



How to Make Environmental Crime Unprofitable

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How to Make Environmental Crime Unprofitable

- **Investigations**
- **Vessel Clearance and Surety Agreements**
- **Environmental Compliance Plans**
- **Sentencing Options**

Investigations

Ship's computers often contain invaluable information which demonstrates corporate knowledge and/or logs regarding handling of oil onboard.

Logbooks

Oil Record Book

Sounding Logs


Deck Logs

Engine Room Logbooks


Withholding Clearance & Negotiating Surety



- Evaluate reasonable cause to suspect violation



- COTP requests that CBP Port Director withhold clearance to depart (by letter)



- COTP notifies vessel owner and operator of Customs hold.

The "Customs Hold"

33 U.S.C. § 1908: Vessels required to clear.

(e) Ship clearance or permits; refusal or revocation; bond or other surety. If any ship subject to the MARPOL Protocol, Annex IV to the Antarctic Protocol, or this chapter, its owner, operator, or person in charge is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury, upon the request of the Secretary, shall refuse or revoke the clearance required by section 60105 of Title 46. Clearance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.

The "Customs Hold"

It's not just APPS:

- **Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(12);**
- **Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(e);**
- **Ports and Waterways Safety, 46 U.S.C. § 70036(f);**
- **Tank Vessel Operating or Inspection Requirements, 46 U.S.C. § 3718(e);**
- **Inland Navigation Rules, 33 U.S.C. § 2072(d);**
- **Vessel Incidental Discharge Act, 33 U.S.C. § 1322(p)(8)(F);**
- **International Safety Management Code; 46 U.S.C. § 3205(d).**

Environmental Compliance Plan (ECP)

A convicted corporation's condition of probation:

- **prevent and detect** environmental harms and;
- **promote organization's ethical conduct and commitment to environmental stewardship & compliance.**

How we get to an ECP?

- Part of the **judgment**; condition of probation.
 - One of the most negotiated provisions in a plea.
 - USSG, ch.8, part D.

An Effective ECP

Seven minimum requirements. USSG 8B2.1.

- 1st – Est. standards & procedures to **prevent & detect** criminal conduct;
- 2nd – Require **reasonable oversight** by “governing authority” and “high-level personnel”;
- 3rd – **Not delegate substantial authority** to people who knew or should have known about illegal or wrongful activity;
- 4th – **Communicate standards & procedures** including training pgrms;
- 5th – Ensure **monitoring & auditing** to detect criminal conduct w/ periodic evaluations & **system for anonymous/confidential** reports;
- 6th – Implement appropriate **incentives & disciplinary** measures;
- 7th – Have reasonable steps to **respond appropriately** after the detection of criminal activity.

An Effective ECP (cont'd)

- Beyond the minimum:
- ECP should incorporate **industry best practices** and **meet or exceed regulatory standards**:
 - Typically new requirements to bolster applicable regs;
 - E.g., add'l sampling, enhanced tag-out systems, auto monitoring, navigation equipment, etc.

Basic outline of vessel ECP

- Outline **responsibilities** (corporate to crew)
- Set **auditing processes**, timelines, etc..
- **Mandate engineering requirements** especially relating to waste management
- Establish/modify **Env'tl Mgmt System (EMS)**
- Establish/enhance **employee training** program (both initial and ongoing)
- Establish/enhance **confidential reporting**

Who oversees?

- Within the ECP construct:
 - A **Court Appointed Monitor (CAM)** provides oversight & works with all relevant actors (initial auditor, third party auditor, etc.) to ensure compliance.
 - **Corporate Compliance Manager (CCM)** is a senior officer who has overall responsibility for corporate compliance & ensuring ECP is implemented.
 - **Third Party Auditor (TPA)** audits the fleet.

Who oversees?

Outside the ECP construct:

- **Reports** will be sent to **US Attorney's Office, Probation Office, & CGHQ (CG-INV)**.
 - Individual audit reports;
 - “Annual Report and Findings;”
 - Immediate reports regarding a “major non-conformit[ies].”
- **Coast Guard District (Prevention, Legal) & DOJ Environmental Crimes Section** may be added.

Remedies

- Remedies for major non-conformities and other violations of ECPs.
Examples:
 - Possible **probation violation**:
 - E.g., lengthening term of probation or other penalties
 - Modify ECP to increase # or frequency of audits
 - May lead to **new investigation**.
 - CG may **consider banning*** vessel and/or fleet from U.S. ports.
**See generally, 33 USC 1228; Policy Letter 10-03, available on CG portal.*

Sentencing

“Disgorgement is a remedy requiring a party who profits from illegal or wrongful acts to give up any profits they made as a result of that illegal or wrongful conduct. The purpose of this remedy is to prevent unjust enrichment and make illegal conduct unprofitable.

Sentencing

- **Fines**
- **Restitution**
- **Forfeiture**
- **Clawbacks**

Fines

FINES FOR ORGANIZATIONS.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined **not more than the greatest of -**

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than \$500,000

18 U.S.C. 3571

Alternative Fines Act

d) ALTERNATIVE FINE BASED ON GAIN OR LOSS.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than **the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.**

18 U.S.C. 3571(d)

Fines

Princess Cruise Lines to Pay \$40 Million Fine for Illegal Dumping

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The Caribbean Princess cruise ship departed Port Everglades, in Fort Lauderdale, Fla. on its maiden voyage in 2004. Andy Newman/Agence France-press

BP Will Plead Guilty and Pay Over \$4 Billion

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By [Clifford Krauss](#) and [John Schwartz](#)

Nov. 15, 2012

HOUSTON — [BP](#), the British [oil](#) company, said on Thursday that it had agreed to pay \$4.5 billion in fines and other penalties and to plead guilty to 14 criminal charges related to the rig explosion two years ago that killed 11 people and caused a giant oil spill in the Gulf of Mexico.

In a rare instance of seeking to hold individuals accountable for company misdeeds, the Justice Department also filed criminal charges against three BP employees in connection with the



Restitution

- A person “**directly and proximately harmed**” as a result of the offense.
- It may be difficult in some environmental cases to identify victims “directly and proximately harmed” by the violation.
- Government may be a “victim” for purposes of restitution when it has suffered harm, including monetary loss, directly from the offense.
- Government not a victim of an offense when it voluntarily incurs costs that result from the violation, such as investigation and prosecution costs.

Forfeiture

- Instrumentalities
- Proceeds
- Need Financial Investigators



Forfeiture

United States v. Philip Joseph Rivkin, No. 4:14-CR-00250 (S.D. Tex.)

Philip Joseph Rivkin, aka Felipe Poitan Arriaga, was sentenced to 121 months' incarceration, followed by three years' supervised release. Rivkin also will pay more than **\$87 million in restitution in addition to forfeiting \$51 million** for generating and selling fraudulent biodiesel credits in the federal renewable fuel program. Rivkin previously pleaded guilty to a mail fraud count and a Clean Air Act false statement violation, after being charged in a 68-count indictment with wire fraud, mail fraud, Clean Air Act false statements, and money laundering violations.

Clawbacks

- **Criminal Division is conducting a Compensation Incentives and Clawbacks Pilot Program (Program). As set forth below, the Program provides that, when entering into criminal resolutions, companies will be required to implement **compliance-related criteria in their compensation and bonus system** and directs Division prosecutors to consider possible fine reductions where companies **seek to recoup compensation from culpable employees** and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct.**