

U.S. Appellate Court Sides with Coast Guard and DOJ in Long Awaited MARPOL Decision

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A US appellate court has struck down a lower court ruling that could have removed at least one of the US government's primary weapons in prosecuting foreign flag vessels and crew members for violations of MARPOL, the international pollution convention that regulates operational discharges from ships. Since 2003, the U.S. Department of Justice ("DOJ") has prosecuted approximately 80 ship owners and managers and 59 crew members for MARPOL related violations.

On June 30, 2008, the U.S. Court of Appeals for the Fifth Circuit reversed a lower court ruling out of the Eastern District of Texas and held that the DOJ may prosecute the owner of a foreign flag vessel and vessel personnel under the Act to Prevent Pollution from Ships ("APPS") for failure to maintain an accurate oil record book ("ORB"), even though the false entries were made at the time the illegal discharges occurred on the high seas, outside US jurisdiction. (*United States v. Jho* (No. 06-41749)). Following the majority of lower court decisions analyzing the same jurisdictional issue, the Circuit Court acknowledged that the act of making the false entry occurred outside of US jurisdictional waters, but ruled that the APPS violation occurred when the vessel called on a US port, at which point the vessel "maintained" an ORB that contained entries which the chief engineer knew to be false. The Circuit Court's decision fully validates the US government's assertion that APPS imposes an affirmative duty upon a foreign-flagged vessel to ensure that its ORB is accurate upon entering US ports, even though the illegal discharge occurred outside US waters.

The DOJ's assertion of its jurisdictional authority in connection with the APPS count had been upheld in prior cases, and as we reported at the time of the *Jho* decision, the District Court ruling was an outlier. Several of the U.S. District Courts that had considered the issue, including the Southern District of Florida, the District of Maine and the District of Connecticut, held that it is the act of maintaining a false ORB when entering US waters, not the discharge itself, that provides the basis for jurisdiction.

The lower court ruling in the *Jho* case was widely reported in the trade press as a major set-back in the US government's long string of successful MARPOL prosecutions; however, the APPS violations for false ORB entries typically are only one of a panoply of other criminal charges (including false statements, obstruction and conspiracy). The jurisdictional basis for the accompanying charges, all of which occur in the US, are well established. For example, in *Jho*, the government charged defendant ship owner Overseas Shipholding Group and defendant Chief Engineer Kun Yun Jho with 10 counts in connection with illegal discharges of oily waste on the high seas: one count of conspiracy,

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one count of making false statements to Coast Guard officials; and eight counts of knowing failure to maintain an oil record book.

The Fifth Circuit's decision is a significant victory for the DOJ and leaves the government's arsenal of legal tools for prosecuting ship owners and crew for MARPOL violations intact. While not binding on federal courts outside of the Fifth Circuit (which includes Texas and Louisiana), the Fifth Circuit's affirmation of the government's jurisdiction to prosecute APPS violations is likely to stand and influence other trial level and appellate courts across the country. Not only is the Fifth Circuit particularly influential with respect to maritime cases, but the clear logic of its ruling is difficult to refute. The Circuit Court noted that, if it accepted the lower court's logic, "a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters," thereby frustrating Congress' "clear intent under the APPS to prevent pollution at sea according to MARPOL."

The message to vessel owners and personnel alike is that the DOJ retains its full set of prosecutorial tools, and to the extent they may have been dulled by the lower court's decision in *Jho*, they have been re-sharpened.

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