

## CRIMINALIZATION OF MARITIME ACTIVITIES

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Vessel operators, including shoreside corporate officers and supervisors, and shipboard officers and crews, potentially are subject to criminal prosecution for a broad variety of unintentional and intentional activities that may result in violation of safety statutes, water pollution, threats to sealife and wildlife, and injury or death to crewmembers and the general public. Although many of the statutes have been the basis of prosecutions in isolated instances prior to 1989 (primarily in cases of persistent and intentional violation of pollution statutes), since the grounding of the *Exxon Valdez* federal prosecutors, with increasing frequency, have utilized criminal statutes to prosecute ship-operating corporations, their corporate officers, and ships' officers, seeking very substantial fines and imprisonment not only for intentional acts but negligent acts or omissions which may have resulted in marine pollution or other major casualty. See, e.g., *United States v. Hanousek*, 176 F.3<sup>d</sup> 1116 (9<sup>th</sup> Cir. 1999), which rejected the argument that criminal liability under the Clean Water Act must be based on a finding of criminal negligence rather than ordinary negligence. The following statutes provide for criminal sanctions. Often, there are provisions for substantial additional civil fines and penalties.

**1. Federal Water Pollution Control Act**, 33 U.S.C. §§ 1251-1376. 33 U.S.C. § 1311(a) makes it unlawful for any person to discharge "pollutants" into the navigable waters of the United States except in compliance with National Pollution Discharge Elimination System permit. "Discharge" means any addition of any pollutant to navigable waters from any point source (33 U.S.C. § 1311(a)). "Pollutant" means dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, wrecked or discarded equipment, rock, and industrial waste (excluding sewage from vessels), biological materials, radioactive materials, and heat. 33 U.S.C. § 1362(6). 33 U.S.C. § 1362(5) defines the "person" to include individuals, corporations, partnerships and associations. 33 U.S.C. § 1319(c)(6), extends the definition: "person" includes "responsible corporate officers". 33 U.S.C. § 1319(c) makes the "negligent" or "knowing" violation of the Act's prohibitions against discharge a criminal offense. 33 U.S.C. § 4301 provides that any person who negligently spills oil into the navigable waters of the United States may be fined up to \$25,000 per day of violation or be imprisoned for up to one year (under 33 U.S.C. § 1319(c)). 33 U.S.C. § 1319(c)(1) makes negligent violations of the FWPCA "misdemeanors" and intentional or knowing violations felonies. The penalty for a felony violation is a fine of not less than \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. If the defendant has a prior conviction under the act, the penalty increases to a fine of up to \$100,000 per day of violation, or imprisonment of not more than six years, or both.

*United States v. Britain*, 931 F.2<sup>d</sup> 1413 (10<sup>th</sup> Cir. 1991), held that responsible corporate officers may be personally criminally responsible although they personally neither willfully nor negligently caused the violations. Under 33 U.S.C. § 1319(c)(1), intentional violations are felonies: the penalty is a fine of not less than \$5,000 - \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. If the polluter has a prior conviction under the Act, the penalties increase: the penalties increase to a fine of up to \$100,000 per day of violation, or imprisonment of not more than six years, or both.

*United States v. M/G Transport Services, Inc.*, 173 F.3<sup>d</sup> 584 (6<sup>th</sup> Cir. 1999), reversed dismissal of charges against corporation and its chief engineering officer which owned tow boats which had dumped oily bilge slops and burned waste ash overboard in remote locations of the rivers

on which they operated at night, to avoid detection. The jury convicted the company and the officer of conspiracy to violate the Clean Water Act and in aiding and abetting discharges of prohibited substances without a permit. The trial court granted defense motions for acquittal on the “without a permit” counts, on the grounds that due process precluded holding defendants criminally liable for discharging pollutants without a permit when no permit would ever have been issued. The court of appeals rejected that defense: that permits would not have been issued to discharge pollutants in the quantities dumped is no defense to charges of discharging pollutants without a permit.

**2. Oil Pollution Act of 1990 (“OPA-90”) 33 U.S.C. Chapter 27.**

**(a) General provisions.** 33 U.S.C. § 1321(b)(3), prohibits discharges of oil or hazardous substances in quantities that “may be harmful” into the waters of the United States or the contiguous zone or upon adjoining shorelines or that may affect natural resources belonging to the United States. “Discharge” is defined as “any spilling, leaking, pumping, pouring, emitting, emptying or dumping”. 33 U.S.C. § 1321(a)(2). “Oil” is defined as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”. 33 U.S.C. § 1321(a)(1). “Hazardous substance” is any substance that creates a potential for imminent and substantial danger to public health and welfare, including fish and wildlife, when discharged. 33 U.S.C. §§ 1321(a)(14), 1321(b)(2)(A). Also see 40 CFR Parts 116-117. A “harmful quantity” is defined as a discharge that violates local water quality standards or “causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.” 40 CFR § 110.2. Criminal liability does not require proof of criminal intent: only that the act of discharging oil was intentional. See *United States v. Frezzo Bros., Inc.*, 602 F.2<sup>d</sup> 1123 (3<sup>rd</sup> Cir. 1979). Ordinary negligence will support conviction of negligent violation. 33 U.S.C. 1319(c)(1)(A). Knowing violation is a felony. 33 U.S.C. § 1319(c)(2)(A). Discharges of oil from a properly functioning vessel engine are excepted from the prohibition. Discharge of any oil accumulated in a vessel’s bilge is specifically prohibited. 40 CFR § 110.7. The use of dispersant or emulsifiers to circumvent the harmful quantity definition is prohibited. 40 CFR § 110.8.

**(b) Obligation to report a discharge.** 33 U.S.C. § 1321(b)(5) makes any person “in charge” of a vessel or of an onshore or offshore facility or vessel from which oil or hazardous substance is discharged in a quantity that may be harmful into waters or shorelines (as defined in the Act) who fails to notify immediately the appropriate federal agency as soon as he or she has knowledge of the discharge, subject to conviction of a felony punishable by a \$250,000 maximum fine (\$500,000 for corporations) and up to five years in prison. *United States of America v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp. 2<sup>d</sup> 155, 1998 AMC 1841 (D. P.R. 1997), upheld application of the law to a small oil spill from a foreign-flag vessel in United States territorial waters. See also *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2<sup>d</sup> 1358, 1998 AMC 1817 (S.D. Fl. 1998), which involved a separate incident. There may be more than one person “in charge”: multiple defendants having authority at various levels can be charged, plus a corporation may be “in charge”. *Apex Oil Co. v. United States*, 530 F.2<sup>d</sup> 1291 (8<sup>th</sup> Cir. 1991); *United States of Royal Caribbean Cruises*. Reporting a spill results in limited immunity to an individual who makes a report: information reported cannot be used against the individual who made the report. 33 U.S.C. § 1321(b)(5). Reported information may be used against a corporation or against other individuals. Notice of oil discharge also is required to be given under 33 U.S.C. § 1906, MARPOL Protocol I; 33 CFR § 151.15. *Royal Caribbean* also rejected the defense that a truthful answer to government inquiries would expose the individual to criminal liability.

**3. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).** CERCLA, 42 U.S.C. § 9600 *et seq.* 42 U.S.C. § 9601 prohibits the discharge or release of hazardous substances, including discharges or releases into “navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management or authority of the United States under the [Magnuson Act, 16 U.S.C. §§ 1801-82]”.

**4. Act to Prevent Pollution from Ships,** 33 U.S.C. §§ 1901-1911. The United States has adopted provisions of the International Convention for the Prevention of Pollution From Ships (“MARPOL”) relating to discharge of oil, noxious liquid substances and garbage. The provisions regulating the discharge of garbage include “plastic” other than certain “degradable” plastics and naturally produced plastics. 33 CFR § 151.05. Regulations prohibiting the discharge of plastic apply to 200 miles. Regulations for discharging dunnage, lining and packing materials that float apply to 25 miles. Regulations prohibit the discharge of victual waste and other garbage generated in the normal operation of a ship (not mixed with plastic), but such may be dumped outside of 12 miles (3 miles if it has been ground pursuant to 33 CFR § 151.75). The United States legislation applies to all vessels registered in the United States or operating in United States waters. 33 CFR 151 states administrative rules promulgated by the Coast Guard relating to the discharge of oil, noxious liquid substances and garbage from vessels. Part 155 states rules relating to the prevention of pollution discharges. Part 157 states special rules relating to oil tankers. Part 158 states rules relative to reception facilities. 33 U.S.C. § 1908(a) makes it a Class D felony for any person to knowingly violate the MARPOL Protocol, with a penalty of imprisonment of not more than six years (18 U.S.C. § 3581(b)), a fine of \$250,000 (18 U.S.C. § 3571(b) [\$500,000 for an organization]) or both. Per 33 U.S.C. § 1908(a), an amount equal to not more than one-half of the fine may be awarded by the court to the person giving information leading to a conviction.

**5. Refuse Act.** 33 U.S.C. §§ 407 and 411 prohibit any person to “throw, discharge, or deposit” from any vessel or from the shore or wharf “any refuse matter of any kind or description whatever ... into any navigable water of the United States” not in compliance with a permit. Although this nineteenth century statute was originally directed as preserving navigability of navigable waters, prosecutors and courts have found it applicable to intentional and unintentional marine oil pollution (or even pollution that threatened to enter navigable waters), irrespective that there is no resulting obstruction to navigation. It is a “strict liability crime”: there is no requirement of “intention” or even negligence on the part of a person charged with a violation of the Act – the fact that a deposit or other prohibited conduct occurred is sufficient for conviction. See, *e.g.*, *United States v. White Fuel Corp.*, 498 F.2<sup>d</sup> 619 (1<sup>st</sup> Cir. 1974). As no proof of intentional misconduct or other scienter is required, charging a person responsible for any unlawful discharge or deposit, the Refuse Act has become a favorite of prosecutors, and the agencies which refer matters to prosecutors, as a basis for prosecution. 33 U.S.C. § 411 makes violation of § 407 a misdemeanor punishable by a fine not exceeding \$2500 or by imprisonment for not less than 30 days nor more than one year, or both. One half of the fine is to be paid to the person or persons giving information which led to the conviction. The Alternative Fines Act, 18 U.S.C. § 3571, may be applied to substantially increase the fines for misdemeanors.

**6. Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act).** 33 U.S.C. §§ 1401-1445. The MPRSA regulates the transportation of material from the United States intended to be dumped into ocean waters and the dumping of material transported from outside the United States into the territorial sea and contiguous zone of the United States. Generally, except as allowed by permits, the MPRSA prohibits the dumping of any “material” in the oceans or territorial

waters. “Material” is defined matter of any description, including solid waste, industrial waste, garbage, sewage sludge, and medical waste. 14 U.S.C. § 1402(c). The Army Corps of Engineers is authorized by the MPRSA to issue permits for the dumping of dredged material. The EPA issues all other permits. 40 CFR Parts 220-229 state the procedures for application and issuance of permits. The MPRSA does not apply to routine discharges of effluent incidental to the operation of motor driven equipment on ships or the deposit of material for the purpose of developing, maintaining, or harvesting fisheries resources. 33 U.S.C. § 1415(b) provides for criminal sanctions for violation of the Ocean Dumping Act. Any person who knowingly violates any provision of the Act or any regulation promulgated under the Act may be fined or imprisoned for not more than five years, or both. Each day of a continuing violation is a separate offense. *United States v. Apex Oil Co.*, 132 F.3<sup>d</sup> 1287 (9<sup>th</sup> Cir. 1997), involved charges against two managers of a tanker owning corporation and four vessels’ masters for conspiring to dispose of cargo-related oil residues and waste materials in violation of the Ocean Dumping Act. The Ninth Circuit affirmed dismissal of one count of violation on grounds that the Coast Guard regulations do not plainly and unambiguously define oil muck in the definition of cargo related oil residue. The owning corporation plead guilty to charges arising from dumping the rags, steel barrels and other shipboard-generated wastes.

**7. Sanctions for negligence and sending an unseaworthy vessel to sea.** 46 U.S.C. § 10908 makes it a crime for a person to knowingly send a vessel to sea in an “unseaworthy state”:

A person that knowingly sends or attempts to send, or that is a party to sending or attempting to send, a vessel of the United States to sea, in an unseaworthy state that is likely to endanger the life of an individual, shall be fined not more than \$1,000, imprisoned for not more than five years, or both.

*United States v. Rivera*, 131 F.3<sup>d</sup> 222, 1998 AMC 609 (1<sup>st</sup> Cir. 1997), reversed the conviction of a manager of a tugboat’s managing company under 46 U.S.C. § 10908 for knowingly sending a United States vessel to sea in an unseaworthy state likely to endanger the life of an individual, on the ground that there was no evidentiary support that knowledge of the defective condition of a towing wire was likely to endanger life. The case arose from the grounding of the tug’s oil-carrying barge after the towing wire parted. The court noted that § 10908 is part of a statutory chapter establishing complaint procedures for seamen reporting unseaworthy vessels, and the statute originally was designed to enhance those procedures by criminalizing a knowing attempt to take a dangerous vessel to sea after it was determined it was unseaworthy after a complaint as to its seaworthiness was lodged. The court, in a *dictum* that rejected the position urged in the amicus briefs of the Maritime Law Association of the United States and other industry interests, held that the statute’s plain language, as amended in 1983, creates a stand-alone criminal basis for criminal prosecution, without a prior finding or prior complaint of unseaworthiness of the vessel. A vigorous dissent would apply the rule of construction that a statute should be construed in its textual context, and its application should be limited to cases where procedures for correcting unseaworthiness under Chapter 109 have been initiated. As the unseaworthiness procedures do not apply to foreign vessels, fishing vessels, harbor vessels, yachts, and vessels on inland waterways, the *Rivera* holding extends the criminal offense to vessels beyond those covered by the procedural provisions.

**8. Regulation of carriage of bulk liquids.** 46 U.S.C. § 3701 *et seq.* provides for Coast Guard regulation of design, construction and operation of tank vessels. 46 U.S.C. § 3718(b) makes a person who willfully and knowingly violates the requirements of the statute or the regulations promulgated thereunder guilty of a felony.

**9. Incompetent operators.** 46 CFR § 35.05-20 states:

No person shall be engaged as a member of a crew on a tank vessel if he is known by the employer to be physically or mentally incapable of performing the duties assigned to him.

This regulation was the basis of the criminal charges against Exxon Corporation with respect to the grounding of the *Exxon Valdez*.

**10. Ports and Waterways Safety Act.** The Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1236, broadly provides for regulation to aid in prevention of casualties in transportation of oil and other hazardous substances in bulk. It provides enforcement remedies for breach of regulations promulgated under its authority. Regulations include 33 CFR § 160.215 which requires that the “owner, agent, master, operator, or person in charge” of any vessel on which there is a “hazardous condition”, or the vessel causes a “hazardous condition”, report the condition to the nearest Marine Safety office of Group office. A “hazardous condition” is defined to include:

... any condition that may adversely affect (1) the safety of any vessel, ... or shore area or (2) the environmental quality of any port, harbor, or navigable waterway of the United States.

33 CFR § 160.203. Some of the defendants in the Barge Morris J. Berman grounding in Puerto Rico discussed in *United States v. Rivera*, 131 F.3<sup>d</sup> 222, 1998 AMC 609 (1<sup>st</sup> Cir. 1997), were convicted for violation of 33 U.S.C. § 1232(b)(1) for not reporting that the towing wire to the tank barge had parted. Sanctions include *in rem* liability (§ 1232(c)), civil penalties (§ 1232(a)), and felony criminal penalties (§ 1232(b)).

**11. Migratory Birds Treaties Act.** 16 U.S.C. app. § 701 *et seq.*, and, specifically, § 707, makes it a misdemeanor for any person to kill any migratory bird or any nest or egg thereof other than as provided by the act. Killing by pollution is interpreted as unlawful. This is a “strict liability” statute: no intention to kill birds or to pollute, or negligence which results in same, need be proven. Penalties can be imprisonment up to six months, or, in the alternative a fine of twice the amount of any benefit derived from the violation plus twice any loss suffered by another person. 18 U.S.C. § 3571(b)-(c)

**12. Carriage of dangerous cargoes.** 46 U.S.C. § 3718, makes it a misdemeanor to willfully and knowingly violate the requirements of 46 U.S.C. § 3701 *et seq.* (The Carriage of Liquid Bulk Dangerous Cargoes Act).

**13. General safety regulations.** 46 CFR § 185.100 requires that a vessel be operated “in accordance with applicable laws and regulations” and “in such a manner as to afford adequate precaution against hazards that might endanger the vessel and the persons being transported.” 46 CFR § 185.900 provides that violation of any provisions in § 185 “will subject the violator to the applicable penalty provisions” of 46 U.S.C. Subtitle II.

**14. Operating vessel in a negligent manner.** 46 U.S.C. § 2302(a) makes any person who operates a vessel in a “negligent manner that endangers the life, limb, or property of a person” liable for a civil penalty of not more than \$1,000.

**15. Operating vessel in grossly negligent manner.** 46 U.S.C. § 2302(b) makes it a misdemeanor to operate a vessel in a “grossly negligent manner,” with sanctions of a fine of not more than \$5,000 and/or imprisonment for not more than one year.

**16. Negligence of ship’s officer which results in loss of life.** 18 U.S.C. § 1115, often is referred to as the “seaman’s manslaughter statute”, states:

Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose

misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

When the owner or charter of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who had knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

The standard for conviction of any crewmember or other person employed on a vessel or of a public officer is ordinary negligence. *United States v. O'Keefe*, 426 F.3<sup>d</sup> 274, 2005 AMC 2805 (5<sup>th</sup> Cir. 2005); *United States v. Ryan*, 364 F. Supp. 2<sup>d</sup> 338, 2005 AMC 1281 (S.D. N.Y. 2005). *Ryan* held that the second paragraph sets a higher standard of culpability than ordinary negligence for corporate executive officers: for a conviction of a corporate officer, there must be sufficient proof that they “knowingly and willfully caused or allowed” the offending conduct.

**17. Navigation duties.** 33 CFR § 164.11(b), a general navigation safety regulation, provides that the owner, master or person in charge of a vessel underway shall ensure that:

... the wheelhouse is constantly manned by person who:

(1) Direct and control the movement of the vessel; and (2) Fix the vessel's position ... .

33 CFR § 164.11(b) requires that the owner, master, or person in charge of the vessel ensures that each person who performs the duties of directing and controlling the movement of the vessel and fix its position “is competent to perform that duty”. This regulation also was used to charge in prosecution of Exxon Corporation and its corporate officers for the grounding of the *Exxon Valdez*.

**18. Fisheries and wildlife conservation.** The Magnuson Act, 16 U.S.C. §§ 1801-82, provides for conservation and management of fisheries resources off the coasts of the United States. § 1859(b) provides for criminalization of certain violations of the Act and regulations promulgated under it. The Lacey Act, 16 U.S.C. §§ 3371-78, prohibits the possession or transportation of fish or wildlife that was taken in violation of any law or regulation of the United States or any state or foreign nation. § 3373(d)(1)(B) makes it a crime for a person to engage in conduct that involves the sale or purchase of products “knowing that the fish or wildlife or plants were taken” in violation of law. § 3373(d)(2), makes a person criminally liable if he engages in prohibited acts “and in the exercise of due care should know that the fish, wildlife or plants were taken ... in violation of ... law.” Criminal sanctions for violation of the Lacey Act are fines of up to \$250,000 for an individual and \$500,000 for a corporation, and five years imprisonment for a “knowing” violation (§ 3373(d)(1)(B)), and, for “failing to exercise due care”, fines of up to \$100,000 for an individual and \$200,000 for a corporation and one year imprisonment (§ 3373(a)). All such unlawfully taken, purchased or transported fish or wildlife and the vehicles and vessels on which they are taken or transported are subject to forfeiture to the United States. § 3374. All such unlawful fish and wildlife (including unlawfully-caught goods being imported as cargo), and the vessels on which they are carried are subject to forfeiture to the United States.

**19. False Statements Act.** The False Statements Act, 18 U.S.C. § 1001, may be the basis of criminal sanctions if any false record or statement is given to an agency of the United States. An example of prosecution under the statute is *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2<sup>d</sup> 1358, 1998 AMC 1817 (S.D. Fl. 1998), which upheld application of the act to failure of a ship's officer to make an entry in the ship's Oil Record Book for discharge of oily water in the

Bahama Islands. The sanction was applied despite the fact that the ship was under foreign flag, the officer was a foreign national, and the discharge occurred in foreign waters. See also *United States v. Royal Caribbean Cruises, Ltd.*, 1998 AMC 1841 (D. P.R. 1997), which involved a separate incident. Prosecutions under the False Statements Act is the subject of an extensive article, R. Michael Underhill, “Dumping Oil, Cooking & Books, and Telling Lies: The False Statements Act as Applied to Marine Pollution,” 15 U.S.F. MAR. L.J. 271 (2003).

**20. Communicate false distress message or cause Coast Guard to attempt to save lives or property when no help is needed.** 14 U.S.C. § 88(c), makes it a felony for an individual to “knowingly and willfully communicate a false distress message to the Cost Guard or cause the Coast Guard to attempt to save lives and property when no help is needed. *United States of America v. Haun*, 2007 AMC 2326 (11<sup>th</sup> Cir. 2007), held that no specific intent is required for the crime of causing the Coast Guard to attempt to save lives and property when no help is needed: it affirmed the conviction of an individual who staged his own disappearance and had no intent to trigger a Coast Guard search for him.

**21. Miscellaneous marine criminal statutes.** The following is a partial listing of other marine criminal statutes:

18 U.S.C. § 11	Assaulting, resulting or impeding a federal officer engaged in or on account of the performance of official duties
18 U.S.C. § 81	Arson in a maritime jurisdiction.
18 U.S.C. § 113	Assault in a maritime jurisdiction.
18 U.S.C. § 114	Maiming in a maritime jurisdiction.
18 U.S.C. § 371	Conspiracy to commit an offense or to defraud the United States.
18 U.S.C. § 545	Smuggling goods into the United States.
18 U.S.C. § 660	Theft or possession of stolen property from a carrier.
18 U.S.C. § 661	Theft of personal property of another.
18 U.S.C. § 662	Receiving stolen property of another.
18 U.S.C. § 1001	Falsifying statement or entries required by a federal agency or department.
18 U.S.C. § 1025	Fraud on the high seas or on a U.S. vessel.
18 U.S.C. § 1111	Murder.
18 U.S.C. § 1112	Manslaughter.
18 U.S.C. § 1113	Attempted murder or manslaughter.
18 U.S.C. § 1115	Misconduct or negligence of ship officers resulting in death.
18 U.S.C. § 1341	Mail fraud.
18 U.S.C. § 1343	Wire fraud.
18 U.S.C. § 1503	Influencing the due administration of justice.

- 18 U.S.C. § 1505 Obstruction of agency proceedings.
- 18 U.S.C. § 1510 Bribery to obstruct a criminal investigation.
- 18 U.S.C. § 1511 Obstruction of state or local law enforcement.
- 18 U.S.C. § 1512 Witness tampering.
- 18 U.S.C. § 1513 Retaliation against a witness, victim or informant.
- 18 U.S.C. § 1621 Perjury.
- 18 U.S.C. § 1622 Suborning perjury.
- 18 U.S.C. § 2191 Cruelty by master or other officer to member of crew of United States vessel.
- 19 U.S.C. § 70 Master of vessel obstructing a customers officer board to enforce revenue or navigation laws.
- 19 U.S.C. § 1581(d) Failure to stop on command of an officer of customs.
- 33 U.S.C. § 411 Wrongful deposit of refuse, injury to harbor improvements or obstruction of navigable waters.
- 46 U.S.C. § 60601 Violation of regulations regarding Customs boarding.
- 46 U.S.C. § 12133(c) Production of Vessel License or Enrollment.
- 46 U.S.C. § App. 324 Obstructing officer enforcing licensing or documentation laws.
- 46 U.S.C. § 56101(e) Unauthorized Charter or Transfer of Ownership of U.S. Documented Vessel to Alien.
- 46 U.S.C. § 2303 Master of a vessel involved in a marine casualty must render assistance to affected individuals and identify himself and his vessel.
- 46 U.S.C. § 2304 Master of a vessel must render assistance to any individual found at sea “in danger of being lost” so far as can do so “without serious danger to the master’s vessel or individuals on board.”
- 46 U.S.C. § 3318(c) Felony for unlawful altering lifesaving devices.
- 46 U.S.C. § 3318(d) Derange or hinder operation of boiler safety devices.
- 46 U.S.C. § 3318(f) Fraudulent marking of safety devices.
- 46 U.S.C. § 3718 Willful and knowing violation of dangerous cargo statutes and regulations.
- 46 U.S.C. § 4311 Willfully operating vessel in violation of Recreational Vessels Safety Act.
- 46 U.S.C. § 4507(d) Owner, charterer, master, etc. of a vessel operated in violation of the Uninspected Commercial Fishery Industry Vessels Act
- 46 U.S.C. § 5116(d) Person allowing departure of a vessel in violation of a load line

detention order

- 46 U.S.C. § 5116(e) Causes or allows unlawful modification or removal of a load line mark.
- 46 U.S.C. § 8503(e) Coerce a witness, induce or give false testimony in connection with investigation of a marine casualty.
- 46 U.S.C. § 12309(a) Violation of the chapter regarding numbering of undocumented vessels.
- 46 U.S.C. § 12507(a) Providing false information regarding identification of vessels and ownership in connection with the federal vessel identification system.

### **Guidelines for Federal Prosecution of Business Organizations**

In addition to prosecution of individuals deemed responsible for breaches of environmental and safety laws, responsible business entities also may be prosecuted. Guidelines for federal prosecution of business organizations are published at [http://www.usdoj.gov/dag-cfff/corporate\\_guidelines.htm](http://www.usdoj.gov/dag-cfff/corporate_guidelines.htm).

### **Conflicts of Interest in Investigating Casualties on Behalf of Owners and Their Insurers**

The longstanding practice of attorneys and adjusters appointed by vessel operators, often designated by the operators' insurers, of obtaining statements from crewmember witnesses as soon as possible after a maritime casualty raises issues as to potential conflicts of interest in the current atmosphere of potential criminal prosecutions of not only the owning corporations, but, of corporate officers and the crewmembers. In many cases, although it may be in the interest of the owning corporation or other business entity to cooperate fully with Coast Guard and other government investigators, including encouraging crewmembers to give statements to investigators, the individuals may wish to invoke their rights to not incriminate themselves. Individuals may not be fully aware of the potential of their criminal liability, that the interests of the owning entity may conflict with their individual interests, and that any information they provide not only to government investigators but to the owners' representatives may be used against them. It may be contrary to the owners' interests to even advise crewmembers and others that they should consult with independent counsel. Additional issues have arisen under the United States Sentencing Guidelines Manual and the United States Attorneys' Criminal Resource Manual. The Criminal Resource Manual states that in determining whether a non-prosecution agreement would be appropriate, prosecutors are instructed to consider the "completeness" of the corporations' disclosure in identifying culprits and providing information, including granting "a waiver of the attorney-client and work product protections, but with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." The proposed 2004 Amendments to the Sentencing Guidelines Manual are available at <http://www.ussc.gov/2004guid/2004cong.pdf>. These guidelines make it strongly in the interests of the owning entity or other defendant to assist prosecutors build the cases not only against themselves, but potential co-defendants, including the unconditional waiver of attorney-client and

work-product privileges with respect to any aspect of the investigation and factual and legal analysis of the casualty. The Department of Justice encourages prosecutors to seek waiver of attorney-client privilege and work product privilege in weighing whether a corporation has sufficiently cooperated in the investigation phase so as to not be charged with a crime. In many cases, any person who investigates a casualty on behalf of a vessel owner may be called as a witness as to any statements made or facts observed during a post-casualty investigation.

### **Investigation and Vessel Searches for Possible Criminal Activity**

Two recent decisions have greatly broadened the authority of Coast Guard officials to board and inspect vessels without warrants and to make warrantless searches for evidence of criminal activity on the vessels. *United States v. Varlack Ventures, Inc.*, 149 F.3<sup>d</sup> 212, 1999 AMC 255 (3<sup>rd</sup> Cir. 1998), upheld the constitutionality of 14 U.S.C. § 89(a), which permits warrantless boarding and searches of vessels in United States waters and upon the high seas if the Coast Guard or other officials have reasonable suspicion of criminal activity. In *United States v. Boynes*, 149 F.3<sup>d</sup> 208, 1999 AMC 249 (3<sup>rd</sup> Cir. 1998), Coast Guard officers made three separate warrantless inspections of a vessel. The first was from alongside the vessel which was observed to discharge a dark brown liquid. The Coast Guard notified the owner/master that they were investigating the incident and instructed him to bring the vessel to a Coast Guard dock for inspection. Before the appointed hour, they boarded the vessel with the consent of the owner and noted oil in the engine room bilge and oil leaking from a fuel line in the engine room. The owner master was arrested when he appeared at the Coast Guard dock, but without the vessel, which then was in drydock in the British Virgin Islands for repairs. The Coast Guard boarded the vessel in the British Virgin Islands the next day without a warrant and videotaped and photographed the interior and exterior of the vessel. In the resulting criminal prosecution of the owner/master, he moved to suppress evidence obtained during the third warrantless search of the vessel. The district court granted the motion. The Third Circuit reversed, holding that a Coast Guard search of a vessel without warrant while the vessel was in foreign territory did not violate the Fourth Amendment, because no warrant was required under exigent circumstances. *United States v. One Big Six Wheel*, 166 F.3<sup>d</sup> 498, 1999 AMC 951 (2<sup>nd</sup> Cir. 1999) (a Gambling Ship Act prosecution, not an environmental case), involved interpretation of expansion of the territorial sea for purposes of criminal jurisdiction. The court held that the definition of “territorial waters” is the Gambling Ship Act was tied to the definition of territorial waters in other existing regulations, which then was three miles, and subsequent extension of criminal jurisdiction to twelve miles does not change the three mile limitation.

### **Application of United States Criminal Law to Foreign-flag Vessels and Their Crewmembers**

*Wildenhus's Case*, 120 U.S. 1, [retro] 2005 AMC 2095 (1887), made clear that absent exemption by an applicable treaty, a foreign merchant vessel which enters United States waters for purposes of trade, and its crewmembers, are subject to jurisdiction of local courts and may be punished for crimes committed on the vessel.

### **State Criminal Jurisdiction over Acts on High Seas and Foreign Waters**

*State of Alaska v. Jack*, 2006 AMC 206 (Ak. 2006), held that states have extraterritorial criminal jurisdiction over activities on United States flag vessels with respect to acts on the high seas (which include foreign territorial waters), if the states have “sufficient interest”, there is no conflict with federal law, and there is no prosecution of the crime by federal or foreign authorities.