ARTICLES

UNITED STATES V. ABROGAR: DID THE THIRD CIRCUIT MISS THE BOAT?

BY

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The U.S. Sentencing Guidelines contain provisions that can enhance a defendant's offense level to one that authorizes jail time, if the court finds that the offense "resulted in" repeated discharges of a pollutant to the environment or "otherwise involved" a discharge of a pollutant. Whether or not a defendant gets jail time in federal environmental crimes cases often depends on the applicability of these Guideline enhancements. However, since the term "environment" is not defined in the Guidelines, it is not clear whether the term includes discharges of pollutants outside of the jurisdiction of the United States.

In United States v. Abrogar, *the Third Circuit Court of Appeals had the opportunity to resolve this issue in the context of a vessel prosecution. In this case, the chief engineer of a large, foreign-flagged cargo vessel ordered his crew to discharge oily wastes to the ocean and then arrived into port in New Jersey with a document called an Oil Record Book (ORB) which he had falsified to conceal the discharges from the Coast Guard. Since the oily discharges were to waters beyond the jurisdiction of the United States, the government charged the chief engineer with maintaining a false ORB in a U.S. port in violation of the Act to Prevent Pollution from Ships (APPS). The*

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district court sentenced the defendant to a jail term of a year and a day based on a finding that the false ORB resulted in repeated discharges to the environment under the Guidelines. The Third Circuit reversed holding that the Guideline did not apply, because the environmental discharges were not relevant conduct or offense conduct under the Guidelines, since they occurred outside the jurisdiction of the United States before the vessel came into port with the false ORB. In doing so, the Third Circuit effectively precluded a sentence of jail time under the Guidelines for the defendant.

This Article argues that the Third Circuit's decision was fundamentally flawed, because the discharges were a necessary element of the offense of the false document violation charged under APPS. The Article then explores other statutes and Guideline provisions available to authorize jail time in these cases. In so doing, the Article details many of the legal and sentencing issues that have arisen in vessel prosecutions.

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I. INTRODUCTION

Arguably the worst ecological disaster in U.S. history, the grounding of the Exxon Valdez oil tanker spilled approximately 37,000 tons of crude oil into Prince William Sound, Alaska on March 24, 1989.[1] This amount is dwarfed by estimates of up to 810,000 tons of fuel oil sludge and oily bilge waste that is illegally dumped to the oceans worldwide every year from the operations of large tanker and nontanker container vessels.[2] The lethal, cumulative impacts of these illegal discharges on marine life cannot be ignored and should not be tolerated.[3] The overwhelming majority of large oceangoing vessels are registered in countries other than the United States. To date, many of these countries, which are often derogatorily called the "flags of convenience," have failed to take appropriate enforcement action against the operators of vessels that dump oily wastes in violation of MARPOL,[4] an international treaty designed to protect the world's oceans from intentional oil pollution from vessels.[5]

The United States Justice Department has responded by prosecuting the corporations that own or operate these vessels and the chief engineers and other supervisory engine room crew members in charge of them. Since the oil discharges are to ocean waters beyond the legal jurisdiction of the United States, prosecutions of these cases are based upon the illegal methods that crew members use to conceal these oily discharges from the United States Coast Guard (Coast Guard) when the vessels arrive into U.S. port. One of the concealment methods used by crew members is to falsify and then use or maintain a document known as an Oil Record Book (ORB) while in U.S. port in violation of the Act to Prevent Pollution from Ships (APPS)[6] and other applicable federal laws. The U.S. Sentencing Guidelines (Guidelines) contain a provision applicable to APPS violations that can enhance a defendant's base offense level by six levels, if the sentencing court finds that the offense "resulted in" an "ongoing, continuous or repetitive" discharge of a pollutant to the environment.[7] Another provision can increase a defendant's base offense by

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1 NAT'L RESEARCH COUNCIL, OIL IN THE SEA III: INPUTS, FATES, AND EFFECTS 11 (2003).

2 *Id.* at 83. In 2007, the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection estimated the total annual operational discharge of fuel oil sludge and bilge oil from all ships to be 188,000 metric tons. GESAMP (MO/FAO/UNESCO-IOC/UNIDO/WMO/IAEA/UN/UNEP JOINT GROUP OF EXPERTS ON THE SCIENTIFIC ASPECTS OF MARINE ENVIRONMENTAL PROTECTION), REPORT AND STUDIES NO. 75: ESTIMATES OF OIL ENTERING THE MARINE ENVIRONMENT FROM SEA-BASED ACTIVITIES 15 (2007).

3 *See* KEES (C.J.) CAMPHUYSEN, INT'L FUND FOR ANIMAL WELFARE, CHRONIC OIL POLLUTION IN EUROPE 6–10 (2007), *available at* http://www.ifaw.org/Publications/Program_Publications/Emergency_Relief/Chronic_oil_pollution_in_Europe.php (discussing the lethal effects of chronic oiling to seabirds in Europe).

4 U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT 238–39 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf. The term "MARPOL" is short for "Marine Pollution." *See* discussion *infra* notes 42–44 and accompanying text.

5 *See* CAMPHUYSEN, *supra* note 3, at 10. It is estimated that approximately 10%–15% of the world's fleet operates in violation of MARPOL's environmental regulations. *Id.*

6 33 U.S.C. §§ 1901–1915 (2000).

7 U.S. SENTENCING GUIDELINES MANUAL § 2Q1.3(b)(1) (2007), *available at* http://www.ussc.gov/2007guid/GL2007.pdf [hereinafter U.S.S.G.].

four levels if the offense "otherwise involved" a discharge of a pollutant.[8] The application of these provisions can make the difference between jail time and probation for crew members who are convicted of violating APPS.[9] Since the term "environment" is not defined in the Guidelines, a contested issue at sentencing can be whether the Guidelines apply to extraterritorial discharges.

In 2006, the Third Circuit had the opportunity to interpret this Guideline term in *United States v. Abrogar*.[10] In *Abrogar*, the defendant was the chief engineer of the Motor Vessel Magellan Phoenix, a Panamanian-flagged cargo vessel that came into port in the District of New Jersey and was inspected by the Coast Guard.[11] During the course of the inspection, the Coast Guard learned that Noel Abrogar had repeatedly discharged oily sludge and bilge wastes into the ocean prior to arriving into port in New Jersey and had falsified the vessel's ORB to conceal these discharges.[12] Mr. Abrogar later pled guilty to a violation of APPS for maintaining a false ORB. At sentencing, the district court applied the six-level enhancement for repetitive discharges into the environment and sentenced Mr. Abrogar to a prison term of one year and a day.[13] The defendant appealed, and the Third Circuit Court of Appeals, finding that the six-level enhancement did not apply, vacated the sentence and remanded to the district court for resentencing. By reaching that conclusion, the Third Circuit virtually guaranteed that the defendant would not serve out his original prison sentence.[14] In its holding, the Third Circuit did not address the issue of whether the term "environment" under the Guidelines applied to discharges of pollutants to waters outside the jurisdiction of the United States. Instead, the Third Circuit found that the defendant's offense of maintaining a false ORB in the United States did not "result in" the repetitive discharges of oil to the environment and that the act of discharging oily wastes to international waters was not offense conduct under the Guidelines.[15]

This Article examines the legal and sentencing issues that arise in the prosecution of chief engineers and other supervisory crew members on board foreign-flagged vessels who discharge oily wastes to international waters and then arrive into U.S. ports with false ORBs in violation of APPS and other applicable federal laws.[16] Part II of this Article describes the generation and disposal of oily wastes on board large oceangoing vessels, provides an overview of APPS, and sets out the basic elements of a vessel prosecution. Part III summarizes the Guidelines and details the sections pertinent to a vessel prosecution. Part IV analyzes the *Abrogar* decision and argues that the discharges were offense conduct under the Guidelines, because they were an element of the offense under APPS. Therefore, the offense "otherwise involved" a discharge of a pollutant and merits a four-level

8 *Id.*

9 Martin Harrell, *Why Eight Plus Six Means Prison for Environmental Criminals*, 14 TUL. ENVTL. L.J. 197, 203 (2000).

10 459 F.3d 430 (3d Cir. 2006).

11 *Id.* at 432–33.

12 *Id.*

13 *Id.*

14 *Id.* at 437.

15 *Id.* at 431, 436.

16 The United States has successfully prosecuted many cases against the companies that operate these foreign flagged vessels resulting in substantial criminal fines. *See* discussion *infra* Part VI.

enhancement under the Guidelines. Finally, Part V explores additional charging mechanisms and Guideline options available to authorize prison time in these types of cases.

II. VESSEL PROSECUTIONS PURSUANT TO APPS

A. The Generation and Disposal of Oily Wastes on Board Oceangoing Vessels

The world's economy depends on the use of large, oceangoing vessels that vary in size and type depending on what they carry. These ships include cruise ships essential for the world's tourist industry, tanker vessels that carry fuel and chemicals, vehicle carrier ships that transport cars and other machines, and container and general dry cargo vessels that carry every type of material and good imaginable.[17] Regardless of what they carry, all of these vessels generate large quantities of oily wastes. The oily wastes fall into two general categories, oily sludge wastes and oily bilge wastes.

There are two general types of oily sludge: fuel oil sludge and lube oil sludge.[18] Fuel oil sludge is generated during the process of purifying heavy fuel oil so that it can be used to power vessel engines. Typically, 1.5%–2.0% of heavy fuel oil contains sludge that cannot be used in the engines.[19] The second type is lube oil sludge which must also be purified so that it can be used in the various engines and machinery on board the vessel. The oily sludge generated as a result of these processes is stored on board the vessel in sludge tanks. Consistent with the law, the sludge can be burned on board the vessel through the use of an incinerator or auxiliary boiler or offloaded onto barges or shore side facilities for disposal.[20]

Engine department operations also generate large quantities of waste oil due to leaks and drips from the engine's lubrication and fuel systems. This waste oil combines with seawater, detergents, solvents, and other wastes that accumulate in the bottom or the "bilges" of the vessel to form an oily wastewater.[21] The equipment used to process this bilge waste is called an oil water separator (OWS).[22] If proper procedures are followed, the bilge waste is pumped to the OWS from a bilge tank where it is processed to remove the oil from the water.[23] The "clean" water with less than fifteen parts per million (ppm) of oil is then pumped overboard out of the ship through an overboard discharge valve.[24] If the bilge waste has oil with a concentration greater than fifteen ppm, a device called an oil content monitor

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17 Press Release, Int'l Mar. Org., World Maritime Day 2001: IMO – Globalization and the Role of the Seafarer (Sept. 27, 2001), http://www.imo.org/Newsroom/mainframe.asp?topic_id=67&doc_id=1458 (last visited Jan. 25, 2009).

18 Ken Olsen, *Wastes and Machinery Space Maintenance*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL: THE COAST GUARD J. OF SAFETY AT SEA, Winter 2004–2005, at 19–21.

19 MAR. TRANSP. COMM., ORG. FOR ECON. CO-OPERATION AND DEV., COST SAVINGS STEMMING FROM NON-COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL REGULATIONS IN THE MARITIME SECTOR 12–13 (2003) [hereinafter COST SAVINGS].

20 *Id.* at 13.

21 *See id.* at 12.

22 *Id.* at 13.

23 *See id.*

24 *See id.*

(OCM) attached to the OWS detects the excess and diverts the waste back to a waste storage tank.[25]

The defendants in these cases, who are typically chief engineers or other supervisory engineers, pollute the oceans with oily bilge and sludge wastes using a number of methods. These methods include, most commonly, attaching one end of a flexible hose to the outlet of a bilge pump that bypasses the vessel's OWS. Engineering crew then attach the other end of the bypass hose to one of several overboard discharge valves on board the vessel and pump the untreated oily bilge waste overboard.[26] Defendants also utilize methods designed to trick the OCM on the OWS, thereby allowing bilge waste with more than fifteen ppm of oil to pass through the OWS and be discharged overboard.[27] Crew members dump fuel and lube oil sludge in a similar manner. Instead of incinerating fuel and lube sludge or offloading the sludge at port, crew members attach hoses to the sludge pumps and pump the sludge tanks directly overboard.[28]

The reasons why defendants choose to illegally dispose of the oily bilge and sludge wastes varies, but usually there are two common factors: money and time.[29] It costs money to upgrade, repair, and maintain the OWS, incinerators, waste tanks, and other pieces of onboard equipment used to store, treat, and dispose of the waste properly. It also costs time and money to offload the oily wastes at port, assuming that waste disposal facilities are available.[30] Even if the vessel's corporate operators provide the equipment and parts necessary to manage the wastes, the equipment still requires crew members to spend a significant amount of time monitoring the equipment to ensure proper operation. Considering the fact that many of these vessels are in poor condition, undermanned, and are on strict port schedules, time is one thing that crew members do not have in abundance.[31] Therefore, it is often simply easier and less time consuming to rig a bypass system and dump the oily wastes overboard than to treat and dispose of the waste properly and legally.[32]

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25 *See id.*

26 *See* Lt. Christopher Coutu, *Tackling the Oily Water Separator Issue*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL: THE COAST GUARD J. OF SAFETY AT SEA, Winter 2004–2005, at 11–12 (describing methods sometimes used by ship personnel to circumvent the OWS).

27 *See* COST SAVINGS, *supra* note 19, at 20 (discussing the two methods typically used by ship's crews to circumvent oily water discharge requirements).

28 *Id.*

29 *See* Andrew W. Homer, Comment, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 151–52 (2007) (describing the motivation to bypass an OWS or trick an OCM as "generally financial," and the alternative of shore-side disposal as "both expensive and time consuming").

30 *See* COST SAVINGS, *supra* note 19, at 16–19 (discussing the cost implications of compliance); *id.* at 35–46 (discussing the costs and risks of noncompliance, evaluating reasons for noncompliance, and providing illustrative examples of compliance costs for different types of ships).

31 *Id.* at 18 (discussing the amount of time required to monitor and maintain the OWS); *id.* at 40–42 (discussing the effect of tight sailing schedules, undermaintenance, and undermanning on operators' decisions about whether to discharge at sea).

32 *See* R. Michael Underhill, *Part I: Dumping Oil, Cooking the Books, and Telling Lies: The False Statements Act as Applied to Marine Pollution*, 15 U.S.F. MAR. L.J. 271, 275–76 (2003) (describing the motivations for a vessel to intentionally dump oil into waterways).

B. Overview of MARPOL and APPS.

The Clean Water Act (CWA)[33] is probably the first law that comes to mind in the prosecution of an oil dumping vessel case. The CWA, as amended by the Oil Pollution Act,[34] prohibits the discharge[35] of a harmful quantity of oil[36] into the navigable waters of the United States or upon the waters of the contiguous zone.[37] Navigable waters or waters of the United States extend seaward to the limits of the territorial seas, which is three miles from the baseline (the low water tide mark of the U.S. coast line).[38] The contiguous zone is the area beyond the territorial sea out to twelve miles.[39] The CWA also prohibits discharges of oil that "may affect natural resources belonging to, appertaining to, or under the exclusive authority of the U.S." (including resources under the Magnuson-Stevens Fishery Conservation and Management Act[40]), which extends through the "exclusive economic zone" of the United States, defined as 200 miles from the baseline of the territorial sea.[41]

The jurisdictional reach of the CWA is limited. Additionally, since most mariners know better than to discharge oil anywhere near the U.S. coast line because it is patrolled by Coast Guard cutters and airplanes equipped with Forward Looking Infrared Radar capable of detecting oil spills even at night, prosecution of individuals on foreign-flagged vessels who dump oil into the ocean is usually based on the maintenance of false ORBs at U.S. ports in violation of APPS.[42] Enacted in 1980, APPS codifies and implements parts of two related treaties to which the United States is a signatory.[43] These are the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.[44] Together, the treaties generally are referred to as MARPOL.

33 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

34 Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761 (2000).

35 *See* 33 U.S.C. § 1321(a)(2) (2000) (definition of "discharge").

36 *See id.* § 1321(a)(1) (definition of "oil"). For oil, the United States Environmental Protection Agency (EPA) has determined that any discharge that violates water quality standards, or causes a film or sheen upon the surface of the water or adjoining shoreline, or causes sludge or emulsion to be deposited beneath the surface of the water or on adjoining shorelines may be harmful to the environment. 40 C.F.R. § 110.3(b) (2008). The regulations also expressly forbid the use of dispersants or emulsifiers that circumvent the harmful quantity definition. *Id.* § 110.4.

37 *See* 33 U.S.C. § 1321(b)(3) (2000) (stating the general prohibitions against the discharge of oil or hazardous substances, and providing for exceptions in certain circumstances).

38 *See id.* § 1362(7)–(8) (defining the terms "navigable waters" and "territorial seas"); 40 C.F.R. §§ 110.1, 116.3 (2008) (providing the EPA definition of "navigable waters" for purposes of oil and hazardous substance discharge regulations); 33 C.F.R. § 2.20 (2008) (providing Coast Guard definition of "territorial sea" baseline).

39 *See* 33 U.S.C. §§ 1321(a)(9), 1362(9) (2000) (defining the term "contiguous zone"); 40 C.F.R. § 116.3 (2008) (providing EPA definition of "contiguous zone" for purposes of oil and hazardous substance discharge regulations); 33 C.F.R. § 2.28 (2008) (providing the Coast Guard definition of "contiguous zone").

40 16 U.S.C. §§ 1801–1883 (2006).

41 *Id.* § 1802(11); 50 C.F.R. § 600.10 (2007).

42 *See* COST SAVINGS, *supra* note 19, at 47; *see also* United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1361–62 (S.D. Fla. 1998) (recounting that a Coast Guard airplane equipped with this technology was used to detect the oily discharges from the Nordic Express vessel operated by Royal Caribbean).

43 *See* 33 C.F.R. § 151.01 (2007) (stating the purpose of APPS).

44 INT'L MAR. ORG., MARPOL 73/78 iii (consolidated ed. 2002) [hereinafter MARPOL 73/78].

As set forth in the Preamble, the parties to the 1973 Convention proclaimed their desire to "achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances."[45] Accordingly, Annex I of MARPOL sets forth the international standards for the maximum amount of oil that ships are permitted to discharge overboard. This standard is generally fifteen ppm for ships (other than oil tankers) of 400 gross tons or more.[46] MARPOL also requires ships to have and maintain an oil filtering device, such as that which would be found on an OWS, to prevent the discharge of a mixture containing more than the legally permitted concentration of oil.[47] In addition to prohibitions on oily waste discharges, MARPOL requires each oil tanker of 150 gross tons or more, or nontanker vessel of more than 400 gross tons to maintain an ORB.[48] The disposal of oily residues, such as sludge, and overboard discharges of bilge waste that has accumulated in machinery spaces are required to be recorded in the ORB.[49] Accidental or emergency discharges of oil or oily mixtures must also be recorded in the ORB.[50] The person in charge of the operation must sign each entry in the ORB.[51] Additionally, the captain of the ship is required to sign every completed page of the ORB.[52]

APPS oil regulations are substantially similar to those in MARPOL Annex I.[53] Importantly, for both tanker and nontanker ships, the regulations require, among other things, that the oil content (without dilution) of oil or oily mixtures[54] discharged from machinery space bilges be below fifteen ppm.[55] Oil tankers weighing more than 150 gross tons and nontanker ships weighing more than 400 gross tons must maintain an ORB.[56] In the ORB, the disposal of oil residue, and the discharges of oily bilge water that have accumulated in machinery spaces, and thus are contaminated with oil, must be recorded by the person in charge of the operations.[57] The ORB must also record any emergency, accidental, or other

45 International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 [hereinafter Int'l Convention on Marine Pollution], *reprinted in* MARPOL 73/78, *supra* note 44, at 3.

46 Int'l Convention on Marine Pollution, *supra* note 45, at 1343–44, *reprinted in* MARPOL 73/78, *supra* note 44, at 58.

47 Int'l Convention on Marine Pollution, *supra* note 45, at 1356–57, *reprinted in* MARPOL 73/78, *supra* note 44, at 88–89.

48 Int'l Convention on Marine Pollution, *supra* note 45, at 1359, *reprinted in* MARPOL 73/78, *supra* note 44, at 94.

49 Int'l Convention on Marine Pollution, *supra* note 45, at 1359–60, *reprinted in* MARPOL 73/78, *supra* note 44, at 94.

50 Int'l Convention on Marine Pollution, *supra* note 45, at 1360–61, *reprinted in* MARPOL 73/78, *supra* note 44, at 94.

51 Int'l Convention on Marine Pollution, *supra* note 45, at 1360–61, *reprinted in* MARPOL 73/78, *supra* note 44, at 95.

52 *Id.*

53 *See* Act to Prevent Pollution from Ships, 33 U.S.C. § 1903(b)(1) (2000) (authorizing the Secretary to prescribe regulations necessary to carry out the provisions of MARPOL).

54 33 C.F.R. § 151.05 (2007) (defining "oil" as petroleum in any form including fuel oil, sludge, and oil refuse, but not animal or vegetable oils; defining "oily mixture" as "a mixture, in any form, with any oil content," which includes but is not limited to slops from bilges, slops from oil cargoes (such as cargo tank washings, oily waste, and oily refuse), oil residue, and oily ballast water from cargo or fuel oil tanks).

55 *Id.* § 151.10.

56 *Id.* § 151.25(a).

57 *Id.* § 151.25(d), (h).

exceptional discharges of oil or mixtures.[58] The ORB must be maintained on board the vessel for not less than three years, and be available for inspection at all times.[59]

The applicability of APPS depends on the kind of vessel and where it is located. APPS does not generally apply to U.S. military vessels, war vessels of other countries, or any other vessel specifically excluded by the provisions of MARPOL.[60] In addition, APPS does not apply during times of war or declared national emergencies.[61] The jurisdictional reach of APPS to commercial ships[62] generally depends on whether the ship is "flagged" or registered in the United States or a foreign country and the type of pollutants that are discharged. APPS applies to all U.S. flagged ships, ships of U.S. registry or nationality, or operated under the authority of the United States, wherever the ship is located.[63] Therefore, the APPS regulations governing the discharge of oil apply to U.S. commercial ships in all oceans and waters of the world. Until recently, the APPS regulations applicable to the discharge of oil from foreign-flagged commercial ships, applied only when the ship was in the navigable waters of the United States, which extended three miles from the baseline out to the limits of the territorial seas, or while the ship was at a port or terminal of the United States.[64] However, with the passage of the Maritime Pollution Prevention Act of 2008,[65] this jurisdictional limit was extended from three to twelve nautical miles.[66]

APPS authorizes the Coast Guard to board any vessel at a port or terminal subject to the jurisdiction of the United States to determine, among other things, whether the vessel has operable pollution prevention equipment and appropriate procedures in place and whether the vessel has discharged any oil or oily mixtures in violation of MARPOL or APPS.[67] If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, it is empowered to deny a vessel's entry to a U.S. port or detain a vessel until it determines that the vessel does not present an unreasonable threat to the marine environment.[68] The Coast Guard also possesses general authority to board vessels in waters subject to the jurisdiction of the United States and conduct warrantless safety and document inspections, as well as searches, seizures, and arrests.[69]

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58 *Id.* § 151.25(g).

59 *Id.* § 151.25(i)–(k).

60 Act to Prevent Pollution from Ships, 33 U.S.C. § 1902(b)(1) (2000); *id.* § 1902(e) (stating that APPS does require vessels owned and operated by the United States Navy to develop technology and waste management practices to comply with Annex V of MARPOL). 33 C.F.R. § 151.09(b) (2007).

61 33 U.S.C. § 1902(b)(2)(B) (2000).

62 A "ship" means a vessel of "any type whatsoever, including hydrofoils, air-cushion vehicles, submersibles, floating craft whether self-propelled or not, and fixed or floating platforms." *Id.* § 1901(a)(10).

63 *Id.* § 1902(a)(1).

64 *Id.* § 1902(a)(2); 33 C.F.R. §§ 2.22(a)(2), 151.09(a)(5) (2007).

65 Pub. L. No. 110-280, 122 Stat. 2611 (to be codified as amended at 33 U.S.C. §§ 1901–1915).

66 *Id.* sec. 3, § 2(a) (to be codified at 33 U.S.C. § 1901(a)(7)) (citing Proclamation No. 5928, 54 Fed. Reg. 595, 777 (Jan. 9, 1989)).

67 33 U.S.C. §§ 1904(c), 1907(c)(2)(A) (2000); 33 C.F.R. § 151.23(a)(3), (c) (2007).

68 33 U.S.C. § 1908(e) (2000); 33 C.F.R. §§ 151.07(b), 151.23(b) (2007).

69 14 U.S.C. § 89(a) (2006). The pertinent part of 14 U.S.C. § 89(a) provides as follows:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such

C. The Elements of a Vessel Prosecution Under MARPOL and APPS

MARPOL provides that the United States, as a Party to the Convention, may either proceed against violators pursuant to its own laws or refer the case to the nation where the vessel is registered.[70] Specifically, Article 4(2) of MARPOL provides:

> Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:
>
> (*a*) Cause proceedings to be taken in accordance with its law; or
>
> (*b*) Furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.[71]

APPS makes it clear that a violation of MARPOL is a violation of APPS and provides the Coast Guard the authority to "administer and enforce the MARPOL Protocol."[72] The criminal penalty provisions of APPS provide, among other things, "a person who knowingly[73] violates the MARPOL protocol . . . this chapter, or the

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> purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

Id.

Numerous courts have upheld the Coast Guard's authority to conduct warrantless searches. *E.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983); United States v. Arra, 630 F.2d 836, 841–42 (1st Cir. 1980); United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980); United States v. Williams, 617 F.2d 1063, 1089 (5th Cir. 1980); United States v. Green, 671 F.2d 46, 52–53 (1st Cir. 1982); United States v. Thompson, 928 F.2d 1060, 1064–66 (11th Cir. 1991); United States v. Boynes, 149 F.3d 208, 209 (3d Cir. 1998); United States v. Varlack Ventures, 149 F.3d 212, 216–17 (3d Cir. 1998); United States v. Thompson, 282 F.3d 673, 679 (9th Cir. 2002); *see also* 14 U.S.C. § 2 (2006) ("The Coast Guard shall enforce or assist in the enforcement of all applicable Federal law on, under, and over the high seas and water subject to the jurisdiction of the United States . . . .").

[70] Rebecca Becker, *MARPOL 73/78: An Overview of International Environmental Enforcement*, 10 GEO. INT'L ENVTL. L. REV. 625, 632 (1998) ("[I]dentified violations can either be prosecuted by the port state or reported to the flag state.").

[71] Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 art. 4, Feb. 17, 1978, 1340 U.N.T.S. 61.

[72] 33 U.S.C. §§ 1903(a), 1907 (2000).

[73] The term "knowing" is not defined under APPS or interpreted in case law under that statute. However, cases interpreting the term in the context of other environmental statutes have interpreted it to connote general intent rather than specific intent. In other words, the government must prove that the defendant knew of the conduct that constituted the violation. The violating acts must be voluntary and intentional and not the result of an accident or mistake of fact. The government is not required to show that the defendant had knowledge of the statute or regulations or knew that his or her conduct was otherwise unlawful. *See, e.g.*, United States v. Rubenstein, 403 F.3d 93, 97–98 (2d Cir. 2005) (Clean Air Act); United States v. Snook, 366 F.3d 439, 443 (7th Cir. 2004) (Clean Water Act); United States v. Ho, 311 F.3d 589, 605–07 (5th Cir. 2002) (Clean Air Act), *cert. denied*, 539 U.S. 914 (2004); United States v. Weitzenhoff, 35 F.3d 1275, 1283–86 (9th Cir. 1994) (Clean Water Act), *cert. denied sub nom.* Mariani v. United States, 513 U.S. 1128 (1995); United States v. Laughlin, 10 F.3d 961, 965–67 (2d Cir. 1993) (Resource Conservation and Recovery Act and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)), *cert. denied sub nom.* Goldman v. United States, 511 U.S. 1071 (1994); United States v.

regulations issued thereunder commits a Class D felony"[74] punishable by up to six years in prison.[75]

The investigation of a vessel case typically begins when the ship comes into port in the United States and is boarded by the Coast Guard. The Coast Guard conducts a Port State Control inspection of the vessel, which usually involves a test of the vessel's OWS, incinerator, and other pieces of equipment involved in the management of the vessel's oily wastes.[76] Based on the Coast Guard's inspection and/or the statements of lower level crew, the Coast Guard may learn that the vessel has been dumping oily sludge and bilge wastes overboard.[77] The Coast Guard then examines the vessel's ORB.[78] APPS prosecutions in these cases are based on the maintenance and presentation at U.S. ports of false ORBs that are designed to conceal discharges of oily wastes in violation of MARPOL.[79] Engineers who are dumping oily bilge and sludge wastes in violation of MARPOL typically attempt to conceal them by failing to make entries regarding the illegal discharges.[80] In sum, the basis of the prosecution is the failure of the engineer to maintain an accurate ORB while at a U.S. port or within U.S. waters in violation of APPS. For example, in *United States v. Kun Yun Jho*,[81] the corporate owner and chief engineer of a foreign-flagged tanker vessel called the M/T Pacific Ruby were charged with ten federal offenses, including eight violations of APPS for entering a

Buckley, 934 F.2d 84, 88–89 (6th Cir. 1991) (Clean Air Act and CERCLA); United States v. Reilly, 827 F. Supp. 1076, 1078 (D. Del. 1993) (Marine Protection, Research and Sanctuaries Act); United States v. Corbin Farms, 444 F. Supp. 510, 519–20 (E.D. Cal. 1978) (Federal Insecticide, Fungicide, and Rodenticide Act), *aff'd*, 578 F.2d 259 (9th Cir. 1978). This amounts to no more than the well-established notion that ignorance of the law is no excuse. *See* Cheek v. United States, 498 U.S. 192, 199 (1991); Jonathan Snyder, *Back to Reality: What "Knowingly" Really Means and the Inherently Subjective Nature of the Mental State Requirement in Environmental Criminal Law*, 8 MO. ENVTL. L. & POL'Y REV. 1, 16–17 (2001) ("A 'knowingly' mens rea merely means being aware of the *conduct* that violates the law and does not require awareness of the law or its regulations.").

74 33 U.S.C. § 1908(a) (2000).

75 Sentencing Reform Act of 1984, 18 U.S.C. § 3581(b)(4) (2006).

76 *See* II U.S. COAST GUARD, MARINE SAFETY MANUAL: MATERIEL INSPECTION D5-14, -16 (2000), *available at* http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_7A.pdf.

77 *Id.* Many cases are also initiated when "whistle blowers," who are typically lower level crew in the engineering department, come forward and tell the Coast Guard about the illegal oil discharges. APPS provides the court with discretion to allocate up to one half of the criminal fine to these crew members. 33 U.S.C. 1908(a) (2000); 33 C.F.R. § 151.04(c) (2007). APPS awards have been given to crew members in several cases. *E.g.*, United States v. Kassian Mar. Navigation Agency, Ltd., No. 3:07-cr-00048-HLA-MCR (M.D. Fla. filed Aug. 29, 2007) (award of $230,000 each to the ship's wiper and cook and $20,000 to two third-engineers); United States v. Sun Ace Shipping Co., No. 2:06-cr-00705-SDW, slip op. at 2 (D.N.J. Dec. 7, 2006) (award of $200,000 split evenly between three engine room crew members); United States v. M.K. Ship Mgmt. Co., Ltd., No. 2:06-cr-00307-WHW, judgment at 2 (D.N.J. filed Aug. 10, 2006) (award of one half of the $200,000 fine to two crew member whistle blowers); United States v. Wallenius Ship Mgmt., No. 2:06-cr-00213-JAG, judgment at 4 (D.N.J. filed Oct. 16, 2006) (award of one half of the $5 million fine to four crew member whistle blowers).

78 33 C.F.R. § 151.23(c) (2007).

79 *See Abrogar*, 459 F.3d 430, 432 (3d Cir. 2006) (discussing Coast Guard authority under APPS to enforce regulations implementing MARPOL).

80 *See, e.g.*, *id.* at 433 ("Abrogar . . . continued to knowingly make false entries in the oil record book and intentionally failed to record the improper discharges in an attempt to conceal those discharges.").

81 465 F. Supp. 2d 618 (E.D. Tex. 2006), *rev'd*, 534 F.3d 398 (5th Cir. 2008).

U.S. port on eight separate occasions with a false ORB.[82] Specifically, counts three through ten of the Indictment charged that the defendants:

> [D]id knowingly fail to maintain an Oil Record Book for the *Pacific Ruby* in which all disposals of oil residue and discharges overboard and disposals otherwise of oily mixtures, slops from bilges and bilge water that accumulated in machinery spaces were fully recorded. Specifically, on each date Defendant JHO failed to maintain an accurate Oil Record Book, by failing to disclose exceptional discharges in which overboard discharges of oily mixtures, slops from bilges and bilge water that accumulated in machinery spaces had been made without the use of a properly functioning Oil Water Separator and Oil Content Meter and falsely indicating the proper use of required pollution prevention equipment.[83]

In this case, the district court granted the defendants' motion to dismiss the APPS counts and the related part of the conspiracy count holding that, since the ORB violations were based on false entries made outside U.S. waters, prosecution of these offenses violated principles of international law.[84] The United States appealed and the Fifth Circuit reversed.[85] Before examining whether the issue as to whether the ORB offense charged violated principles of international law, the Fifth Circuit concluded that the district court erred in construing the criminal conduct as occurring outside U.S. waters. Citing the *Abrogar* decision and two recent district court cases,[86] the Fifth Circuit held that the conduct charged in the Indictment was not for entries made in the ORB outside of U.S. waters, as the lower court held, but instead for the maintenance of a false ORB while in a U.S. port.[87] The court concluded that APPS can be read to criminalize the maintenance of false ORBs by engineers on board foreign-flagged vessels in U.S. ports noting that the Coast Guard's ability to investigate foreign-flagged vessels would be severely hindered and the government's ability to enforce MARPOL would be frustrated if these vessels could avoid application of APPS requirements by merely falsifying ORB information prior to arriving into a U.S. port or navigable waters.[88] The court then went on to examine the district court's holding that the ORB charge would violate principles of international law. Citing a provision of APPS that states that "[a]ny action taken under this chapter shall be taken in accordance with international law,"[89] the defendants argued that the law of the flag doctrine and two articles contained within the Third United Nations Convention on the Law of the Sea

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82 *Id.* at 627–28 (describing each of the ten counts).

83 Second Superseding Indictment at 11, United States v. Kun Yun Jho, 465 F. Supp. 2d 618 (E.D. Tex. 2006) (No. 1:06-cr-00065-TH).

84 United States v. Kun Yun Jho, 465 F. Supp. 2d at 624–26.

85 United States v. Kun Yun Jho (*Jho*), 534 F.3d 398, 400 (5th Cir. 2008).

86 *See id.* at 403–04 (discussing *Abrogar*, 459 F.3d 430, 435 (3d Cir. 2006); United States v. Ionia Mgmt., S.A., 498 F. Supp. 2d 477, 485 (D. Conn. 2007), aff'd, Nos. 075807-cr,08-1397-cr, 209 WL 116966 (2nd Cir. Jan. 20, 2009); United States v. Petraia Mar., Ltd., 483 F. Supp. 2d 34, 39 (D. Me. 2007)).

87 *Jho*, 534 F.3d at 402–04.

88 *Id.* at 403. Importantly, the court also held that since the chief engineer was charged with aiding and abetting the maintenance of the false ORB, the fact that he was not the master or other person in charge of the vessel under the APPS regulations did not preclude his liability. *Id.* at 402 n.1.

89 Act to Prevent Pollution from Ships, 33 U.S.C. § 1912 (2000).

(UNCLOS)[90] precluded an ORB charge under APPS.[91] The court dismissed these arguments holding that neither the law of the flag doctrine nor UNCLOS encroach upon the "well settled rule" that a sovereign state may prosecute violations of criminal laws committed in its ports.[92]

Following the Fifth Circuit's decision and reasoning in *Kun Yun Jho*, the Second Circuit in *United States v. Ionia Management, S.A.*, recently upheld the authority of the United States to charge an operator of a foreign flagged vessel for maintaining a false ORB in U.S. ports under APPS.[93]

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[90] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. UNCLOS represents an international effort to provide a comprehensive legal framework relating to competing uses of the world's oceans. Article 216(1) of UNCLOS provides that certain laws and regulations for the prevention, reduction and control of pollution by "dumping" shall be enforced:

> (a) by the coastal State with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;
>
> (b) by the flag State with regard to vessels flying its flag or vessels or aircraft of its registry;
>
> (c) by any state with regard to acts of loading of wastes or other matters occurring within it territory or at its off-shore terminals.

Id. art. 216(1).

Article 230 of UNCLOS, entitled "[m]onetary penalties and the observance of recognized rights of the accused," suggests limitations on nonmonetary penalties (i.e., incarceration) in certain instances:

> 1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
>
> 2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of willful and serious act of pollution in the territorial sea.

Id. art. 230.

The official United States interpretation of Article 230 of UNCLOS states:

> The United States understands that sections 6 and 7 of Part XII [containing Art. 230] do not limit the authority of a State to impose penalties, monetary or non-monetary, for, inter alia
>
> (A) non-pollution offenses, such as false statements, obstruction of justice, and obstruction of government or judicial proceedings, wherever they occur; or
>
> (B) *any violation of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment that occurs while a foreign vessel is in any of its ports*, rivers, harbors, or offshore terminals.

S. EXEC. REP. NO. 108-10, at 19–20 (2004) (emphasis added) (Record Excerpts of the United States, Tab 6); *see also* United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate With Commentary, Oct. 7, 1994, 34 I.L.M. 1393, 1418 (1995) (Record Excerpts of the United States, Tab 5) (stating Article 230 applies only to vessel source pollution, and then only when in or beyond the territorial sea).

[91] *Jho*, 534 F.3d at 405–10.

[92] *Id.* at 409.

[93] United States v. Ionia Mgmt., S.A., Nos. 07-5807-cr, 08-1387-cr, 2009 WL 116966 at *3–4 (2d Cir. Jan. 20, 2009) *aff'g*, 498 F. Supp. 2d 477 (D. Conn. 2007).

III. THE SENTENCING GUIDELINES AND THEIR APPLICATION TO VIOLATIONS OF APPS

A. Overview of the Sentencing Guideline System

The Guidelines for individual defendants were first published in 1987 by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984.[94] The purpose of the Guidelines is to provide a coherent, uniform system and to eliminate sentencing disparities for crimes of similar seriousness between similarly situated defendants.[95] Although no longer mandatory, federal courts are still required to "consult" the Guidelines and "take them into account" in determining a sentence.[96] Appellate courts may apply a "presumption of reasonableness" to a district court's sentence that properly applies the Guidelines.[97] Procedurally, district courts must use the Guidelines as a "starting point" and "initial benchmark" in their sentence calculation, and must give "serious consideration" to any departure.[98] Further, the Justice Department's position is that a sentence within the Guideline range is per se reasonable, and federal prosecutors are required by the Department to urge the court to impose a sentence within the guideline range.[99] The Guidelines calculate sentences through a step-by-step, point system that takes into account a variety of factors that ultimately result in an offense level that determines a sentencing range for the defendant.[100]

The first step is to determine the offense guideline applicable to the offense of conviction.[101] The guidelines applicable to the offense of conviction are located at Chapter Two of the Guidelines (Offense Conduct).[102] Determination of the applicable Guideline yields a base offense level, which is the numerical starting point for calculating the ultimate total offense level for the crime. The next step is to identify specific offense characteristics in the particular offense guideline that apply to the particular case and may increase or decrease the base offense level.[103] After an offense level is calculated from the applicable guideline involved, the third step is to apply any adjustments to the offense level from Chapter Three of the Guidelines based on the defendant's role in the offense, the status of any victims of

94 Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3586, 28 U.S.C. §§ 991–998 (2006)).

95 28 U.S.C. §§ 991(b), 994 (2000).

96 United States v. Booker, 543 U.S. 220, 264 (2005).

97 Rita v. United States, 127 S. Ct. 2456, 2462–63 (2007).

98 United States v. Gall, 128 S. Ct. 586, 594, 596 (2007).

99 *See* U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES 254–55 (3d ed. 2006), *available at* http://www.usdoj.gov/criminal/cybercrime/ipmanual/ipma2006.pdf (citing Memorandum from Christopher A. Wray, Assistant Attorney Gen., United States Dep't of Justice, on Guidance Regarding the Application of *United States v. Booker* and *United States v. Fanfan*, 2005 WL 50108 (Jan. 12, 2005), to Pending Cases (Jan. 19, 2005), for the U.S. Justice Department's general position that "prosecutors should . . . seek sentences within the guideline range . . . because they are presumptively reasonable").

100 *See* Jane Barrett, *Sentencing Environmental Crimes Under the Sentencing Guidelines—A Sentencing Lottery*, 22 ENVTL. L. 1421, 1422–24 (1992).

101 U.S.S.G., *supra* note 7, §§ 1B1.1(a), 1B1.2.

102 *Id.* § 1B1.2.

103 *Id.* § 1B1.1(b).

the offense, and any additional obstructive or other aggravating acts committed by the defendant in the course of the offense.[104]

If there are multiple counts of conviction, the fourth step is to group the base offense levels and adjustments calculated under the applicable offense conduct guidelines under Chapter Two and then adjust the offense level according to the rules set out in Part D of Chapter Three of the Guidelines.[105] If the defendant accepts responsibility for his crimes, the fifth step is to determine whether the defendant may be eligible for a downward adjustment in his offense level pursuant to Part E of Chapter Three of the Guidelines.[106] The prosecutor may request a further downward departure if "the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[107] The sixth step is to determine the defendant's criminal history by referring to Chapter Four of the Guidelines.[108]

After the sixth step, the court is ready to take the final offense level, combined with the defendant's criminal history category, and refer to the Sentencing Table in Chapter Five of the Guidelines to determine the appropriate sentencing range.[109] The court determines the amount of time that a defendant actually spends in prison versus the amount of time diverted to home detention, community confinement, or probation by referring to the Sentencing Table and the particular zone that corresponds to the defendant's final offense level. The Sentencing Table contains four irregular zones, A through D, which correspond to the defendant's final offense level as modified by the defendant's criminal history.[110] The zones range from Zone A, the lowest final offense level, to Zone D, the highest level. The higher the Zone and the offense level, the more likely it is that a judge who adheres to the Guidelines will sentence the defendant to time in jail. For example, the Guidelines recommend that a defendant with a final offense level that places him in Zone D serve at least the minimum time in prison within the range set out in the Sentencing Table.[111] If a defendant has a lower offense level that places him in Zone C, the court may impose a split sentence where up to half of the defendant's time in jail may be substituted by a term of supervised release that may include community or home confinement.[112] If the same defendant were to drop down to Zone B, the court would have the discretion to substitute community or home confinement for all but one month of prison or order straight probation with no prison time.[113] Finally, no prison time at all is required for a defendant who falls into Zone A with a final offense level of eight or lower.[114]

104 *Id.* § 1B1.1(c).
105 *Id.* § 1B1.1(d).
106 *Id.* §§ 1B1.1(e), 3E1.1.
107 *Id.* § 5K1.1.
108 *Id.* § 1B1.1(f).
109 *Id.* § 1B1.1(g).
110 *Id.* at ch. 5, pt. A.
111 *Id.* § 5C1.1(f).
112 *Id.* § 5C1.1(d)(2) cmt. n.4(B).
113 *Id.* § 5C1.1(c).
114 *Id.* § 5C1.1(b).

B. Offense Conduct and Adjustment Guidelines Applicable to Violations of APPS

The provisions applicable to offenses involving the environment are set out at Chapter 2, Part Q of the Guidelines. Section 2Q1.3 of the Guidelines, which applies specifically to violations of APPS and several other environmental laws, has a base offense level of six.[115] Section 2Q1.3 of the Guidelines contains four "Specific Offense Characteristics" provisions that can increase the offense level for conduct related to the offense. The last three will be dealt with before discussing the initial characteristic. Pursuant to section 2Q1.3(b)(2), offenses that result in a substantial likelihood of death or serious bodily injury can increase the offense level by eleven levels or more.[116] Offenses that disrupt public utilities, cause the evacuation of a community, or incur substantial cleanup costs can increase the offense level by four levels or more.[117] Finally, offenses involving the discharge of a pollutant without or in violation of a permit can increase the defendant's offense level by four levels or more.[118] To date, there has never been an APPS case which involved a substantial likelihood of death or serious injury that would trigger the enhancement under section 2Q1.3(b)(2), and since the discharges of oily wastes are outside of U.S. waters, there is little chance that there would be any cleanup costs, disruption of public utilities, or the need to evacuate necessary to implicate section 2Q1.3(b)(3) of the Guidelines. Finally, since the regulatory scheme established by APPS does not require or involve permits like several other environmental laws, section 2Q1.3(b)(4) would probably not apply.[119]

Going back to the first specific offense characteristic, section 2Q1.3(b)(1) provides for an increase of six levels if the offense resulted in an "ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment," or a four-level increase if the offense "otherwise involved a discharge,

115 *Id.* § 2Q1.3(a). Section 2Q1.3 parallels section 2Q1.2 but applies to offenses involving substances that are not designated as hazardous or toxic. *Id.* § 2Q1.3 cmt. background.

116 *Id.* § 2Q1.3(b)(2) cmt. n.5. There are no cases interpreting Specific Offense Characteristic under section 2Q1.3(b)(2) of the Guidelines. For cases interpreting section 2Q1.2(b)(2), see generally United States v. Thorne, 446 F.3d 378, 384 (2d Cir. 2006) (reversing the district court's refusal to impose a nine-level increase for Clean Air Act violations); United States v. Williams, 399 F.3d 450, 453 (2d Cir. 2005) (discussing section 2Q1.3(b)(2) in the context of Sixth Amendment protections); United States v. Dillon, 351 F.3d 1315, 1318–19 (10th Cir. 2003) (upholding a nine-level increase for storing ignitable hazardous waste); United States v. Thorne, 317 F.3d 107, 117–19 (2d Cir. 2003) (reversing the district court's decision not to impose a nine-level increase for Clean Air Act violations); and United States v. Pearson, 274 F.3d 1225, 1235 (9th Cir. 2001) (upholding a nine-level enhancement for violating work safety standards in the removal and storage of asbestos).

117 U.S.S.G., *supra* note 7, § 2Q1.3(b)(3). *See* United States v. Phillips, 367 F.3d 846, 857 (9th Cir. 2004), *cert. denied*, 543 U.S. 980 (2004) (reversing the district court's decision not to apply CERCLA-related cleanup expenses under section 2Q1.3(b)(3)).

118 U.S.S.G., *supra* note 7, § 2Q1.3(b)(4). *See* United States v. Ortiz, 427 F.3d 1278, 1284 (10th Cir. 2005) (reversing the district court's decision not to apply sentence enhancement after a jury finding of a discharge without a permit); United States v. Cooper, 173 F.3d 1192, 1205–06 (9th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999) (upholding a four-level enhancement for a discharge without a permit); United States v. Goldfaden, 987 F.2d 225, 227 (5th Cir. 1993) (upholding a four-point upward adjustment for a discharge without a permit).

119 U.S.S.G., *supra* note 7, § 2Q1.3, app. n.7. *See* United States v. Rubenstein, 403 F.3d 93, 100–01 (2d Cir. 2005), *cert. denied*, 546 U.S. 876 (2005); United States v. Chau, 293 F.3d 96, 101–03 (3d Cir. 2002) (discussing applicability of parallel Guideline enhancement at section 2Q1.2(b)(4)).

release, or emission of a pollutant."[120] The case law concerning these two specific offense characteristics has never dealt with the issue of whether the term "environment" includes areas outside of the United States.[121] Instead the cases have involved the following three issues: 1) what constitutes an "ongoing, continuous, or repetitive," discharge;[122] 2) whether the United States must prove a specific level of "environmental contamination" or "harm" from the discharge;[123] and 3) what constitutes a "discharge, release, or emission . . . into the environment."[124]

In addition to the Specific Offense Characteristics at section 2Q1.3, there are several other adjustments at Chapter 3 of the Guidelines that may be applicable to individuals who violate APPS. The first is the "Aggravating Role" adjustment at section 3B1.1 of the Guidelines. This adjustment provides between two and four upward levels based upon the defendant's role and the size or nature of the criminal activity.[125] Specifically, the Guideline calls for: a) a four-level increase if the defendant was an "organizer or leader" of a criminal activity that involved five or more participants or was otherwise extensive; b) a three-level increase if the defendant was a "manager or supervisor" and the criminal activity involved five or more participants or was otherwise extensive; or c) a two-level increase if the

120 U.S.S.G., *supra* note 7, § 2Q1.3(b)(1)(A)–(B).

121 Section 2Q1.3 of the Guidelines also applies to crimes charged under a statute known as the Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act), 33 U.S.C. § 1415(b) (2000). U.S.S.G., *supra* note 7, § 2Q1.3 cmt. Among other things, the Ocean Dumping Act prohibits persons without permits from transporting materials from the United States for the purpose of dumping those materials into "ocean waters," and it contains criminal penalties for knowing violations of that prohibition. 33 U.S.C. §§ 1411(a), 1415(b) (2000); *see also* Charles B. Anderson, *Ocean Dumping and the Marine Protection, Research, and Sanctuaries Act*, 1 LOY. MAR. L.J. 79, 83, 99 (2002). Since "ocean waters" are defined as waters of the open seas lying seaward from the base line of the low water mark of the coast line, the Act prohibits the dumping of waste materials transported from the United States to anywhere in the world. 33 U.S.C. § 1402(b) (2000). A "person" is defined to include "any" private person and any instrumentality of either the United States or a foreign government. *Id.* § 1402(e). Therefore, violations of the Ocean Dumping Act would arguably qualify for the environmental discharge enhancement under section 2Q1.3(b)(1) of the Guidelines.

122 *See Ortiz*, 427 F.3d at 1285–86 (holding that one conviction for a "knowing discharge" and a separate conviction for "negligent discharge" under the CWA "justifies application of the § 2Q1.3(b)(1)(A) enhancement" for an ongoing, continuous, or repetitive discharge of a pollutant); United States v. Kuhn, 345 F.3d 431, 439 (6th Cir. 2003) (agreeing that a discharge that "resulted from essentially a single incident that occurred over a day or two" was a "single discharge" not requiring application of the section 2Q1.3(b)(1)(A) enhancement); *Cooper*, 173 F.3d at 1205 (upholding application of the section 2Q1.3(b)(1)(A) enhancement for the dumping of 425 truckloads of sewage sludge).

123 U.S.S.G., *supra* note 7, § 2Q1.3 cmt. n.4. *See* United States v. Overholt, 307 F.3d 1231, 1257 (10th Cir. 2002); United States v. Cunningham, 194 F.3d 1186, 1201–02 (11th Cir. 1999), *cert. denied*, 531 U.S. 831 (2000); United States v. Freeman, 30 F.3d 1040, 1041 (8th Cir. 1994); United States v. Goldfaden, 959 F.2d 1324, 1330–31 (5th Cir. 1992).

124 *See* United States v. White, 270 F.3d 356, 367–69 (6th Cir. 2001). For cases interpreting this issue under section 2Q1.2(b)(1) of the Guidelines, see United States v. Technic Services, 314 F.3d 1031, 1047–48 (9th Cir. 2002); United States v. Ho, 311 F.3d 589, 608 (5th Cir. 2002) (discussing but not reaching the "interpretive question" of the meaning of "into the environment"); *Overholt*, 307 F.3d at 1256–57; and United States v. Ferrin, 994 F.2d 658, 662–64 (9th Cir. 1993).

125 U.S.S.G., *supra* note 7, § 3B1.1. "A 'participant' is a person who is criminally responsible for the commission of the offense but need not have been convicted." *Id.* § 3B1.1 cmt. n.1. Section 3B1.1 of the Guidelines "does not apply unless the criminal activity involved at least two criminally responsible 'participants.'" *Ho*, 311 F.3d at 610 n.26.

defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in a) or b).[126]

The second enhancement is for "Abuse of Position of Trust or Use of a Special Skill," which results in an increase of two levels.[127] The abuse of trust, but not special skill, enhancement may be used in addition to the Aggravating Role adjustment.[128] The final adjustment is for Obstruction or Impeding the Administration of Justice at section 3C1.1 of the Guidelines. This Guideline calls for a two-level increase if the defendant willfully obstructed or impeded or attempted to obstruct or impede the investigation of the offense of conviction. The types of conduct include: 1) "producing or attempting to produce a false, altered, or counterfeited document or record," 2) destroying or concealing or procuring another to destroy or conceal material evidence to an official proceeding, or 3) "providing a materially false statement to a law enforcement officer that significantly obstructed the official investigation or prosecution of the offense."[129]

C. Why the Environmental Discharge Enhancement is Necessary to Authorize Jail Time for an APPS Violation

Whether or not an engineer would be sentenced to jail time for the maintenance of a false ORB is simply a matter of math, and the Guideline calculations in most cases require the enhancement for the discharge of a pollutant to authorize this outcome. To illustrate this point, it may helpful to do a Guideline calculation assuming that the enhancements for environmental discharges are not available. In this scenario, the defendant would be subject to the base offense level of six under Part 2Q of the Guidelines. Moving on to the general adjustments at Part Three of the Guidelines, an engineer would be subject to an increase of two or three levels depending on whether he supervised five or more crew in the engineering department who were involved with or otherwise aided or abetted in the falsification of the ORB or if the criminal activity was found to be "otherwise extensive" by a sentencing court.[130] Since the application of this Guideline precludes the application of the special skill enhancement in addition to the

126 U.S.S.G., *supra* note 7, § 3B1.1(a)–(c).

127 *Id.* § 3B1.3.

128 *Id. See* United States v. Kuhn, 345 F.3d 431, 437–38 (6th Cir. 2003) (discussing abuse of trust enhancement).

129 U.S.S.G., *supra* note 7, § 3C1.1 cmt. ns.4(c), (d), (g). The conduct does not include false statements not under oath that do not obstruct the investigation. *Id.* § 3C1.1 cmt. n.5(b).

130 It is unlikely that a supervisory engineer would qualify for the four-level increase, since the Captain or Master of the vessel is ultimately responsible for all on board operations. *See id.* § 3B1.1, 3B1.1 cmt. n.4. Even if there were fewer than five people directly involved with the falsification of the ORB, a court could still find that the other crew members involved with the discharging of the oil waste in violation of MARPOL could be considered in finding that the criminal activity was "otherwise extensive," thereby meriting a three-level enhancement under section 3B1.1(b) of the Guidelines. Application Note 3 of section 3B1.1 states that all persons involved in the "entire course" of the offense are to be considered in determining whether the criminal activity was "otherwise extensive." *See Ho*, 311 F.3d at 610–11, 611 n.28 (finding that a defendant convicted of violating various asbestos requirements under the Clean Air Act could be subject to a four-level enhancement under section 3B1.1(a) even though he alone committed the unlawful acts, because "these acts presuppose[d] the unlawful asbestos removal activity, which involved more than five persons").

aggravating role enhancement, and it is unclear whether an engineer (who most likely is not a U.S. citizen) on a foreign-flagged vessel would qualify for the abuse of trust increase,[131] the most that an engineer would probably face at this point would be a level nine.

After applying the obstruction of justice enhancement, the defendant's Guideline level would be eleven. If the defendant cooperated and pled guilty, he would be subject to a two-level downward departure for acceptance of responsibility, resulting in a level nine.[132] Since most engineers are foreign citizens with no or unknown criminal histories, they would be placed in a criminal history category of I, resulting in a Zone B offense level, which does not require prison time.[133]

The entire sentencing picture changes if the defendant is subject to the four or six-level enhancement for discharges to the environment under section 2Q1.3(b)(1) of the Guidelines. Using the same scenario described above, the defendant who pled guilty and was at a level nine would now be at a level thirteen with a four-level enhancement under section 2Q1.3(b)(1)(B), which requires a sentence of twelve months under the Guidelines. If the defendant qualified for a six-level increase under section 2Q1.2(b)(1)(A) for repeated discharges of oil, he would now be at a level fourteen, which calls for a minimum of fifteen months in jail.[134]

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131 U.S.S.G., *supra* note 7, § 3B1.3, 3B1.3 cmt. n.1. The cases interpreting this Guideline, although not completely consistent, all seem to require that the defendant be in a position with enough responsibility, discretion, and trust in relation to the public or the government that his decisions could significantly and directly affect public health and safety. *See Kuhn*, 345 F.3d at 437 (government employee of wastewater treatment plant qualified for abuse of trust enhancement because "significant numbers of public depended on Kuhn to prevent or ameliorate water pollution in the area"); United States v. Snook, 366 F.3d 439, 445–46 (7th Cir. 2004); United States v. Technic Servs., Inc., 314 F.3d 1031, 1049–51 (9th Cir. 2002); United States v. In Ho Kim, No. A02-0030-002-CR (HRH), judgment at 1–8 (D. Alaska filed Aug. 14, 2002). In this case, the court applied the two-level enhancement for the "abuse of trust," but the enhancement was applied specifically for the witness tampering charge under 18 U.S.C. § 1512, not the false ORB charge. *Id.* at 7.

Whether or not a chief engineer on a foreign flagged vessel who dumped oily wastes into international waters and then falsified documents, lied, and took other actions to cover up these discharges from the Coast Guard would qualify for this enhancement might well hinge on the reasons for the waste dumping and the condition of the vessel when it came into U.S. port. As discussed earlier, the Coast Guard has broad authority to detain or deny port entry to a vessel that poses a threat to U.S. ports or the marine environment. Therefore, if, for example, the vessel was dumping oily wastes because of a hazardous or otherwise unsafe condition on board the vessel and the chief engineer attempted to hide these discharges and underlying conditions from the Coast Guard, then the enhancement should apply. Of course, one could always make the argument that a vessel that was dumping oily wastes to the oceans, for whatever reason, presents an unreasonable risk to U.S. ports and the marine environment.

132 U.S.S.G., *supra* note 7, § 3E1.1(a).

133 For example, the second engineer of the M/T Kriton, who was indicted along with Ionia Ship Management Company, ultimately pled guilty in several districts to multiple violations of APPS for failing to maintain an accurate ORB. The Guideline calculation in the plea agreement was as follows: a base level offense of six pursuant to section 2Q1.3(a), a two-level enhancement for aggravating role under section 3B1.1(c), a two-level enhancement for obstruction of justice pursuant to section 3C.1.1, and a two-level reduction for acceptance of responsibility under section 3E1.1(a). This resulted in a final Guideline calculation of eight. Mr. Mercurio was sentenced by the judge to probation. United States v. Edgardo Mercurio, No. 3:07-cr-00134-JBA (D. Conn. filed Oct. 18, 2007).

134 Since the six-level enhancement results in a Guideline calculation of 17, the defendant would be eligible for a downward departure of three levels for acceptance of responsibility if he pled guilty and cooperated, resulting in a final offense level of 14. U.S.S.G., *supra* note 7, § 3E1.1(b).

IV. *UNITED STATES V. ABROGAR*, EXTRATERRITORIAL DISCHARGES, AND RELEVANT CONDUCT

A. The United States v. Abrogar *Decision*

On March 25, 2005, Coast Guard inspectors boarded the M/V Magellan Phoenix at port in Gloucester, New Jersey, and conducted a Port State control examination.[135] The Magellan Phoenix was a Panamanian-flagged ship managed by a Japanese company. Noel Abrogar, a citizen of the Philippines, was the chief engineer on board the vessel. During the boarding, vessel inspectors learned that Mr. Abrogar had repeatedly commanded lower lever crew members to improperly discharge oily sludge and other wastes into the ocean using a bypass or "magic" pipe, had made no entries in the vessel's ORB regarding these illegal discharges, and had falsified the ORB by making entries indicating that the sludge had been incinerated.[136] Mr. Abrogar also lied to Coast Guard inspectors by denying any knowledge of the illegal discharges and stating that the ORB was accurate.[137]

Mr. Abrogar pled guilty to a one-count Information[138] charging him with a violation of APPS for failing to maintain an accurate ORB. The pre-sentence report recommended that Mr. Abrogar receive the six-level enhancement pursuant to section 2Q1.3(b)(1)(A) of the Guidelines for repetitive discharges into the environment.[139] The report also recommended the addition of three levels based on Mr. Abrogar's role in the offense pursuant to section 3B1.1(b) and then deducted two levels for acceptance of responsibility under section 3E1.1(b) resulting in a final offense level of thirteen. Since Mr. Abrogar had no criminal history, the guideline range was twelve to eighteen months, and the district court sentenced Abrogar to a prison term of twelve months.[140]

Mr. Abrogar appealed the six-level enhancement, arguing that the offense of conviction, namely the maintenance of the false ORB in violation of APPS, did not "result in" the repeated discharges under section 2Q1.3(b)(1)(A), that the definition of "environment" under the Guideline did not include the discharges in this case, and that foreign conduct may not be considered in sentencing under the Guidelines.[141] The United States argued, among other things, that the discharges are part of the offense as

135 United States v. Abrogar, 459 F.3d 430, 433 (3d Cir. 2006).

136 *See id.*; Brief of Plaintiff-Appellee at 8, United States v. Abrogar, 459 F.3d 430 (3d Cir. 2006) (No. 06-1215).

137 Brief of Plaintiff-Appellee at 11, United States v. Abrogar, 459 F.3d 430 (3d Cir. 2006) (No. 06-1215). Shortly after the ship came into port in New Jersey, Mr. Abrogar also ordered the crew to bring him the bypass pipe whereupon he threw it overboard. *Id.* at 10. Mr. Abrogar also ordered the crew to paint all areas where the pipe had been connected. *Id.*

138 Any offense that is punishable by death or incarceration for more than a year must be prosecuted by an Indictment that is returned by a federal grand jury. FED. R. CIV. P. 7(a)(1). A defendant, however, may waive this right to be prosecuted by Indictment and may be prosecuted by way of an Information filed by the United States Attorney's Office as long as the defendant waives this right in open court after being advised of the nature of the charge and of the defendant's rights. *Id.* at 7(b).

139 *Abrogar*, 459 F.3d at 433.

140 Brief of Plaintiff-Appellee at 13, United States v. Abrogar, 459 F.3d 430 (3d Cir. 2006) (No. 06-1215).

141 *Abrogar*, 459 F.3d at 431, 431 n.1.

"relevant conduct" and therefore resulted in the discharges into the environment.[142] Citing a number of cases, the United States also argued that "relevant" conduct can include conduct outside the United States and its legal jurisdiction.[143]

Without ever addressing the issue of whether the term "environment" under the Guidelines includes discharges outside the jurisdiction of the United States, the Third Circuit held that the enhancement under section 2Q1.3(b)(1)(A) did not apply to the charged offense.[144] The court began its analysis by pointing out that section 1B1.1 of the Guidelines defines a defendant's offense as the offense of conviction and all relevant conduct.[145] In examining the offense of conviction under APPS, the court reasoned that the provision of APPS that criminalizes knowing violations of MARPOL[146] is limited by the provision[147] that restricts the enforcement of APPS to foreign-flagged vessels while in U.S. navigable waters, the exclusive economic zone, or at U.S. ports or terminals.[148] Accordingly, the court reasoned that the provisions of APPS and its implementing regulations that require the maintenance of accurate ORBs at 33 C.F.R. § 151.25 are applicable to foreign-flagged vessels only while they are in U.S. navigable waters or at U.S. ports or terminals pursuant to 33 C.F.R. § 151.09.[149] Therefore, the "offense" for purposes of the Guidelines for foreign-flagged vessels only includes failing to maintain accurate ORBs while the vessel is in U.S. waters or ports, and specifically excludes from criminal liability this failure for foreign-flagged vessels when these vessels are outside U.S. waters.[150]

After the court defined and limited the term "offense," it looked to the text of "relevant conduct" under the Guidelines to see if it would include the discharges outside U.S. waters. Relevant conduct under the Guidelines includes all acts and omissions by the defendant that 1) occurred during the commission of the offense of conviction, 2) in preparation for that offense, or 3) in the course of attempting to avoid detection or responsibility for that offense.[151] The court reasoned that, since all of the discharges occurred outside U.S. waters and before the vessel came into port, none of the discharges could be considered relevant conduct under these terms:

> The Government acknowledged at oral argument—and the paper record before us indicates—that none of the improper discharges at issue occurred within U.S. waters. As such, none of the illegal discharges "occurred during the commission of the offense of conviction." § 1B1.3. Nor can it reasonably be asserted that the discharges took place "in preparation for that offense." *Id.* Nor did the discharges take place "in the course of attempting to avoid detection or responsibility for" maintaining a false oil record book within U.S. waters. *Id.* In fact, the reverse is true. The "offense of conviction"—maintaining a false oil record book—occurred in the course of attempting to avoid detection of the illegal discharges. In short, the improper

142 *Id.* at 434.
143 *Id.*
144 *Id.* at 431 n.1.
145 *Id.* at 434; U.S.S.G., *supra* note 7, § 1B1.1 cmt. n.1(H).
146 Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a) (2000).
147 *Id.* § 1902(a) (2000 & Supp. II 2002).
148 *Abrogar*, 459 F.3d at 434–35.
149 *Id.* at 435; 33 C.F.R. §§ 151.09, 151.25 (2007).
150 *Abrogar*, 459 F.3d at 435.
151 U.S.S.G., *supra* note 7, § 1B1.3(a)(1).

> discharges simply do not fit within the textual parameters of § 1B1.3's definition of "relevant conduct" *vis-a-vis* the "offense of conviction" as properly defined.[152]

Once the court decided that the discharges were not offense conduct or relevant conduct, it determined that the violation of maintaining a false ORB while in the United States could not have "resulted" in the repeated environmental discharges.[153] The government then pointed to section 2Q1.3(b)(5) of the Guidelines, which provides "[i]f a record keeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive [environmental] offense," and argued that the structure of section 2Q1.3 of the Guidelines reflects a policy to enhance record keeping offenses to account for the damage wrought by the underlying offense.[154]

The court dismissed this argument for two reasons. First, since criminal liability for MARPOL violations for a foreign-flagged vessel does not attach until the vessel enters U.S. waters, the discharges in this case that occurred outside of U.S. waters do not constitute "substantive environmental offense[s]" under U.S. law. Therefore, vacating the enhancement would not frustrate the policy of the Guidelines.[155] Second, the court noted that any policy concerns of section 2Q1.3(b)(5) must yield to the plain meaning of the relevant conduct provisions at section 1B1.3 of the Guidelines, which "reflect[] the broader will of Congress as to a fundamental aspect of sentencing policy—the scope and type of collateral conduct to be included in sentencing."[156] The court further noted that any policy concern implied in section 2Q1.3(b)(5) of the Guidelines must yield to the scope of liability and applicability set forth in APPS and its regulations that limit the applicability of the criminal provision of APPS to foreign-flagged vessels in U.S. waters.[157]

In sum, without citing any case law interpreting these terms under the Guidelines, or any case law at all for that matter,[158] the court concluded that since the United States did not have the jurisdiction to prosecute an individual on a foreign-flagged vessel for failing to maintain an accurate ORB outside U.S. waters as a crime under APPS, these discharges could not be considered part of the offense or relevant conduct under the Guidelines, and therefore the offense did not "result in" the repeated discharges to the environment and the six-level enhancement did not apply:

> In sum, we conclude that Abrogar's "offense of conviction"—taking into account the text of the relevant provisions of the APPS and accompanying regulations—was the "failure to maintain an accurate oil record book while in U.S. waters or in a U.S. port." Under that definition of the "offense of conviction," the improper discharges are not

152 *Abrogar*, 459 F.3d at 436.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 436–37.

157 *Id.* at 437.

158 In fact, the only cases cited by the court in its entire decision are in regard to the exercise of its appellate review of the district court's decision and the Guidelines. *Id.* at 433–34.

> "relevant conduct," they cannot be considered part of the "offense" under the Guidelines, and therefore the "offense" did not "result[] in" repeated discharges of a pollutant.[159]

Once the court vacated the six-level enhancement and remanded the case for re-sentencing, Mr. Abrogar's offense level dropped to a level seven in Zone A where prison time was no longer required by the Guidelines.

B. What the Third Circuit Got Right

The Third Circuit Court of Appeals was correct in finding that, based on facts of the case and a strict textual reading of section 2Q1.2(b)(1)(A) of the Guidelines, the six-level enhancement should not apply. Abrogar discharged oil to international waters before his vessel entered port in New Jersey with the false ORB. Therefore, as a factual matter, the offense of maintaining a false ORB in the United States did not "result in" the repeated discharges at issue in this case which is required in order for the six-level enhancement to apply pursuant to a textual reading of section 2Q1.3(b)(1)(A) of the Guidelines. It seems that what the Third Circuit was requiring in order for this enhancement to apply was a causal connection between the offense of maintaining the false ORB and the environmental discharges. Since the discharges occurred before the offense, there was no causal connection.

This factual holding finds support in *United States v. Hagerman*.[160] In *Hagerman*, the president of a wastewater treatment facility was convicted of violating the CWA by submitting false Discharge Monitoring Reports (DMRs) and Monthly Monitoring Reports (MMRs) regarding the amount of effluent discharged from the facility.[161] Since the submission of these false reports allowed the facility to discharge effluents in violation of its permit limits, the court held that the violation resulted in the repeated discharges to the environment and applied the enhancement at section 2Q1.2(b)(1):

> The evidence at trial showed that Mr. Hagerman's record-keeping crimes *enabled* [the facility] to discharge wastewater into the Wabash River with pollutant levels far above those permitted. Those discharges covered a period of at least ten months during which [the facility] discharged many millions of gallons of polluted wastewater. The discharges can fairly be described as ongoing, continuous, and repetitive. The full 6-level enhancement was justified here.[162]

The court in *Abrogar* was also correct that extraterritorial discharges that occurred before the vessel came into port in New Jersey did not fit into the textual parameters of section 1B1.1 of the Guidelines. This is because they did not "occur during the commission of," "in preparation for," or "in the course of attempting to avoid detection or responsibility for" maintaining a false ORB in the United States. The Second Circuit Court of Appeals made a similar finding in *United States v.*

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159 *Id.* at 437 (alteration in original).

160 525 F. Supp. 2d 1058 (S.D. Ind. 2007).

161 *See id.* at 1059. The CWA makes it a crime to knowingly submit false reports to the government. Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(4) (2000).

162 *Hagerman*, 525 F. Supp. 2d at 1063 (emphasis added).

Liebman,[163] where the defendant pled guilty to an Information charging him with the failure to immediately notify the government of a release of a hazardous material in violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[164] In *Liebman*, the defendant owned a mill with boilers that contained asbestos that required removal prior to the sale of the property.[165] The unlicensed contractor hired by the third party broker to remove the asbestos dumped the asbestos in a gravel pit in the woods.[166] The defendant argued that he was initially unaware the mill had asbestos, but admitted that he eventually became aware of the asbestos removal and failed to notify the government.[167] The defendant appealed the district court's application of the six-level enhancement under section 2Q1.2(b)(1)(A), and the government argued on appeal that the repeated discharges from the dumping of the asbestos was relevant conduct.[168]

Like the court in *Abrogar*, the Second Circuit in *Liebman* found that the Guideline's "relevant conduct" language was strained when applied to a situation where the failure to report the conduct charged occurred *after* the release of the pollutant into the environment.[169] While declining to "force a construction" of section 1B1.3 to fit that scenario, the court did find a degree of "overlap" between repeated releases and the ongoing failure to report them.[170] Instead of upholding the district court's application of the enhancement based on the "relevant conduct" Guideline, the Second Circuit found the recordkeeping enhancement at section 2Q1.2(b)(5) a better fit.[171] The Second Circuit remanded the case to the district court to determine whether the defendant's failure to report reflected an effort to conceal the environmental offenses involved with the illegal removal and disposal of the asbestos.[172]

In light of the particular facts of the case at hand, the *Abrogar* court could have stopped at this point, found that the offense of maintaining a false ORB did not result in the repetitive discharges, and remanded the case to the lower court for a determination of whether section 2Q1.3(b)(1)(B) of the Guidelines applied. Since this lesser Guideline enhancement of four levels does not have the causal language contained in section 2Q1.3(b)(1)(A) and requires only that the offense "otherwise involve a discharge of a pollutant," the lower court could have found that the facts justified the application of the four-level enhancement.[173] This determination would have lowered the defendant's final offense level from a Zone D thirteen to a Zone C eleven resulting in a split sentence with a minimum sentence of four months in jail.

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163 40 F.3d 544 (2d Cir. 1994).

164 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9603(b) (2000); *Liebman*, 40 F.3d at 546.

165 *Liebman*, 40 F.3d at 546.

166 *Id.* at 547.

167 *Id.* at 546–47.

168 *Id.* at 551.

169 *Id.*

170 *Id.*

171 *Id.* at 552.

172 *Id.*

173 *See Ortiz*, 427 F.3d 1278, 1285–86 (10th Cir. 2005). In this case involving a negligent discharge of a pollutant, the Tenth Circuit vacated the district court's sentence and remanded for re-sentencing with instructions to apply section 2Q1.3(b)(1)(A) of the Guidelines to the sentence. *Id.* at 1286.

C. How the Third Circuit Missed the Boat

Unfortunately, however, the court in *Abrogar* went beyond applying the facts of the case to the Guidelines and held that the discharges were not offense conduct under the Guidelines, thereby precluding, as a legal matter, the application of both the six-level enhancement under section 2Q1.3(b)(1)(A) of the Guidelines as well as the four-level enhancement for violations that "otherwise involved" the discharge of pollutants pursuant to section 2Q1.3(b)(1)(B).

The primary and fundamental flaw with the court's conclusion that the discharges were not offense conduct begins with the court's recognition of the authority of the United States pursuant to APPS to prosecute an individual on a foreign-flagged vessel for failing to maintain an accurate ORB while in U.S. ports and waters.[174] As charged in the Information cited by the court, the failure to maintain an accurate ORB is a violation of Coast Guard regulations implementing APPS and MARPOL at 33 C.F.R. § 151.25.[175] These regulations require that entries be made in the ORB whenever the following machinery space operations take place: 1) the "[d]isposal of oil residue," and 2) the discharge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces.[176] Mr. Abrogar failed to maintain an accurate ORB and therefore violated this regulation and APPS, because he did not make entries in it that accounted for these discharges.[177]

Model Penal Code section 1.13(9) defines an element of the offense as including "such conduct" as "is included in the description of the forbidden conduct in the definition of the offense."[178] Once the vessel and the ORB entered U.S. waters and port in New Jersey and were subject to U.S. jurisdiction under APPS, the oil discharges became an element of the offense as charged and described in the Information. Without these discharges, and Mr. Abrogar's consequent failure to make note of them in the ORB, there would have been no offense to charge under APPS. Therefore, it is nearly axiomatic that these discharges in violation of MARPOL, which the court referred to as "illegal" or "improper" on at least nine occasions in its opinion,[179] are offense conduct under the Guidelines.

There are also problems with the court's reasons for finding that the extraterritorial discharges did not constitute "substantive environmental offenses" for purposes of section 2Q1.3(b)(5). The court's first reason was that since the discharges are outside U.S. waters, they are not crimes and therefore not substantive environmental offenses under U.S. law.[180] In other words, since the government could not prosecute the defendant for these discharges under APPS, they are not substantive environmental offenses under the Guidelines. The term "substantive environmental offense" is not defined further in the Guidelines, and the court did not cite any case law or other authority for this reasoning. So the court

174 *Abrogar*, 459 F.3d 430, 435 (3d Cir. 2006).
175 *Id.* at 433.
176 33 C.F.R. § 151.25(d)(2)–(3) (2008).
177 *Abrogar*, 459 F.3d at 437.
178 MODEL PENAL CODE § 1.13(9) (1985).
179 *Abrogar*, 459 F.3d at 433, 436.
180 *See id.* at 436.

was, in effect, simply grafting its interpretation of the APPS limitation for these discharges as a charging matter onto the Guideline term as a sentencing matter.

The Ninth Circuit Court of Appeals reached a similar holding in *United States v. Ford*[181] as the Third Circuit in *Abrogar*. In this case, the defendant was convicted of tax evasion and filing a false federal tax return. The United States sought a two-level enhancement under section 2T1.3(b)(1) of the U.S. Sentencing Guidelines Manual,[182] which states that, "[i]f the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels."[183] The criminal activity in this case exceeding $10,000 was based on the defendant's fraudulent activity in Canada.[184] The Ninth Circuit denied the government's request, because Application Note 1 to that provision of the Guideline explicitly limited "criminal activity" to conduct constituting an offense under "federal, state, or local law."[185] Since the defendant's activity was not a violation of U.S. law, the Guideline enhancement could not apply. But the situation in *Ford* is markedly different than that in *Abrogar*. While the tax guideline at issue in *Ford* is expressly limited to violations of U.S. law, the Environmental Guidelines Part 2Q usage of "substantive environmental offense" at issue in *Abrogar* contains no such express limitation. Therefore, since the term is not defined, courts should give the term a broad interpretation to include MARPOL offenses.[186]

The *Abrogar* court's conclusion regarding "substantive environmental offenses" does find support in *United States v. White*.[187] In this case, two employees of the Ohio County Water District were convicted of submitting false reports turbidity sampling reports from the drinking water treatment plant to the Kentucky Department of Environmental Protection Division of Water.[188] The reports were a part of Kentucky's requirements pursuant to the Federal Safe Drinking Water Act (SDWA).[189] Since there was no criminal provision of the SDWA that covered the employees' conduct, the United States charged them pursuant to 18 U.S.C. § 1001 for submitting false documents to a matter within the jurisdiction of the United States. At sentencing, the government sought application of section 2Q1.3(b)(1) of the Guidelines.[190] The district court denied the government's request for two reasons: 1) that turbidity is not considered a

181 989 F.2d 347, 351 (9th Cir. 1993).

182 *Id.* at 349.

183 Section 2T1.3 of the Guidelines was deleted by consolidation into section 2T1.1. 18 U.S.C.S. Appx., U.S.S.G. § 2T1.1(b)(1) (2008).

184 *Ford*, 989 F.2d at 349.

185 *Id.* at 350–51.

186 *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 66 (1998) (applying a broad interpretation to an undefined term in CERCLA); United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998) ("When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words Congress used.").

187 270 F.3d 356, 360 (6th Cir. 2001).

188 *Id.*

189 42 U.S.C. §§ 300f–300j-18 (2000).

190 Section 2B1.1 of the Guidelines apply to violations of 18 U.S.C. § 1001. However, the "cross-over" provision of this Guideline states that another Guideline can be used "if more appropriate to the defendant's charged conduct." 18 U.S.C.S. Appx., U.S.S.G. § 2B1.1 cmt. n.15 (2008).

"pollutant" under the guidelines, and 2) that there was no evidence that a pollutant was discharged into the environment.[191]

The Sixth Circuit Court of Appeals deferred on the issue of whether turbidity qualified as a pollutant under the Guidelines, but upheld the district court's decision finding that "ultimately the regulatory character of the Safe Drinking Water Act and the language and structure of the sentencing guidelines as a whole preclude the use of the enhancements the government seeks."[192] Beginning with the language and structure of the Guidelines, the court turned to the commentary to Guideline section 2Q1.2, which parallels its nontoxic counterpart at section 2Q1.3.[193] The Comment states that the first four Specific Offense Characteristics, which include the environmental discharge enhancement, applied when the offense involves a "substantive violation."[194] The court then went on to analyze the SDWA and found that it did not contain any provision criminalizing or prohibiting the conduct underlying the defendant's fraudulent conduct.[195] The SDWA contains two provisions criminalizing conduct related to safe drinking water. Specifically, the SDWA prohibits knowing violations of state laws regulating underground injection control programs and tampering or threatening to tamper with public water systems.[196] Since neither the SDWA nor any other federal statute contained a "substantive environmental offense" criminalizing the defendant's underlying conduct, there can be no criminal offense when someone lies to the government to conceal this conduct.[197]

The legal and regulatory context in an APPS violation is different from the one that the court confronted in *White*, because there is a "substantive environmental offense" involved, namely MARPOL. Specifically, in an APPS violation for a false ORB, the underlying conduct, dumping of waste oil, is a violation of MARPOL and APPS specifically prohibits violations of MARPOL, whether or not the United States has jurisdiction to prosecute the violation against a specific defendant.[198] Further, the *Abrogar* court recognized that the United States was a signatory to MARPOL—which seeks to "achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances."[199]

The *Abrogar* court's second reason for finding that the discharges were not substantive environmental offenses is also incorrect, because it confuses the limits of criminal liability under APPS with the range of sentencing accountability under the Guidelines. In its reasoning, the court recognized that it "must consider the fact that § 1B1.3 of the Guidelines applies to all of the individual substantive provisions of the Guidelines and reflects the broader will of Congress as to a fundamental

191 *White*, 270 F.3d at 368.

192 *Id.*

193 *Id.*

194 U.S.S.G., *supra* note 7, § 2Q1.2 cmt. background.

195 *White*, 270 F.3d at 368–69.

196 *See* Safe Drinking Water Act, 42 U.S.C. § 300h-2(b) (2000) (providing for criminal enforcement of willful violation of underground injection control programs); *id.* § 300i-1(a)–(b) (2000 & Supp. IV 2004) (providing for criminal penalties for any person who tampers with a public water system).

197 *White*, 270 F.3d at 369–70.

198 Act to Prevent Pollution from Ships, 33 U.S.C. § 1907(a) (2000).

199 *Abrogar*, 459 F.3d 430, 431–32 (3d Cir. 2006). *See also supra* note 45 and accompanying text (discussing MARPOL).

aspect of sentencing policy—the scope and type of collateral conduct to be included in sentencing."[200] However, in interpreting the term "relevant conduct" under the Guidelines, the court failed to take into account that the application notes interpreting the term state that relevant conduct deals with sentencing accountability rather than criminal liability. In other words, the defendant need not be criminally liable for an act in order for the court to consider that act in determining the applicable guideline range:

> The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. . . . [T]he focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, *rather than on whether the defendant is criminally liable* . . . .[201]

Although the discharges in the *Abrogar* case did not fit within the strict textual parameters of section 1B1.3, because they occurred before the vessel came into port in New Jersey, they do fit within the broad purpose of relevant conduct as interpreted by the courts. Case law is replete with holdings that Guideline enhancements can apply where conduct occurred outside of the United States, even where the conduct could not have been charged as a substantive offense. For example, in *United States v. Dawn,*[202] the Seventh Circuit addressed this issue in the context of a child pornography case.[203] In that case, the defendant pleaded guilty to charges that he received and possessed child pornography in violation of 18 U.S.C. § 2252.[204] The defendant made the films in question while he was in Honduras.[205] The Guideline provisions applicable to the offenses of conviction contained a cross-reference directing the sentencing court to apply another Guideline provision applicable to production of child pornography where the relevant conduct included production.[206] This other Guideline provision resulted in a much higher total offense level.[207] The defendant argued that the cross-reference should not be used in his case, because the production of the child pornography occurred outside of the United States and the Guidelines should not be applied to foreign conduct unless explicitly stated therein.[208]

The Seventh Circuit disagreed, holding that the application of the Guidelines do not turn on whether the conduct occurred within the United States, but rather on the factual and logical connection between the offense of conviction and the defendant's other acts, "wherever they may have occurred."[209] The court held that sentencing

200 *Abrogar*, 459 F.3d at 437.

201 U.S.S.G., *supra* note 7, § 1B1.3 cmt. n.1 (emphasis added).

202 129 F.3d 878 (7th Cir. 1997).

203 *Id.* at 878.

204 *Id.* at 879.

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.* at 881.

209 *Id.* at 882; *see also* United States v. Harvey, 2 F.3d 1318, 1330 (3d Cir. 1993) (stating sentencing Guideline applies when defendant sexually exploits children abroad in violation of 18 U.S.C. § 2552); *but cf.* United States v. Thomas, 893 F.2d 1066, 1068–69 (9th Cir. 1990) (holding that a child pornography law, 18 U.S.C. § 2251(a), applied to extraterritorial conduct).

judges may look to the conduct surrounding the offense of conviction, regardless of whether the defendant was ever charged with or convicted of that conduct, and regardless of whether he could be so charged.[210] The court also noted "that taking into account conduct related to the offense of conviction in sentencing is not the same thing as holding the defendant criminally culpable for that conduct."[211]

The Tenth Circuit in *United States v. Wilkinson*,[212] reached a conclusion identical to that of the Seventh Circuit in *Dawn*. In its holding, the court defended the broad authority of sentencing judges to consider all relevant conduct of the defendant, whether committed inside or outside of the United States:

> It would be absurd to suggest that there is a long-standing principle that judges cannot consider in calculating a sentence relevant conduct committed outside of the United States. In fact, 18 U.S.C. § 3661 clearly states otherwise, requiring that, "*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[213]

Finally, in *United States v. Greer*,[214] the defendants were convicted of conspiracy to import and export hashish and marijuana and violating the Maritime Drug Law Enforcement Act.[215] In calculating the base offense level under the Guidelines, the district court refused to consider ninety-eight percent of the drugs as relevant conduct.[216] The district court found that the majority of the drugs were intended for distribution in Canada and noted that the defendants already had been prosecuted and had served their sentences in Canada for the importation of the drugs.[217] The Second Circuit concluded that the district court misapplied Guideline section 1B1.3, holding that the value of the drugs in Canada had to be considered as relevant conduct under the Guidelines:

> Section 1B1.3 provides that *all* acts committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant and that occurred during the commission of the offense *shall* be factored into the determination of the base offense level. . . . [N]othing in the U.S.S.G. limits their application to "activity undertaken against the United States." Thus, the District Court erred in failing to include the "foreign drugs" in its determination of the defendants' relevant conduct pursuant to § 1B1.3.[218]

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210 *Dawn*, 129 F.3d at 884.

211 *Id.* (citing United States v. Watts, 519 U.S. 148, 153 (1997)).

212 169 F.3d 1236 (10th Cir. 1999).

213 *Id.* at 1238–39.

214 285 F.3d 158 (2d Cir. 2002).

215 *Id.* at 162.

216 *Id.* at 179.

217 *Id.*

218 *Id.* (citation omitted). The Second Circuit vacated the district court's decision and remanded the case for resentencing. *Id.* at 183.

D. Can the Boat Be Fixed?

In response to *Abrogar*, the U.S. Sentencing Commission could make at least two clarifications to the environmental Guidelines that would enable chief engineers and other supervisory engineering crew members on board foreign-flagged vessels, who dump oil in international waters in violation of MARPOL and APPS, to receive the enhancements at section 2Q1.3(b)(1). First, Application Note 4 of section 2Q1.3 of the Guidelines could be amended to include a sentence to make it clear that a discharge, release, or emission into the environment may include events that occur outside the territorial jurisdiction of the United States.[219] Second, Application Note 1 could be amended to define a "substantive environmental offense" or "offense" for purposes of section 2Q1.3(b)(5) to include a violation under not only federal, state, and local laws but also foreign or international law to which the United States is a party.[220] The Commission made a similar clarification to the application note in the tax Guideline at section 2T1.2. In apparent response to the Ninth Circuit's decision in *United States v. Ford*, the Commission clarified that "criminal activity" included conduct constituting a criminal offense under foreign law as well as federal, state, and local law.[221]

These clarifications would probably not change the Third Circuit's holding in *Abrogar*, because it relied on a reading of the "resulted in" language at section 2Q1.3, rather than on the definition of the term "environment" under the Guidelines or whether foreign conduct may be considered in a Guideline sentence.[222] More fundamentally, in determining that the extraterritorial discharges did not constitute offense conduct under the Guidelines, the court relied primarily on its interpretation of APPS and its implementing regulations. In its reasoning, the court emphasized that the limiting language in APPS and its implementing regulations as they apply to foreign-flagged vessels do not implicate just U.S. jurisdiction in enforcing APPS, but go beyond to define which MARPOL violations constitute crimes and therefore "offenses" under the Guidelines.[223]

However, these Guideline changes may support a challenge to the *Abrogar* decision in a different circuit court with a more compelling set of facts.[224] In

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219 For consistency purposes, Application Note 5 of section 2Q1.2 would also be amended similarly for discharges of hazardous or toxic substances.

220 Once again, for consistency purposes, Application Note 1 of section 2Q1.2 would also need to be amended.

221 U.S.S.G., *supra* note 7, § 2T1.1 cmt. n.3.

222 *Abrogar*, 459 F.3d 430, 431 n.1 (3d Cir. 2006).

223 *Id.* at 435 n.3.

224 Of course, a district court in a different circuit is not bound to the holding in the *Abrogar* case and could make a contrary judgment without a more compelling set of facts or the Guidelines clarifications suggested above. On November 25, 2008, a jury in the Southern District of Texas convicted the corporate operator, chief engineer, and first engineer of a foreign flagged vessel for using and maintaining a false ORB in violation of APPS and 18 U.S.C. § 1001. Verdict of the Jury at 1–2, United States v. Gen. Mar. Mgmt., (Portugal) L.D.A., Cr. No. C-08-393 (S.D. Tex. filed Nov. 25, 2008); Indictment at 1–7, United States v. Gen. Mar. Mgmt., (Portugal) L.D.A., Cr. No. C-08-393 (S.D. Tex. filed June 12, 2008). Sentencing in this case is currently scheduled for February 10, 2009, at which time the district court will have the opportunity to decide whether to apply the environmental discharge enhancements to the chief and first engineers. Sentencing Order at 1, United States v. Gen. Mar. Mgmt., (Portugal) L.D.A., Cr. No. C-08-393 (S.D. Tex. filed Nov. 25, 2008).

Abrogar, the court dealt with the discharge of waste during only one voyage to the United States—Abrogar's vessel discharged oily wastes in international waters and then came into port in Newark with a false ORB that concealed these discharges. Therefore, the court ultimately reasoned that the false ORB could not have "resulted in" the oily waste discharges.[225] But what if the factual scenario were different? What if a vessel were a repeat offender in that it continued to discharge after it left a port in the United States and then returned with a false ORB? In other words, what if the chief engineer in *Abrogar* had ordered the crew to discharge oily wastes before the vessel came into Newark, presented the false ORB to the Coast Guard *that allowed the vessel to leave port*, discharged oily wastes again at sea, and then came back again with a false ORB designed to conceal these oily waste discharges from the Coast Guard? In this case, the false ORB would have "resulted in" the discharges since the Coast Guard would not have allowed the vessel to leave Newark if it had known that the vessel was dumping wastes in violation of MARPOL. The Third Circuit recognized the authority of the United States and the Coast Guard to prohibit a vessel that was in violation of MARPOL from entering U.S. ports and prohibit it from leaving port without whatever remedial action is necessary to comply with MARPOL requirements.[226] Further, the Fifth Circuit's recent decision in *United States v. Kun Yun Jho* (*Jho*) left the issue open as to whether multiple counts could be charged under APPS for multiple port calls with false ORBs.[227] At the very least, this different set of facts, along with the suggested clarifications to the Guidelines, would merit a four-level enhancement under section 2Q1.3(b)(1)(B) for a violation of APPS.

V. OTHER STATUTORY CHARGING AND SENTENCING OPTIONS

APPS is not the only charging option available to prosecutors against crew members on foreign-flagged vessels who arrive into U.S. ports with false ORBs. Several other criminal statutes, most notably 18 U.S.C. §§ 1001, 1505, and 1519,[228] are equally applicable and appropriate for charging crew members who engage in the maintenance of a false ORB, related false statements, and other obstructive conduct in order to conceal these illegal discharges of oil from the government.[229] Importantly, these other statutes have higher Guideline base offense levels or enhancements that authorize jail time in these cases.[230]

225 *Id.* at 436.

226 *Id.* at 432.

227 *Jho*, 534 F.3d 398, 406 (5th Cir. 2008).

228 These statutes allow prosecution for: False Statements, 18 U.S.C. §§ 1001–1040; Obstruction of Agency Proceedings, 18 U.S.C. § 1505; and Falsification of Agency Records in Federal Investigations, 18 U.S.C. § 1519. *See* discussion *infra* Parts V.A, V.B.1, and V.B.2, respectively.

229 Chief engineers have also been charged and sentenced to jail time under 15 U.S.C. § 1512 for witness tampering when they instructed crew members on board foreign flagged vessels to lie to the Coast Guard about the illegal discharges of waste oil and use of bypass hoses. *See, e.g.*, United States v. In Ho Kim, No. A02-0030-002-CR (HRH) (D. Alaska filed Aug. 14, 2002) (sentencing the chief engineer of M/V Khana to 90 days in jail); United States v. Je Yong Lee, No. A02-0034-01-CR (JKS) (D. Alaska filed Aug. 9, 2002) (sentencing the chief engineer of M/V Sohoh to four months in jail).

230 *See* Memorandum from John Ashcroft, Attorney Gen., United States Dep't of Justice, on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to all Federal Prosecutors 2 (Sept. 22, 2003) ("It is the policy of the Department of Justice that, in all

A. The False Statements Act

The False Statements Act[231] provides, in pertinent part, that "whoever, in any matter within the jurisdiction of the executive . . . branch of the United States, knowingly[232] and willfully[233] . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry [violates this section]."[234]

Defendants who violate the law face a maximum statutory period of incarceration of five years.[235] Importantly, to meet the materiality requirement, the government need only prove that the false document had a tendency to influence or was capable of influencing the federal agency; actual reliance by the agency on the false document is not required.[236] Further, to be within the jurisdiction of the agency, the document need not have actually been presented to or read by the federal agency to be a violation of the law.[237]

In *United States v. Royal Caribbean Cruises Ltd.* (*Royal Caribbean*),[238] the company was indicted for maintaining a false ORB in violation of 18 U.S.C. § 1001 in connection with the cruise ship Nordic Empress that was observed by

criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines . . . .").

231 18 U.S.C. §§ 1001–1040 (2006).

232 Specifically, the government must prove that the defendant knew the writing or document contained a false, fictitious, or fraudulent entry at the time the defendant made the entry. *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 6.18.1001C (2008), *available at* http://www.juryinstructions.ca8.uscourts.gov/crim_manual_2008_expanded.pdf; FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS 2.49 (2001), *available at* http://www.lb5.uscourts.gov/juryinstructions/crim2001.pdf.

233 The term "willfully" means the defendant acted voluntarily, intentionally, and with the intent to do something that the law forbids. *See* PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 18 U.S.C. § 1001[8] (1999), *available at* http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf; CRIMINAL PATTERN JURY INSTRUCTIONS 2.46.2 (2005), *available at* http://www.ca10.uscourts.gov/downloads/pji10-cir-crim.pdf; NINTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 8.66 and comment (2003), http://207.41.19.15/web/sdocuments.nsf/crim (last visited Jan. 25, 2009).

234 18 U.S.C. § 1001(a) (2006).

235 *Id.*

236 United States v. Gaudin, 515 U.S. 506, 509 (1995) (citing Kungys v. United States, 485 U.S. 759, 770 (1988)); United States v. Shah, 44 F.3d 285, 288 n.4 (5th Cir. 1995) (citing United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976)); United States v. Johnson, 937 F.2d 392, 396 (8th Cir. 1991); United States v. Hansen, 772 F.2d 940, 949 (D.C. Cir. 1986) (quoting United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979)).

237 *See* United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 655 (E.D. Tex. 2006) (citing United States v. Puente, 982 F.2d 156, 159 (5th Cir. 1993)) ("The statement may be material even if it is ignored or never read by the agency receiving the misstatement."), *rev'd on other grounds*, 534 F.3d 398 (5th Cir. 2008); United States v. Rutgard, 116 F.3d 1270, 1287 (9th Cir. 1997) (stating that patient charts within doctor's office that were never reviewed by agency are still a violation of the law); United States v. Frazier, 53 F.3d 1105, 1115 (10th Cir. 1995) (stating that the law does not require that defendant physically submit the false statement to the agency); United States v. Richmond, 700 F.2d 1183, 1187 (8th Cir. 1983) (stating that it is not necessary that the false statement be presented directly to the agency); United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973) (holding that a violation of 18 U.S.C. § 1001 does not require that the false statement actually be submitted to the agency, only that it was contemplated that the statement would be utilized by the agency).

238 11 F. Supp. 2d 1358 (S.D. Fla. 1998).

Coast Guard aircraft discharging oil in Bahamian waters en route to Miami, Florida.[239] In this case the Indictment read:

> On or about February 1, 1993, in the port of Miami, within the Southern District of Florida, the defendant Royal Caribbean Cruises Ltd knowingly and willfully used a false writing, in a matter within the jurisdiction of the United States Coast Guard, knowing the same to contain materially false, fictitious and fraudulent entries, to wit, an Oil Record Book for the Nordic Empress, that falsely represented that all overboard discharges of oil contaminated bilge waste occurred only after treatment of the bilge waste through 15 parts per million equipment, that is, the Oil Water Separator, and which failed to record the overboard discharge of oil contaminated bilge waste without the use of the Oil Water Separator.[240]

The defendants in *Royal Caribbean* used many of the same arguments that were dismissed by the court in the *Jho* decision. Specifically, the defendants argued that the United States did not have jurisdiction under 18 U.S.C. § 1001 since the discharges themselves and the related falsification and omissions in the ORB were made outside of the United States. The court dismissed this claim finding:

> Whether or not the United States had the authority to regulate either the alleged . . . unauthorized discharge . . . or any attendant Oil Record Book violations at that time does not bear upon our inquiry as to whether the United States has jurisdiction to enforce its laws in port in Miami, Florida regarding the commission of false statements made to a United States agency performing its regular and proper duties.[241]

The court also dismissed the defendant's arguments that provisions of international law, namely MARPOL and UNCLOS, precluded the prosecution.[242]

Courts have two options in deciding which set of guidelines to apply for violations of 18 U.S.C. § 1001 for false ORB cases and related conduct. First, pursuant to the "cross-over" provisions in the Guidelines, courts can opt to use the Guidelines applicable to environmental cases at section 2Q1.3 instead of the Guideline applicable to false statement cases at section 2B1.1.[243] The United States opted for this first approach in *United States v. Chun Do Oh*,[244] a prosecution in the Western District of Washington of a chief engineer who plead guilty in 2002, to an Information charging him with a violation of 18 U.S.C. § 1001 for the maintenance and presentation of the false ORB.[245] In this case, the defendant discharged oily

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239 *Id.* at 1362. *See generally* Shaun Gehan, United States v. Royal Caribbean Cruises, Ltd.*: Use of Federal "False Statements Act" to Extend Jurisdiction over Polluting Incidents into Territorial Seas of Foreign States*, 7 OCEAN & COASTAL L.J. 167 (2001) (discussing the case as a unique example of using a domestic law of general applicability to overcome jurisdictional hurdles in international conflict).

240 *Royal Caribbean*, 11 F. Supp. 2d. at 1362.

241 *Id.* at 1364.

242 *Id.* at 1368, 1370–71.

243 U.S.S.G., *supra* note 7, § 2B1.1(c)(3).

244 Government's Sentencing Memorandum at 7, United States v. Chun Do Oh, No. 3:02-cr-05646-FDB (W.D. Wash. Oct. 16, 2002).

245 United States v. Chun Do Oh, No. 3:02-cr-05646-FDB, judgment at 1 (W.D. Wash. filed Oct. 18, 2002).

wastes on a voyage to Tacoma, Washington.[246] At sentencing, the district court applied the six-level enhancement at section 2Q1.3(b)(1)(A), but exercised its discretion provided in Application Note 4 of the section and departed down two levels, and then applied the three-level supervisory role adjustment under section 3B1.1(b) and the two-level obstruction enhancement at section 3C1.1 resulting in a preliminary offense level of 15.[247] After a two-level downward departure for acceptance of responsibility under section 3E1.1, the defendant was left with a final offense level of thirteen.[248] Since the defendant had no criminal history, the district court sentenced him to a prison term of one year and a day.[249] The defendant appealed the application of the four-level enhancement arguing that the term "environment" in the Guidelines does not include waters outside the territorial jurisdiction of the United States.[250] The defendant ultimately dropped his appeal before the case could be argued before the Ninth Circuit, so the court never had the opportunity to decide whether the six or four-level enhancements applied to the case.

It could be argued that this case suffers from some of the same problems as in *Abrogar*, since the discharges themselves were outside of U.S. waters and therefore were not subject to prosecution. First, in light of *White*, which was also a case that charged a violation of 18 U.S.C. § 1001, the record keeping violation in *Chun Do Oh* did not involve a "substantive environmental violation." Second, since the false ORB charged as a violation of 18 U.S.C. § 1001 also occurred when the vessel came into port in Tacoma, Washington, after it had discharged oily wastes, the discharges would probably have the same problems fitting into the textual parameters of sections 2Q1.3(b)(1)(A) and 1B1.3 under the Guidelines as in the *Abrogar* case.

However, there are at least two important differences between the False Statements Act and APPS that would overcome the defendant's successful argument in *Abrogar* that the discharges are not offense conduct under the Guidelines. First, the False Statements Act does not contain any similar provision to that in section 1902 of APPS or its implementing regulations that explicitly limits criminal liability under 18 U.S.C. § 1001 to U.S. waters for foreign-flagged vessels and, therefore, defines what is considered offense conduct under the Guidelines.[251] The absence of these limiting provisions in the False Statements Act allows for a broader interpretation of offense conduct under the Guidelines.

Second, the materiality requirement of the False Statements Act strengthens the argument that the discharges are offense conduct, because the discharges are an element of the offense. As discussed above, to prove that the ORB violates 18 U.S.C. § 1001(a)(3), the government would have to show that the entries therein were materially false. In order to be materially false, the entries have to be

246 *See* Government's Sentencing Memorandum at 9, United States v. Chun Do Oh, No. 3:02-cr-05646-FDB (W.D. Wash. filed Oct. 16, 2002).

247 Brief of Appellee at 12–13, United States v. Chun Do Oh, No. 02-30350 (9th Cir. Feb. 10, 2003).

248 *Id.* at 13.

249 United States v. Chun Do Oh, No. 3:02-cr-05646-FDB, judgment at 2 (W.D. Wash. filed Oct. 18, 2002).

250 Defendant-Appellant's Opening Brief at 9, United States v. Chun Do Oh, No. 02-30350 (9th Cir. Jan. 9, 2003).

251 *Abrogar*, 459 F.3d 430, 437 (3d Cir. 2006) ("Here, criminal liability under 33 U.S.C. § 1908(a) is plainly limited by § 1902 and the regulations accompanying APPS.").

important enough to be capable of influencing the government agency.[252] In a vessel case where the false ORB is charged as a violation of 18 U.S.C. § 1001(a)(3), the false entry regarding the operation of the OWS is material, because instead of processing the oily bilge waste through the OWS, the engineer discharged the pollutant directly into the ocean. Therefore, without the fact of the discharge, the false entry would not be material to the Coast Guard and the document would not be a violation of the law. As such the illegal discharges, whether they were to U.S. or international waters, are offense conduct under the Guidelines, and, therefore, are subject to the six or four-level enhancement at sections 2Q1.3(b)(1)(A) or (B).

The second option is to use section 2B1.1 of the Guidelines. This Guideline has a base offense level of six, the same base offense level at section 2Q1.3. However, the false statement guidelines have a Specific Offense Characteristic that can raise the offense level to twelve, which would match the increase with the application at section 2Q1.3(b)(1)(A), if "a substantial part of a fraudulent scheme was committed from outside the United States; or the offense otherwise involved sophisticated means."[253] This Specific Offense Characteristic would be very appropriate to false ORB cases since a "substantial part of the scheme," namely the illegal discharges and false entries and omissions in the ORB, are conducted in international waters outside of the United States.

The application of this Specific Offense Characteristic was tested in *United States v. Kostakis*.[254] In this case, the defendant, an engineer on board a Bahamian-flagged oil tanker, pled guilty to a one-count Information charging him with the use of a false ORB.[255] Specifically, the Information charged:

> In or about and between October 2001 and January 2002, both dates being approximate and inclusive . . . CHRISTOS KOSTAKIS . . . did knowingly and willfully make and use a false writing and document in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, the United States Coast Guard, knowing the same to contain materially false, fictitious and fraudulent statements and entries in that the defendants stated and represented in the Alkyon's Oil Record Book for the period October 24, 2001 to January 16, 2002 that all of the Alkyon's oily bilge water had been processed in its oil-water separator, when in fact, as the defendants then and there well knew and believed, the defendants had caused oily bilge water from the Alkyon to be discharged directly into the sea without being processed in the ship's oil-water separator.[256]

The district court applied the six-level increase based on the fact that a substantial part of the scheme occurred outside the United States, but then concluded that the defendant's conduct was "of the simplest possible form" and departed downward, thereby eliminating the effect of the enhancement.[257] The

252 *See* ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 36 (2003), *available at* http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf ("[A] misrepresentation is material if it relates to an important fact as distinguished from some unimportant or trivial detail.").

253 U.S.S.G., *supra* note 7, § 2B1.1(b)(9).

254 364 F.3d 45 (2d Cir. 2004).

255 *Id.* at 47.

256 *Id.* at 48.

257 *Id.* at 49–50 (quoting the district court opinion).

Second Circuit Court of Appeals disagreed, vacated the sentence, and remanded so that the district court could conduct an evidentiary hearing to determine whether the defendant's conduct involved conduct outside the United States and was in fact complex.[258] In so doing, the Second Circuit opined that the defendant's conduct, as proffered by the United States, if found to be true by the sentencing court, would qualify for the six-level enhancement:

> [A]s described in the government's proffer, Kostakis's conduct appears to have been rather sophisticated. The government alleged that Kostakis made false entries in two oil record books between April 16, 2001 and January 16, 2002, on thirty separate occasions. These entries concealed the fact that Kostakis routinely instructed his subordinates to dump oily water directly into the sea, most often at night. These falsified entries had numerous technical components, and were made with the purpose of deceiving the Coast Guard. The government further alleged that upon apprehension Kostakis made false statements regarding these activities to the Coast Guard and hid equipment used to discharge the oily water into international waters.[259]

B. Obstruction of Justice

Obstruction of an agency proceeding pursuant to 18 U.S.C. § 1505 and 18 U.S.C. § 1519 is an excellent alternative to APPS and 18 U.S.C. § 1001 charges, because the base offense level for these crimes is fourteen instead of just six.[260] Therefore, even without applying any of the applicable Adjustments at Chapter 3 of the Guidelines, a defendant convicted of obstruction of justice with no criminal history would serve a minimum of fifteen months in jail.[261] Even with a two-level downward departure for acceptance of responsibility,[262] the defendant would be at an offense level of twelve with a split sentence of at least five months in jail.[263] The two relevant obstruction of justice sections applicable to vessel cases involving a false ORB are entitled "Obstruction of proceedings before departments, agencies, and committees," 18 U.S.C. § 1505, and "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," 18 U.S.C. § 1519.

1. Obstruction of Agency Proceedings, 18 U.S.C. § 1505

The obstruction of justice provision at 18 U.S.C. § 1505 provides, in pertinent part: "Whoever, corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of law under which any pending proceeding is being had before any department or agency of the United States [shall be fined, imprisoned, or both]."[264]

The statute itself defines the term "corruptly" under 18 U.S.C. § 1505 to include making false or misleading statements, "[a]cting with an improper purpose,

258 *Id.* at 52.
259 *Id.*
260 U.S.S.G., *supra* note 7, § 2J1.2.
261 *Id.* at ch. 5, pt. A.
262 *Id.* § 3E1.1(a).
263 *Id.* at ch. 5, pt. A.
264 18 U.S.C. § 1505 (2006).

personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[265] Courts have consistently held that presenting false documents or making false or misleading statements to agency investigators amounts to obstruction of justice under 18 U.S.C. § 1505.[266] Further, there is no requirement that the defendant successfully obstructed the proceeding, but just that the "endeavor" was made.[267] In *United States v. Stickle*,[268] the court held that a Coast Guard boarding constitutes a "pending proceeding" for purposes of 18 U.S.C. § 1505, based on the Coast Guard's "discretionary or adjudicative power" and the "power to enhance [its] investigations through the issuance of subpoenas or warrants."[269]

Several chief engineers have been convicted pursuant to 18 U.S.C. § 1505 for falsifying ORB and related obstructive conduct that occurred during the boarding. For example, in 2007, the chief engineer of a foreign-flagged vessel pled guilty to count three of an Information in the District of New Jersey charging him with obstruction of justice for the maintenance of a false ORB and for making false statements in regard to his knowledge of the use of a bypass pipe to discharge oily

265 *Id.* § 1515(b).

266 In *United States v. Leo*, 941 F.2d 181 (3d Cir. 1991), the Third Circuit upheld a conviction of a defendant who was under investigation by the United States Defense Contract Audit Agency for fraud involving defense contracts because he delayed an agency auditor's search for purchase order dates. In making its finding, the court rejected the defendant's argument that "[18 U.S.C.] § 1505 does not cover false statements made to a federal auditor" because the statements obstructed a proceeding. *Id.* at 198–99. *See also* United States v. Schwartz, 924 F.2d 410, 422–23 (2d Cir. 1991) (involving false statements to United States Customs Service regarding illegal shipments of arms made by defendants that were being detained at Kennedy Airport); United States v. Sullivan, 618 F.2d 1290, 1294–95 (8th Cir. 1980) (involving false statements to a compliance officer of the Labor Department regarding the veracity and accuracy of entries made in a strike expense journal required to be kept by the Landrum-Griffin Act); United States v. Tallant, 547 F.2d 1291, 1293, 1299 (5th Cir. 1977) (involving falsification and presentation of stockholder ledger records to investigators of the Securities and Exchange Commission (SEC)); United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir. 1970) (involving submission of false invoices to the Federal Trade Commission (FTC)).

267 *See* United States v. Senffner, 280 F.3d 755, 762 (7th Cir. 2002) (asserting that the government only must show that the conduct charged had the "natural and probable effect" of obstructing justice); United States v. Sprecher, 783 F. Supp. 133, 163 (S.D.N.Y. 1992) ("[I]t is sufficient that the defendant has made an 'effort or essay to accomplish the evil purpose' outlawed by the statute." (quoting United States v. Buffalano, 727 F.2d 50, 53 (2d Cir. 1984))); United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991).

268 355 F. Supp. 2d 1317 (S.D. Fla. 2004), *aff'd*, 454 F.3d 1265 (11th Cir. 2006).

269 *Id.* at 1328–29. *See also* United States v. Petraia Maritime, Ltd., 483 F. Supp. 2d 34, 39–40 (D. Me. 2007) (rejecting defendant's argument that there was no Coast Guard proceeding because, under MARPOL, the matter should have been referred to the flag state). Courts have consistently held that an agency's administrative investigation qualifies as a "proceeding" under 18 U.S.C. § 1505 where the proceeding is more than a "mere police investigation" in that the agency is imbued with administrative or adjudicative power. *See Senffner*, 280 F.3d at 761 (SEC investigation); United States v. Kelley, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (Office of Inspector General for the Agency for International Development investigation); *Leo*, 941 F.2d at 198–99 (U.S. Defense Contract Audit Agency investigation); *Schwartz*, 924 F.2d at 423 (U.S. Customs Service investigation); *Price*, 951 F.2d at 1031 (U.S. Internal Revenue Service investigation); United States v. Lewis, 657 F.2d 44, 45 (4th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981) (U.S. Internal Revenue Service investigation); *Sullivan*, 618 F.2d at 1294 (Department of Labor investigation); United States v. Browning, 572 F.2d 720, 723–24 (10th Cir. 1978) (U.S. Customs Service investigation); *Tallant*, 547 F.2d at 1299 (SEC investigation); *Fruchtman*, 421 F.2d at 1021 (FTC investigation).

wastes overboard.[270] In this case, the defendant was sentenced to five months in prison.[271] Similarly, in Puerto Rico, a chief engineer of a foreign-flagged vessel pled guilty in 2007 to a felony Information charging him with a violation of 18 U.S.C. § 1505 for presenting a false ORB and instructing crew members to lie to the Coast Guard and was sentenced to five months in jail.[272] In this case, the Information read:

> Between on or about April 14, 2007, and April 16, 2000, in the Port of San Juan, in the District of Puerto Rico, and in the navigable waters of the United States in a matter within the jurisdiction of the United States Coast Guard, an agency of the United States, the defendant herein, being the Chief Engineer of the *M/V Sportsqueen*, aided and abetted, to corruptly influence, obstruct and impede, or endeavor to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding, to wit, a Port State Control inspection of the *Sportsqueen* that was being had by the Coast Guard, by: (1) presenting a false Oil Record Book to the Coast Guard; and (2) making false statements to the Coast Guard regarding the operation of the vessel's Oil Water Separator and denying any knowledge or use of a hose to bypass the Oil Water Separator and discharge oily wastes directly overboard.[273]

2. Falsification of Agency Records in Federal Investigations, 18 U.S.C. § 1519

Enacted in response to the Enron case[274] and several other high level criminal corporate cases, 18 U.S.C. § 1519 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[275]

The advantage of charging this statute instead of charging 18 U.S.C. § 1505 for prosecutors is two-fold. First, there is the less stringent "knowing" mens rea requirement in 18 U.S.C. § 1519 versus the "corruptly" mental state contained in 18 U.S.C. § 1505. Second, there is no "pending proceeding requirement" in 18 U.S.C. § 1519 as there is in 18 U.S.C. § 1505. Instead, the United States must only prove that the obstructive conduct was in "in relation to or in contemplation" of the government investigation or administration of the matter.[276]

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270 United States v. Chang-Sig O, No. 2:06-cr-00599-SDW (D.N.J. filed Jan. 30, 2007).

271 *Id.* at 2.

272 United States v. Francisco M. Sabando, Jr., No. 3:07-CR-391-001 (GAG), judgment at 2 (D.P.R. filed Sept. 20, 2007).

273 Information at 3–4, United States v. Francisco M. Sabando, Jr., No. 3:07-CR-391-001 (GAG) (D.P.R. Sept. 20, 2007).

274 *See* Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519, 1558 (2004).

275 Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1519 (2006).

276 *See* United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 635–36 (E.D. Tex. 2006) (rejecting the defendant's argument that the government must prove that there was a "pending" investigation to prove a violation of 18 U.S.C. § 1519).

In *United States v. Ionia Management, S.A.* (*Ionia*),[277] the corporate operator of a foreign-flagged tanker vessel called the M/T Kriton, along with the ship's second engineer were charged with a violation of 18 U.S.C. § 1519 for the falsification of the ORB.[278] Specifically, the Indictment charged that the defendants

> knowingly alter[ed], conceal[ed], cover[ed] up, falsif[ied], and [made] false entries in a record and document with the intent to impede, obstruct, and influence the investigation and proper administration of a matter within the jurisdiction of a department or agency of the United States, specifically, an inspection by the U.S. Coast Guard and Department of Homeland Security, by presenting Oil Record Books on or about March 20, 2007 which omitted entries required to be recorded of overboard discharges of oil, oil sludge, oil residue, oily mixtures, bilge slops, and bilge water that had accumulated in machinery spaces and elsewhere aboard the M/T Kriton, without processing through required pollution prevention equipment, and by falsely representing that all discharges and disposals had been made using either an incinerator or properly-functioning Oily Water Separator and Oil Content Monitor, when the defendant well knew that oil, oil sludge, oil residues, oily mixtures, bilge slops, and bilge water that had accumulated in machinery spaces and elsewhere aboard the M/T Kriton had been discharged directly overboard through a bypass house.[279]

In *Ionia*, the defendants moved to dismiss the count making the same jurisdictional and international arguments that the defendants made in *Jho*. Specifically, the defendant argued that the United States did not have jurisdiction to charge the false entries made in the ORB outside the United States and that prosecution would violate principles of international law codified in UNCLOS.[280] The court denied the defendant's motion for the same reasons that the Fifth Circuit set out in the *Jho* case. The district court held that the United States has the authority to charge violations of domestic law occurring in its ports, and that neither MARPOL nor UNCLOS precludes the United States from enforcing domestic law within its borders.[281] The court in *Ionia* also dismissed the defendant's arguments that the 18 U.S.C. § 1519 and APPS charges, based on the false ORB, were multiplicitous, since each contained at least one element not contained in the other.[282]

VI. CONCLUSION

The court in *Abrogar* began its analysis correctly by applying the facts of the case to the Guidelines. In doing so, the Third Circuit found that the extraterritorial discharges of oil did not qualify for a six-level enhancement under sections 2Q1.3(b)(1)(A) or 1B1.3 of the Guidelines, because the discharges occurred before the vessel came into port with the false ORB. At this point, the court could have

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277 498 F. Supp. 2d 477 (D. Conn. 2007) *aff'd*, Nos. 07-5807-cr, 08-1357-cr, 2009 WL 116966 (2d Cir. Jan. 20, 2009).

278 *Id.* at 480.

279 *Id.* at 480–81 (internal quotations omitted).

280 *Id.* at 482.

281 *Id.* at 483–87.

282 *Id.* at. 493.

remanded to the district court to determine whether the offense "otherwise involved" a discharge under section 2Q1.3(b)(1)(B). The text of this section is broad and flexible enough to apply to the extraterritorial discharges, and the four-level enhancement would have been sufficient to authorize jail time for the defendant under the Guidelines. Unfortunately, the court missed the boat when it went beyond its factual application and held that the discharges were not offense conduct under the Guidelines or APPS, thereby precluding the application of the four-level enhancement to the defendant's offense and a sentence of jail time for Mr. Abrogar. This decision undermined the fundamental purpose of MARPOL, the purposes of sentencing, and the significant deterrent effect that the risk of jail time can have on engineers who violate MARPOL and APPS.[283]

The U.S. Department of Justice and U.S. Attorneys have prosecuted cases aggressively for more than a decade against companies that own or operate these vessels.[284] These prosecutions have obtained multimillion dollar fines and community service payments[285] against the corporate operators of cruise lines,[286] tanker vessels,[287] car carrying vessels,[288] cargo vessels,[289] and container vessels.[290] As a special term of probation, many of these plea agreements have involved environmental compliance plans (ECPs) designed to prevent future violations.[291]

283 Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(2)(A), (B) (2006) provide that a sentence shall be sufficient to provide a just punishment for the offense and to afford adequate deterrence to criminal conduct.

284 *See* United States v. Ionia Management S.A., Nos. 07-5807-cr, 08-1387-cr, 2009 WL 116966, at *5 (2d Cir. Jan. 20, 2009), aff'g, 498 F. Supp. 2d 477 (D. Conn. 2007) (holding that a corporate operator of a vessel can be liable for the criminal acts of its crew members acting within the scope of their employment even if the employees were not of management level, and that a corporate compliance program does not immunize a corporation for the acts of its employees).

285 Section 8B1.3 of the Guidelines provides that community service may be ordered as a condition of probation where it is "reasonably designed to repair the harm caused by the offense." The introductory commentary to section 8B also provides that a community service order can be used to reduce the harm threatened or repair the harm when the harm or threatened harm would not otherwise be remedied. *See generally* James B. Nelson, *Alternative Sentencing Under the MARPOL Protocol: Using Polluters' Fines to Fund Environmental Restoration*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2003) (discussing advantages of the community service fine provision under MARPOL).

286 *See* Gehan, *supra* note 239, at 167 (describing a total of $27 million in fines).

287 In 2007, Overseas Shipholding Group, Inc. pled guilty to a multiple-count Information involving APPS charges and paid $37 million in criminal fines and community service payments. Plea Agreement at 7–13, United States v. Overseas Shipholding Group, No. 1:06-cr-00065-TH (C.D. Cal. filed Jan. 23, 2007).

288 In 2006, Wallenius Ship Management pled guilty to a seven-count Information charging it with conspiracy as well as multiple violations of APPS and 18 U.S.C. § 1001. The company paid a $5 million dollar fine and made a community service payment of $1.5 million dollars. Plea Agreement at 6, United States v. Wallenius Ship Mgmt., No. 2:06-cr-00213-JAG (D.N.J. Mar. 22, 2006).

289 In 2008, National Navigation Company pled guilty to multiple count Informations filed in the District of Oregon, Western District of Washington, and Eastern District of Louisiana and agreed to pay a total monetary penalty of $7.25 million dollars. Plea Agreement at 2–5, 7, United States v. Nat'l Navigation Co., No. 08-CR-154 (D. Or. filed Apr. 29, 2008), No. 08-5252 (W.D. Wash. filed Apr. 29, 2008), No. 08-81 (E.D. La. filed Apr. 29, 2008).

290 In 2005, Evergreen International, S.A. pled guilty to a 25-count Information in a multidistrict vessel case involving APPS as well as obstruction of justice and false statement charges, paid a $15 million dollar criminal fine, and made $10 million dollars in community service payments. United States v. Evergreen Int'l, No. 2:05-cr-00238-TJH, judgment at 1–3 (C.D. Cal. filed Apr. 20, 2005).

291 Section 8B1.2 of the Guidelines provides that a remedial order may be imposed as a condition of probation to remedy the harm or eliminate or reduce the risk of future harm from the offense. This

The terms of these ECPs have included employee training and hot lines, vessel audits, court-appointed monitors, and the installation of updated pollution prevention equipment.[292] In other cases, where the defendants have chosen not to implement ECPs, the plea agreements have banned the defendants' vessels from U.S. ports for the term of probation.[293] For example, after a jury conviction and a court imposed fine of $4.9 million dollars in the *Ionia* case, the court prohibited the defendant's vessels from returning to U.S. ports until the corporate operator had installed certain pollution prevention equipment on board all of its vessels.[294]

Despite these substantial criminal fines and the publicity that accompanies them,[295] the Coast Guard continues to discover and refer new vessel cases on a steady and frequent basis to the U.S. Justice Department. Unfortunately, the level of noncompliance with MARPOL remains unacceptably high, especially among operators of general cargo vessels that tend to have tighter operating budgets and earn low freight rates, leading to a greater temptation to cut all costs that do not directly endanger navigation.[296] Apparently, the corporate operators of these vessels are either willing to take the risk of getting caught in order to continue to keep compliance costs low as a way of doing business, or are unwilling to overcome an historic lack of environmental compliance prevalent in the industry culture.[297] Therefore, the U.S. Justice Department has responded with a two-pronged approach that has involved the prosecution of both the corporate ship operators and chief engineers or other supervisory crew members as the best way of changing the noncompliance culture and increasing deterrence within the shipping industry.[298]

Some may argue that it is not fair to prosecute engineers for these violations, when corporate operators place them in the position where dumping the oily wastes is inevitable, by failing to provide them with sufficient resources, personnel, and facilities to manage and dispose of the wastes properly. In other words, engineers

provision also authorizes trust funds to be created by the organization to address any expected harm. *See also* U.S.S.G., *supra* note 7, § 8D1.4 (detailing list of additional recommended conditions of probation including publicizing nature of offense committed by organization, punishment imposed, and steps taken to prevent recurrence).

292 *See, e.g.*, Plea Agreement at 7–13, United States v. Overseas Shipholding Group, No. 1:06-cr-00065-TH (C.D. Cal. filed Jan. 23, 2007) (indicating Overseas Shipholding Group agreed to provide funding for environmental restoration projects in each of the five districts where offenses occurred).

293 *See, e.g.*, Plea Agreement at 4–6, United States v. Accord Ship Mgmt. Ltd., No. 3:07-cr-00390-GAG (D.P.R. filed Sept. 20, 2007) (banning Accord Ship Management vessels from the United States for three years).

294 United States v. Ionia Mgmt., S.A., No. 3:07-cr-00174-JBA (D. Conn. filed Dec. 18, 2007). The $4.9 million fine imposed by the district court was upheld by the Second Circuit as "substantively reasonable." United States v. Ionia Mgmt., S.A., Nos. 07-5801-cr, 08-1387-cr, 2009 WL 116966, at *6 (2d Cir. Jan. 20, 2009).

295 Press releases from the U.S. Department of Justice, Environment and Natural Resources Division can be found at http://www.usdoj.gov/enrd/News.html (last visited Jan. 24, 2009).

296 COST SAVINGS, *supra* note 19, at 38.

297 *See id.* at 49, 52 (noting fines of $165 to $558 per day may not be seen as deterrence, but as a cost of doing business); Ken Olsen, *Someone Will Report, Guidance for Crewmembers*, PROCEEDINGS OF THE MARINE SAFETY & SEC. COUNCIL: THE COAST GUARD J. OF SAFETY AT SEA, Winter 2004–2005, at 48–49 (stating that a ship crewmember should report a violation if he determines the master of vessel has made illegal discharges).

298 *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.200 cmt.B, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#FN1 (last visited Jan. 25, 2009).

have the Hobson's choice of losing their jobs if they do not dump or going to jail if they do.[299] This argument fails to recognize that these violators are highly trained, educated, licensed engineers who are well aware of the MARPOL prohibitions, have a duty to comply with the law, and yet knowingly and intentionally violate it.[300] Further, although the corporate operators of these vessels may place the engineers in a position where oil dumping is difficult to avoid, it is their choice to falsify the ORBs, lie to the Coast Guard, order subordinate crew members to lie to the Coast Guard, destroy evidence, and take other actions to conceal these MARPOL violations. It is these wrong choices that ultimately get engineers charged with federal offenses.

Others may argue that jail time of several months or even up to a year is not sufficient punishment for an engineer who knowingly, intentionally, and repeatedly dumps large amounts of waste oil into the world's oceans. This argument also misses the point, because the sentences for these individuals can involve an order banning them from returning to the United States.[301] Since the United States is one of the largest commercial shipping hubs, an engineer's ability to obtain employment could be severely impacted if he or she could not sail on vessels bound for the United States. In addition, the felony conviction itself may have adverse impacts on an engineer's license.

The *Abrogar* decision may well be hailed as a victory for the defense bar. In the final analysis, however, the victory was a pyrrhic one, because there are statutes in addition to APPS with Guideline provisions that can be used to authorize jail time sentences against chief engineers and other supervisory crew members who pollute the world's oceans with oily wastes.

299 *See* Homer, *supra* note 29, at 173 (noting that "for foreign crew members detained in the United States after doing something they felt compelled to do, any incarceration must seem unjust").

300 For example, MARPOL and APPS both have provisions requiring the notification of the Coast Guard and other port authorities whenever a discharge of oil from a vessel has occurred. *See* Act to Prevent Pollution from Ships, 33 U.S.C. § 1906 (2000) (stating master of ship shall report discharge or presence of oil in manner prescribed by Article 4 of MARPOL); 33 C.F.R. § 151.15 (2007) (stating master of vessel must report particulars of incident without delay to fullest extent possible); MARPOL 73/78, *supra* note 44, at 27–29 (laying out basic duty to report, when reports need to made, contents of report, and reporting procedures).

301 *See, e.g.*, United States v. Chang-Sig O, No. 2:06-cr-00599-SDW, judgment at 3 (D.N.J. filed Jan. 30, 2007) (prohibiting defendant from seeking employment as engineer, or in any supervisory position, aboard any ship or motor vessel that travels in navigable waters of the United States); United States v. Francisco M. Sabando, Jr., No. 3:07-CR-391-001 (GAG), judgment at 4 (D.P.R. filed Sept. 20, 2007).