

Exercise of Prosecutorial Discretion in Vessel Pollution Cases



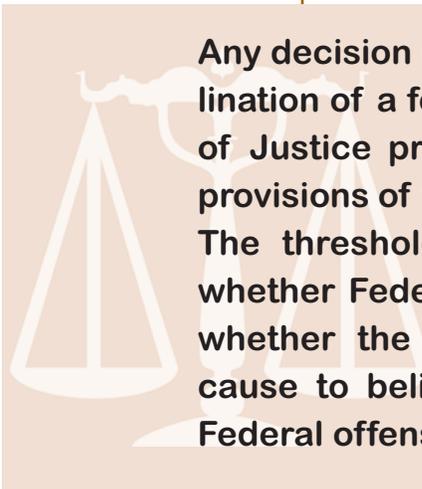
*Dubunking the myth of the renegade prosecutor
recklessly filing criminal charges.*

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One of the more persistent myths regarding criminal vessel pollution enforcement in the United States concerns the renegade prosecutor who casually files criminal charges against vessel owners or operators—and possibly senior shipboard officers as well—with the effect of criminalizing innocent or, at worst, inadvertent behavior. The purveyors of this myth either do not understand or simply choose to ignore the careful analysis and complex review processes to which the charging decisions in vessel pollution cases are subjected.

The truth is that one of the most critical decisions confronting a public prosecutor is the determination of whether a particular case will be accepted for criminal prosecution or declined for evidentiary, legal, or policy considerations. For prosecutors with the U. S. Department of Justice, this exercise of prosecutorial discretion is governed by several departmental policy statements that carefully guide the decision-making

process. There are several additional factors that also affect a prosecutor's decision whether to accept or decline a vessel pollution case for criminal prosecution. The purpose of this article is to discuss the policies that govern the exercise of prosecutorial discretion for federal prosecutors generally and to identify those additional factors that relate more specifically to vessel pollution cases. It is hoped that a more thorough understanding of this case selection process will benefit vessel owners and operators individual mariners, and the broader commercial maritime industry.



Any decision regarding the commencement or declination of a federal criminal case by a Department of Justice prosecutor is governed initially by the provisions of the Principles of Federal Prosecution. The threshold requirement for an evaluation of whether Federal prosecution may be warranted is whether the prosecutor finds there is probable cause to believe that a person has committed a Federal offense in the relevant jurisdiction.

Principles of Federal Prosecution

The initial case referral in a vessel pollution case is likely to be made to the Department of Justice by a component of the U. S. Coast Guard. The case referral also initiates a process of dialogue and consultation between the prosecutor and Coast Guard field personnel that continues throughout the duration of the case. Any decision regarding the commencement or declination of a federal criminal case by a Department of Justice prosecutor is governed initially by the provisions of the Principles of Federal Prosecution.¹ The threshold requirement for an evaluation of whether Federal prosecution may be warranted is whether the prosecutor finds there is probable cause to believe that a person has committed a Federal offense in the relevant jurisdiction. If that initial standard is met, the prosecutor must then evaluate several additional factors, including the possibility of a referral to another jurisdiction and the potential of a non-criminal disposition, to determine whether further investigation of that case is warranted in that jurisdiction at that time.²

If the decision is made to investigate the matter further, the prosecutor must then consider the complete investigative record and determine whether the conduct at issue constitutes a Federal offense and whether the admissible evidence is "sufficient to obtain and sustain a conviction"³ This requires the prosecutor to evaluate the evidentiary quality of the evidence, to determine whether the quantum of proof is sufficient to establish each of the elements of the offense beyond a reasonable doubt, and to consider whether, in the event a conviction is obtained, it can be sustained before an appellate court.

Even if the prosecutor determines that this substantial evidentiary burden has been satisfied, the departmental policy requires the prosecutor to consider whether the prosecution should be declined because: no substantial Federal interest would be served by prosecution; the target of the investigation is subject to effective prosecution in another jurisdiction; or there exists an adequate non-criminal alternative to prosecution.⁴ The assessment of the Federal interest in a potential prosecution requires consideration of the nature and seriousness of the offense, the prospective defendant's relative culpability, prior criminal history, and the extent of cooperation in the investigation.⁵ The potential for effective prosecution in another jurisdiction is a particularly relevant factor in vessel cases, because other coastal districts may have initiated related

investigations involving the same vessel owner or operator.⁶ The potential effectiveness of non-criminal alternatives to prosecution is routinely considered in vessel pollution cases, both with respect to organizational defendants and to shipboard personnel.⁷ Each of these potential bases for declination must be judged carefully before a decision can be made to commence a criminal prosecution.

Voluntary Disclosure Policy

In addition to the questions regarding the sufficiency of the evidence and the availability of alternative enforcement options, Federal prosecutors of environmental cases are required to consider several additional factors concerning the nature and extent of cooperation demonstrated by the subject of the investigation. In 1991, the Environment and Natural Resources Division of the Department of Justice issued a policy statement regarding the manner in which significant voluntary compliance or disclosure efforts by an environmental violator will be considered in evaluating the appropriateness of criminal prosecution.⁸ This policy governs the treatment of voluntary compliance or disclosure efforts in all environmental cases, not just vessel pollution cases. The policy requires the environmental prosecutor to consider several factors to determine whether the degree of cooperation warrants mitigation of enforcement actions.

One such factor is whether the subject made a voluntary, timely and complete disclosure of the matter under investigation, with particular attention to whether the disclosure occurred before regulatory or law enforcement officials had already obtained knowledge of the noncompliance. Another factor is the extent of cooperation demonstrated by the entity under investigation, including the extent and quality of the organization's assistance to the investigation. The voluntary disclosure policy also stresses that the prosecutor should consider the existence and scope of any preexisting environmental compliance program and evaluate whether the adoption and implementation of that program demonstrated a strong institutional commitment to environmental compliance. Finally, this policy identifies several additional factors that may be relevant to the issue of mitigation, including the pervasiveness of the noncompliance; the existence and use of effective internal disciplinary procedures; and the extent of any effort to remedy any ongoing noncompliance.

The application and effect of the voluntary disclo-

sure policy will depend on facts and circumstances of each particular case. However, the potential mitigation factors enunciated in the policy are evaluated in every environmental case that is considered for criminal enforcement. The record of Federal environmental criminal enforcement in the United States, specifically including vessel pollution cases, contains numerous cases where the application of this voluntary disclosure policy has resulted in either a declination of criminal enforcement or a significant mitigation in the nature of the enforcement action filed and a substantial concession with respect to the amount of the criminal fine imposed.

Principles of Federal Prosecution of Business Organizations

Over the years, certain components of the Department of Justice have issued various policy statements to guide Federal prosecutors in their exercise of prosecutorial discretion with respect to the filing of criminal charges against business organizations. In January 2003, the Office of the Deputy Attorney General issued a revised set of principles regarding the prosecution of business organizations (“the Thompson Memorandum”), with an increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.⁹ Although the principles discussed in the Thompson Memorandum apply broadly to all departmental components, many have direct applicability to the specific charging issues presented in vessel pollution cases. In addition, the Thompson Memorandum constitutes an updated treatment of relevant factors and principles, some of which are also contained in the general Principles of Federal Prosecution and the Environment Division’s voluntary disclosure policy. As such, the Thompson Memorandum represents the most current treatment of these issues in the context of criminal enforcement against corporations. Finally, the promulgation and discussion of these principles underscores the fact that these issues are actively evaluated by prosecutors in all components of the Department of Justice as they consider whether to initiate a criminal prosecution of any business organization.

General Principles

The Thompson Memorandum clarifies that a corporation should not be treated more leniently or more harshly because of its artificial nature.¹⁰ The decision to charge a corporation in an appropriate case may result in immediate remedial steps within an industry and may enhance the overall deterrent

effect of the prosecution. Moreover, crimes that carry with them a more substantial risk of public harm, including environmental crimes, are more likely to be committed by businesses and “there may, therefore, be a substantial federal interest in indicting the corporation.”¹¹

The policy guidance emphasizes that a decision to charge a corporation should not be viewed as a substitute for the prosecution of criminally culpable individuals. There must be a principled evaluation of the appropriateness of charging the business organization and any criminally responsible employees, recognizing that, at times, employees may engage in criminal conduct solely to advance their personal interests. In the latter case, it may not be appropriate to pursue criminal charges against the business organization. However, even where the misconduct is relatively minor in nature, if the wrongdoing was pervasive, it may be appropriate to pursue charges against the corporation. The most important factor in differentiating between such cases is a critical evaluation of the role of management and a recognition that it is a corporation’s management that is responsible for the corporate culture in which criminal conduct is either discouraged or tacitly encouraged.¹²

In the context of vessel pollution investigation, this guidance requires the prosecutor to look beyond the wrongful conduct that may have occurred aboard a specific vessel and consider the actions or the inaction of the shore-side management of the company with respect to the conduct in question.

Cooperation and Voluntary Disclosure

The Thompson Memorandum also stresses the importance of evaluating a corporation’s timely and voluntary disclosure of information and its willingness to cooperate with the government’s investigation.¹³ Factors that may properly be considered in gauging the extent of cooperation is a corporation’s willingness to: identify the individuals responsible for the wrongdoing; to make witnesses available; disclose the complete results of internal investigations or audits; and waive attorney-client and work product protection.

Depending upon the facts of the case, the dynamics of the investigation, and the extent of the corporation’s cooperation, it may be possible to consider a grant of immunity or pretrial diversion to the corporation. However, in the context of a vessel pollution investigation, before a decision is made to enter

into such a non-prosecution agreement with a vessel owner or operator, it will likely be necessary for the prosecutor to consult with other coastal districts and with the Environmental Crimes Section to determine what, if any, effect such a disposition may have on other related investigations.

Another important factor to be weighed in assessing the nature of a corporation's cooperation is whether, under the guise of cooperation, a corporation is taking steps that have the effect of protecting culpable employees or otherwise frustrating the government's investigation.¹⁴ In making this assessment, the prosecutor is cautioned to evaluate whether the corporation's advancement of attorney's fees, its retention of culpable employees without sanction for their misconduct, and its provision of information to culpable employees about the nature of the government's investigation pursuant

to a joint defense agreement with a vessel owner or operator, it will likely be necessary for the prosecutor to consult with other coastal districts and with the Environmental Crimes Section to determine what, if any, effect such a disposition may have on other related investigations.

For example, pursuant to the requirements of the International Safety Management Code, most commercial vessels now have a Safety Management System (SMS) manual on board setting forth policies and procedures that are, on their face, designed to ensure that the vessel is operated in compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL), International Convention for the Safety of Life at Sea (SOLAS), and other applicable international maritime conventions. The more significant question, though, is whether the SMS manual has actual relevance to the day-to-day operation of the vessel and to the shore-side management and oversight of the vessel.



The myth of the renegade prosecutor recklessly filing criminal charges against innocent vessel operators and mariners may serve the interests of those persons who seek to perpetuate it—but it bears no relation to the actual process whereby prosecutorial discretion is exercised in this important area of environmental enforcement.

Vessel owners and operators will frequently argue that the existence of the SMS manual on board the vessel demonstrates the corporation's good faith effort to ensure compliance with the environmental statutes, and that, if environmental statutes were violated, it was simply the act of rogue employees acting in violation of express company policy. The prosecutor must look behind the

to a joint defense agreement are indicia of true cooperation. Additionally, overly broad assertions of corporate representation of employees (e.g., a declaration by corporate counsel that he represents the corporation as well as all licensed and unlicensed crewmembers), directions to employees not to cooperate with the investigation, or the submission of misleading or incomplete information to the government may properly be understood as conduct that is designed to impede rather than to assist the investigation.

Corporate Compliance Programs

As with other guidance documents, the Thompson Memorandum emphasizes the potential importance of a meaningful compliance program in evaluating whether the corporation should be subjected to criminal enforcement.¹⁵ The mere presence of a "paper program" does not insulate the business organization from criminal enforcement. The prose-

“paper program” and consider what concrete steps the shore-side management has taken to ensure compliance with the enunciated policy.

Shore-side vessel managers routinely monitor a range of operational parameters while the ship is underway, including vessel location and navigation, vessel speed, fuel consumption rates, machinery maintenance, and cargo operations. When evidence of environmental violations involving the same vessel is detected by Coast Guard inspectors, it is reasonable to inquire whether the vessel's shore-side managers expended the same level of energy on a systematic basis to ensure that the vessel was operating in compliance with the requirements of MARPOL. This inquiry is especially relevant when the evidence of non-compliance is as flagrant as an inoperable oil water separator, a bypass system circumventing the ship's pollution prevention equipment, fresh oil in the ship's overboard

discharge valve, or substantial disparities between the ship's sounding logs and the machinery space Oil Record Book.

Additional Factors Applicable to Vessel Cases

Vessel pollution investigations present a number of additional elements that directly impact the prosecutor's exercise of prosecutorial discretion. One of the more obvious factors that is unique to vessel pollution investigations is the mobility of the vessel and its crew and the resulting time pressures this creates with respect to the conduct of an investigation. This timing factor places a high premium on early and intensive consultation among Coast Guard field personnel, the Coast Guard's District Legal Office and the Federal prosecutor. The goal of such early consultations is to ensure a reasonable assessment of the potential violations at issue and, if there is an initial determination that the matter warrants further scrutiny, the securing of critical documentary evidence, the collection of necessary physical evidence, and the identification of crewmembers who may have directed the illegal activity or who have been eyewitnesses to the violations. If the initial investigation indicates a likelihood of criminal prosecution, there may also be a need to obtain a surety bond from the vessel owner or operator.¹⁶

The backdrop to any such investigative effort, however, is the recognition that these legitimate law enforcement objectives must be met in a manner that is minimally disruptive to the vessel's schedule. Additionally, if it is necessary to secure statements or testimony from individual crewmembers, extraordinary measures may be required to accelerate the timing of the standard investigative procedures to minimize the disruption of the crewmembers' schedules. In this regard, the extent of early cooperation by the vessel's owner or operator can have a very tangible impact on the course of the investigation and the extent of the disruption to the vessel and its crew.

Another question that often surfaces in vessel pollution cases is whether the wrongful conduct that is uncovered with respect to the operation of one ship may also have occurred aboard other ships within the fleet. This issue often arises logically from the initial investigation when one crewmember will report that the same or similar illegal activity occurred on another ship on which the crewmember previously served. If sufficient credible evidence is developed to indicate that there may be a multi-ship or fleet-wide environmental compliance

problem, the Federal prosecutor has an obligation to evaluate the nature and extent of those violations, at least to the extent the United States might have jurisdiction to enforce against the violations.

Vessel cases also require early consultation and coordination among the various coastal judicial districts that may be affected by the unlawful activity in question. Communication networks have been established among the coastal United States Attorneys' Offices, the Environmental Crimes Section, and the cognizant Coast Guard offices to ensure that information regarding pending vessel pollution investigations and the leads developed by such investigations can be shared in a timely manner with interested jurisdictions. This coordination continues throughout the pendency of the investigation to ensure that significant prosecutive decisions, including declinations, immunizations, and charging decisions, are made in a consistent manner and are based upon all of the available evidence.

As the vessel pollution enforcement program in the United States matures, real-time consultations among Port States regarding specific investigations of mutual interest are also increasing, and this process is yielding significant enforcement benefits.

Consultation and Review

A prosecutor who is supervising a vessel pollution investigation is required to consider and weigh each of the principles and factors outlined above in exercising prosecutorial discretion to recommend the filing of criminal charges. The prosecutor must also weigh heavily the recommendation of the District Commander of the Coast Guard with respect to the initiation of a criminal enforcement action. However, the decision to file Federal criminal charges, including any such decision in a vessel pollution case, is not a solitary decision made by a line prosecutor. Although the specific procedures vary from office to office, every component of the Department of Justice has a mechanism for ensuring supervisory review and authorization before a criminal case can be initiated. This process of consultation and review is designed to ensure that the recommendations of the line prosecutor are scrutinized and evaluated by independent supervisory personnel within the office and to guarantee that the ultimate exercise of prosecutorial discretion is an expression of collective professional judgment.

The myth of the renegade prosecutor recklessly filing criminal charges against innocent vessel operators and mariners may serve the interests of those

persons who seek to perpetuate it—but it bears no relation to the actual process whereby prosecutorial discretion is exercised in this important area of environmental enforcement.

Conclusion

The U.S. Coast Guard and the Department of Justice are eager to work constructively with the responsible members of the commercial maritime industry to achieve the common goal of enhanced compliance with MARPOL without resort to criminal prosecution. It is for this reason that the vast majority of environmental deficiencies or violations identified by Coast Guard inspectors are resolved without consideration of a potential referral to the Department of Justice. Moreover, any case that is referred to the Department of Justice by the Coast Guard for consideration of criminal enforcement is subjected to a rigorous review and analysis based upon the principles and factors discussed above. In fact, many cases referred to the Department of

Justice are declined for criminal enforcement either because the evidence is found to be insufficient to establish a violation or because a non-criminal alternative was determined to be a more appropriate resolution.

However, when the Coast Guard uncovers evidence of flagrant, intentional violations of MARPOL, including bypass systems designed to circumvent the ship's pollution prevention equipment, the falsification of official ship's records in an effort to conceal such violations, or other intentional actions designed to obstruct the Coast Guard's Port State Control inspection, the Department of Justice will carefully consider pursuing a criminal enforcement action. This is both to address the specific wrongful conduct aboard that vessel and to deter other unscrupulous vessel owners or operators who may be tempted to engage in similar criminal conduct that is detrimental to the marine environment.

Endnotes

- ¹ United States Attorneys Manual ("USAM"), § 9-27.000, et seq. http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm
- ² USAM, § 9-27.200.
- ³ USAM § 9-27-220.
- ⁴ *Ibid.*
- ⁵ USAM, § 9-27.230. These factors are similar to those incorporated in the Commandant's Instruction M16201.1 on Criminal Enforcement of Environmental Laws, Chap. 1.E.3.
- ⁶ USAM, § 9-27.240. To date, the referral by the United States of evidence regarding vessel pollution violations to the vessel's State of registry has not established a high likelihood of effective prosecution for these offenses by the Flag States.
- ⁷ USAM § 9-27.250. This includes an assessment of potential disciplinary actions against responsible individuals by the vessel owner or operator, the potential of suspension and revocation hearings against a mariner's license in the United States, the potential for administrative sanctions by the U. S. Coast Guard, and the potential for a referral to another component of the Department of Justice for pursuit of civil penalties.
- ⁸ Factors in Decisions on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, July 1, 1991. <http://www.usdoj.gov/enrd/factors.htm>
- ⁹ Principles of Federal Prosecution of Business Organizations, January 20, 2003. <http://www.usdoj.gov/dag/cftf/corporateguidelines.htm>
- ¹⁰ *Ibid.*, Sec. I.
- ¹¹ *Ibid.*, Sec I.B.
- ¹² *Ibid.*, Sec. IV.
- ¹³ *Ibid.*, Sec. VI.
- ¹⁴ *Ibid.*, Sec. VI.B.
- ¹⁵ *Ibid.*, Sec. VII.
- ¹⁶ Title 33, United States Code, Section 1908(e).