

RECENT DEVELOPMENTS  
CONCERNING MARINE  
POLLUTION AND  
ENVIRONMENTAL  
MATTERS

Thomas S. Rue

## **RECENT DEVELOPMENTS CONCERNING MARINE POLLUTION AND ENVIRONMENTAL MATTERS**

**Moderator:** **Thomas S. Rue**, Johnstone, Adams, Bailey, Gordon & Harris, Mobile, AL

**Panelists:** **Michael G. Chalos**, Fowler, Rodriguez & Chalos, Port Washington, NY  
**Joseph Poux**, U.S. Department of Justice, Environmental Crimes Section,  
Washington, D.C.

- I. INTRODUCTION AND A SHORT SUMMARY OF THE REASONS FOR THE USE OF MAGIC PIPES TO BYPASS A VESSEL'S POLLUTION CONTROL EQUIPMENT
- II. THE RESPECTIVE ARGUMENTS FOR THE CURRENT ENFORCEMENT POLICIES OF THE U.S. GOVERNMENT IN RESPECT TO MARPOL
- III. DISCUSSION OF MARPOL
  - A) THE HISTORY AND PURPOSE OF MARPOL
  - B) THE JURISDICTIONAL REACH OF MARPOL
    - 1) FLAG STATE JURISDICTION UNDER MARPOL
    - 2) PORT STATE AND TERRITORIAL WATERS JURISDICTION OVER FOREIGN-FLAGGED VESSELS UNDER MARPOL
- IV. THE IMPLEMENTATION OF MARPOL BY THE ENACTMENT OF APPS
  - A) THE HISTORY AND JURISDICTIONAL PROVISIONS OF APPS
  - B) THE INTERPLAY OF APPS AND MARPOL
  - C) THE CODE OF FEDERAL REGULATIONS PROVISIONS RELATING TO MARPOL ISSUES
- V. DISCUSSION OF UNCLOS, A TREATY SETTING FORTH THE INTERNATIONAL LAW OF THE SEA
- VI. HOW MARPOL, APPS AND UNCLOS ARE INTENDED TO WORK TOGETHER
  - A) FLAG STATE ARBITRATION AND DETERRENCE

- VII. NUTS AND BOLTS DISCUSSION OF U.S. COAST GUARD INVESTIGATION PROCEDURES AND TACTICS
  - A) COAST GUARD ROLE AS A LAW ENFORCEMENT AGENCY IN MARPOL INVESTIGATIONS (GOOD OR BAD IDEA?)
  - B) EFFECTIVE USE OF 14 U.S.C. 89(A)
  - C) SECURITY AGREEMENT REQUIREMENTS AND LEGAL BASIS THEREFOR
- VIII. APPLICABLE CRIMINAL STATUTES UTILIZED IN U.S. PROSECUTIONS OF MARPOL VIOLATIONS
  - A) PRINCIPLES OF RESPONDEAT SUPERIOR
  - B) THE RESPONSIBLE CORPORATE OFFICER DOCTRINE
  - C) APPLICABLE FINES, PROBATION COMPLIANCE PROGRAMS AND OTHER PENALTIES
- IX. WHERE DO WE GO FROM HERE?



- **THE CRIMINALIZATION OF  
MARITIME ACCIDENTS AND MARPOL  
VIOLATIONS IN THE UNITED STATES**

**Michael G. Chalos**

**Chalos, O'Connor & Duffy**

# **MARPOL Violation Prosecutions in US--Government's Position**

- **Enforcement of US laws**
- **Punishment of Wrongdoer by Fines and/or Jail Time**
- **Deterrence of Wrongdoer**
- **Deterrence of Other Potential Wrongdoers**
- **Protecting the Environment for all**
- **Flag States Not Enforcing Marpol**

# The Reality

- **Shipping industry is an easy target**
- **Shipping companies are perceived as having lots of money and will pay large fines rather than fight**
- **No political constituency**
- **No organized political muscle**
- **Good publicity for US government on Environmental enforcement**

# **Current Status of MARPOL Violation Prosecutions in US**

- **US DOJ and Coast Guard are well organized with task forces to investigate and prosecute shipowners, operators, managers and seafarers for Marpol violations**
- **Prosecutions are on the rise**
- **Security demands (monetary and maintaining crew during investigation) for release of vessel increasing and becoming more onerous**
- **Fines are getting larger**
- **Court ordered and enforced compliance programs**

# How and Why?

- **OWS equipment do not always operate as advertised or as intended**
- **Poor culture for protection of environment and adherence to regulations**
- **Lack of maintenance of OWS equipment and poor training of crew in its use and in record keeping**
- **Lack of available reception facilities**
- **Aggressive US government investigations and prosecutions**
- **“Whistleblowers”- can get up to 50% of fine**



## BigMike makes hasty retreat to Singapore

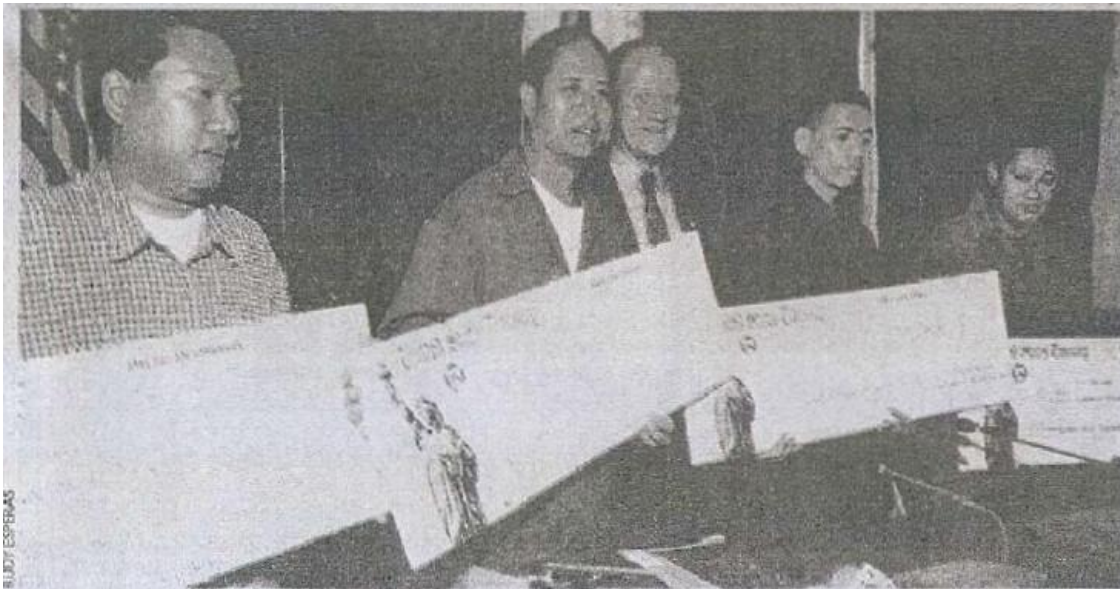
By Nikko Dizon

11iE BILLEAGUE F.D husband of President Macap 1-Arroyo left yesterday morning for Singapore; at J Ordeftly eluding members of ILC media waiting (Or Ilim at the NiMy Aquino Inter-11<1dou AirpnrTerruinall in Pasay Cty.

Joe Ml&uel "Mike" Arroyo requested early



## US makes 4 RP seamen rich as environment heroes



By Nikko Dizon

THE UN111!D Srnres 001 only heaped praises on their heroic deed. It also turned them into millionaires. But the four Filipino seamen-insrrum Cllt victlon of violators of international and US environmental laws-chose to make only a brief appearance at the US Embassy yesterday.

They disappeared *is* soon as the press coverage over.

Jonathan Sanchez, Jimmy Piamonte and Florencio Tolentino each got \$75,000 (or <111 estii lion) while Richard Santillan got \$250,000 (P from the US Justice Dept)! Illenr.

Their reward was for their initiative in informing the US Coast Guard of the vessel, MV Katerina, which was dumping oil into the sea, in violation of international and US environmental laws.

US Charge d'Affaires Joseph Musso.neli held a large "mock" ceremony in a brief ceremony at the Charles !arsons Ballroom. The embassy did not release the money was given to them.

Two of the seamen came with their wives. If kuuw this is an inspiring story. But the citizens and they said they do not wish to be

INSTANT MILUONAIRE; S.FouF Seamn rec:d t!" tlt<ll of \$250,000 from the US Embassy for alerting the US Coast Guard that their ship was dumping oil waste into the Pacific. The awardees, from left, Jonithan Sanchez, Jimmy Piamontt, Richard Santillan and Florencio Tolentino flank Charge d'Affaires Joseph Musso.neli.

# **Gov't Authority for Marpol** **Violations Investigations**

- **The MARPOL Protocol (“MARPOL”) is an international treaty implemented in the United States by the Act to Prevent Pollution from Ships (“APPS”), 33 U.S.C. §§ 1901 et seq.**
- **APPS makes it a crime for any person to knowingly violate MARPOL, APPS, or the federal regulations promulgated under APPS. 33 U.S.C. § 1908(a).**

- **These regulations apply to all commercial vessels, including vessels operating under the authority of a country other than the United States, when these vessels are operating in United States waters or while at a port or terminal under the jurisdiction of the United States. 33 C.F.R. § 151.09.**
- **The United States has no jurisdiction over a foreign flag vessel for any violation of MARPOL that occurs outside the US 12 miles jurisdictional limit.**

- **The United States Coast Guard regularly inspects the Oil Record Book during port state inspections to determine compliance with United States law and the MARPOL Protocol and to assure that ships are not an environmental threat to United States ports and waters.**
- **The United States Coast Guard is charged with enforcing the laws of the United States and is empowered under 14 U.S.C. § 89(a) to board vessels and conduct inspections and investigations of potential violations and to seize evidence.**

- **If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, the Coast Guard is empowered to deny a vessel's entry to a United States Port or detain a vessel 33 C.F.R. §§ 151.07(b).**
- **The Coast Guard is also required to report to the United States Attorney's office for the District in which the vessel is inspected all suspected violations of any US laws.**

# CRIMINAL STATUTES & SANCTIONS

- **There are a broad array of criminal sanctions available to prosecutors against crewmembers, owning and managing corporations, and individuals in such corporations.**
- **Prosecutors can and will:**
  - **arrest, detain and/or confiscate vessels to obtain security and/or collect fines/penalties;**
  - **criminally charge and hold vessel personnel;**
  - **criminally charge owning/operating and/or management companies; and**
  - **criminally charge responsible corporate officers, as well as, managing company personnel.**

## **CORPORATE LIABILITY**

- A corporation can incur vicarious liability for the actions of its employees undertaken in the course of their employment if such actions are intended for the benefit of the corporation.**
- A corporation may have direct criminal liability for the acts of its directors, and officers.**
- A corporate officer/director may be found criminally liable just because of his/her position of responsibility.**
- The fact that the company and its employees, officers and/or directors are outside the US not a bar to the dogged efforts of US prosecutors.**

# Applicable Criminal Statutes

- **False Statement Act (18 USC Sec.1001)**
- **Act for the Prevention of Pollution from Ships (APPS) (33 USC Sec 1901 et seq)**
- **Conspiracy (18 USC Sec 371)**
- **Obstruction of Justice (18 USC Sec 1505)**
- **Tampering with Witnesses (18 USC Sec 1512)**
- **The Clean Water Act (CWA) 33 USC Sec 1251**
- **Sarbanes-Oxley Act of 2002, 18 USC Sec 1519**



# **“RED FLAGS”**

- **Flexible by-pass hoses in and around OWS**
- **Flange nuts and bolts around OWS and overboard discharge valve that show recent use**
- **Freshly painted piping, flanges, nuts & bolts**
- **Oil on valve stems on discharge side of OWS**
- **Oil in piping between OWS and overboard discharge valve**
- **Oil in overboard discharge valve**
- **Inoperable and/or malfunctioning OWS**

# **Red Flags (Cont'd)**

- **Inoperable Incinerator**
- **Lack of spares or record of maintenance of OWS and/or Incinerator**
- **Engineering crew's inability to operate OWS and/or Incinerator**
- **Improper and or missing ORB entries**
- **Amounts recorded as transfers exceed tank capacity**
- **Repeat entries**
- **Bilge soundings do not conform to ORB entries**

# **Red Flags (Cont'd)**

- **Evidence of Oil Content Meter (or “15 ppm sensor”) not working properly or overridden**
- **Existing piping/valve arrangement does not match original piping diagrams**
- **Non-use or excessive use of Incinerator**
- **Unauthorized cross over valves and piping**
- **Whistleblowers**

# Crewmembers' Rights in US

- **No crewmember can be forced to speak to US authorities if there is a possibility that by doing so they will incriminate themselves (5<sup>th</sup> Amendment)**
- **Each crewmember is entitled to consult with counsel before speaking to authorities**
- **If a crewmember does choose to speak with authorities, such crewmember must be completely truthful**
- **If English is not the crewmember's first language can ask for interpreter**

# WHERE DO WE GO FROM HERE?

- **Prosecutions obviously not working**
- **Government and industry must work together**
- **Owners/Operators must:**
  - **Provide better and more sophisticated equipment**
  - **Change culture of shipboard and shoreside personnel by better training and closer supervision of onboard activities**

- **Government and industry need to explore ways and means of developing more available reception facilities**
- **Government and industry need to work together on an EPA type of protocol agreement whereby industry agrees to establish and abide by certain best practices, compliance programs and initiatives and in return receives a “safe harbor”/non-prosecution consideration for any illegal conduct by rogue employees**

**Chalos, O'Connor & Duffy, LLP**

**Thank You for your Attention**

**Michael G. Chalos**