

Managing Environmental Law and Regulation in Shipping Lloyd's Maritime Academy

United States Environmental Law and Regulation Affecting the Maritime Industry

April 22, 2008

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April 22, 2008

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U.S. Environmental Law

- Developed, administered, and enforced at three levels of government
 - Federal
 - State (50)
 - Local (county, city) (thousands)
 - Port Authorities
- Significant amount of private (NGO) enforcement
 - Class actions
 - Citizen suits

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The US Federal Structure

- Federal government (national) has limited powers
- All powers not granted to federal government are reserved to states
- States determine scope and extent of local powers
- Some states preempted from enforcing certain laws due to
 - need for national uniformity
 - International/foreign policy needs

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National System of Laws and Regulations

- United States Constitution
- Laws (statutes) passed by US Congress and signed by President
 - Sets basic standards for laws
 - Creates agencies to administer laws
 - Gives authority to agencies to develop regulations
- Regulations issued by agencies
- Policies and guidances issues by agencies
- Court decisions interpreting and applying laws, regulations and policies

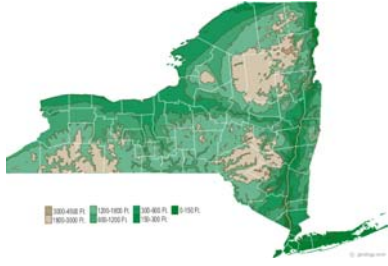
State System of Laws and Regulations

- State constitutions
- Laws (statutes) passed by State Legislatures and signed by state governors
 - Sets basic standards for laws
 - Creates agencies to administer laws
 - Gives authority to agencies develop regulations
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National System of Laws and Regulations



State System of Laws and Regulations



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7

State System of Laws and Regulations



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8

U.S. Environmental Law: Federal

- Primary focus of this presentation
- Laws developed and enacted by U.S. Congress
- Implemented primarily by several federal agencies
- Department of Justice and United States Attorneys provide enforcement support
- States can 'share' responsibility for enforcing some federal laws if authorized by Congress and approved by appropriate agency

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9

Federal Agencies With Regulatory Authority Relating to Environmental Protection

- United States Environmental Protection Agency
- United States Coast Guard
- National Oceanographic and Atmospheric Administration (NOAA)
- National Park Service
- National Transportation Safety Board (NTSB)
- Department of Homeland Security

US Environmental Protection Agency

- *Clean Water Act* – discharge of pollutants into 'waters of the United States'
- *Clean Air Act* – emissions of air pollutants
- *Resource Conservation and Recovery Act* (waste disposal) – treatment, storage and disposal of 'hazardous waste'

United States Coast Guard

- Act to Prevent Pollution from Ships
- Nonindigenous Aquatic Nuisance Prevention and Control Act

National Oceanographic and Atmospheric Administration (NOAA)

- Oil Pollution Act
 - Acts as trustee for natural resource damages caused by discharge of oil into navigable waters
 - National Resource Damage Assessment and Restoration Advisory Committee
 - <http://restoration.doi.gov/faca.html>

National Park Service

- Park System Resource Protection Act

National Transportation Safety Board

- Separate government agency
- An investigator, not a regulator
- Works closely with Coast Guard on Marine accidents
 - *New Delhi Express* grounding, Kill Van Kull Waterway, New York Harbor, April 15, 2006
 - Collision of *Columbus Canada* and *Black Sheep*, Galveston, TX, December 21, 1998
- http://www.nts.gov/Publictn/M_Acc.htm

Department of Homeland Security

- Chemical Facility Safety

Federal Agencies with Authority to Bring Legal actions to Enforce Environmental Laws

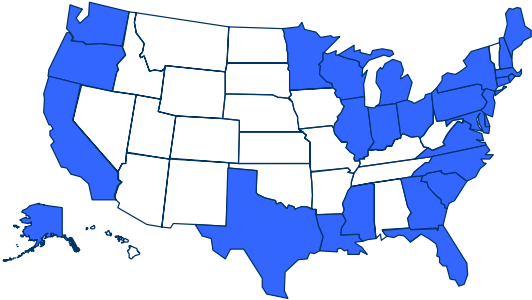
- United States Department of Justice
Environmental Division
- Offices of United States Attorneys

U.S. Environmental Law: State

- States have their own inherent authority to protect the environment using their 'police power'
 - California Oil Spill Prevention and Response Act
- States can also enforce the federal law under federal statutes (e.g., CWA Section 402)
- Some state regulation may be preempted by federal law (e.g., Clean Air Act and California Marine Vessel Rules)

States with significant port facilities

- Atlantic: Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida
- Gulf: Florida, Mississippi, Louisiana, Texas
- Great Lakes: Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota
- Pacific: Alaska, Washington, Oregon, California



Preemption of State Air Pollution Laws by Federal Law (Marine Engines)

- Clean Air Act, *inter alia*, permits the regulation of emissions from engines (including marine engines)
- CAA also permits California to seek authorization from EPA to develop standards related to the control of emissions
- Without seeking authorization from EPA, California promulgated regulation of emissions from auxiliary diesel engines
- Ninth Circuit held that California regulations, without authorization, were preempted by Clean Air Act

Pacific Merchant Shipping Assoc. v. Goldstone, 2008 U.S. App. LEXIS 4171 (9th Cir. 2008)

Why Worry About Environmental Enforcement?

- Profits
- Publicity
- Penalties
- Prison

Kinds of Enforcement Mechanisms

- Administrative
- Civil
- Criminal
- Citizen suits

Remedies Available Through Enforcement Mechanism

- Penalties and fines
 - Clean Water Act – \$32,500 per violation per day
 - Oil Pollution Act – \$25,000 per violation per day
- Injunctive Relief : a court order requiring that something be done in the future to prevent violations
- Prison
- Disgorgement of profits
- Remediation

Remember:

These enforcement tools are available to federal *AND* state authorities

U.S. Environmental Law: Administrative Enforcement

- Agencies empowered to assess penalties without filing a complaint in court
- Cases heard by agency employee called hearing officer or Administrative Law Judge
- No jury
- No injunctive relief
- Limited rights when appealed to court
- Lower penalties

**U.S. Environmental Law:
Governmental Civil Judicial Enforcement**

- Department of Justice
 - Clean Water Act
 - Clean Air Act
 - Resource Conservation and Recovery Act (hazardous waste)
 - Oil Pollution Act
 - Marine Protection Research and Sanctuaries Act
 - CERCLA

Governmental Civil Enforcement: General Principles

- Civil cases seek penalties
 - \$203M in civil penalties in 2003
- Orders to assure future compliance
- Remediation of damage
- Strict liability
- Jury trial on liability but not on penalty

Statutory Criteria Governs Assessment of Civil Penalties – CWA

- Seriousness of violations
- Economic benefit of noncompliance
- History of violations
- Good faith efforts to comply
- Economic impact on violator
- Other factors as justice may require

Governmental Civil Enforcement Penalties: Calculation

- Economic Benefit of Noncompliance (BEN MODEL)
 - computes the economic benefit to a violator from delaying or avoiding necessary pollution control expenditures. See 70 Fed. Reg. 50,326 (August 26, 2005)
 - Profits realized from violations
- <http://www.epa.gov/compliance/civil/econmodels/index.html>
- EPA Policy and Guidance Documents
<http://www.epa.gov/Compliance/resources/policies>

Economic Benefit of Noncompliance Resources

- EPA Enforcement Economic Models: <http://www.epa.gov/compliance/civil/econmodels/index.html>
 - **BEN Model:** calculates violator's economic savings in delaying or avoiding pollution control measures

Governmental Civil Enforcement Penalties: Examples

- *United States v. Pearl Shipping Co.* – \$1.4M in civil penalties to settle claims arising from M/T Command oil spill
- *United States v. Icicle Seafoods, Inc.* – \$900,000 in civil penalties to settle claims arising from illegal discharge of pollutants

Governmental Civil Enforcement Restitution and Remediation: Natural Resource Damages

- Provides for recovery based on cost of replacing natural resources, the diminution in value of those resources, and the cost of assessing damages
- Slightly different process for various statutes
 - CERCLA – 43 C.F.R. Part 11
 - Oil Pollution Act – 15 C.F.R. Part 990
 - National Marine Sanctuaries Act
 - Park System Resource Protection Act

**Governmental Civil Enforcement
Restitution and Remediation:
Natural Resource Damages
Process**

- Responsible party and trustee work together to assess damage, create recovery plan, and implement recovery
- Assessments involve scientific and economic studies, lead to development of recovery plan
- Responsible parties are often owners and operators of vessels involved in spills and groundings

**Governmental Civil Enforcement
Restitution and Remediation: Natural Resource
Damages: Examples**

- *United States v. Exxon* – \$900M paid to settle claims by the U.S. and State of Alaska for natural resource damages caused by Exxon Valdez
- *United States v. EW Holding Corp.* – \$11.25M paid to settle claims by the U.S. and State of Rhode Island for natural resource damages caused by North Cape oil spill

Criminal Enforcement

- Enforced by DOJ and United States Attorneys
- Two types of criminal offenses
 - Misdemeanors: penalty of up to a year in jail
 - Felonies: penalty of more than a year in jail

**Criminal Enforcement
Intent Standards**

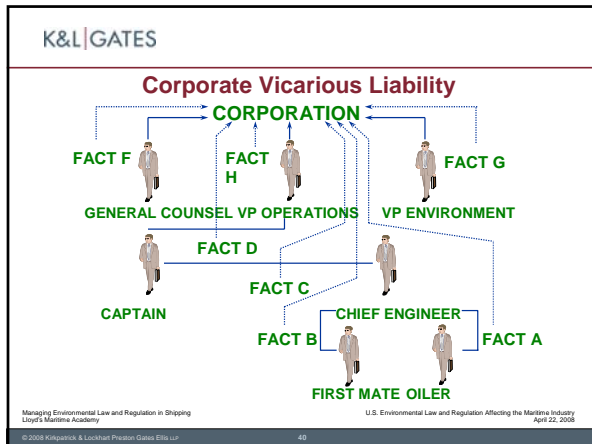
- *Strict Liability* – no intent to violate needed
- *Knowingly* engage in *conduct* that violates a provision
- *Negligence* – unreasonable risk of conduct or result

**Criminal Enforcement
Intent Standards Defined by Statute**

- Clean Air
 - Knowing violations
- Clean Water
 - Knowing and negligent criminal violations
- Migratory Bird Treaty Act
 - Strict Liability

**Criminal Enforcement
Vicarious Liability of Ship Owner/Captain/Supervisors
for Conduct of Crew**

- Responsible Corporate Officer Doctrine
 - Corporate officers may be liable for the acts of their employees where they "stand[] in responsible relation to a public danger"
- *United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997)
 - Held that corporate officers may be liable for sending unseaworthy vessel to sea based on vicarious liability
 - Nevertheless, reversed conviction because evidence was insufficient to support verdict



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Citizen Suit Enforcement

Unique American phenomenon

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Citizen Suit Enforcement

- any citizen may commence a civil action on his own behalf –
 - (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)
- who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation
- or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator

–Clean Water Act, 33 U.S.C. § 1365

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Citizen Suit Enforcement

- Statutes often require that
 - The agency or state has not started its own enforcement action against the offending party
 - The citizen provide notice to the agency or state charged with enforcing the statute
- Statutes often provide for recovery of attorneys' fees and costs if the plaintiff "prevails"
 - Defendants are only entitled to attorneys' fees and costs if the suit is frivolous or vexatious

Citizen Suit Enforcement

"environmental law is written in such a way that a cartel of environmental advocacy groups is formed and maintained through citizen suits."

Benson, "Unnatural Bounty: Distorting the Incentives of Major Environmental Groups," PERC Policy Series, Issue Number PS-37, July 2006 at 9.
<http://www.perc.org/perc.php?id=842>

Citizen Suit Enforcement *Northwest Envir. Advocates v. EPA, No. 03-05760 (N.D. Cal. Filed March 30, 2005)*

- Since 1973, EPA exempted ballast water from the permit requirements of the CWA
 - Ballast water can contain invasive species
- In March 2005, the Northern District of California held that this exemption contravened the express language of the CWA
- In June 2007, EPA announced it was developing a regulatory framework for ballast water discharges
- Legislation has also been introduced in Congress and the states

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THE LAWS

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**Federal Water Pollution Control Act
(Clean Water Act)**

“Except as in compliance with...this title, the **discharge** of any **pollutant** by any person shall be unlawful.”

33 U.S.C. § 1131(a)

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**Clean Water Act :
Definitions**

- Discharge – any addition of any pollutant to navigable waters from “point source.”
- Point source – any discernible, confined and discrete conveyance from which pollutants are or may be discharged
- Pollutant – dredge spoil, solid waste, incinerator residue, sewage, garbage, chemical wastes, industrial waste (excluding sewage from vessels), biological materials, radioactive materials, and heat.

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Clean Water Act: Principles

- "Person" includes corporations, as well as "responsible corporate officers"
- Discharge of pollutants is only lawful when performed in compliance with a National Pollution Discharge Elimination System permit
- Strict Liability for discharge



Clean Water Act: Enforcement

- Administrative orders and penalties of up to \$125,000
- Civil penalties of up to \$32,500 per violation per day
- Criminal penalties
 - Negligent discharge – \$2,500 to \$25,000 and up to one year in jail
 - Knowing violations \$15,000 to \$50,000 and up to three years in jail
 - Knowing endangerment – up to \$250,000 and 15 years for individuals, \$1M for organizations

United States v. M/G Transport Servs.

- Corporation owned tow boats which had dumped oily bilge slops and waste ash overboard, in a manner calculated to avoid detection
- Corporation and chief engineering officer convicted of conspiracy to violate CWA, aiding and abetting discharges of pollutant without a permit

173 F.3d 584 (6th Cir 1999)

Oil Pollution Act of 1990

- Enacted in response to *Exxon Valdez* spill
- Prohibits discharge of oil or hazardous substances in harmful quantities into the waters of the United States or upon adjoining shorelines. 33 U.S.C. § 1321(b)(3).
- Requires vessels to prepare and submit contingency response plans to the Coast Guard.
- Created trust fund for oil spill response

**Oil Pollution Act:
Enforcement**

- Civil penalties – \$25,000 per day per violation (discharge in harmful quantities)
 - Unlike Clean Water Act, cannot avoid liability by seeking a permit
- Criminal penalties under the CWA
- Natural Resource Damages
 - NRD Process under OPA-90 is administered by NOAA. 15 C.F.R. Part 990.

**Oil Pollution Act Cases:
“Magic Pipe” Cases**

- Höegh Fleet Services A/S operated the M/V Höegh Minerva, a ocean freighter
- The vessel was outfitted with an oily water separator, as required by law, to prevent discharge of oil in harmful quantities
- The crew created a system to bypass the separator, called the “magic pipe”
- Operator pled guilty to seven felony charges, fined \$3.5M

**Oil Pollution Act Case:
Barge North Cape**



- On January 19, 1996, the fuel barge North Cape caught fire off the coast of Rhode Island
- Both the tug and the barge ran aground
- 828,000 gallons of No. 2 heating oil spilled into Block Island Sound
- Owners pled guilty to negligent violation of OPA, as well as other charges
- \$9.5M criminal settlement
- \$11.25M natural resource damage settlement

**Comprehensive Environmental Response,
Compensation and Liability Act
(CERCLA)**

- Prohibits discharge of hazardous substances into waters of the United States
- EPA administers process for natural resource damages similar to the process for natural resource damage assessments under OPA-90. 43 C.F.R. Part 11
- Covers non-oil discharges

**Act to Prevent Pollution from Ships
(APPS)**

- Requires compliance with the International Convention for the Prevention of Pollution from Ships ("MARPOL")
- Prohibits discharge of plastic and other garbage from ships
- Vessels are subject to inspection and reporting requirements

Act to Prevent Pollution from Ships Enforcement

- Knowing violation of the Act is a Class D felony – up to \$250,000 fine and **up to six years in jail**
- Civil penalties of \$25,000 per violation



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Refuse Act

- Prohibits any person from throwing, discharging, or depositing from any vessel or from the shore or wharf any refuse matter of any kind into navigable waters of the United States without a permit
- Strict liability crime
- Fines of up to \$2500 and up to one year in jail

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Refuse Act Case: M/V Selendang Ayu



- December 6, 2004, the freighter encountered poor weather off the Aleutian Islands
- Engines failed, and the ship ran aground
- Spilled 340,000 gallons of diesel and bunker fuel
- IMC, a Singapore corporation, paid \$10M criminal penalty for Refuse Act and Migratory Bird violations (both strict liability)
- \$100M in natural resource damages under OPA

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Marine Protection Research and Sanctuaries Act

- Regulates
 - transportation of material from U.S. intended to be dumped into ocean waters;
 - dumping of material transported from outside the U.S. into its territorial waters
- Creates a permitting system for the dumping of waste (administered by EPA) and dredge material (administered by Army Corps of Engineers)
- Provides criminal penalties for dumping without a permit

Review

- **Clean Water Act** – prohibits discharge of *any pollutant* into navigable waters without permit
- **Oil Pollution Act** – prohibits discharge of harmful quantities of *oil* into navigable waters
- **CERCLA** – prohibits discharge of *hazardous substances* into navigable waters
- **APPS** – prohibits discharge of *plastics and garbage* by U.S. flagged vessels or any vessel in U.S. waters (MARPOL treaty)
- **Refuse Act** – prohibits discharge of *any garbage* into U.S. waters
- **MPRSA** – regulates *dumping* of waste and dredge material into U.S. waters

Sending an Unseaworthy Vessel to Sea

- “A person that knowingly sends or attempts to send, or that is a **party to sending or attempting to send**, a vessel of the United States to sea, in an **unseaworthy state** that is likely to endanger the life of an individual, shall be fined not more than \$1,000, imprisoned for not more than five years, or both.” 46 U.S.C. § 10908.
- Note: only applies to U.S.-flagged vessels
- Example: Barge Berman, San Juan, PR

Sending an Unseaworthy Vessel to Sea: Barge Berman



- Fuel barge broke free of its tow and ran aground near San Juan, PR.
- Tow line was defective.
- Tugboat owner's conviction for unseaworthy vessel charge was overturned; no evidence that knowledge of tow line's condition would endanger life.
- Owner still liable for CWA and OPA damages

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64

Incompetent Operators

- Coast Guard regulation prohibits hiring a person as a crew member on a tank vessel where the employer **knows that person to be physically or mentally incompetent.** 46 C.F.R. § 35.05-20.
- This regulation supported criminal charges against Exxon Corporation after the Exxon Valdez spill



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Migratory Bird Treaty Act

- Prohibits killing any migratory bird, or destroying any egg or nest thereof. 16 U.S.C. app. § 701 *et seq.*
- **Does not require that defendant have intended to kill birds or to pollute**
- Penalties of up to six months in jail or a fine of twice the benefit derived from the violation plus twice the loss suffered by another person
- Favorite of criminal prosecutors

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66

Migratory Bird Treaty Act Barge Bouchard 120



- First mate left wheelhouse for extended period while on duty; barge ran aground
- Spilled 98,000 gallons of No. 6 fuel oil into Buzzard's Bay, MA
- U.S. Owner and Operator pled guilty to Clean Water Act and MBTA charges, fined \$10M
- Mate pled guilty, sentenced to five months in prison

National Marine Sanctuaries Act

- Prohibits damage to various specifically enumerated marine sanctuaries in U.S. waters
- Provides for natural resource damages
 - Administered by NOAA; likely to follow regulations for OPA-90 natural resource damage assessments

NMSA Cases: Med Taipei



- February 2004: containership encountered rough seas between Los Angeles and San Francisco
- 15 large shipping containers were lost overboard as vessel traveled through Monterey Bay National Marine Sanctuary; containers were improperly secured
- Owners and operators (based in Italy and Taiwan) settled NMSA claims for \$3.25M

Park System Resource Protection Act

- Prohibits damage to “park resources”
- Includes natural resources as well as man-made resources of the park
- Provides for damage assessment with National Park Service as trustee
 - If the damage to park resources is caused by an oil spill, NPS is likely to follow NOAA's regulations for OPA-90 natural resource damage assessments

PSRPA Cases: Berge Banker and Skaubay

- On February 5, 1995, two Norwegian tankers collided during a lightering attempt in Galveston Harbor, TX
- Approximately 35,490 gallons of crude spilled into the Gulf of Mexico
- Due to damage to National Park resources, DOJ sought civil damages under both OPA and PSRPA
- Operators (based in Bermuda and UK/Houston) paid \$1.6M plus performed restoration projects as conditions of settlement



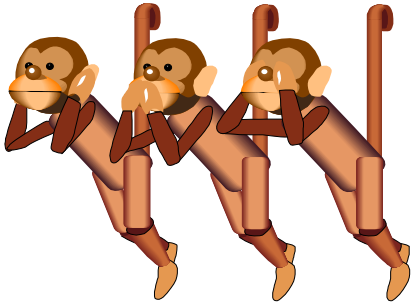
Other Relevant Statutes

- False Statements – 18 U.S.C. § 1001
- Conspiracy – 18 U.S.C. § 371
- Obstruction of Justice – 18 U.S.C. §§ 1505-1510
- Aiding and Abetting – 18 U.S.C. § 2
- Accessory After the Fact – 18 U.S.C. § 3

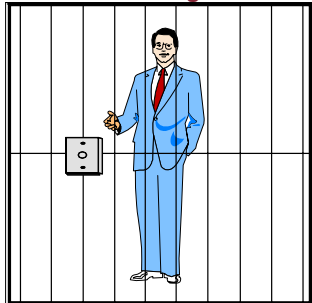
Criminal Knowledge Under US Environmental Laws

Conscious Disregard = knowledge

- “deliberately closed his eyes to what would otherwise have been obvious to him”
- “failing to investigate if he is in possession of facts which cry out for investigation”



Federal Sentencing Guidelines



Base Level Offenses Factors (cont.)

- Base Level for an Environmental Violation: 8
- Possession of 250 grams of marijuana: 8
- Murder: 43
- Robbery: 20

Applying the Guidelines

Nature of Offense	Increase/Decrease Offense Level
Offense involving a toxic waste	8
Increase based on noncontinuous violation	+4
Increase based on permit violation	+4
Decrease because defendant pled guilty/cooperated	-2
Total value assigned to offense	14

Applying the Guidelines (cont.)

Cooperate by pleading guilty -2

Applying the Guidelines (cont.)

Downward Adjustment: -2
Criminal History 1

SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71

Thank You!

Questions?

1400 Lawyers, 22 Offices, 3 Continents

Global Financial & Commercial Centers:
New York, London, Hong Kong, California

Europe:
More than 150 lawyers in London and Berlin

World Capitals:
Washington D.C., London, Beijing, Berlin

Asia:
More than 50 lawyers in Beijing, Taipei and Hong Kong



Maritime Practice

- Maritime Finance
- Maritime Regulatory Issues
 - Coast Guard
 - US Department of Transportation/Maritime Administration
 - Department of Homeland Security
 - Federal Maritime Commission
 - Environmental Protection Agency (EPA)
- Litigation
 - US Environmental Protection Agency
 - US Department of Justice
 - Maritime Arbitrations

Environmental and Natural Resources Practice

- Enforcement
 - Civil – Administrative – Criminal
 - State and Federal
 - Citizen Suits
 - Audits and Investigations
 - CAA, CWA, OPA, RCRA, FIFRA, TSCA
- Natural Resources
 - Endangered Species
 - Mineral/Energy Resources
 - Coastal Zone Issues
- Permitting - Development - Transactions -Land Use

Washington, DC Office

- Comprises approximately 220 lawyers and policy professionals in a wide variety of practice disciplines.
- One of the twenty largest law offices in Washington, DC and services clients throughout the United States as well as internationally.
- Over 20 professionals specializing in Maritime Law, Regulation and Legislation.

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