

**NAUTICAL INSTITUTE – TO THE FUTURE**



**CRIMINALISATION – AN INTERNATIONAL PERSPECTIVE**

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# What we'll be talking about...

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- **Recent U.S. Casualties**
  - *Cosco Busan*
  - *M/V Tintomara*
  - *Deepwater Horizon*
- **Maritime Prosecutions Go Global**
- **Latest OWS Cases and Trends**
- **Regulatory Developments**

# ***Cosco Busan* – November 9, 2007**

- 53,000 gallons (200,000 litres) of fuel oil spilled into San Francisco Bay after the vessel allided with the San Francisco-Oakland Bay Bridge
- > 2400 birds killed, 26 miles of shoreline oiled and fisheries closed/delayed
- Multiple investigations – Department of Justice, Coast Guard, NTSB, OSPR, CARB, locals



# Cosco Busan – The Pilot

- Pled guilty in March 2009 to Clean Water Act (CWA) and Migratory Bird Treaty Act (MBTA) violations
- DOJ stated that the pilot:
  - “made a series of intentional and negligent acts and omissions, both before and leading up to the incident that produced a disaster that, as widespread as it was, could have had even worse consequences...He abandoned ship by not following required safety procedures which then resulted in an environmental disaster.”
- Sentenced to 10 months in prison
- Errors included:
  - Left in fog with bow not visible; many other commercial ships did not depart.
  - Failed to have a master/pilot exchange to review the transit plan.
  - Did not fortify the bridge or bow watch despite the fog.
  - No one took fixes –“It’s like driving your car out of the driveway” said the pilot...
  - Medical conditions/prescription drug use not disclosed to the Coast Guard.

# Seven U.S. Criminal Prosecutions in Wake of Oil Spill Events

- ***US v. DRD Towing*** – Tugboat piloted by apprentice-mate collided with tanker; time records falsified; owner goes to jail.
- ***US v. Fleet Management*** – Ship allided with supporting tower of San Francisco-Oakland Bay Bridge; passage plans falsified; ship manager fined; pilot goes to jail.
- ***US v. IMC Shipping*** – Bulker experienced mechanical problem and unable to restart main engine; vessel runs aground, breaks apart in rough seas, and sinks; false statement to Coast Guard; company fined.
- ***US v. Bouchard Transportation*** – Tugboat runs aground outside Buzzards Bay Channel; wheelhouse not manned; company fined.
- ***US v. Ekloff Marine*** – Tugboat engine room fire causing loss of power; tug and barge run aground; prior maintenance problems; company fined.
- ***US v. Rivera*** – Towline between tug and barge parts twice; crew of tug asleep; barge grounds off coast of Puerto Rico; company fined.
- ***US v. Exxon*** – Tanker exits vessel traffic lanes and grounds on reef in Prince William Sound; multiple maritime offenses.
- ***Deepwater Horizon*** – ???



# Cosco *Busan* – The Ship Manager

- **Pled guilty in August 2009 to three counts in the Indictment:**
  - Negligently discharging oil in violation of the CWA (Count 1)
  - Knowingly and willfully making a false statement (Count 5)
  - Obstructing justice by knowingly altering or falsifying documents (Count 8)
- **Fine of \$10 million:**
  - \$7 million for Count 1
  - \$1 million for Counts 5 and 8
  - \$2 million community service to the National Fish and Wildlife Foundation
- **Enhanced Compliance Program**
  - Focuses on operational and safety procedures and the safety management system, bridge procedures, vessel takeovers, crew training and familiarization, and crew changes.
- **Settlement (Sept 2011)**
  - US\$44 million (pending court approval) for environmental claims/penalties

# Cosco Busan – Key Issues

- **From Joint Factual Statement**

- ***Crew and Training***

- New crew on vessel – allision about 2 weeks after the take over
    - Deviations from the Safety Management System

- ***Berth-to-Berth Passage Plan***

- Required for every voyage – not done – only pilot-to-pilot station passage plan, which were reviewed by the Master and Superintendent on board

- ***Day of Allision***

- Very foggy; visibility < .5 NM
    - First voyage without deck superintendent aboard
    - Master stated he was concerned that a delay could result in consequences
    - Master deferred to pilot
    - Crew did not take fixes or monitor vessel's progress
    - Questions about markers on the radar / ECDIS
    - Records concealed and documents falsified, with Master's signature on the "created" passage plans

# DRD Towing Company

- In July 2008, DRD's towing vessel, the *Mel Oliver*, pushed a tank barge into the path of the tanker *Tintomara*, causing a 282,000 gallon fuel spill.
- DRD pled guilty and, in January 2011, sentenced to 2 years probation and a \$200,000 fine in connection with violations of the Ports and Waterways Safety Act and the CWA for the negligent discharge of oil.
- PWSA count related to creating a hazardous condition by having improperly licensed employees operate towing vessels and violating the work/rest hour requirements.
- Co-owner sentenced to 21 months in prison and a \$50,000 fine for obstruction of justice for causing the deletion of "electronic payroll sheets," which were material to the Coast Guard's investigation.
- Apprentice-mate pled guilty to violating the PWSA and the CWA for operating the *Mel Oliver* without a proper license and without proper supervision.
- Tug's master pled guilty to a PWSA violation for creating a hazardous condition by leaving the vessel and allowing the apprentice-mate to operate it.



# National Transportation Safety Board Findings

## Key Findings:

- Pilot's degraded cognitive performance from his use of prescription medications, despite clean post accident drug test (and Coast Guard's inadequate oversight).
- Absence of a comprehensive pre-departure master/pilot exchange and a lack of effective communications.
- Master's ineffective oversight of pilot's performance and vessel's progress.
- Failure of technical manager to train the crew (which led to gross negligence as the bow lookout was eating breakfast in the galley instead of being on watch) and failure to ensure the crew understood and complied with the SMS.
- Failure of Caltrans to maintain foghorns on the bridge.
- Failure of VTS to alert pilot/master that they were headed for the tower.
- Malfunctioning radar, which led the master and pilot to use an electronic chart for part of the voyage (Coast Guard investigators found radar to be in working order, but did not examine it until days after the accident).
- Master's incorrect identification of symbols on the electronic chart and pilot's confusion → Loss of situational awareness.

# Deepwater Horizon – By the Numbers

- Estimated release of almost 5 million bbls
- About 6,500 response vessels and 115 aircraft utilized
- Over 47,000 personnel responded
- Over 13 million feet of boom deployed
- Over 400 controlled burns conducted
- About 1.8 million gallons of dispersant used
- Over 605 miles of shoreline oiled, over half in Louisiana
- Over half the Gulf of Mexico was closed to fishing
- Assets and assistance from more than 20 countries
- Lots of legal issues and finger pointing
- 11 Transocean seafarers died when the rig exploded



# Key Federal Investigations

- **Joint Marine Board of Investigation**
  - Coast Guard/BOEMRE
  - Hearings with over 90 witnesses
  - USCG Volume 1 on April 22, 2011
  - BOEMRE Volume 2 and USCG “final agency action” – September 2011?
  - **Flag State** - Republic of the Marshall Islands – August 16, 2011
- **Congressional committees**
  - CLEAR Act / other bills
- **Presidential Commission**
  - Final Reports/Staff Reports – completed
- **Department of Justice**
  - Civil and Criminal





# Law – Enforcement Actions

- **Clean Water Act / OPA 90**
  - Civil liability of between \$1,100 to \$4,300 per barrel
  - Liability for natural resource damages
  - Criminal liability if discharge results from negligence
  - Criminal fine could be up to twice the pecuniary loss caused by the violation
- **Seaman's Manslaughter Statute**
  - Criminal liability if deaths caused by negligence
  - Potential sentence of 10 years imprisonment
- **Strict Liability Statutes**
  - Migratory Bird Treaty Act
- **Civil / Criminal Fraud?**
  - Providing false information rate of release



# Key Issues

- Stopping the release!
- Who is liable?
  - At least two RPs named
    - BP and Transocean
  - MOEX, Anadarko also RPs
- Jones Act implications
- Liability Limits / Breaking Limits
- Finger pointing
- Claims vs. Litigation
- Multiple investigations
- Enforcement actions
  - Civil / Criminal





# Perspective

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- **Vast majority** of oil spills do not result in significant enforcement action.
- **Some substantial oil spill events** have been considered for criminal prosecution, but were declined following consultations between U.S. Coast Guard and Department of Justice.
- **Post incident conduct** is problematic and will inevitably lead to a criminal investigation.

# Factors That Have Influenced Exercise of Prosecutorial Discretion

- **Actual or threatened environmental harm is a key factor.**
  - Sensitivity of marine environment
  - Proximity to high population centers
- **Politics**
- **All but one case involved acts of negligence that were proximate causes of casualty.**
- **Majority of cases involved post-incident conduct designed to falsify records or otherwise obstruct the investigation.**
  - False Statements / Obstruction of Justice
- **Several cases involved violations of other maritime laws.**

# Preparing for a Marine Casualty in U.S. Waters

- Be prepared in advance and train crew and senior managers on what to expect, as well as their rights → PLAN
- First 24 hours are critical – get counsel on scene immediately
- Advise crew (and superintendents) of their rights (Tell the Truth!) and to direct the preservation of hard and electronic information
- Coordination and cooperation with investigators
- Determine need for criminal counsel – better safe than sorry
  - Be mindful of conflicts
- Key decisions relating to selection of counsel to represent the owner, operator, manager, P&I Club and individuals
- Company control group / Communications with client
- Internal Investigation – define objectives and deliverables
- Be flexible and adapt

# Preservation of Paper and Electronic Records

## Paper Records

- General Vessel Records
- Navigation Records
- Cargo Records
- Personnel Records
- Engineering Records

## Electronic Records

- GPS
- Radar/ARPA
- AIS
- ECDIS
- VDR
- Imaging Computers

→ *Get the message to the ship immediately!*

# Maritime Prosecutions Go Global

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# Crewmembers' (and others') Rights

- No one is required to speak with investigators if they do not want to – it is the individual's choice.
- Everyone have the right to consult with counsel before speaking with investigators.
- If individuals choose to speak, they must understand that they have to tell the truth.
- The company may have a policy that encourages crewmembers to speak with counsel before being interviewed, but cannot require it.
- Crewmembers should never interfere with an investigator's investigation or hide/destroy documents or other possible evidence.
- “*Miranda* Rights”? Generally not.

# International Prosecutions

- **VLCC Orapin Global (Singapore 1998)**
  - master pled guilty and fined and jailed for causing an oil spill
- **Erika (France 1999)**
  - master charged with endangering life and causing marine pollution from an oil spill
- **FarEast Victory (France 2001)**
  - owner and master charged with causing pollution by releasing fuel oil from washing cargo tanks
- **Mimi Selmer (Germany 2000)**
  - master and chief charged for negligently causing pollution by disposing of hazardous waste
- **Stena Alexita (United Kingdom 2000)**
  - owners prosecuted and fined for pumping oily water overboard
- **Coastal Bay (United Kingdom 2000)**
  - owner prosecuted and fined for a grounding and resulting oil pollution
- **Nissos Amorgos (Venezuela 2000)**
  - master convicted in absentia and sentenced to 16 months in prison for causing an oil spill
- **Mobil's Sylvan Arrow (Australia 2003)**
  - owner pled guilty and fined for an oil spill caused by equipment failure
- **MSC Carla (Australia 2006)**
  - master and owner pleaded guilty – A\$150,000 fine for 140 litre spill
- **Neftegaz-67 (Hong Kong 2008)**
  - master of *Neftegaz-67* jailed for 38 months; senior pilot on board *Yao Hai* jailed for 36 months and master and junior pilot jailed for 30 months
- **Pacific Adventurer (Australia 2009)**
  - owners pleaded guilty in September 2011 re 270 ton fuel oil spill

# International Prosecutions

- **Prestige**

- In 2009, a court in Spain cleared the way for prosecution of the former head of the merchant marine service for “crimes against the environment.” In July 2010, the court decided that this civil servant, the Master, the Chief Engineer and Chief Officer should face prosecution.
- Captain jailed at the outset.

- **Hebei Spirit**

- In 2007, two tugs were towing the *Samsung No. 1*, a crane barge in heavy seas, when a tow cable broke. The freed crane barge hit the anchored *Hebei Spirit*, and over 3 million gallons of oil were spilled.
- After the spill:
  - **Korean Coast Guard** – share blame among tug and barge captains, and ship’s officers, who, along with Samsung and Hebei shipping were charged with negligence and violating anti-pollution laws.
  - **District Court** – put blame squarely on the tug captains and Samsung, one of whom was sentenced to 3 years in prison and the other one year, and Samsung was fined. Barge captain, tanker’s officers, and Hebei Shipping were not guilty – even so, still detained because the government appealed.
  - **Appeals Court** – in late 2008, overturned acquittal and sentenced the captain to 18 months and chief officer to 8 months in jail for: (i) not going full astern to drag the anchor, (ii) pumping inert gas into the tank, and (iii) taking too long create a list through transferring cargo between tanks.

# What's on The Horizon

- **Internationally, additional regulation and more/continued focus on marine pollution**
  - EU Ship-Source Pollution Directive criminalizing “serious” pollution discharges
  - Canada amendments to the Canadian Environmental Protection Act, increasing penalties and liabilities
  - China’s “OPA 90”
- **Continuing aggressiveness in the US**

# CRIMINAL ENFORCEMENT UPDATE



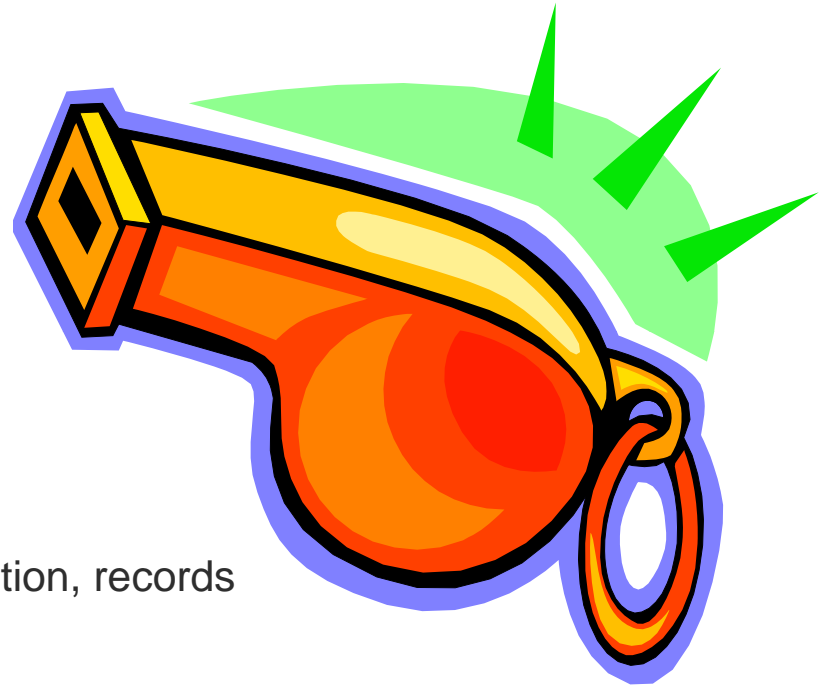
*How did we get here?*

*Where are we going?*



# How Do Investigations Start in the U.S.?

- DOJ's Vessel Pollution Initiative
  - Ongoing since mid 1990s
- Whistleblowers
- Remote sensing
- International Cooperation
- Inspections
  - Good first impressions, organization, records
  - No surprises
- If “red flags” found, criminal investigators called in
- Incidents / Oil Spills
- Obstructive Conduct / False Statements will intensify any investigation



# Some 2010 Prosecutions...

- **P/V Hannah Glover** – In February in Boston, company pled guilty and fined \$300,000 for discharging raw sewage from a ferry boat.
- **Styga Compania Naviera** – In April in Texas, chief engineer found not guilty, then filed a \$22 million lawsuit against the company. Another chief is a fugitive. Company pled guilty in 2009.
- **Aksat Denizcilik Ve Ticaret A.S** – In May in Florida, the Turkish operator of the *M/T Kerim* pled guilty to two counts for failing to maintain an accurate ORB and will pay \$725,000 and implement an ECP.
- **Wilmina Shipping AS** – In May in Texas, the Coast Guard removed the *Wilmina's* certificate of compliance and banned the vessel from returning to the US for three years. This ban was imposed due to several marine environmental-related, including MARPOL, offenses.
- **Transmar Shipping** – In August in California, company sentenced to pay \$850,000 penalty and ECP. Chief and second engineers pled guilty

*After a slowdown  
at the end of 2009,  
DOJ  
is now getting about  
**a case a week,**  
which is almost  
a record pace.*

# And More...

- **Coastal Shipping / HP Maritime Consultants** – A master and chief engineer, and HP Maritime Consultants, as well as an employee, were convicted by jury for falsifying the ORB, conspiring to falsify the ORB, and failing to conduct a complete oil pollution prevention survey of the cargo ship ISLAND EXPRESS I. HP Maritime Consultants surveyed the oil pollution prevention equipment and deemed it adequate despite the fact that the OWS was broken.
- **Brusco Towing** – In California in September, regional manager sentenced to 21 months in prison after convicted by a jury of CWA and other violations in connection with a dredging operation. Company pled guilty in 2009.
- **Atlas Ship Management** – In Florida in December, a Turkish company pled guilty to false statements and a false ORB and will pay a \$900,000 penalty and implement an ECP in connection with *Avenue Star* after 2 whistleblowers informed the Coast Guard. Chief and Second Engineers previously pled guilty. Whistleblowers awarded \$125,000 each.

# And Some More...

- **Stanships, Inc.** – In June in Louisiana, company pleaded guilty to violating the APPS and the CWA from the M/V Doric Glory. Sentenced to pay \$1.35 million in penalties and serve three years probation.
- **Cooperative Success Maritime S.A.** – In June in North Carolina, company pled guilty and was sentenced to pay an \$850,000 penalty for violating the APPS and making false statements in connection with the *Chem Faros*. Investigation began after a whistleblower passed a note to the Coast Guard. Chief pled guilty and was sentenced to one year probation.
- **Irika Shipping S.A.** – In July in Maryland, company pled guilty for second time for obstruction and violating APPS on *M/V Iorana*. Will pay \$4 million in penalties and will be placed on probation for five years and must implement an Enhanced ECP. Investigation commenced when the whistleblower passed a note to CBP along with cell phone photos. Chief banned for 5 years.
- **Offshore Vessels LLC** – In August in Louisiana, company pled guilty to violating APPS with respect to its ice breaker / research vessels. Penalty of \$2.1 million, 3 years probation, and an ECP. Chief also pled guilty.
- **Coastal Shipping Holding, LLC** – In August in Florida, company was sentenced to pay a penalty of \$700,000 and serve three years' probation for failure to maintain an accurate ORB on board the *M/V Island Express I*.

# And now 2011...

- **Epps Shipping Company** – In August in Puerto Rico, company sentenced to pay a \$700,000 fine, 5 years probation and an ECP for violating APPS and making false statements to inspectors.
- **Noka Shipping Company Ltd.** – In June in Texas, company pled guilty to violation of APPS, failure to maintain an accurate ORB and violation of the PWSA. Company was fined \$750,000, ordered to make a \$150,000 community service payment and 5 years probation with the condition that all company ships are banned from U.S. ports during the probation.
- **Cardiff Marine Inc.** – In February in Maryland, company pled guilty for maintaining a false ORB and obstruction of justice in connection with the *M/V Capitola*. Will pay \$2.4 million in penalties, probation for 3 years, and an ECP. Chief pled guilty in May to obstruction of justice in connection with the investigation and was sentenced to 6 months in prison after already having been “detained” in the US for 13 months.
- **Stanships, Inc.** – In April in Louisiana, in violation of its 2010 probation, company plead guilty to 8 counts of obstruction of justice, knowingly violating PWSA and failing to maintain an accurate ORB aboard the vessel resulting in a \$1 million fine and 5-year probation and prohibition from doing business in the United States during probation.
- **Koo’s Shipping Company** – In March in American Samoa, company pled guilty to false statements, and for maintaining an inaccurate ORB and paid a \$1 million fine, 3 years probation and an ECP;



# Recent Trends – According to DOJ

**“In the discretion of the Court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to a conviction.”**

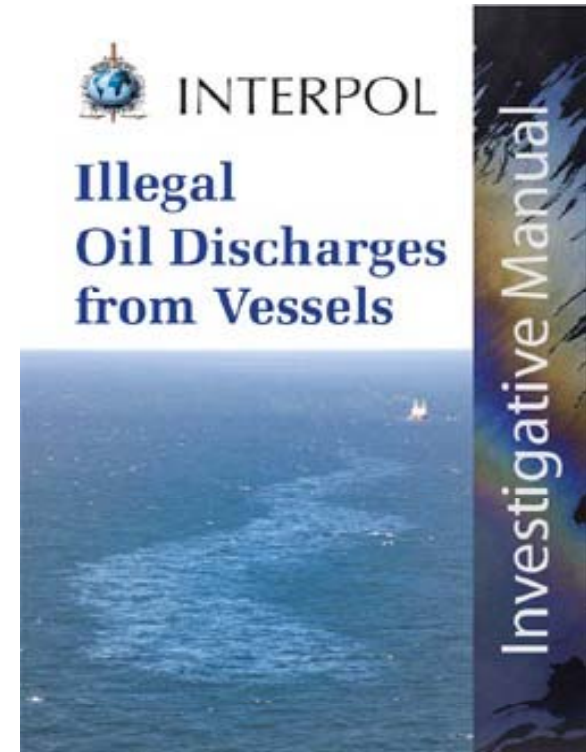
- Continued non-compliance
- Increased international enforcement and cooperation
- Increased whistleblower awards under APPS – 50% of DOJ prosecutions arise from whistleblower reports:
  - **B Navi Ship Management (2008)**
    - 6 whistleblowers awarded between \$43,000 and \$85,000 each
  - **STX Pan Ocean (2008)**
    - 2 whistleblowers awarded \$125,000 each
  - **Holy House Shipping (2009)**
    - 2 whistleblowers awarded \$375,000
  - **General Maritime (2009)**
    - 5 whistleblowers awarded \$250,000
  - **Fleet Management (2010)**
    - 1 whistleblower awarded \$200,000
- Continued Oil Record Book / Garbage Record Book violations
- Increased criminal penalties and Expanding theories of liability
- Corporations blaming their crew / Crew blaming their employers

# International Efforts

- **Much cooperation → Several US prosecutions referred by foreign countries**
  - **OSG** – Canada referred after it realized sounding logs and ORB didn't match up
  - **Ionia** – Dutch had caught the same ship with side-borne radar and reported it to the United States
  - **D/S Progress** – Sweden provided a video indicating violations
- **US is doing international training and recently conducted a session in Dubai, which was attended by government representatives and others**
- **Biggest effort is through INTERPOL, which solicited information on bad actors from IMO**
  - Deliberate pollution is a priority crime
- **Germany and Australia are reportedly prosecuting OWS cases like the United States**

# International Efforts

- INTERPOL Investigative Manual
- INTERPOL has a Clean Seas Group that is very interested in environmental crimes
- Provides tools to port states regarding enforcement and coordinates efforts and communications among member countries
- Many countries are working together to combat pollution



# Coast Guard Authorization Act of 2010

- Signed into law on October 15, 2010, after 4 years without having a bill, with many significant provisions
- **Sec 216. Enforcement of Coastwise Trade Laws** – Program to be established for the Coast Guard to enforce.
- **Sec 608. Safe Operations and Equipment Standard** – Expands existing law to allow the USCG to take certain actions when a vessel is being operated in an unsafe manner.
- **Sec 701. Rulemakings** – Requires report on pending rules and imposes deadlines.
- **Sec 702. Oil Transfers from Vessels** – Requires new regulations to reduce the risk of oil spills from oil transfer operations, focusing on highest risk discharges.
- **Sec 703. Improvements to Reduce Human Error and Near Miss Incidents** – Requires a report to Congress by October 2011 identifying types of human errors contributing to oil spill incidents.
- **Sec 709. International Efforts on Enforcement** – *Mandates better enforcement coordination between US and international partners regarding oil discharges.*
- **Sec 713. Liability for use of Single-Hull Vessels** – Broadens definition of “responsible party” to oil cargo owners if using single hull oil tankers after December 31, 2010.
- **Sec 811. Seamen’s Shoreside Access** – Requires facility security plans to include provisions for mariners and others to “board and depart the vessel through the facility in a timely manner at no cost to the individual.”

# EPA's Vessel General Permit





# Vessel General Permit

It's all about the paperwork...



- Current VGP expires in December 2013
- EPA working on next version, which should be proposed by year's end
- Conflicting state requirements that require technology not yet available (CA and NY)
- NY granted ballast water extension requests until August 2013, but dealing with graywater case-by-case
- EPA/Coast Guard Memorandum of Understanding



# Coast Guard / EPA Memorandum of Understanding

## The MOU

- **MOU published February 11, 2011** setting forth enforcement coordination, data tracking, training, monitoring, verifying compliance and outreach
- **USCG Policy Letter 11-01** provides guidelines to evaluate compliance
- Compliance monitoring to be incorporated into existing vessel inspection program
  - Recordkeeping, deckside/topside walkthrough and large/medium cruise ships
- **When deficiencies discovered:**
  - Encourage immediate corrective action
  - Inform the Master of deficiencies and which can be immediately fixed
  - Within 24 hours, entered into MISLE, which is available to EPA for review and subsequent enforcement

## Penalties

- Administrative/Civil – up to \$37,500 per day for each day of violation
- Injunctive – prevent vessel from operating or require a corrective action
- Criminal – including fines and imprisonment

# Other issues?

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- **California Low-Sulfur Fuel Litigation**

- 9<sup>th</sup> Circuit gives California a victory in its efforts to regulate out to 24 miles

- **Right Whale Speeding Restrictions**

- Don't speed – enforcement actions by NOAA based on (rather dated) AIS data

- **Air Emissions**

# THE END...

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## Questions?

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