I Regulation 17, paragraph (3) prohibits vessels from creating a direct connection between the sludge tank to the overboard valve except for the standard discharge connection. APPS adopted MARPOL’s discharge definitions and prohibitions at 33 U.S.C § 1901(5).

53. Seagoing “bulklers,” or bulk cargo carriers, may take on several hundred, even thousands of, metric tons of bunker fuel per voyage. Marine Engineer Valerie Scott Interview, *supra* note 51. By MARPOL Protocol estimation, 1 percent of that volume becomes “sludge” which the vessel must process and store during the voyage. *Id.*

54. “Fuel oil, as produced at the refinery is clean. However, during the transfer from the storage tank at the refinery into the tank car, barge, or tank truck, during transportation to the plant, and during the transfer to the storage tank at the plant it often becomes contaminated with dust, scale from the tanks, water, and products of oxidation.” V. L. MALEEV, DIESEL ENGINE OPERATION AND MAINTENANCE 155 (McGraw-Hill Book Company).

55. Marine Engineer Valerie Scott Interview, *supra* note 51; *see also infra* Diagram # 1.

56. *Id.*; *see also infra* Diagram # 2.

57. Settling Tanks are called “day tanks” by many mariners, because the Settling Tank holds roughly one day’s worth of fuel. Marine Engineer Valerie Scott Interview, *supra* note 51.

58. *Id.*; *see also infra* Diagram # 2. “Fuel treatment systems include the settling tanks and purifiers, which enable most of the water and solids in the fuels to be removed. While clean distillate fuels are sometimes considered suitable for combustion in diesel engines without any treatment other than settling and filtration, given current refining practices it is advisable to centrifuge even the distillate fuel. In normal operation, fuel is transferred directly into the settling tanks from the bunker tanks, but passes to the day tanks only via the purifiers.” MODERN MARINE ENGINEER’S MANUAL, VOLUME II 16-87 (Everett C. Hunt, James A. Harbach, Alan L. Rowen ed., Cornell Maritime Press 1991) (on file with author) (newer editions of this work may be available). For a more detailed look at the mechanical operations of purifiers and settling tanks see *id.* at 16-86 – 16-89.

59. Marine Engineer Valerie Scott Interview, *supra* note 51. The purifier uses centrifugal force to separate liquids with differing densities. *Id.* The purifier discs spin rapidly to pull the oil and water out of solution, so that the fuel can be burned more efficiently. *Id.*; *see also infra* Diagram # 3.

60. *Id.*; *see also infra* Diagram # 2.

it is then supplied to the Main Engine for combustion.⁶¹

A vessel's sludge system consists of the Fuel Oil Sludge Tank discussed above, the Lube Oil Sludge Tank, and the Stuffing Box Drain Tank. Lube oil is stored in the main engine sump, and is continuously pumped through a purifier⁶² to remove contaminants and water.⁶³ Purified lube oil is then pumped back into the main engine reservoir, and contaminants are diverted to the Lube Oil Sludge Tank.⁶⁴ The Stuffing Box Drain Tank, which is also attached to the main engine, collects lube oil, engine scrapings, and other sediments that result from the pistons' motion within the main engine.⁶⁵

The sludge system houses all of the waste material produced by the bunker fuel purification process onboard a vessel—principally oil, sediment, water, and

engine scrapings which are removed to allow the engine to function more efficiently.⁶⁶ Naturally, all of the waste stored in sludge tanks must be disposed of.⁶⁷

The first step in the disposal process is to draw material from the Lube Oil, Fuel Oil, and Stuffing Box Drain Tanks through a strainer⁶⁸ and into the Separated Bilge Oil Tank (SBOT).⁶⁹ Once sludge has been pumped into the SBOT, the vessel has two options for legally disposing of the waste: incinerate the sludge onboard, or store the sludge until the vessel reaches port where the ship discharges it to an environmental company for proper disposal.⁷⁰ If the vessel chooses to incinerate, sludge is pumped from the SBOT to the Incinerator Sludge Tank where it is gradually injected into the incinerator and burned.⁷¹ Both portside disposal and

61. *Id.*

62. The lube oil purifier very closely resembles the purifier discussed *supra* at note 59 and accompanying text.

63. Marine Engineer Valerie Scott Interview, *supra* note 51; *see also infra* Diagram # 3.

64. *Id.*; *see also infra* Diagram # 3.

65. *Id.* "Waste to the Stuffing Box Drain Tank should be minimal. If the pumps are not adjusted correctly, overfeeding will occur. As a result, there will be high cylinder oil consumption and excess waste being produced. This waste is highly viscous and gritty, as it contains coke and carbon, metal particles loosened by wear of the piston rings and cylinder wall, and dust that is introduced through the air intake. These byproducts of the combustion process are scraped from the cylinder liner by the oil scraping ring in the piston ring pack and ultimately end up in the Stuffing Box Drain Tank." Seminar, WASTE OIL GENERATION, Los Angeles, California, Feb. 20, 2004 (presentation by Valerie Scott, Vessel Inspector, Washington State Department of Ecology SPPR Program).

66. *Id.*; Marine Engineer Valerie Scott Interview, *supra* note 51. Sludge has a very thick consistency, resembling tar, and is grainy with sediment. Because of its makeup, sludge must be kept heated at all times during the refinement and storage process. If sludge is not kept at a proper temperature it will solidify in the tanks, strainers, pumps or purifiers. *Id.* Though it is costly to constantly heat the sludge, it is even more costly and time consuming to remove solidified tar from engine room machinery and restore it to good working order. *Id.*

67. *Id.*

68. *See supra* note 56 and accompanying text.

69. Marine Engineer Valerie Scott Interview, *supra* note 51; *see also infra* Diagram # 4. The SBOT is also known as the Waste Oil Tank, and it serves as the vessel's main storage tank for sludge. Once strained, sludge can either be incinerated or disposed of at port. Marine Engineer Valerie Scott Interview, *supra* note 51.

70. Marine Engineer Valerie Scott Interview, *supra* note 51.

71. *Id.*

incineration bear significant costs—disposal of sludge at port is very costly, and incineration requires the diversion of manpower and energy away from vessel operations to oversee the incineration process.⁷²

The sludge system should not be confused with the vessel's bilge system. A vessel has three main bilge wells located on the starboard, port, and aft sides of the engine room.⁷³ The bilge wells are located below decks against the keel, and they are designed to collect water and other liquids that drain from various locations onboard.⁷⁴ Such locations include—but are not limited to—sinks, condensed steam, pump leaks, and hoses.⁷⁵ As water drains through the vessel into the bilge well it collects oil, degreasers and sediments from the vessel's decks and machinery.⁷⁶

72. *Id.*

73. *Id.*; see also *infra* Diagram # 5.

74. *Id.* “The *Bluejacket's Manual* defines the bilge as: (1) The bottom of the hull near the keel, (2) To fail an examination, (3) Bilge water is foul water, so to apply the term to oral or written statements implies that the statement is worthless. To sum up, bilge water is the wicked, nasty, foul water in the bottom of the ship.” WASTE OIL GENERATION, *supra* note 65.

75. Marine Engineer Valerie Scott Interview, *supra* note 51.

76. *Id.*

77. *Id.*; see also *infra* Diagrams # 5 and 6.

78. See *infra* Diagram # 5. The pipe extends below the normal oil level but not quite to the bottom of the tank. This allows the pipe to collect most of the bilge water without also collecting much sediment or oil.

79. Marine Engineer Valerie Scott Interview, *supra* note 51; see also *infra* Diagram # 6.

80. There are a few different types of OWS on the market, but the most popular models are “coa-

lescing” separators which use pressure from either a vacuum or gravity to feed bilge water through the OWS where oil and water are separated. Seminar, INVESTIGATING ILLEGAL DISCHARGES OF SHIPBOARD WASTE OIL, Olympia, WA (2003) (including speeches by representatives of the United States Coast Guard, United States Department of Justice, United States Environmental Protection Agency, and the Washington Department of Ecology) (materials on file with author). Coalescing separators use a variety of methods to change the speed and velocity of the bilge solution inside the OWS as a means to separate the oil and water. This method is effective because oil and water have different densities, and therefore separate rather easily under the right conditions. *Id.* See also *generally*, COFFIN WORLD WATER SYSTEMS, MANUAL NO. HSMN5000-CM02, INSTALLATION, OPERATION AND MAINTENANCE MANUAL FOR OIL WATER SEPARATOR HELI-SEP MODEL 5000-OCD (April 2003).

Bilge water is pumped from the three bilge wells into the Bilge Water Tank. Inside the Bilge Water Tank, the water settles out—sediment collects at the bottom of the tank and emulsification and oil rise to the top of the water level.⁷⁷ A suction pipe⁷⁸ from the holding tank draws bilge water through a strainer where it is pumped into the Oily Water Separator (OWS).⁷⁹ As its name implies, the OWS is specifically designed to separate oil from bilge water before discharging clean water overboard.⁸⁰

Under APPS/MARPOL, bilge water can be discharged if it contains less than 15 parts-per-million (ppm) oil.⁸¹ The first step (Stage 1) in the OWS process is to force bilge water through a series of stationary plates. This process alters the direction of the solution, allowing oil and

81. 33 C.F.R. § 151.05. At 15ppm, the appearance of bilge water is “cloudy,” but neither oil nor sheen can be seen in the water and oil cannot be smelled. Marine Engineer Valerie Scott Interview, *supra* note 51.

water to separate by density.⁸² Oil from this process collects into beads, flows to the top of the OWS, and is detected by the Oil Level Probe.⁸³ The oil from Stage 1 is diverted through a strainer and piped back to the SBOT.⁸⁴ The water from Stage 1 is drawn through a “t” strainer and then piped into the OWS Coalescer (Stage 2).⁸⁵

Inside the Coalescer, pressure is used to alter the speed and direction of the bilge water, so that any remaining oil will separate from the water.⁸⁶ Oil from Stage 2 is also drained and piped to the SBOT for proper disposal. The water is then pumped out of the OWS where a sample of the overboard effluent passes through the Oil Content Monitor, which measures the ppm of oil contained in the bilge water.⁸⁷ If less than 15ppm oil are present

in the bilge water, it is discharged overboard. If more than 15ppm are present, then an engine room alarm sounds, the OWS shuts down, and the system prevents any water from being discharged overboard.⁸⁸

It is almost impossible for waste oil to be discharged overboard when a vessel’s sludge and bilge systems operate as designed.⁸⁹ Nonetheless, there are economic motivations to modify engine room systems to allow a discharge. As noted above, both of the legal methods for disposing of waste oil are expensive and incineration is both extremely difficult and time consuming.⁹⁰ In order to avoid these costly and time-consuming processes, crew members may fashion bypass hoses to pump sludge overboard.⁹¹

82. See Marine Engineer Valerie Scott Interview, *supra* note 81; see also *infra* Diagram # 7.

83. See *infra* Diagram # 7.

84. Thus, oil in the bilge system is routed into the sludge system where it can either be incinerated or disposed of at port in accordance with APPS/MARPOL. See *supra* notes 69–71 and accompanying text.

85. See *infra* Diagram # 7.

86. This process is very similar to the Stage 1 process discussed *supra* at notes 82–84 and accompanying text.

87. The Oil Content Monitor utilizes refracted light to analyze the oil content of the bilge water. *Investigating Illegal Discharges of Shipboard Waste Oil*, *supra* note 80.

88. Marine Engineer Valerie Scott Interview, *supra* note 51.

89. This is true because the sludge and bilge systems are not connected—there is no way to discharge sludge overboard through a normal engine room design. *Id.*

90. Because sludge is very thick and contains both sediments and water it is relatively difficult to burn. Even under perfect working conditions it

may be almost impossible to incinerate all of the waste oil sludge produced during a normal day at sea. *Id.*

91. The decision to bypass may be made by the vessel’s chief engineer, the master, or even shoreside management, though bypass operations are usually implemented by engine room crew members. However, the vessel’s attempts to cover up and disguise the bypass operation generally indicate that the bypass is part of a company-wide conspiracy to violate APPS/MARPOL and avoid the high costs of proper waste oil sludge disposal. *Id.* Because most shipping companies—like any other company—are primarily concerned with the “bottom line,” they may see a financial advantage to illegally discharging waste oil. The federal government’s recent, aggressive prosecution of APPS/MARPOL crimes—including the application of Environmental Compliance Plans, see *infra* Pt.III E—is aimed at forcing companies to consider costly fines and compliance plans in their long-term financial analysis. This policy is based on the presumption that if both the odds of getting caught and the criminal and civil penalties increase, corporations will eventually decide that it is less expensive to comply with the law than it is to violate it.

Polluters most commonly utilize one of the following two types of bypass.⁹² First, sludge can be discharged through the OWS system.⁹³ This bypass method requires several engine room modifications: the crew must cross-connect the bilge and sludge systems; and both the Oil Level Probe and Oil Content Monitor must be disabled so that the OWS does not recognize that the bilge water is choked with sludge.⁹⁴ By utilizing this method, the vessel can force waste oil through the bilge system (including the disabled OWS) and directly overboard. In addition to the obvious environmental impact, this type of bypass will eventually ruin the vessel's bilge system—sludge corrodes the OWS's interior walls, which are not designed to handle materials this "dirty."⁹⁵ Telltale signs that a vessel is utilizing such a bypass include extra flanges and piping which would not normally be present, the presence of oil in the OWS, malfunctioning OWS and bilge systems, and the presence of oil on valve stems on the "clean side" of the OWS including the overboard valve.⁹⁶

92. Unfortunately, there are as many possible bypass types as the human imagination can create. It is not uncommon for inspectors to discover that a vessel is bypassing in a way that inspectors have never seen before. *Id.*

93. *See infra* Diagram # 6.

94. The OWS can be disabled by turning off both the Oil Level Probe located in Stage 1 of the OWS and the Oil Content Monitor, which is located on the "clean side" of the OWS (beyond the point where oil should be located). Marine Engineer Valerie Scott Interview, *supra* note 51.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

The second common bypass method utilizes a hose to draw sludge from the sludge pump discharge directly into the overboard valve.⁹⁷ Such a bypass generally only requires a length of rubber hose or hard pipe to span the distance between the sludge pump and the overboard valve.⁹⁸ The only modification required for this bypass method is the connection of a rubber hose or hard pipe to the overboard valve.⁹⁹ The telltale signs of this bypass method include extra flanges, oily hoses or piping hidden in the engineer spaces, and the presence of oil in valve stems on the "clean side" of the OWS including the overboard valve.¹⁰⁰

Because bypasses are prohibited under APPS/MARPOL, they must be concealed to avoid a Coast Guard investigation. The only way to conceal such a bypass is to hide the hose¹⁰¹ and falsify the vessel's Oil Record Book.¹⁰² All vessels subject to APPS¹⁰³ are required to maintain an Oil Record Book.¹⁰⁴ The vessel's Oil Record Book must be stored

99. There is an abundance of piping and hose on most vessels, and inspectors have found "custom made" bypasses manufactured from hard pipe onboard some ships. These custom pipes, sometimes referred to as "magic pipes," were obviously manufactured in a shipyard to the exact dimensions of the vessel's engine room. *Id.*

100. *Id.*

101. Bypass hoses are usually removed and hidden before the vessel reaches port, and the crew also paints over the bypass connection points so that it is not immediately obvious that bolts and flanges have been removed *en route*. *Id.*

102. *Id.*

103. *See supra* note 12 and accompanying text.

104. 33 C.F.R. § 151.09. The recording requirements vary depending on the size of the vessel, its primary function, and its flag state. *Id.* "An Oil

onboard for three years,¹⁰⁵ and non-tankers must create an entry for each occurrence of fuel oil tank cleaning; oily mixture discharge; oil residue disposal; and bilge water disposal.¹⁰⁶

The Oil Record Book must also contain entries for any volume of waste oil that is incinerated while en route.¹⁰⁷ Engine room bypasses are most commonly “concealed,” by way of a false Oil Record Book entry indicating that crew members incinerated waste oil that was actually pumped overboard.¹⁰⁸ The creation of false Oil Record Book entries can be prosecuted as false statements under 18 U.S.C. § 1001.¹⁰⁹ If an inspection team is presented with a false Oil Record Book, one way to refute the entries is by proving that the ship’s equipment was incapable of incinerating the stated volume of sludge in the stated amount of time.¹¹⁰

As noted above, a typical voyage will produce one percent of the vessel’s

Record Book printed by the U.S. Government is available to the masters or operators of all U.S. ships subject to this section, from any Coast Guard Marine Safety Office, Marine Inspection Office, or Captain of the Port Office.” *Id.* § 151.25(b). The United States Coast Guard can demand production of a vessel’s Oil Record Book at any time, because “[t]he ownership of the Oil Record Book of all U.S. ships remains with the U.S. Government.” *Id.* § 151.25(c).

105. *Id.* §§ 151.25(i), (k).

106. *Id.* §§ 151.25(c)(1)–(4).

107. *Id.* § 151.25(c)(3).

108. Marine Engineer Valerie Scott Interview, *supra* note 51.

109. *See infra* Pt. III.B. False Oil Record Books have also been prosecuted under the Sarbanes-Oxley Act. *See e.g.* Plea Agreement, United States v. Vincent B. Genovana, Case No. CR03-5596-BML (W.D. Wash. 2003) For a more detailed look at the application of section 1001 to pollution cases, see

bunker fuel consumption in waste oil.¹¹¹ If only one vessel per year discharged this amount of sludge overboard it would constitute a significant amount of pollution. However, the number of APPS prosecutions in recent history indicates that the problem is far more widespread. Between January 2002 and April 2003 federal prosecutors convicted defendants in thirteen separate cases for crimes arising out of illegal waste oil bypasses.¹¹² Most likely this number includes only a fraction of those vessels violating APPS/MARPOL worldwide.

Though federal prosecutors have learned a great deal about illegal oil discharge, several important facts remain unknown. For example, it is not clear whether engine room bypasses are common industry practice, or if they are employed by only a few companies that value extra profits over environmental preservation. More importantly, the environmental effects of waste oil sludge dis-

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

110. Marine Engineer Valerie Scott Interview, *supra* note 51. Refuting a false Oil Record Book is very difficult. Though foreign crew members may not speak fluent English, they are trained in the illegality of waste oil discharge. Inspectors are often faced with a language barrier, and crew members who refuse to admit to waste oil discharge, even when the Oil Record Book and other documents contradict their statements. *Id.*

111. *See supra* note 53 and accompanying text. It is important to note that this figure is a rough estimation, it is impossible to know for sure the exact percentage of sludge produced by each individual vessel’s engine during a voyage. Marine Engineer Valerie Scott Interview, *supra* note 51.

112. GREGORY F. LINSEN, SELECTED CRIMINAL PROSECUTIONS OF VESSEL POLLUTION AND RELATED MARITIME OFFENSES 1989–2003.

charge are unknown at this time. Though some blame illegal discharges for the steady decline of marine mammal populations along America's Pacific coast, very little research has been done to determine the extent of sludge pollution and its effect on marine ecosystems in American or foreign waters.¹¹³ The remainder of this Comment discusses ways in which the fine money paid by APPS/MARPOL violators can be diverted to fund scientific research on the effect of waste oil pollution and restoration of coastal ecosystems.

III. APPS/MARPOL in the Courts— Holding Vessel Owners and Crew Responsible for Oil Pollution and Opening Doors Toward Alternative Sentencing

A. The Elements Required to Prove a Criminal Violation of APPS

i. Discharge of Oil by Non-Tankers

Prosecutions for the discharge of oil by non-tankers must be broken up into two categories: discharges in United States territorial seas (less than 12 miles from land); and discharges on the high seas (more than 12 miles from land).¹¹⁴ To sustain a conviction for the discharge of oil by a non-tanker *in the territorial seas*, the government must prove four affirmative elements: (1) the defendant is a person; (2) who knowingly; (3) discharged oil or oily mixtures into the sea less than 12

miles from land; (4) from a non-oil tanker subject to APPS' oil discharge regulations."¹¹⁵ The government must also prove that any one of the following five conditions did not occur:

(a) The oil or oily mixture did not originate from cargo pump room bilges;

(b) The oil or oily mixtures were not mixed with oil cargo residues;

(c) The oil content of the affluent without dilution was less than 15 parts per million;

(d) The ship had in operation oily-water separating equipment, a bilge monitor, bilge alarm, or combination thereof;

(e) The oily-water separating equipment is equipped with an approved 15 parts per million bilge alarm.¹¹⁶

To sustain a conviction for the discharge of oil by a non-tanker *on the high seas*, the government must prove four affirmative elements: "(1) the defendant is a person; (2) who knowingly; (3) discharged oil or oily mixtures into the sea more than 12 miles from land; (4) from a non-oil tanker subject to APPS' oil discharge regulations."¹¹⁷ The government must also prove that any one of the following six conditions did not occur:

sea discharges and non-territorial sea discharges are governed by separate regulations. 33 C.F.R. §§ 151.10(a), (b).

115. 33 U.S.C. § 1908(a); 33 C.F.R. § 151.10(b).

116. *Id.*

117. 33 U.S.C. § 1908(a); 33 C.F.R. § 151.10(a).

113. Marine Engineer Valerie Scott Interview, *supra* note 51.

114. This differentiation is necessary because President Ronald Reagan extended the boundary for United States territorial seas to 12 nautical miles in 1988. Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1988). Further, territorial

- (a) The oil or oily mixture did not originate from cargo pump room bilges;
- (b) The oil or oily mixtures were not mixed with oil cargo residues;
- (c) The ship was not within a special area;
- (d) The ship was proceeding en route;
- (e) The oil content of the effluent without dilution was less than 100 parts per million;
- (f) The ship had in operation oily water separating equipment, a bilge monitor, bilge alarm, or combination thereof.¹¹⁸

Discharges by non-tankers on the high seas that are *not* traveling en route are governed by the rules and elements applying to non-oil tankers in the territorial seas.¹¹⁹

ii. Discharge of Oil by Tankers

Oil tankers are treated differently under APPS because they carry oil as cargo.¹²⁰ Interestingly, the elements for

American-flagged tankers are much more stringent than the elements for foreign-flagged tankers.¹²¹ To sustain a conviction for the discharge of oil¹²² by an American-flagged oil tanker, the government must prove four affirmative elements: (1) the defendant is a person; (2) who knowingly; (3) discharged oily mixtures into the sea; (4) from a cargo tank, slop tank, or cargo pump room bilge on an oil tanker subject to APPS' oil tanker discharge regulations.¹²³ The government must also prove that one of the following seven conditions did not occur:

- (a) The tanker was more than 50 nautical miles from the nearest land;
- (b) The ship was proceeding en route;
- (c) The instantaneous rate of oil content of the discharge did not exceed 60 litres per nautical mile;
- (d) If the ship was an "existing vessel,"¹²⁴ the total quantity of oil discharged into the sea did not exceed 1/15,000 of total quantity of the cargo that the

118. *Id.*

119. *Id.*

120. *Id.*

121. Though the difference is substantial, APPS only applies to tank vessels larger than 150 gross tons—regardless of whether the ship is American—or foreign-flagged ships. 33 C.F.R. § 157.25(a).

122. Specifically, this regulation covers the discharge of oil from a vessel space other than the machinery space bilges. 33 C.F.R. §§ 157.26, 29, 35. The regulations also provide specific requirements

for the discharge of "clean ballast" and "segregated ballast." 33 C.F.R. § 157.43.

123. 33 U.S.C § 1908(a); 33 C.F.R §§ 151.10(c), 157.26, 157.29.

124. "The [1992] amendments to Annex I . . . brought in the 'double hull' requirements for tankers, applicable to new ships (tankers ordered after 6 July 1993, whose keels were laid on or after 6 January 1994 or which are delivered on or after 6 July 1996) as well as existing ships built before that date, with a phase-in period." IMO Website, *supra* note 1, at http://www.imo.org/Conventions/main-frame.asp?topic_id=258&doc_id=678#6 (last visited April 12, 2004).

discharge formed a part; if the ship was a “new vessel,” the total quantity of oil discharged into the sea did not exceed 1/30,000 of the total quantity of the cargo that the discharge formed a part.

(e) The discharge into the sea is from one of the points authorized under the APPS regulations (33 C.F.R. § 157.37(a)(5));

(f) The ship had in operation a cargo monitor and control system that is designed for use with the oily mixture being discharged;

(g) The discharge occurred outside of a Special Area.¹²⁵

iii. Failure to Report Discharges

MARPOL, APPS, and the Coast Guard regulations all contain provisions for notifying authorities whenever a discharge of oil has occurred.¹²⁶ The knowing violation of any of these reporting provisions is a felony.¹²⁷ As with all other facets of APPS, the reporting requirements apply to both American-flagged vessels and foreign-flagged vessels sailing in American waters or docked at an American port or facility.¹²⁸

To sustain a conviction for the failure to report a discharge of oil, the govern-

ment must prove the following affirmative elements:

(1) The master or other person in charge;

(2) Of a ship subject to the APPS regulations reporting requirements;

(3) Involved in an incident involving:

(a) a discharge of oil or oily mixtures not permitted under the APPS regulations;

(b) the probability of such a discharge; or

(c) a discharge permitted because it was for the purpose of securing the safety of the ship or saving life at sea or results from damage to the ship or its equipment;

(4) Who knowingly fails to report the particulars of the incident without delay and to the fullest extent possible.¹²⁹

In a prosecution for failure to report a discharge, the terms “without delay” and “fullest extent possible” have the meaning given them by the Coast Guard regulations.¹³⁰

125. *Id.*

126. The APPS provisions are located at 33 U.S.C. § 1906. The Coast Guard regulations also contain reporting requirements located at 33 C.F.R. §§ 151.15, 65. The MARPOL provisions were added with the 1985 Protocol I amendments. IMO Website, *supra* note 1, at http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#6 (last visited April 12, 2004).

127. 33 U.S.C. § 1908(a).

128. *See supra* note 12 and accompanying text.

129. 33 C.F.R. § 151.15.

130. The term “without delay” means that the report was made “by radio if possible, or otherwise by the fastest available means.” 33 C.F.R. § 151.15(c). The term “to the fullest extent possible, means that the report must include “the identity of the ship, the time and date of the incident’s

B. APPS/MARPOL in the Courts and the Drawing of Lines between International Law, General Maritime Law, Criminal Law and Environmental Law

Though there have been relatively few APPS/MARPOL cases that have gone to trial in the federal courts, those that *have* been decided are incredibly important to environmentalists, the shipping industry, and prosecutors alike. Courts have been faced with such issues as a federal court's jurisdiction over a foreign vessel's violation of an international treaty, the validity of Coast Guard regulations promulgated under APPS,¹³¹ the Coast Guard's authority to search a vessel without securing a warrant, and the applicability of false statement laws in APPS/MARPOL prosecutions. The resolution of these issues has clarified APPS/MARPOL's reach, making it more likely that future violators will be prosecuted successfully.¹³²

occurrence, the geographic position of the ship when the incident occurred, the wind and sea condition prevailing at the time of the incident, relevant details concerning the condition of the vessel, and an estimate of the quantity of oil or oily mixtures discharged or likely to be discharged." 33 C.F.R. §§ 151.15(f)(1)–(6).

131. See *supra* note 18 and accompanying text. Over the government's objection, the *Apex Oil* court compared an APPS violation to a CERCLA violation, holding that the Coast Guard's inclusion of "muck" scraped from tank linings into the definition of "petroleum" was inappropriate—a holding that relied primarily on the regulation's vagueness. *Apex Oil*, 132 F.3d at 1288–91.

132. The *Apex Oil* court noted that it was "interpreting [the Coast Guard] regulations in a criminal case of first impression in the circuit and in the country." *Id.* at 1288. Though few APPS/MARPOL cases have gone to trial as of the time of this writing, APPS prosecutions appear to be on the rise. See *supra* note 112 and accompany-

The District of Puerto Rico first considered the jurisdiction of United States courts over APPS/MARPOL violators in *United States v. Royal Caribbean Cruises, Ltd. I*.¹³³ Royal Caribbean Cruise Lines (RCCL) was indicted on ten counts relating to unlawful discharge of oil. According to the indictment, Coast Guard officers witnessed the vessel *Sovereign of the Seas* discharge what was later determined to be 30 gallons of oil off the coast of San Juan, Puerto Rico.¹³⁴ The Coast Guard investigated the vessel and took samples of oil from the vessel's engine room—" [t]hese samples later provided a 'fingerprint match' to samples removed from the site of the . . . spill."¹³⁵ Defendants first moved to dismiss Counts One through Six of the indictment,¹³⁶ claiming that proper jurisdiction lay in Norway [the vessel's flag state] and not in the United States.¹³⁷ RCCL's claim rested entirely on the Law of the Flag Doctrine.¹³⁸ The District of Puerto Rico held, however, that the doc-

ing text. As more APPS cases are prosecuted public awareness of waste oil violations and their environmental impact should also increase.

133. 24 F. Supp. 2d 155 (D.P.R. 1997) [hereinafter *Royal Caribbean Cruises I*]. *Royal Caribbean Cruises I* is a classic example of a waste oil sludge dumping case as described in Pt.II.

134. *Id.* at 158.

135. *Id.*

136. *Id.* at 158–59.

137. *Id.* at 159. RCCL's attorneys were zealous indeed—RCCL filed "six motions to dismiss one or more of the ten counts of the indictment against [them]." *Id.* at 157.

138. "Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag. [The United States Supreme Court] has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because the ship is deemed to be

trine was not applicable to this case because the oil spill occurred outside of the vessel and therefore beyond the jurisdiction of Norwegian law.¹³⁹

Having dismissed the Law of the Flag Doctrine, the court next considered the international implications of a foreign vessel discharging oil into United States territorial seas.¹⁴⁰ The court noted that the United Nations Convention on the Law of the Sea (UNCLOS), which governs such situations, limited the United States's prosecution options:¹⁴¹

Section Seven of Part XII of UNCLOS provides that: Monetary penalties *only* may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment, committed by foreign vessels on the territo-

a part of the territory of the sovereignty whose flag it flies, and not to lose that character when in navigable waters within the territorial limits of another sovereignty." *Id.* at 160 (quoting *Lauritzen v. Larsen*, 345 U.S. 571, 584–85 (1953)).

139. *Id.*

140. Since the alleged oil spill occurred less than twelve miles from the shore of Puerto Rico, it occurred within the territorial seas of the United States. *Id.* at 159–60 (citing Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1988) (President Reagan mandated a twelve mile boundary for territorial seas of the United States pursuant to International Law)). See *supra* note 114.

141. *Id.* at 159.

142. *Id.* (citing Law of the Sea Convention, Article 230.2) (emphasis added). For more information on UNCLOS see UNITED NATIONS CONVENTION ON THE LAW OF THE SEA available at www.unclos.com (last visited April 12, 2004).

rial sea, except in the case of a willful and serious act of pollution in the territorial sea.¹⁴²

UNCLOS does not, however prevent the prosecution of oil discharges in United States federal courts. Accordingly, the District of Puerto Rico dismissed RCCL's motion to dismiss Counts One through Six with the understanding that the government could not pursue imprisonment for the violations.¹⁴³

RCCL next moved to dismiss all ten counts of the indictment on the grounds that the Coast Guard performed an unwarranted search of the *Sovereign of the Seas* in violation of the Fourth Amendment.¹⁴⁴ The court dismissed this argument out of hand because "individuals have a diminished expectation of privacy on a vessel as opposed to that which can be claimed in their homes."¹⁴⁵ Congress has recognized this decreased expectation of privacy at 14 U.S.C. § 89(a).¹⁴⁶ The District of Puerto Rico upheld the Coast Guard's search,

143. *Id.* at 160. The court also dismissed RCCL's motion to dismiss Count Two on Double Jeopardy grounds, holding that the government could still pursue a fine for the violation even though the Coast Guard had already imposed a \$4,000 administrative fee for the violation. *Id.* at 161.

144. *Id.*

145. *Id.* at 163–64 (citing *United States v. Cardona-Sandoval*, 6 F.3d 15, 21 (1st Cir. 1993); *United States v. Green*, 671 F.2d 46, 53 (1st Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Hilton*, 619 F.2d 127, 131 (1st Cir. 1980), *cert. denied*, 449 U.S. 887 (1980)).

146. *Id.* "Coast Guard searchers are covered under the rubric of searches on the high seas or in United States territorial waters and fall under the regulatory rubric directed to safety inspections and ships. That criminal activity might be suspected or discovered is immaterial to the issue of

because the *Sovereign of the Seas* was not boarded until after a Coast Guard airplane witnessed an oil slick behind the vessel and closer inspection confirmed visible discharge from the vessel.¹⁴⁷ No Fourth Amendment violation occurred because the search was “reasonable statutorily and practically,” and the searchers were “minimally intrusive at most.”¹⁴⁸

In 1998, the Southern District of Florida first addressed an issue that has become increasingly important in criminal prosecutions under APPS/MARPOL—the applicability of 18 U.S.C. § 1001¹⁴⁹ to waste oil discharges. In *United States v. Royal Caribbean Cruises Ltd. II*,¹⁵⁰ the cruise line was indicted under 18 U.S.C. § 1001 for presenting a false Oil Record Book during a Coast Guard inspection of the vessel *Nordic Empress*.¹⁵¹ RCCL moved to dismiss the indictment on three grounds.¹⁵²

the reasonableness *vel non* of the search.” *Id.* at 164 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983)).

147. The Coast Guard is required to prove neither probable cause nor reasonable suspicion prior to boarding a vessel, because they are statutorily authorized to search. *Id.*

148. *Id.* at 165.

149. In pertinent part, 18 U.S.C. § 1001(a) states that: “. . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under this title or imprisoned not more than 5 years, or both.”

150. 11 F. Supp. 2d 1358, 1361–62 (S.D. Fla. 1998) [hereinafter *Royal Caribbean Cruises II*].

RCCL’s first ground for dismissal was that the alleged discharge was made in Bahamian waters and the United States did not have jurisdiction to prosecute.¹⁵³ The United States countered that it made no difference where the actual discharge of oil occurred, because the indictment alleged that RCCL: (1) failed to record the alleged discharge of oil, (2) recorded false information in their Oil Record Book, and (3) knowingly presented an Oil Record Book containing false statements to the Coast Guard while in a United States port.¹⁵⁴

The Southern District of Florida initially noted that a false statement can be prosecuted under section 1001 so long as the “documents containing the alleged false statements are routinely or commonly used by United States officials during the course of their regularly conducted activities.”¹⁵⁵ The court also noted that

151. The government alleged that the Oil Record Book contained a false statement because it failed to disclose the illegal discharge of oil in violation of APPS/MARPOL. 33 C.F.R. § 151.25 requires oil tankers larger than 150 gross tons and all other ships larger than 400 gross tons to maintain an Oil Record Book which documents each occasion that the vessel’s crew cleans or ballasts fuel tanks; discharges oily mixture ballasts or cleaning waters overboard; disposes of oil residues; or discharges bilge water from machinery spaces overboard. *Id.* § 151.25(d).

152. *Royal Caribbean Cruises II*, 11 F. Supp. 2d at 1362–63.

153. RCCL argued, essentially, that the Coast Guard could not require them to present an Oil Record Book for dates in which they were not sailing in United States territorial waters. *Id.* at 1363

154. *Id.*

155. *Id.* at 1363–64 (citing *United States v. Godinez*, 922 F.2d 752 (11th Cir. 1991); *United States v. Cox*, 696 F.2d 1294 (11th Cir. 1983), *cert. denied*, 464 U.S. 827 (1983)).

the five section 1001 elements—a statement; falsity; materiality; specific intent; and agency jurisdiction—must also be present in order to sustain a conviction.¹⁵⁶ The court found that all of the elements were present and that the Coast Guard was authorized to enforce federal law in United States ports, regardless of where the dumping took place.¹⁵⁷ Accordingly, RCCL's first ground for dismissal was denied.

RCCL next argued that neither APPS nor the Coast Guard regulations allow an indictment under section 1001.¹⁵⁸ RCCL claimed that, because presenting a false Oil Record Book was prohibited by APPS, it could only be prosecuted under APPS—the government was not allowed to bring an indictment under section 1001 instead.¹⁵⁹ The court rejected this argument because it is well settled that, “when an act violates more than one statute, the defendant may be charged under either law”¹⁶⁰ RCCL's argument would only

have been accurate if there was irreconcilable conflict between APPS and section 1001.¹⁶¹ No such conflict existed because APPS neither implicitly repeals nor supercedes any existing false statement laws.¹⁶² Thus, RCCL's second ground for dismissal was also denied.

Finally, RCCL argued that the rule of lenity¹⁶³ should preclude a prosecution under section 1001 because the statutory prohibitions were ambiguous.¹⁶⁴ In considering this argument, the court distinguished *Apex Oil* because RCCL's indictment involved neither an expanded definition of “petroleum,” nor the potential criminalization of a standard practice within the industry.¹⁶⁵ RCCL was not charged with violating an ambiguous regulation which prohibited conduct that had previously been legal and accepted. Rather they were charged with knowingly presenting a falsified Oil Record Book to the United States Coast Guard upon docking at the port of Miami.¹⁶⁶ The court had

156. *Id.* at 1364 (citing *United States v. Lawson*, 809 F.2d 1514, 1571 (11th Cir. 1987)).

157. “Under MARPOL [and APPS] . . . the U.S. Coast Guard has the duty and the obligation to board and inspect ships while in port and to pursue appropriate measures to address any violations thereof.” *Id.*

158. *Id.* at 1362–63.

159. *Id.* at 1365.

160. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *United States v. Hopkins*, 916 F.2d 207, 218–19 (5th Cir. 1990)).

161. *Id.* (citing *Blanchette v. Conn. Gen. Ins. Co.*, 419 U.S. 102, 134 (1974)).

162. “Remedies and requirements of this chapter *supplement and neither amend nor repeal* any provisions of law, except as expressly provided in this chapter. Nothing in this chapter shall limit, deny, amend, modify, or repeal any other remedy available to the United States or any other person,

except as expressly provided in this chapter.” *Id.* (citing 33 U.S.C. § 1907(d)) (emphasis added).

163. The rule of lenity is defined as “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.” *BLACK'S LAW DICTIONARY* 1332–33 (7th ed. 1999).

164. *Id.* at 1362–63; *see also Apex Oil*, 132 F.3d at 1290–91 (holding that a shipping company could not be prosecuted under an ambiguous Coast Guard statute because they could not have known that their conduct would have been illegal).

165. *Id.* at 1365–66. *But see supra* Pt.II, though neither the discharge of oil through a bypass hose nor the maintenance of a false Oil Record Book are a necessary part of maritime commerce, such behavior is arguably standard in the industry.

166. *Id.*

little difficulty finding that RCCL knew that such actions were illegal.¹⁶⁷ Accordingly, the court dismissed RCCL's motion to dismiss in its entirety.¹⁶⁸

Royal Caribbean Cruises II was a groundbreaking case for prosecutors, because it clarified both the connection between section 1001 and APPS/MARPOL as well as the scope of the *Apex Oil* decision.¹⁶⁹ Specifically, the applicability of the rule of lenity is much clearer after *Royal Caribbean Cruises II*—the rule applies to APPS/MAR-

POL prosecutions if the specific regulation being charged is ambiguous. The rule does not automatically apply simply because the statute did not clarify the “balancing test” between environmental protection and the importance of the international shipping trade.¹⁷⁰ As was stated in Part II, one of the most frequent APPS/MARPOL violations involves presenting a false Oil Record Book in an attempt to “cover” discharges through an engine room bypass.¹⁷¹ Thus, the availability of section 1001 as a prosecution

167. “The conduct alleged is knowingly and willfully presenting to the United States Coast Guard a writing that RCCL knew to contain materially false, fictitious and fraudulent entries . . . We do not think RCCL is contending that it is the standard practice to do so such that they would have no way of knowing that such actions are considered subject to criminal sanctions.” *Id.* at 1366.

168. The court also discussed the international law implications of the MARPOL Protocol that—though not relevant to the motion to dismiss—were quite interesting. That discussion is located at *id.* at 1366–74.

169. *See infra* Pt.II. A falsified Oil Record Book is the most common method of concealing the illegal discharge of waste oil. Thus, section 1001 allows prosecutors to punish violators even if they cannot prove when, where, and how much waste oil was discharged overboard. Similarly, the threat of criminal sanctions under section 1001 is a valuable tool that investigators and prosecutors can use to convince crew members to testify against a more culpable party. Between the application of the False Statements Act and the APPS whistleblower provision, 33 U.S.C. § 1908(a), crew members have every reason to cooperate with law enforcement.

170. The *Apex Oil* court hinted that any “ambiguity” in the statute should be resolved in favor of the oil tanker trade because the goal of MARPOL was to balance environmental and commercial interests. *Apex Oil*, 132 F.3d at 1290–91. However, given MARPOL's history, it is hard to imagine that either the Protocol or its implementation in APPS can be viewed as anything other than an interna-

tional attempt to police all instances of vessel pollution. *See* IMO Website, *supra* note 1 at http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#7 (last visited April 12, 2004).

Further, the Coast Guard has estimated that APPS/MARPOL reduced oil tanker operational pollution by 85 percent between 1973 and 1994. Griffin, *supra* note 8, at 503, *cited in Apex Oil*, 132 F.3d at 1291 (no figures were provided for non-oil tankers). Griffin noted that MARPOL's stated goal was to “strike a balance between the need to protect and preserve the marine environment and the desire to impose laws which make shipping prohibitively expensive.” *Id.* at 490. This balance included consideration of the “conflicting interests of environmentalists and oil importers, coastal states and flag states.” *Apex Oil*, 132 F.3d at 1291 (citing Griffin, 1 IND. J. GLOBAL LEGAL STUD. at 512–13). Nonetheless, neither the history of the MARPOL Protocol nor the statutory language of APPS indicate that such conflicts should necessarily be resolved in favor of oil importer interests. Similarly, neither document indicates that conflicts should be resolved through consultation of other existing, land-based environmental regulations. Quite the contrary, both MARPOL and APPS were founded on international understanding that the shipping trade's systematic pollution of the oceans posed such a serious threat that a global agreement was the only way to preserve the marine environment. IMO Website, *supra* note 1 at http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678#7 (last visited April 12, 2004).

171. *See supra* Pt.II and accompanying notes.

tool is critical, because after *Royal Caribbean Cruises II* it is highly unlikely that a defendant could argue that it is unaware that the presentation of a falsified Oil Record Book was a criminal act. *Royal Caribbean Cruises II* was truly a landmark decision in criminal prosecution for APPS/MARPOL violations.

C. The Public Policy Benefits of “Community Service” or Alternative Sentencing under 18 U.S.C. § 3553

Though federal criminal sentencing is controlled by the United States Sentencing Guidelines, 18 U.S.C. § 3553 requires that sentencing courts take into account seven factors when imposing a sentence.¹⁷² The underlying function of criminal sentencing requires the courts to dispense a sentence that provides: adequate punishment for the specific crime; deters similar conduct by similar defendants; protects the public’s interest in law enforcement; and provides education, medical care, and correctional treatment to the defendant.¹⁷³

Provided that the ultimate sentence reflects this baseline requirement, the

court may consider a variety of other factors, including: the nature and circumstances of the offense;¹⁷⁴ the types of sentence applicable to the offense;¹⁷⁵ the applicable sentencing range for the offense based on defendant’s criminal history;¹⁷⁶ Sentencing Commission policy statements;¹⁷⁷ the need to avoid disparate sentences for similar conduct;¹⁷⁸ and victim restitution.¹⁷⁹ The Sentencing Guidelines, citing section 3553, also recommend the imposition of Community Service fines to remedy the harms caused by defendant’s actions.¹⁸⁰

The breadth of the Community Service factors has led many prosecutors, particularly in environmental crimes, to pursue Community Service fines as part of the sentence imposed. Community Service fines (also known as Alternative or Supplemental Sentencing) allow for the imposition of a fine against the defendant, with some or all of that fine diverted to a community service organization.¹⁸¹ To apply Community Service fines meaningfully in an APPS/MARPOL case the fine must be large enough to punish the defendant *and* deter similar conduct from similarly situated defendants. Further,

172. 18 U.S.C. § 3553(a) (2000). *See also* U.S.S.G. § 8C2.10—the sentencing guidelines cannot impose incarceration for corporations in environmental offenses. Instead, corporations are subject to fines under section 3553.

173. *Id.* §§ 3553(a)(2)(A)–(D).

174. *Id.* § 3553(a)(1).

175. *Id.* § 3553(a)(3).

176. *Id.* §§ 3553(a)(4)(A)–(B).

177. *Id.* § 3553(a)(5).

178. *Id.* § 3553(a)(6).

179. *Id.* § 3553(a)(7).

180. U.S.S.G. § 8B1.3 (2002). The commentary

to Section 8B1.3 notes that such fines are “indirect sanctions,” which are generally disfavored because the defendant could perform community service simply by paying someone else to perform the services. *Id.* § 8B1.3 cmt. background (2002). Nonetheless, the Commentary suggests that Community Service fines are consistent with 18 U.S.C. § 3553(a) because “community service directed at repairing damage may provide an efficient means of remedying harm caused . . . such community service provide[s] a means for preventative or corrective action directly related to the offense” *Id.*

181. In the case of an environmental crime, the fine money is diverted to an environmental preservation group. *See infra* Pt. III.D.

the sentencing judge should consider the extent of the damage caused by defendant—including the total amount of oil discharged—and the need for environmental restoration to remedy the damage.¹⁸²

Given the public benefits of Community Service sentencing, it is not surprising that federal prosecutors have begun incorporating Community Service fines into environmental prosecution strategies. There are numerous public policy justifications for imposing Community Service sentences in APPS/MARPOL cases.¹⁸³ First, the public should be put on notice that a vessel has violated environmental regulations by discharging oil overboard. It is also important that the public be made aware that the Coast Guard—and corresponding coastal state agencies—are investigating and assisting in the prosecution of violators. Finally, the public benefits from the courts' diversion of fine money to organizations that are working to remedy the effects of oil pollution. This is particularly true for the residents of coastal states where the effects of oil pollution on water quality, mammal populations, and marine habitats are more visible.

182. 18 U.S.C. §§ 3553(a)(1), (2), (7). This fine diversion would come after any division of the fine under the award provision at 33 U.S.C. § 1908(a).

183. See *supra* Pt.II. The benefits of Community Service fines are especially great in waste oil sludge discharge cases because the environmental effects of such discharge are still unknown.

184. Plea Agreement, *United States v. Norwegian Cruise Line Ltd.*, Case No. 02-20631-CR-LENARD (S.D. Fla. 2002).

D. Applying Alternative Sentencing Provisions to APPS/MARPOL Prosecutions

Federal courts have the authority to issue Community Service fines, but such fines most often result from plea agreements between the defendant and the government. The following examples are illustrative of the application of 18 U.S.C. § 3553(a) in APPS/MARPOL prosecutions.

In *United States v. Norwegian Cruise Line Ltd.*,¹⁸⁴ the United States Attorney's Office for the Southern District of Florida utilized a Community Service fine as part of a massive prosecution for repeated APPS/MARPOL violations. Norwegian Cruise Lines pled guilty to a one-count criminal information alleging that crew members aboard the S.S. *Norway* bypassed the Oil Water Separator to discharge waste oil overboard into the ocean.¹⁸⁵ The information also alleged that the Oil Record Book was knowingly and willingly falsified to conceal the illegal discharges.¹⁸⁶

Norwegian Cruise Lines admitted that its gross pecuniary gain resulting from the discharges was greater than \$500,000,¹⁸⁷ and that a larger-than-normal fine was appropriate under the circumstances.¹⁸⁸ Accordingly, the plea

185. *Id.* at 1.

186. *Id.*

187. Five-hundred thousand dollars is ordinarily the maximum allowable fine under 18 U.S.C. § 3571(c)(3) (2000).

188. See *supra* note 30, 18 U.S.C. § 3571(d), also known as the Alternative Fines Provision, calls for a larger fine to reflect either the defendant's pecuniary gain or the victim's pecuniary loss; Plea Agreement, *United States v. Norwegian Cruise Line Ltd.*, at 2.

agreement called for a criminal fine of \$1,000,000 payable on the date of sentencing, with one-half (\$500,000) reserved for Community Service.¹⁸⁹ The Community Service fine was diverted to the National Park Foundation (a division of the National Park Service) and the Florida Environmental Task Force Trust

189. *Id.* at 3–6.

190. *Id.* at 5. Community Service fines are inherently “local” in nature, because they are aimed at remedying the harm caused by a particular polluter. For example, in *United States v. Matson Navigation Co.*, Case No. CR-01-25-DT (C.D. Cal. 2001) (court order on file with author), Judge Dickran Tevrizan diverted 1/2 of the defendant’s \$2,000,000 fine to local Community Service projects. Judge Tevrizan’s diversion was incredibly specific, establishing perhaps the most detailed Alternative Sentencing plan in any APPS/MARPOL case:

The explicit goal of defendant’s required community service is to fund environmental projects and initiatives designed for the benefit, protection, preservation and restoration of the environment and ecosystems in the Central District of California, which includes the counties of Los Angeles, Orange, Ventura, Santa Barbara, San Luis Obispo, Riverside and San Bernardino as well as the Channel Islands. These projects and initiatives should primarily be designed to support and enhance the enforcement of environmental and wildlife protection laws. These projects may also include, but are not limited to, the following: monitoring, study, restoration and preservation of fish, wildlife and plant resources; monitoring, study clean-up, remediation, sampling and analysis of pollution and other threats to the environment and ecosystem; research, education and public outreach relating to the environment and ecosystem. . . .

The monies shall be used to support the following: \$500,000 to the Channel Islands National Park, headquartered in Ventura, California. \$350,000 of the \$500,000 shall be used to establish the

Fund to “establish and fund a program designed to increase public understanding of adverse impacts to the coastal environment and ecosystem resources . . . through multi-year research and educational outreach to the users of the South Florida marine environment.”¹⁹⁰

Channel Islands Law Enforcement Fund as an endowment in perpetuity to support and implement the enforcement of environmental and marine wildlife protection laws within the Channel Islands, including, but not limited to, staffing; purchase of communication and defensive equipment and patrol vessels and vehicles; training; purchase and/or construction of facilities and equipment used in the collection, identification, preservation, analysis and storage of evidence, including architectural artifacts and protected or threatened wildlife and plants, and accounted for to Congress in annual reports required by 16 U.S.C. Section 19-N. The remaining \$150,000 of that \$500,000 that is going to the Channel Islands National Park shall be used directly by the Channel Islands National Park to fund the Island Fox Recovery Project, including staffing and purchasing of services, equipment, supplies and materials that aid in the recovery of the Island Fox.

[The remaining \$500,000 is diverted] to the Santa Monica National recreation Area, headquartered in Thousand Oaks, California. \$250,000 of that \$500,000 shall be used to establish the Santa Monica Mountains Law Enforcement Fund as an endowment in perpetuity to support and implement the enforcement of environmental and wildlife protection laws within the Santa Monica National Recreation Area, including, but not limited to, the following: staffing purchase of communication and defensive equipment and patrol vessels and vehicles; training; purchase and/or construction of facilities and equipment used in the collection, identification, preservation, analysis and storage of evidence, including architectural

The United States Attorney's Office for the Western District of Washington reached a similar agreement with the shipping company Unix Line following the investigation of a Unix vessel in 2002.¹⁹¹ Unix Line pled guilty to a two-count information alleging that crew members aboard the M/T *Kaede* negligently discharged a harmful amount of oil into the ocean and knowingly falsified the vessel's Oil Record Book to conceal the discharge from the Coast Guard during a port inspection.¹⁹²

As a result of the plea agreement, Unix Line agreed to pay a total fine of \$550,000,¹⁹³ of which no more than \$300,000 was to be diverted to

artifacts and protected or threatened wildlife and plants; and accounted for to Congress in annual reports required by 16 U.S.C. Section 19-N.

The remaining \$250,000 of the \$500,000 that is going to the Santa Monica National Recreation Area shall be used to establish the Santa Monica Mountains Natural Resources Protection Fund as an endowment in perpetuity to support the study, assessment, protection and preservation of natural resources, including, but not limited to, the following: acquisition of private property, claims and leases within and adjacent to the Santa Monica National Recreation Area; response to and clean-up of pollution spills or threats of pollution; research and planning for the restoration of national ecosystems and resources; provide public environmental and historical interpretation and education; and accounted for to Congress in annual reports required by 16 U.S.C. Section 19-N. . . .

Id. at 2–3. The most important feature Judge Tevrizian's order is that it establishes programs into which future Community Service fines can be directed. Thus, the programs begun through the *Matson Navigation* fines can be continued with each-

Community Service projects.¹⁹⁴ The agreement further called for the United States Attorney's Office and Unix Line to agree upon specific recipient projects prior to sentencing, with the understanding that the projects must be for the "benefit, preservation, and restoration of the environment and ecosystems in the waters of the United States adjoining the coastline of Washington State."¹⁹⁵

More recently, the United States Attorney's Office for the Western District of Washington imposed a similar provision on the Ta Tong Marine company.¹⁹⁶ In *Ta Tong Marine*, the grand jury returned a three-count indictment alleging that crew members aboard the M/V *Grand Glory*

successive APPS/MARPOL prosecution in the Central District of California. The United States Attorney's Office for the District of Oregon has recently developed a similar Community Service program. Fine money is diverted to the National Fish and Wildlife Foundation—a subsection of the U.S. Fish & Wildlife Service—through 18 U.S.C. § 3553. Under the program, an NFWF committee made up of representatives from environmental groups and local, state, tribal and federal government requests proposals for environmental restoration projects to be performed on the Columbia River estuary and wildlife habitat along the lower Columbia River. Subject to review, the committee allocates funding to various projects as it deems to be appropriate.

191. Plea Agreement, *United States v. Unix Line Pte. Ltd.*, Case No. CR-02-6064(JET)RBL (W.D. Wa. 2002).

192. *Id.* at 2.

193. The agreement called for a fine of \$350,000 for count one and \$200,000 for count two. *Id.* at 5.

194. *Id.* at 8–9.

195. *Id.* at 9.

196. Plea Agreement, *United States v. Ta Tong Marine Co.*, Case NO. CR03-5171JET (W.D. Wa. 2003).

knowingly and willfully falsified the vessel's Oil Record Book to conceal an OWS bypass and subsequent discharges of sludge, bilge water, and oily waste into the ocean.¹⁹⁷ Pursuant to the plea agreement, Ta Tong Marine agreed to pay a total fine of \$750,000,¹⁹⁸ and the government reserved the right to petition the sentencing court that a portion of the fine be diverted to a Community Service project similar to the provision in *Unix Line*.¹⁹⁹

These cases demonstrate the feasibility of applying Community Service fine provisions in APPS/MARPOL prosecutions. Not only is the defendant corporation held liable for causing environmental harm, a portion of its fine—based in part on the gravity of the offense—is diverted to organizations that work to remedy that environmental harm. This diversion benefits both the environmental organization which receives much-needed funding for its projects, and the community at large which has a right to know more about illegal discharges of oil and the consequent harms to marine ecology. Community Service fines are especially relevant in the APPS/MARPOL context where so many questions regarding discharge frequency and environmental impact remain unanswered.

E. The Implementation of Environmental Compliance Plans

Another common requirement in APPS/MARPOL plea agreements is the Environmental Management System Compliance Plan, also known as an Environmental Compliance Plan (ECP). The individual structure of an ECP varies with the facts of each case, but each ECP shares certain common characteristics. First, the ECP must demonstrate the corporate vessel owner's plan for training its employees to comply with applicable laws when handling fuel oil, waste oil, and hazardous materials on board.²⁰⁰ This includes training employees to comply with laws governing the disposal of waste oil and oily wastes through the OWS.²⁰¹

ECPs also require the corporation's shoreside administration to develop management practices to adequately supervise the handling and treatment of waste oil, pollutants, and hazardous materials.²⁰² These management practices must identify all waste streams onboard vessels owned by defendant corporations as well as the proper means of storage, treatment, and disposal of shipboard waste.²⁰³ Some ECPs also require that compliance with APPS/MARPOL be listed as a "posi-

197. *Id.* at 2.

198. The agreement called for fines of \$375,000 each for counts one and three. *Id.* at 6.

199. *Id.* at 10. Unfortunately, the Sentencing Judge later rejected the government's request for a community service fine. Marine Engineer Valerie Scott Interview, *supra* note 51.

200. *Norwegian Cruise Lines*, *supra* note 184, at 7–8; *Unix Line*, *supra* note 191, at 6–7; *Ta Tong Marine*, *supra* note 196, at 7–9.

201. *Id.*

202. *Id.*

203. *Id.*

tive factor” in employee reviews and that failure to comply be listed as a “negative factor.”²⁰⁴ Another common ECP provision requires the defendant to hire an independent auditor—this individual must usually be approved by the defendant, the court, and the United States Attorney’s Office.²⁰⁵ The auditor must be provided access to defendant’s vessel(s) in order to verify that crew members are complying with the ECP.²⁰⁶ Defendant must bear all of the auditor’s salary, expenses and costs, and the auditor’s employment—like all ECP provisions—must remain in force for the entirety of defendant’s term of probation.²⁰⁷ Some ECPs also state that the ECP will continue if the defendant corporation changes its name²⁰⁸ or if vessels are added or subtracted from the corporation’s fleet.²⁰⁹

204. *Norwegian Cruise Lines*, *supra* note 184, at 7. Norwegian Cruise Lines is also required to employ “a Vice-President responsible for implementing the program and overseeing the ECP and continue to employ an Environmental Officer on each cruise ship who reports to the master (Captain) of the ship, to the Staff Captain, the cognizant Vice-President regarding environmental matters” *Id.*

205. *Id.*

206. *Id.* at 7; *Unix Line*, *supra* note 191, at 8; *Ta Tong Marine*, *supra* note 196, at 8. A copy of the auditor’s reviews must be provided to the court and the United States Attorney’s Office. *Id.* The *Ta Tong* agreement also required that the corporation make its vessels available for inspection by United States government agents to ensure compliance with the ECP. *Ta Tong Marine*, *supra* note 196, at 9.

207. *Id.*

208. *Unix Line*, *supra* note 191, at 7.

209. *Ta Tong Marine*, *supra* note 196, at 9–10. “Any vessel the management of which is assumed by *Ta Tong Marine* shall be included within the scope of its [ECP]. Any vessel removed from management by *Ta Tong Marine* shall be excluded from

At the time of this writing, ECP provisions were most recently applied by the United States Attorney’s Office for the District of Oregon in a plea agreement with Fairmont Shipping (Canada).²¹⁰ In *Fairmont Shipping*, the Chief Engineer and other crew members aboard the M/V *Emerald Bulker* pled guilty to using rubber hoses to bypass the OWS in order to discharge waste oil overboard into the ocean.²¹¹ The discharges were made at night to avoid detection, and the Chief Engineer falsified the vessel’s Oil Record Book in an attempt to conceal the discharges.²¹²

As part of the agreement, Fairmont Shipping agreed to adopt an ECP during its period of probation.²¹³ The compliance plan requires Fairmont Shipping to identify environmental and related opera-

the scope its [ECP].” *Id.* In reality, it is rare that a single corporation owns more than one vessel in the modern shipping industry. This type of case most often arises in instances where an agent manages more than one vessel owned by more than one corporation.

210. Plea Agreement, *United States v. Fairmont Shipping (Canada) Ltd.*, Case No. CR-03-506-BR (D. Or. 2003). As a result of the plea agreement, Fairmont Shipping agreed to serve a four-year term of probation and pay a fine of \$450,000 by March 14, 2004. *Id.* at 3. Fairmont Shipping did not own the *Emerald Bulker*, but was responsible at the owner’s request for staffing the vessel’s crew, and therefore was held responsible for the crew’s violations.

211. *Id.* at 10. Coast Guard officers stationed at the Port of Portland were made aware of the discharges by a crewmember informant. As part of the plea agreement, the informant received 1/2 of the fine imposed against Fairmont Shipping (Canada) under 33 U.S.C. § 1908(a).

212. *Fairmont Shipping*, *supra* note 210, at 10.

213. *Id.* at 5.

tional risks associated with the processing of fuel-oil onboard vessels under its management.²¹⁴ Under the plan, Fairmont Shipping must also demonstrate that it can identify and avoid those risks and obey applicable regulations, policies, and laws.²¹⁵ Fairmont Shipping must submit the plan to the Probation Department within 60 days of its sentencing date.²¹⁶

Environmental Compliance Plans are generally regarded as strong tools for APPS/ MARPOL enforcement. ECPs serve the dual role of punishing the defendant and deterring future conduct from similarly situated corporations. Further, ECPs provide education to both management and crew members on the benefits—both economic and environmental—of complying with prohibitions against oil discharge. The only real problem with ECPs is that they are only as “good” as the party that is enforcing them.

Unless someone vigilantly watches over defendant corporations, there is no way to be sure that they will actually comply with their ECP. Thus, the only way to know if the ECP is working is to appoint Coast Guard officers to double-check that independent auditors are actually requiring the defendant corporation to comply with the ECP. Obviously, the sheer cost of

this level of enforcement makes such an idea unthinkable. Furthermore, ECP implementation is a relatively recent law enforcement tool. Though ECPs are part of the federal government's prosecution strategy to make violation of the law more expensive than compliance, it is still too early to tell if ECPs have had any effect in altering common vessel management.²¹⁷ Thus, while ECPs are a valuable piece of the puzzle, they are not quite so powerful as they may seem.

IV. Conclusion

APPS is one of the most important—if unknown—environmental statutes ever created. Under APPS, United States District Courts have imposed tens of millions of dollars in fines on corporations whose vessels illegally discharge oil into the ocean. However, APPS enforcement would be even more meaningful if fine money from each prosecution was diverted to an environmental group as part of a Community Service sentence. Through the universal application of Community Service provisions, we may begin to understand the gravity of the oil discharge problem and its effect on marine ecosystems for the benefit of environmental groups, the public, and the environment alike.

214. *Id.* at 5–8.

215. *Id.*

216. *Id.* at 8.

217. *See supra* note 30 and accompanying text.

MARPOL Resource Guide

1. International Maritime Organization (IMO (date)) www.imo.org. See also www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 (Outstanding resource within the IMOP site devoted specifically to MARPOL.)
Comprehensive informative web site on maritime activities in international waters.
2. Rebecca Becker, MARPOL 73/78: An Overview in International Environmental Enforcement 10 *Georgetown International Environmental Law Review* 625 (1998).
Overview of MARPOL.
3. Andrew Griffin, MARPOL 73/78 And Vessel Pollution: A Glass Half or Half Empty, 1 *Indiana Journal of Global Legal Studies* 489 (Spring 1994).
An overview of the mechanics and an evaluation of the effects of MARPOL.
4. Jeff B. Curtis, Vessel Source Oil Pollution and MARPOL 73/78: An International Success Story? 15 *Environmental Law* 679 (Summer 1985).
An overview of the history of international oil pollution law and MARPOL.
6. UN Atlas of the Oceans (published by (date)) www.oceansatlas.org
Comprehensive web site on international waters with sections on MARPOL.
7. Facts about Nonpoint Source Pollution () at www.epa.gov/owow/nps/facts/point9.htm
Managing nonpoint source pollution from boating and marinas.
8. The U.S. Commission on Ocean Policy () <http://oceancommission.gov>
Contains information about the Commission as well as its preliminary report.

DIAGRAM # 1

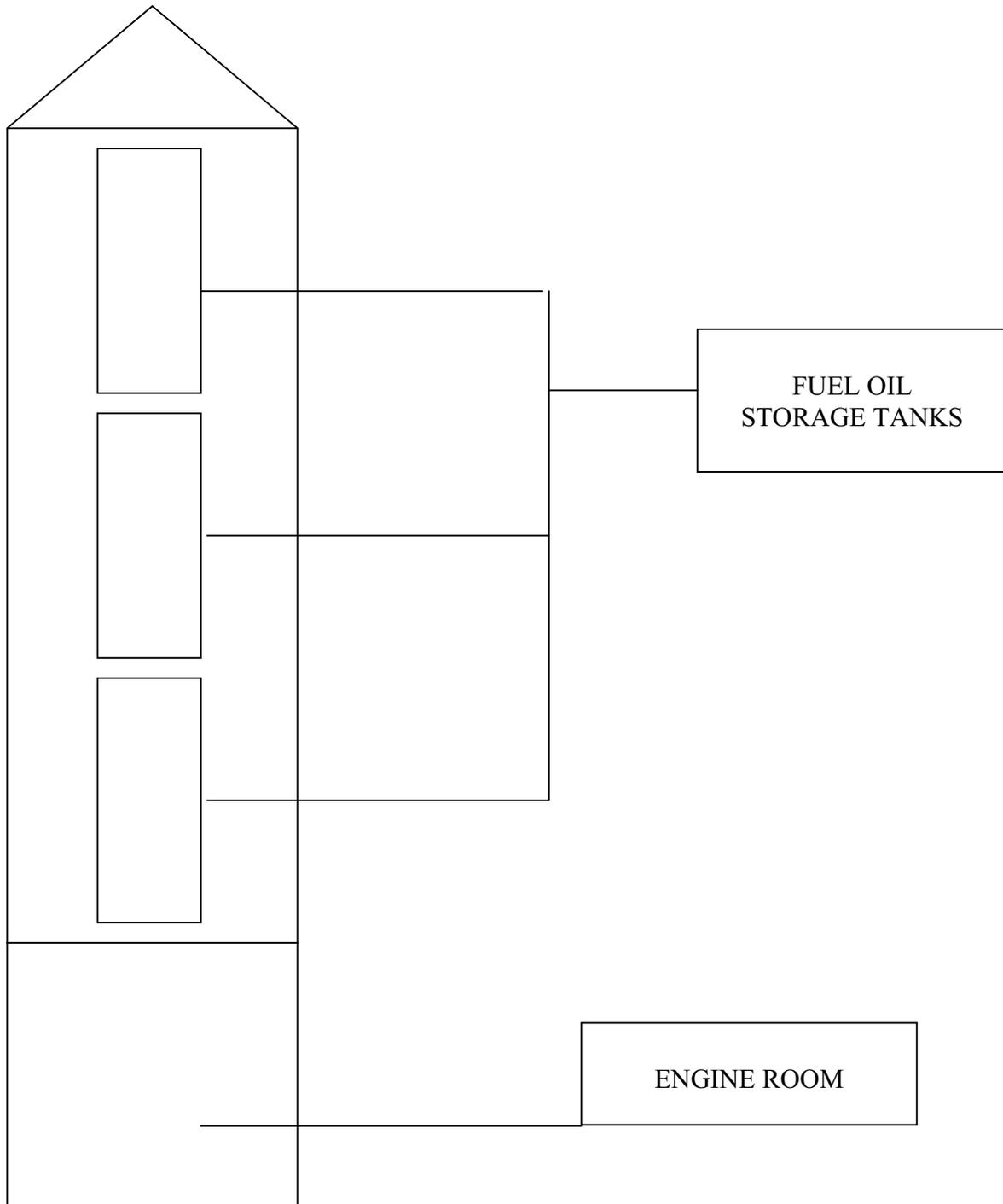


DIAGRAM # 2

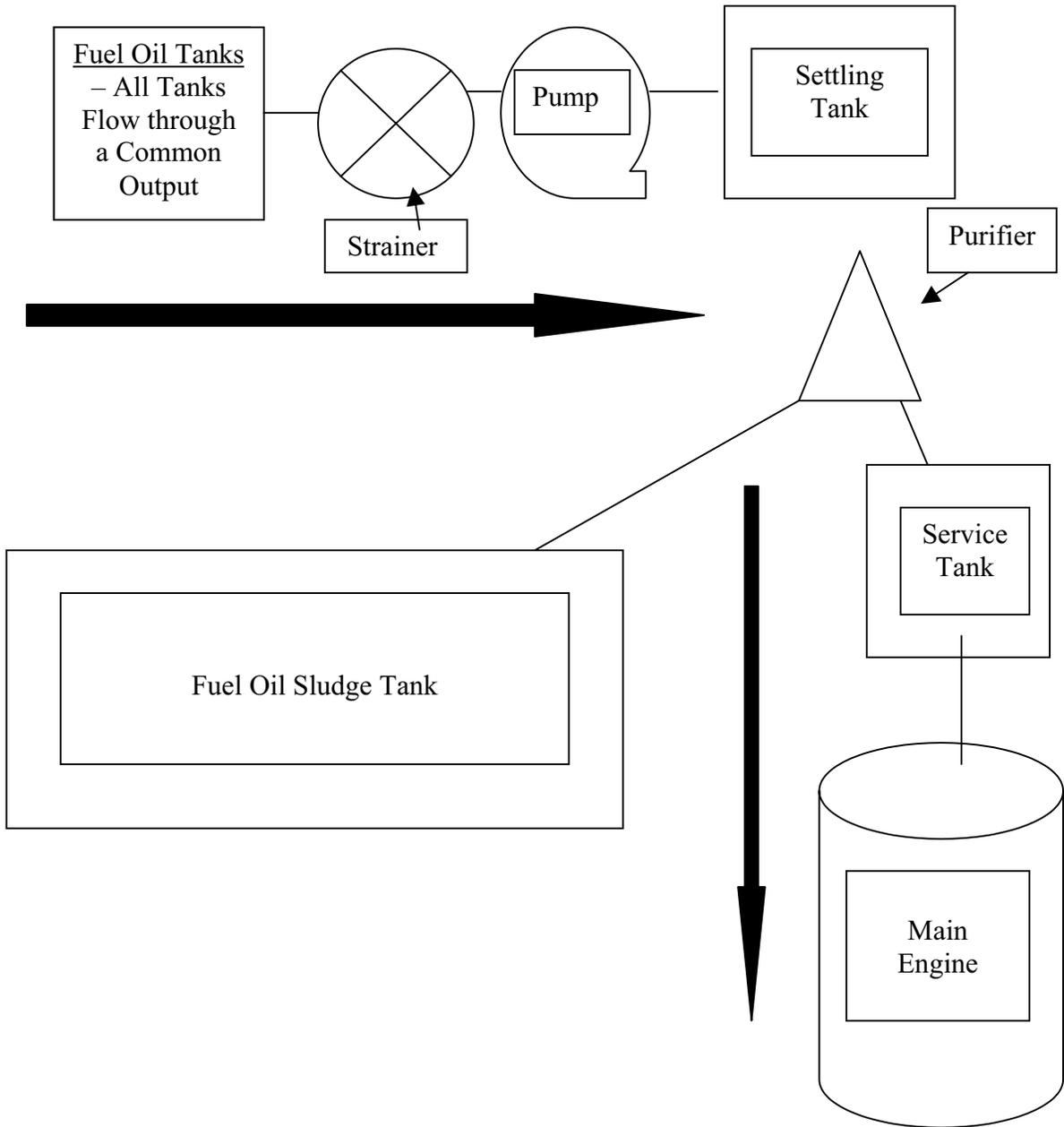


DIAGRAM # 3

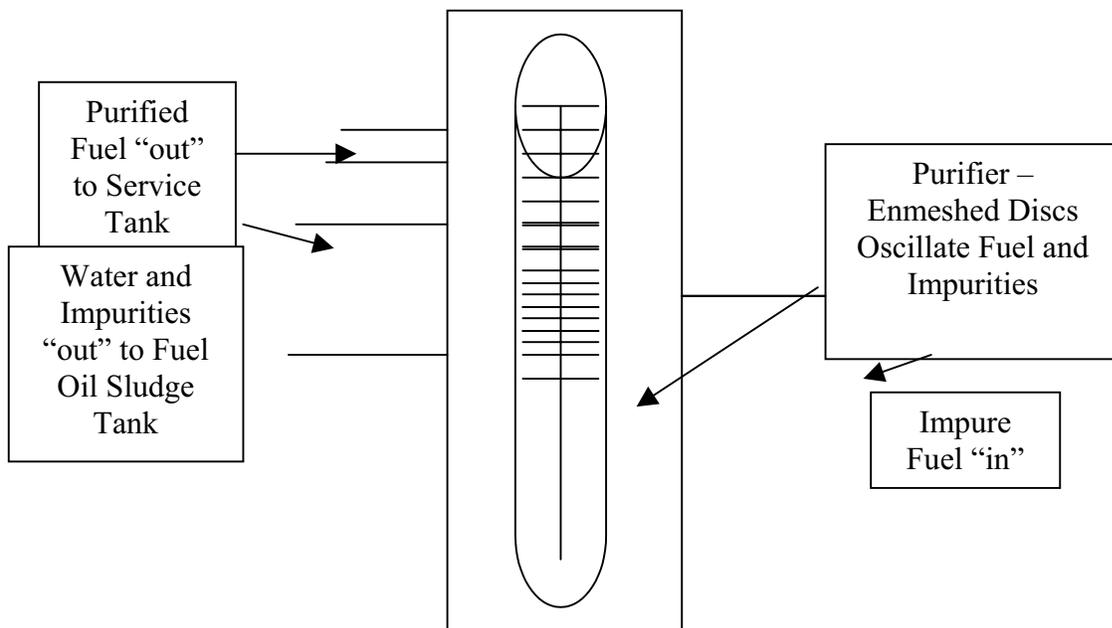
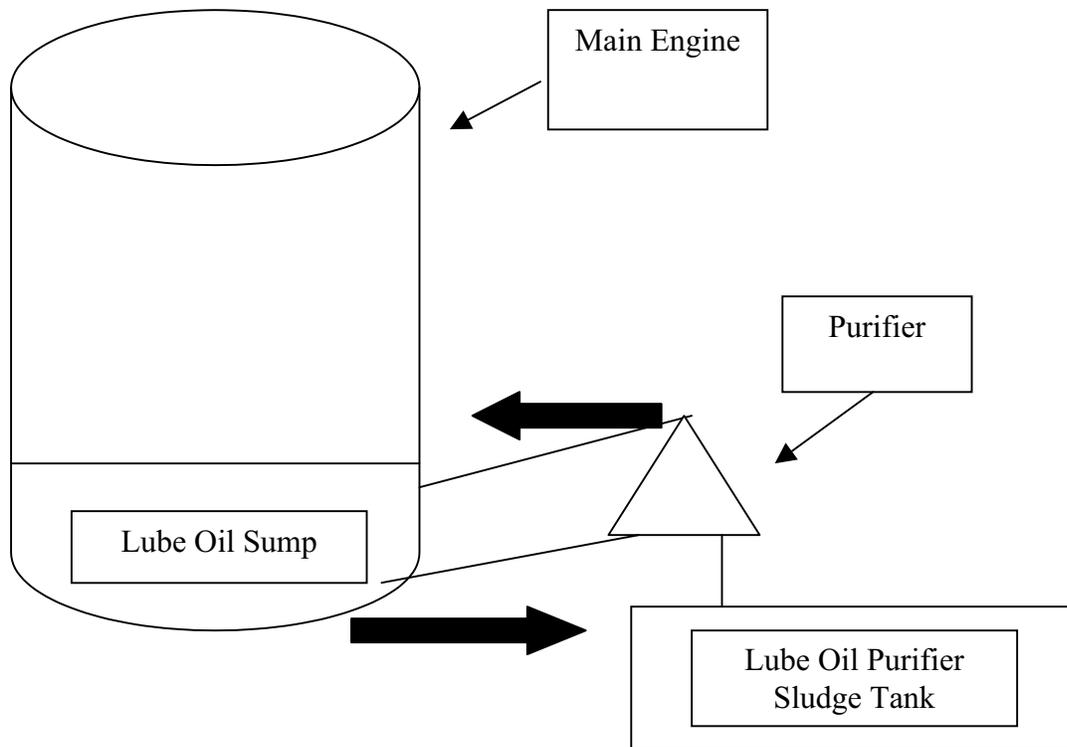


DIAGRAM # 4

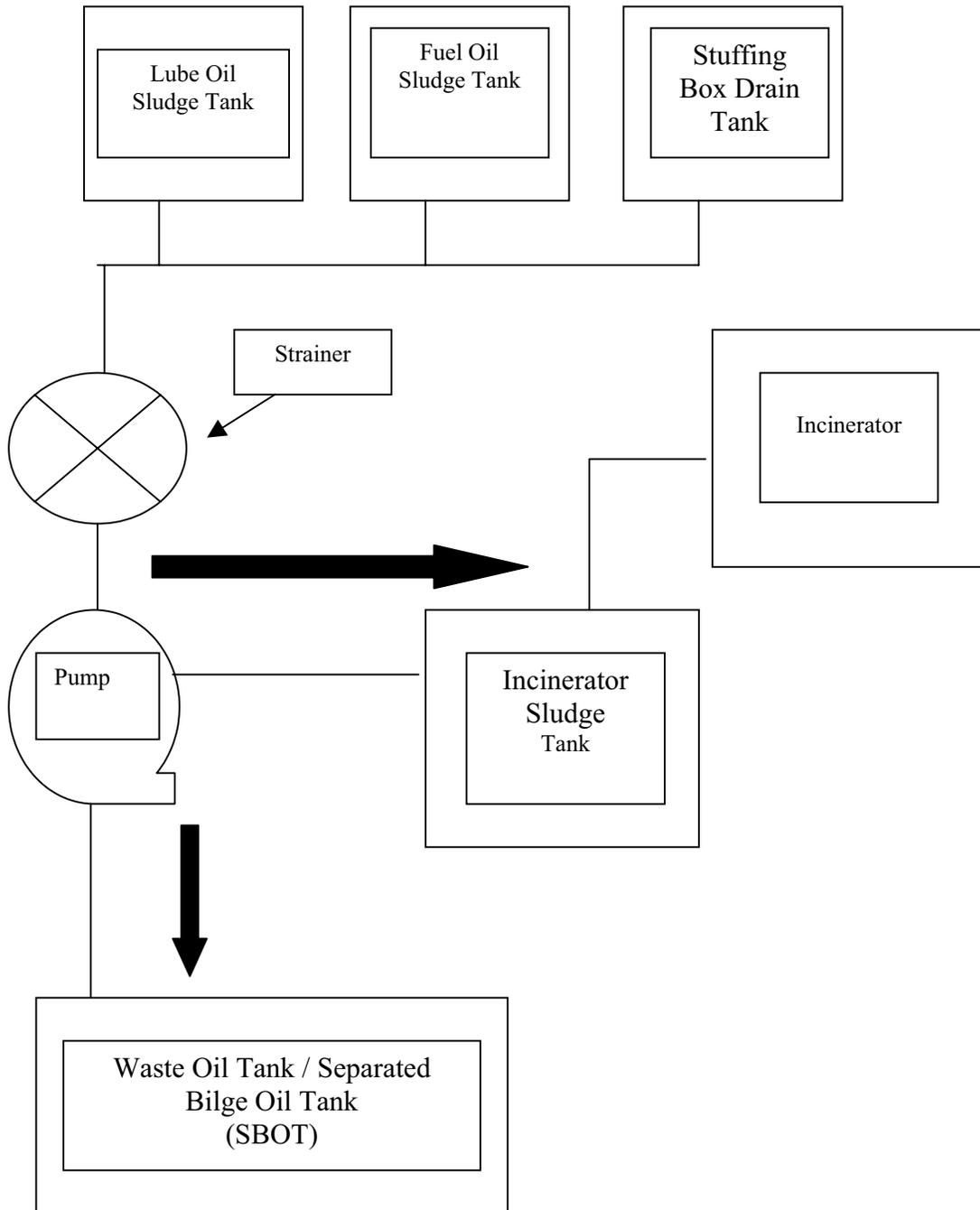


DIAGRAM # 5

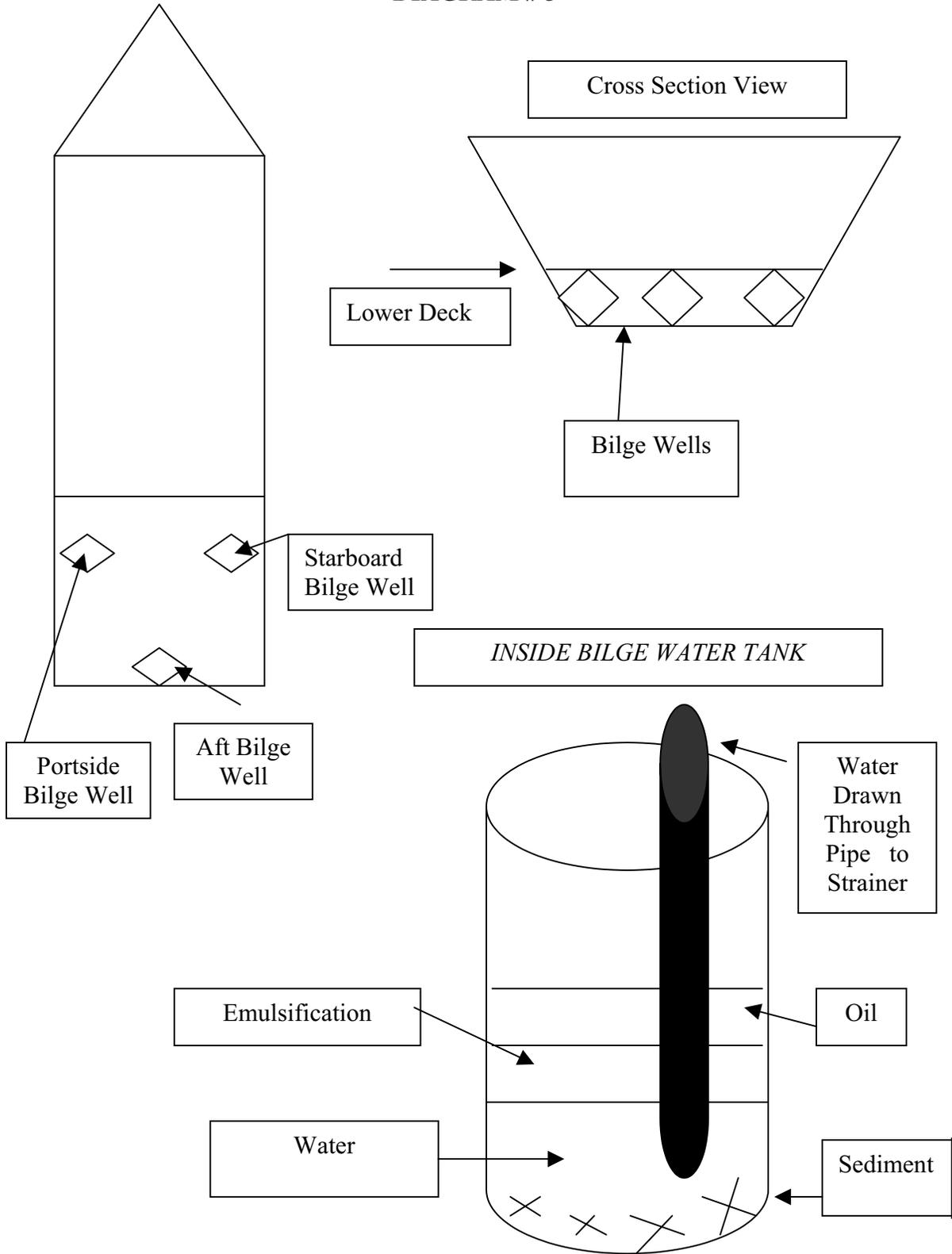


DIAGRAM # 6

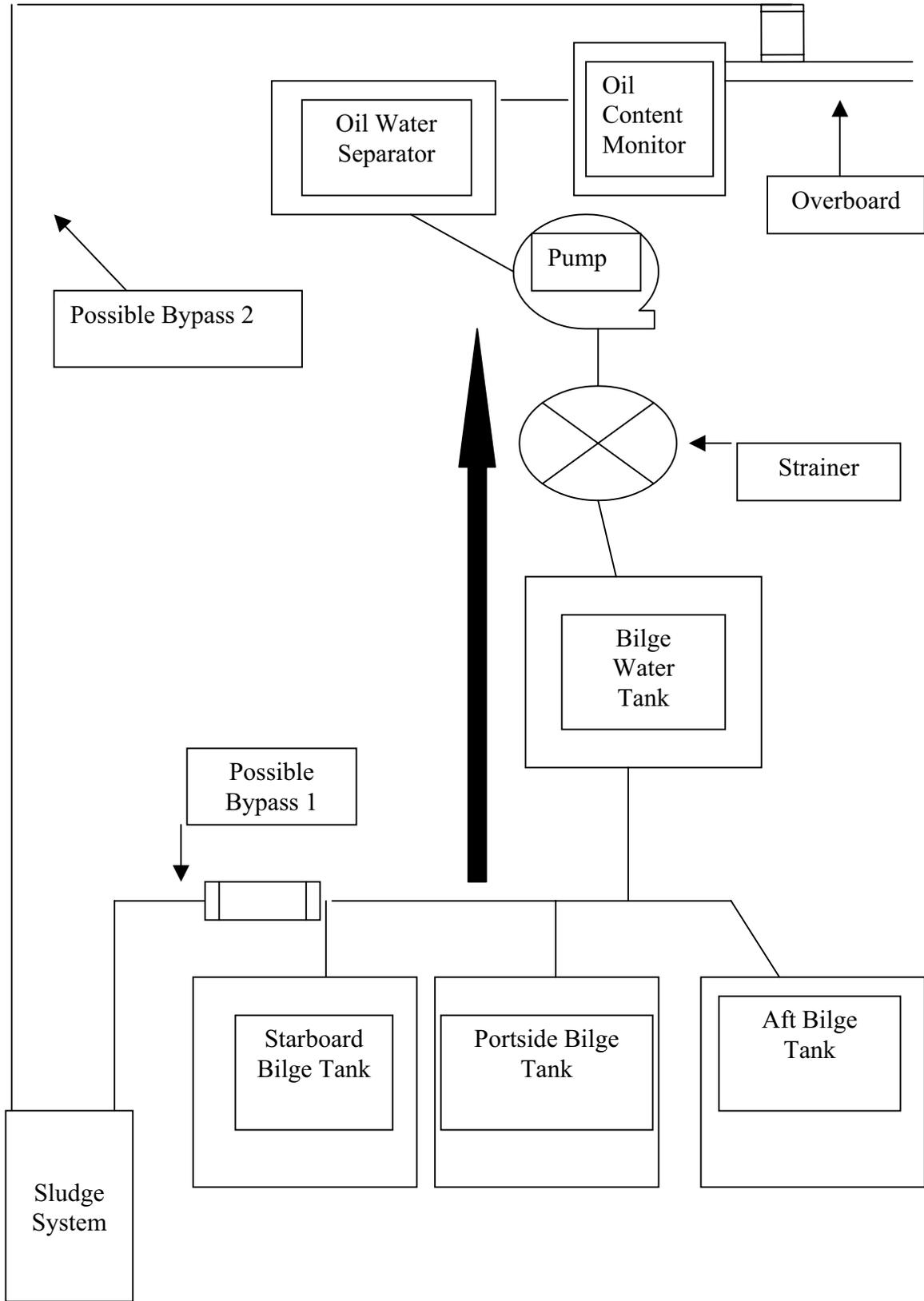


DIAGRAM # 7

