"New and Old Initiatives: Hazardous Materials Transportation,
Maritime Cases, Chronic Violators"

MARITIME POLLUTION PROSECUTIONS - A DEFENSE PERSPECTIVE

ALI-ABA, *Criminal Enforcement of Environmental Laws*
Washington, D.C.
September 30, 2004

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I. Introduction

Beginning in the 1990's, the Department of Justice began prosecuting owners and operators of ocean going vessels for marine pollution violations that occurred on the high seas. The earliest cases that attracted substantial publicity involved prosecutions of Royal Caribbean Cruise Lines and Holland America Lines. Since then, the government has prosecuted more than a hundred similar cases on all three coasts of the United States. In this paper we provide an introduction to these prosecutions and the issues that arise in them

II. International Regulation of Maritime Environmental Matters

The key player in international maritime safety and environmental regulation is the International Maritime Organization (IMO), a United Nations organization. The IMO was responsible for development of the MARPOL Convention on marine pollution. That international agreement set rules for the management of shipboard wastes including garbage and oil waste (bilge water and sludge). MARPOL created a multi-level program of regulation and administrative inspection by government and private parties. The regulatory program is described in the attached sentencing memorandum, filed in *United States v. Höegh Fleet Services* in June 2004. (Exhibits and appendices to the sentencing memorandum have been omitted because of their length.)

III. MARPOL Enforcement

Under Article 4 of MARPOL, each signatory state must establish sanctions for violations of the Convention by ships of its flag “wherever the violation occurs.” If a flag state receives information that one of its vessels has violated the Convention, it “shall

cause" proceedings to be initiated "in accordance with its law." The penalties "shall be adequate in severity to discourage violations . . . and shall be equally severe irrespective of where the violations occur." If a violation is detected by a port state other than the flag state, the state discovering the violation may refer the matter to the flag state or "cause proceedings to be taken in accordance with its law . . ."

Article 6 appears to create a preference for enforcement by flag states rather than by port states at which foreign ships call. Nonetheless, in 1992 the United States government declared that it no longer would refer matters to flag state authorities under Annex V of the Convention (relating to garbage disposal). Instead it would proceed under U.S. law where it had jurisdiction.

The United States has been the most aggressive party to MARPOL in its enforcement efforts. Recently it has endeavored to persuade other countries to increase their enforcement efforts. It has done so through Interpol, through the IMO and by offering training to foreign prosecutors and investigators.

IV. The Common Fact Pattern

A majority of the cases prosecuted in the last several years involve discharges of waste oil or bilge water on the high seas, usually during an ocean crossing. As in most criminal cases, the recurrent questions are how was it done, by whom and why.

Every ship is equipped with all sorts of pipes, hoses and pumps needed to move materials about the ship, between ship and shore or between the ship and the sea. Moving a quantity of sludge or bilge water to the sea can be accomplished as simply as dropping the end of a fire hose into a tank and using a portable pump to force the liquid overboard. Or it may be accomplished by using the ship's existing waste piping but "bypassing" the oil

water separator and/or the oil content meter. If a ship's crew decides that it wants to discharge illegally, there are many ways to do it. Rarely is an illegal discharge on the high seas observed by law enforcement authorities, although the United States did use aerial surveillance in the Royal Caribbean investigation and some ships have been caught by U.S. and Canadian fisheries patrol aircraft.

Most prosecutions have developed as a result of MARPOL inspections at U.S. ports. The Coast Guard has become adept at finding telltale signs of unlawful discharges aboard the ship, as discussed in the sentencing memorandum attached.

In most of the cases prosecuted, the principal actor has been a ship's engineer assigned the responsibility for waste management and use of the waste disposal equipment. Those individuals have been prosecuted but prosecutions of their superiors, aboard ship or ashore, have been rare, reflecting the fact that their superiors have not been involved in violating the law. Consistently we hear in these cases that the responsible engineer caused his crew to conceal the illegal activity from the ship's chief engineer and captain and from the array of inspectors who periodically visit the ship.

Similarly, prosecution of junior engine room crewmen has been rare, as the government generally provides them with immunity in return for their testimony. Consistently we have heard that junior crew members were ordered to assist in illegal practices, knew their conduct was illegal and would result in loss of their jobs, but went along because they were afraid of the engineer who was their immediate supervisor. The attached sentencing memo reflects the fears expressed by crewmen in that case.

There are competing theories of why these violations occur. The government maintains that ship owners and operators benefit financially from such violations, in saving

the costs of maintaining or replacing processing equipment or the costs of shoreside disposal. There have been some prosecutions in which waste disposal equipment aboard a ship was broken down beyond the crew's ability to repair it, and where the owner or operator refused to repair or replace equipment or authorize shoreside disposal. In the majority of cases, however, the ships had fully functional waste disposal equipment (as certified by port state and classification society inspectors) and adequate storage capacity. In the majority of cases the crews were educated on the law, trained in the proper methods of waste handling and warned of the consequences of acting illegally.

The facts in the *Höegh Fleet Services* memorandum are typical. Discharging waste illegally can be faster and easier for the crew than using the IMO-approved equipment for that purpose. In the attached sentencing memorandum we set out the crew's testimony about why the violation occurred aboard this ship. With the exception of the engineer who ordered the illegal discharges (and who sought a USSG § 5K1.1 departure for cooperation against his employer), the crew said the equipment was in working order but it was easier to pump bilge water over the side rather than process it. The government's theory was that the crew was too small in number[1] and that they had too much work to do, leading them to find shortcuts. Yet when the question was posed in depositions, the answer was that it allowed the responsible ship's engineer "more time to rest."

[1] Crew size is governed by international law. Each vessel sails with a "minimum manning certificate" that dictates the minimum number of crewmen required to operate the vessel.

V. Statutes Used in Prosecutions

Prosecutions in these cases have involved the use of three principal statutes: 18 U.S.C. § 1001 (the False Statements Act), 33 U.S.C. § 1908 (Act to Prevent Pollution from Ships (APPS)), and 18 U.S.C. § 1519 (the Sarbanes-Oxley Obstruction of Justice provision). A sample indictment is attached. Legal issues with these statutes abound, including questions of jurisdiction and the applicable units of prosecution, but for the most part have not been litigated.

Section 1001 prohibits making a false statement to a government agency and it prohibits making or using a false document. MARPOL requires the maintenance aboard ship of a log book called the Oil Record Book. MARPOL requires that a crew log its discharges of waste oil and bilge water in that book. During a port state MARPOL inspection, the Coast Guard routinely asks for and reviews the Oil Record Book. "Presenting" a false record to the Coast Guard clearly is a violation of section 1001. But the government takes a more expansive view of the law, and has charged cases on the theory that entering the United States with a false or incomplete Oil Record Book violates § 1001, even if the Coast Guard does not review it. That issue has not been litigated to conclusion to date. The government also takes an expansive view of the unit of prosecution. It has asserted that if a ship enters the United States in one district and proceeds to other districts thereafter, it can be prosecuted in each for the same record book problem, even if the Coast Guard does not review it.

Section 1908 makes it a crime to violate "the MARPOL Protocol,, [sic] . . . this chapter, or the regulations issued thereunder . . ." The jurisdictional reach of the statute has not been addressed by the courts. Again, taking an expansive view, the government

has asserted that the law and its penalties apply even to a ship flagged to a nation that is not an MARPOL party.

Two obstruction of justice theories have emerged in these cases, especially after passage of Sarbanes-Oxley. Aboard ships on which there has been illegal discharge activity, there has also been an effort to conceal the activity from inspectors – port state authorities, classification societies or company inspectors – who may come aboard in port. Pipes used to bypass the oil water separation equipment is hidden, log books are "cooked," and physical evidence is cleaned up before the ship enters territorial waters at the end of its voyage. This conduct does appear to fall within 18 U.S.C. § 1519 although it appears not to be a violation of earlier obstruction statutes because there was no pending investigation at the time of the conduct.

The second obstruction theory is the classic witness intimidation scenario. It too is illustrated in the attached sentencing memorandum. In that case, despite the manager's instructions to the crew to tell the truth if crewmen elected to speak with the Coast Guard, the responsible engineer directed them to lie and conceal their activity.

VI. The Course of the Investigation and Prosecution

Most of these cases begin with a Coast Guard inspection of a ship. The inspection may be predicated upon the port state's authority to conduct MARPOL inspections or it may be predicated upon a whistle blower's "tip."[2] Fourth Amendment issues are presented by

[2] The Act to Prevent Pollution from Ships allows the court, on government motion, to reward a tipster with up to half the fine imposed. In August 2004 an informer in the OMI prosecution received $2.1 million.

the scope and nature of the Coast Guard activity aboard the vessel.

If evidence of an MARPOL violation is found, the government delays the ship's departure, creating serious problems for the ship's operator. Although Article 7 of MARPOL requires "[a]ll possible efforts . . . to avoid a ship being unduly detained or delayed . . ." serious delays have resulted. The government either arrests the ship's engineering crewmen as "material witnesses" or forces the company to leave them behind as a condition of allowing the ship to sail. In either event the ship is delayed while a replacement crew is located or recruited and brought to the United States.

Second, under APPS, the government has the authority to demand "the filing of a bond or other surety satisfactory to" the government if the ship's operator is "liable for a fine or civil penalty . . ." 33 U.S.C. § 1908(e). In recent cases the government's has demanded multiple millions of dollars in financial security before allowing a vessel to depart. Just arranging a bond, if a company can afford it, takes time. The government also has demanded litigation concessions under the guise of a "security agreement"[3] before it will allow a ship to depart. For example, such agreements have required the ship's owner or operator to agree to pay for food and lodging for people whom the government has detained in the United States, even if they have been arrested as material witnesses. It has required companies to stipulate, before any charges have been filed, to the admissibility of documents and materials seized by the government and to waive objections to *in personam jurisdiction* over the company. And the government has even required that the companies pay full salaries, for the duration of the litigation, to crew members who

[3] Because the security agreements do not become part of the public record, we have not provided an example.

violated company policies and the law in illegally discharging waste from the ship.[4]

While ship owners and operators and their lawyers bridle at the imposition of such conditions under the guise of a statutory bond provision, no company to date has had the ability to tie the ship up in port long enough to litigate the security issues in district court.

The security agreement marks only the beginning of the government's pressure on a ship's owner and operator. Consider the statement of one Assistant U.S. Attorney on what awaited a company if it rejected the government's settlement demand.

> In the event the parties are unable to reach a pretrial resolution of this matter, the U.S. Attorney's Office will broaden its investigation to include the disposal practices of all [company] vessels that have made port calls in this District. The investigation likely will include company-wide and fleet-wide subpoenas on a wide range of pertinent matters. As a result of this litigation, the Coast Guard Investigative Service for this Region also has a heightened interest in [company] vessels and, with the assistance of Coast Guard Marine Safety Offices throughout the country, will closely monitor all [company] vessels which make future U.S. port calls.

The company gave in to that pressure rather than face continuing and severe disruption of its ships' schedules and the huge cost of subpoena compliance. In a later case, the government went further, initiating investigations simultaneously in multiple districts, then offering a package resolution to end all of them. Given the profit margins at which operators and charterer's do business, few if any can afford such massive litigation expenses. That is why so few of the many legal issues presented in these cases have

[4] In stark contrast, the Thompson Memorandum on prosecuting corporations says "a corporation's promise of support to culpable employees . . . through retaining the employees without sanction for their misconduct . . . may be considered by the prosecutor [as weighing against the company.]

been heard by a court.

At the same time, the government has offered or given 5K1.1 motions for reduction of sentence to the engineering personnel who broke the law and large cash rewards to other crew members who were aware of the misconduct and failed to report it to their ship's captain. The effect is counterproductive. The government should work with the industry to find better ways to identify and remove sailors who have violated pollution policies and laws. Instead, engineers who have been convicted of MARPOL violations are free to apply for a job with another company. They do not lose their licenses to sail; there is no central record of offenders. Some likely will offend again, victimizing their subordinates and the companies for which they work.

Except for financially marginal companies, ship operators and managers have invested heavily since the 1990's in upgrading equipment, developing new technology for waste treatment and crew training. The government's enforcement program victimizes them in situations where their trust already has been abused by errant employees. The government should instead work with the industry to find better ways to police crewmen who would violate MARPOL and company rules and deter them.

Exhibit

1

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. HÖEGH FLEET SERVICES, Defendant.	No. CR03-5765 RBL DEFENDANT HÖEGH FLEET SERVICE'S SENTENCING MEMORANDUM

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I. Introduction

Höegh Fleet Services has acknowledged that the second engineer aboard the Höegh Minerva violated international pollution control laws, company policies and U.S. law. It has accepted responsibility for his conduct as an employee. Its analysis of the violations leads it to believe that it and the second engineer's subordinates were victims of a second engineer who took "shortcuts" in required waste disposal practices in search of "faster and easier" ways of discharging his duties. In doing so, the second engineer abused the trust that the company placed in him, abused his responsibilities to subordinate crewmen and even abused physically one of those crewmen.

The Höegh Minerva met all applicable international standards for the waste disposal equipment and processes. The ship was subject to four levels of inspection from within and outside the company. The crew was fully and properly trained and knew what was required under law and company rules. Procedures were in place for repair of any equipment that failed and for interim measures that could be taken when equipment failed.

Despite the rules set and procedures implemented, second engineer Genovana found ways to defeat shipboard waste disposal systems and rules and to conceal his conduct from his superiors and from outside inspectors. In response to the realization that "the system can be beaten," Höegh Fleet Services has adopted new procedures to protect itself, its employees and the environment against further incidents. But the reality is that no company can protect itself completely from an employee who acts contrary to the rules and effectively covers up of what he has done.

In this memorandum we explain the international regulatory scheme and its implementation through inspections by the Höegh Minerva's flag state authority, the international community and the company. (Sections II. and III.) We address Höegh's efforts to go beyond what the rules require (Section IV.) and its renewed efforts after this matter arose. (Section V.) In Section VI. we address the company's policies and training

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of its crew. In Section VII. we offer our analysis of the facts and testimony taken in this matter.

II. International Regulation of Maritime Environmental Matters

The key player in maritime safety and environmental regulation is the International Maritime Organization (IMO). It is a United Nations organization that has been responsible for international conventions on Safety of Life at Sea (SOLAS), the United Nations Convention on the Law of the Sea (UNCLOS) and the MARPOL Convention, among others. (Section II. A.) To implement its safety and environmental rules, the IMO requires that ships operate under the International Safety Management (ISM) Code. (Section II. B.) Each flag state is given the responsibility to ensure that its ships meet the ISM Code's requirements. (Section II. C.) Flag states usually delegate authority on these matters to private organizations called classification societies. (Section II. D.) Under IMO rules, ships are subject to intensive inspection by their managers, by the flag state's approved classification society, and by the port state control authorities of every country at which a ship stops. (Section II. E. and F.)

A. The International Maritime Organization (IMO)

The IMO was created by international convention in 1948 and entered into force in 1958. Article 1(a) of the convention defines the IMO's purposes:

> . . . to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.

In 1973 the IMO enacted the International Convention for the Prevention of Pollution from Ships, which was modified by a 1978 Protocol (MARPOL 73/78 or MARPOL). The agreement addressed accidental and operational marine oil pollution and pollution by chemicals, goods in packaged form, sewage, garbage and air pollution. MARPOL is one of about forty international agreements created by the IMO.

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B. The International Safety Management (ISM) Code

The IMO created the ISM Code in 1994. It became mandatory for passenger ships and tankers in 1998 and for other merchant vessels in 2002. It requires a safety management system (SMS) to be established by the shipowner, manager or charterer (referred to in the Code as "the Company") of a vessel. A company's SMS must establish and implement policies to achieve the Code's objectives. The ISM Code and implementing guidelines were amended in 2002. A copy of the Code may be found at Exhibit 1and the guidelines at Exhibit 2.

The ISM Code is intended to "ensure safety at sea, prevent[ ] . . . human injury or loss of life, and avoid[ ] . . . damage to the environment, in particular to the marine environment and to property." (Section 1.2.1, Exhibit 1.) It requires that every company "develop, implement and maintain a safety management system" that includes "a safety and environmental-protection policy" and instructions and procedures to protect the environment. (Section 1.4, Exhibit 1.) The company must "ensure the policy is implemented and maintained . . ." (Section 2.2, Exhibit 1.) To that end the ISM Code requires company internal audits (Section 12.1, Exhibit 1) and external verification/certification. (Sections 13-15, Exhibit 1.) The guidelines issued by the IMO specify the required content of the SMS. (Guidelines, Section 2, Exhibit 2.)

C. Flag State Responsibilities under the ISM Code

The government of the ship's flag state (called "the Administration") "is responsible for verifying compliance with the requirements of the ISM Code and for issuing" two certification documents. (Guidelines, page 4, Exhibit 2.) The first is called a "Document of Compliance." It is issued to a company "complying with the requirements of" the ISM

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Code. (Section 13.2, Exhibit 1.) Annual "verification" of compliance is required. (Section 13.4, Exhibit 1.) Certification must be withdrawn if there is no annual verification or if the company fails inspection. (Section 13.5, Exhibit 1.) Each ship must have a second government-issued document called a Safety Management Certificate. It "verif[ies] that the Company and its shipboard management operate in accordance with the approved safety management system." (Section 13.7, Exhibit 1.) The certificate requires periodic government inspection and validation. (Section 13.8, Exhibit 1.) It may be withdrawn if there is a deviation from the plan that poses a serious risk to the environment. (Section 13.9, Exhibit 1.)

Details of the external verification process required by the IMO are contained in the guidelines at Section 3. They require interviews, examination of documents and observation of activities and conditions. A written audit report must be prepared. Corrective action must be taken as needed.

D. Delegation of Flag State Authority to Classification Societies

The ISM Code expressly permits a flag state administration to delegate its responsibilities under the Code to "an organization recognized by the Administration." (Section 13.3, Exhibit 1.) The IMO issued rules for delegating authority and the manner in which delegated authority must be exercised. (IMO Resolutions A.739(18) and A.789(19).) Most flag states have delegated their responsibilities to classification societies.

> Classification societies are "organized societies which undertake to arrange inspections and advise on the hull and machinery of a vessel . . ." [Citation omitted.]

Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp., 346 F.3d 530, 533 (5th Cir. 2003). In the United States, for example, the flag state administration (U.S. Coast Guard) has delegated

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its responsibility to a classification society named The American Bureau of Shipping. *See*, 46 CFR Part 8. The Coast Guard also recognizes foreign classification societies on a reciprocal basis. *Id.* Of note here is the fact that the United States, through the U.S. Coast Guard, has recognized *Det Norske Veritas* as an approved classification society that may issue required certificates.[1] *Det Norske Veritas* is the classification society that at all relevant times inspected, certified and approved the ISM Code program for the Höegh Minerva.

E. The IOPP Certificate Requirement and MARPOL Regulations

The IMO issued regulations under MARPOL and required all parties to the agreement to enact domestic law enforcing them. Under MARPOL regulations ships as the Höegh Minerva must either retain oily waste aboard, process it at sea or discharge it to a port facility. Oily waste is of two types: sludge and bilge water. Sludge is heavy oil or oil residue that accumulates when fuel or lubricating oil is "purified" before use in a ship's engines, and oil residue that is removed from bilge water. MARPOL allows sludge to be burned in an approved shipboard incinerator. The Höegh Minerva had an incinerator.

Bilge water may be discharged at sea if it is processed through IMO-approved equipment and if the effluent contains less than 15 parts/million (15 ppm) of oil. That equipment includes an oil water separator to process the water and an oil content meter to measure the oil content of its outflow.

[1] A memorandum agreement between the Coast Guard and *Det Norske Veritas* may be found at http://www.uscg.mil/hq/gm/mse/acp/dnv.pdf .

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To assure compliance, the MARPOL regulations require that a vessel must be surveyed periodically. (MARPOL Annex I, Regulation 4.) The survey "shall be such as to ensure that the equipment and associated pump and piping systems, including oil discharge monitoring and control systems, . . . oily-water separating equipment and oil filtering systems, fully comply with the requirements of this Annex and are in good working order." (Regulation 4(1).) If a vessel meets MARPOL requirements, it is issued an International Oil Pollution Prevention (IOPP) certificate. A ship is not permitted to sail without a current IOPP certificate. (Regulation 4(3)(d).)

As with the ISM Code, above, the IMO has placed enforcement of MARPOL regulations in the hands of flag state authorities and port state inspectors. Flag state authorities, with IMO approval (Regulation 4(3)(a)), have in turn delegated their authority to classification societies. Classification societies perform surveys and issue IOPP certificates. Each port state authority is authorized to board a ship in its waters and examine both the IOPP certificate and the equipment to which it applies.

F. The ISM/MARPOL Audit Regime

As discussed above, there are three separate groups of inspection under the IMO's marine protection rules. Ships are inspected by classification societies, by port state control authorities and the companies which manage ships. The inspections are rigorous.

1. Classification Society Inspections

The major classification societies form the International Association of Classification Societies. (http://www.iacs.org.uk/index1.htm) That organization publishes standards to guide the performance of classification society duties. Relevant to present purposes are its standards for ISM Code certification (Exhibit 3) and for qualifying outside auditors who

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conduct certification inspections (Exhibit 4). Review of those documents demonstrates that obtaining the required certificates and keeping them requires successful completion of a rigorous external audit by well-qualified outside auditors.

2. Port State Inspections

To enforce MARPOL, that convention gives authority to every port state to board and inspect vessels that come within its waters.[2] An individual vessel may be inspected several times during a year by port state control authorities in different countries. To illustrate the scope of the inspections, we have appended two U.S. Coast Guard documents to this memorandum.

Exhibit 5 is a chapter from the *USCG Marine Safety Manual* on "General Aspects of Port State Control Examinations." As the Court will see, at Exhibit 5, page D1-7, the threshold inspection is an "annual examination" by the port state authority. "This examination may be expanded as necessary" if "clear grounds" suggest that "a vessel is not in compliance with applicable U.S. laws or international conventions." Additional inspections may be warranted based upon the annual inspection. *Id.*, at D1-8. Problems identified during an inspection are called "deficiencies." More detailed guidance to inspectors on what to examine and how to evaluate a ship is contained in a Coast Guard document titled "D13 MARPOL Exam Job Aide [sic]." A copy may be found as Exhibit 6, attached. It tells inspectors to examine the oil record book, looking for discrepancies and

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[2] Article 6 of MARPOL gives any port state that is party to the agreement the authority to inspect a ship "for the purpose of verifying whether the ship has discharged any harmful substances in violation" of MARPOL. If evidence of a violation is found, the port state is required to furnish the information to the flag state, which in turn is obligated "to investigate the matter. . ."

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recorded discharges greater than the capacity of the ship's processing equipment, and to compare entries in that book to other ship's records. It tells them to examine the ship's piping to look for "Oil where it should not be (i.e. clean side of OWS)." It tells them to determine whether the crew demonstrates an ability to use the processing equipment. In sum, the port state control authorities have authority to ferret out MARPOL violations and they are trained to find documentary and physical indicia of violations.

3. Company Inspections

In addition to port state control examinations and classification society examinations, the Höegh Minerva was regularly inspected by company personnel, about which we provide more information below.

III. REPEATED INSPECTIONS SHOWED NO PROBLEMS WITH OILY WASTE MANAGEMENT ABOARD THE HÖEGH MINERVA

Under the international inspection regime described above, the Höegh Minerva was regularly and thoroughly inspected by port state authorities (Section III.A.), by the *Det Norske Veritas* classification society (Section III.B.) and by Höegh Fleet Services auditors and superintendents. (Section III.C.) No problems were found with the ship's oily waste management in any of those inspections.

A. Port State Inspections of the Höegh Minerva

Between March 2000 and mid-September 2003 (when second engineer Genovana was arrested), the Höegh Minerva was inspected more than twenty-four times by port state authorities. None of the inspections found a "deficiency" in oily waste management under

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MARPOL. Several of those inspections were conducted by the United States Coast Guard.

March 2000	Savannah
July 2000	New York
September 2002	Savannah[3]
September 2002	Norfolk (Annual Inspection)
September 2003	Los Angeles
September 2003	Richmond, CA (Annual Inspection)

Copies of the Coast Guard inspection reports are attached as Exhibit 7.

The ship was inspected by other port state control authorities during the same time period. No deficiencies were found with its oily waste management.

April 2000	Yemen
September 2000	Saudi Arabia
October 2000	Singapore
May 2001	Canada[4]
May 2001	Mexico
June 2001	Saudi Arabia
July 2001	Indonesia
October 2001	South Africa
November 2001	Singapore
November 2001	Indonesia
March 2002	Indonesia
March 2002	Indonesia
June 2002	Italy
July 2002	Indonesia
August 2002	Indonesia
October 2002	Mexico
July 2003	Japan

[3] We were not provided with a copy of the USCG report for this inspection but we did receive a U.S. Coast Guard computer printout that shows a "Vessel Inspection" for that port and date.

[4] The Court may notice that some of the reports show the ship's name as the Max Oldendorff. The Höegh Minerva sailed under that name during a time when it was chartered to another company. During all relevant times it was managed by Höegh Fleet Services.

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Copies of the foreign inspection reports may be found as Exhibit 8. It is important to note that inspection reports are furnished to the company and to regulators and are relied upon as reflecting the true condition of the vessel inspected.[5]

B. Classification Society Inspections

Det Norske Veritas is the classification society responsible for inspecting and approving the Höegh Minerva for IMO purposes. It performed annual surveys of the Höegh Minerva. Exhibit 9 contains the annual survey reports for 2001, 2002 and 2003. At all times the oily waste handling equipment and management was found to be without fault or problem. We invite the Courts attention particularly to the 2002 report which provides a sense of the depth and breadth of these annual surveys.

Based on the annual IOPP survey requirements, *Det Norske Veritas* approved the ship's IOPP compliance and certified

> . . . that the structure, equipment, systems, fittings, arrangements and material of the ship and the condition thereof are in all respects satisfactory and that the ship complies with the applicable requirements of Annex 1 of the Convention.

The IOPP survey and certification in 2003 were done about two months before Genovana joined the ship. (Exhibit 10.)

In addition to the annual surveys and IOPP surveys, *Det Norske Veritas* conducted periodic or special surveys of the Höegh Minerva on twenty-four occasions between May 2000 and mid-September 2003. The volume of reports generated in the course of those surveys is too large to append to this memo; however, they are available if the Court

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[5] Among other places, all port state inspection data may be found in an internationally available database called Equasis.

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wishes to see them. We believe the frequency and scope of contact *Det Norske Veritas* had with the Höegh Minerva demonstrates that the classification society performed its function fully and that Höegh Fleet Services properly relied on its inspection reports. At no time did *Det Norske Veritas* report any suggestion that anything was amiss with the Höegh Minerva's oily waste management.

Similarly, *Det Norske Veritas* annually audited and approved the company for ISM Code compliance and audited and approved the Höegh Minerva for compliance. Exhibit 11 contains the April 2003 audit report and the Documents of Compliance from 1998 and later for the company. It also includes the ship's certifications for 1998 and later.

C. Company Inspections

Under Höegh Fleet Service's ISM Code plan, it conducts an annual internal audit of the ship's Safety and Environmental Management System (SEMS) compliance. The audits usually last for three days but may be completed in 2-4 calendar days.

Exhibit 12 contains the Höegh Minerva audit reports for 2001, 2002 and 2003. The Court will notice several things in them. First, the audit is in depth. It includes scrutiny of matters as varied as navigation chart corrections, location of a first aid manual and the condition of filters in a laundry room. Second, it includes an interview with every crewman.[6] Third, the auditor "writes up" practices or conditions that do not conform to the SEMS. Before he leaves the ship, he and the captain agree on a manner in which problems will be corrected. Fourth, the auditor is required to sign off on corrective action taken. The audit is thorough, detailed, frank in its criticisms and demanding in obtaining prompt

[6] That record shows that during the 2003 audit, second engineer Genovana was interviewed for a half-hour.

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corrections. In none of the internal audits is there a suggestion of a problem in the ship's oil waste management.

Each ship in the Höegh fleet is assigned a superintendent. A superintendent has responsibility for three to five ships, allowing him or her enough time for each. On average, a superintendent visits a ship 5.5 times a year and often sails with the ship between ports to better evaluate the ship and her crew.

IV. HÖEGH FLEET SERVICES WENT BEYOND THE REQUIREMENTS OF LAW IN DEVELOPING AND IMPLEMENTING ITS ENVIRONMENTAL PROGRAM

A. Höegh Fleet Services Implemented the ISM Code for the Höegh Minerva Years before it was Required

Under IMO regulations, the ISM Code did not apply to the Höegh Minerva until July 2002. Höegh Fleet Services, however, adopted its ISM Code plan and had its SEMS plan implemented for the Höegh Minerva in 1998. Exhibit 11.

B. Höegh Fleet Services Voluntarily Adopted a SEP Program in 1996

Before the ISM Code was finalized by the IMO, a number of marine companies voluntarily established similar programs under the auspices of the classification societies. These were called SEP (Safety and Environmental Protection) Management Systems. The company and the Höegh Minerva were certified as compliant with the program in 1996. Exhibit 13.

C. Höegh Fleet Services Voluntarily Adopted the More Strict Requirements of ISO 14001

The International Organization for Standardization is headquartered in Geneva, Switzerland. It is composed of the national standards organizations of 128 countries. *See*, http://www.iso.ch/iso/en/ISOOnline.frontpage. ISO 14001 is a voluntary standard for environmental management systems that was published in 1996. It has been adopted by

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more than 60,000 organizations around the world, including about 3,500 in the United States and 350 in Norway.[7] A good summary of the standard may be found at the United States Environmental Protection Agency's web site.[8]

> The ISO 14001 standard requires that a community or organization put in place and implement a series of practices and procedures that, when taken together, result in an environmental management system. ISO 14001 is not a technical standard and as such does not in any way replace technical requirements embodied in statutes or regulations. It also does not set prescribed standards of performance for organizations. The major requirements of an EMS under ISO 14001 include:
>
> -- A policy statement which includes commitments to prevention of pollution, continual improvement of the EMS leading to improvements in overall environmental performance, and compliance with all applicable statutory and regulatory requirements.
>
> · Identification of all aspects of the community organization's activities, products, and services that could have a significant impact on the enviromment [sic], including those that are not regulated
>
> · Setting peformance [sic] objectives and targets for the management system which link back to the three comitments [sic]established in the community or organization's policy (i.e. prevention of pollution, continual impovement, [sic] and compliance)
>
> · Implementing the EMS to meet these objectives. This includes activities like training of employees, establishing work instructions and practices, and establishing the actual metrics by which the objectives and targets will be measured.
>
> · Establishing a program to periodically audit the operation of the EMS
>
> · Checking and taking corrective and preventive actions when deviations from the EMS occur, including periodically evaluating the organization's compliance with applicable regulatory requirements.
>
> · Undertaking periodic reviews of the EMS by top management to

---

[7] These numbers were taken from the Federal Environmental Agency of Germany. http://www.ecology.or.jp/isoworld/english/analy14k.htm

[8] http://www.epa.gov/owm/iso14001/isofaq.htm

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> ensure its continuing performance and making adjustements [sic] to it, as necessary.

Höegh Fleet Services earned its ISO 14001 certification in 2001 and since then has been subject to annual outside audit of its performance. Exhibit 14 contains the original certification and the most recent recertification.

ISO 14001 requires that a participating company establish and work toward goals that are stricter than the requirements of law. For example, the MARPOL Convention allows discharge at sea of garbage other than plastics. Under its ISO 14001 program, Höegh Fleet Services has eliminated at-sea disposal of garbage other than food waste. Similarly, Höegh Fleet Services has a policy of buying fuel that exceeds legal requirements, and has been making engine modifications in order to reduce air pollution.

Company environmental policies and plans, adopted under the ISM Code and ISO 14001, include the following “Objectives and Targets for 2004" that relate to oily waste management. (A copy of the full objectives statement may be found as Exhibit 15. It includes initiatives on ballast water management, garbage management and freon use, among others.)

- Reduce to a minimum oil and water leaks from machinery and tanks
- Install sludge separators onboard 5 car carriers
- Incinerator, opitmise waste oil burning capacity
- Install bilge water pre-treatment equipment in order to handle emulsions
- Upgrade/renew oily water separators and oil content meter - 15 ppm bilge alarm in order to comply with latest Marpol regulation. (IMO resolution MEPC.60(33).

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- Implement Crew training scheme to give understanding of the MARPOL Law and Regulations, and in the use of the MARPOL equipment.

These Höegh Fleet Services initiatives were begun well before the Höeogh Minerva's problem arose. And they are expensive.

Beginning in 2002, Höegh Fleet Services adopted a practice of using environmentally friendly anti-fouling paint. All ocean going ships are painted with an anti-fouling paint below the water line to prevent the buildup of marine organisms on the hull. The traditional paints are toxic to marine organisms. In lieu of those paints, Höegh Fleet Services uses a silicon coating. The cost is about $100,000 per ship/application greater than using a traditional paint.

Beginning in 1995, Höegh Fleet Services embraced the use of sludge purifiers. The equipment very substantially reduces the amount of sludge that must be burned aboard ship or disposed of at port. All ships built for Höegh Fleet Services after 1995 were ordered with that equipment. Existing ships are being upgraded. In 2003, sludge purifiers were installed in five ships at a cost of about $70,000 each.

Freon is used in the marine industry for cooling. Recognizing the environmental damage that results from freon leakage, Höegh Fleet Services began a program to reduce freon consumption. In 2002, as a result of that program, freon use was reduced by more than 40%.

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V. ADDITIONAL MEASURES IMPLEMENTED AFTER THE HÖEGH MINERVA INCIDENT

Exhibit 16 is a chart summarizing additional environmental initiatives taken after the Höegh Minerva incident. As the Court will see, they include additional inspections of expanded scope, coupled with extra training for superintendents who conduct those inspections, additional equipment changes and improvements of $80,000 per ship for new and experimental technology to facilitate waste management and develop "failsafe" devices which cannot be defeated by crew members, review of procedures and intensified training of all crews.

VI. HÖEGH FLEET SERVICES AND THE HÖEGH MINERVA

A. Höegh Fleet Services

Höegh Fleet Services is a Norwegian corporation that provides technical management to vessels owned by Leif Höegh & Co. Shipping, which is also a Norwegian corporation. The Leif Höegh & Co. companies were founded in 1927. Their principal business was and remains shipping.

In 2003, Höegh Fleet Services managed 38 vessels, of which ten were "open hatch" vessels as the Höegh Minerva. Three of those ten ships have been sold and were delivered to their new owners earlier this year.

B. The Höegh Minerva and its Crew

The Höegh Minerva was built in 1979. It was one of a series of open hatch ships built between 1977 and 1979 to provide timber and lumber transport for Weyerhauser Co. products. From the end of May 2003, the Höegh Minerva traveled between Asia and North

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America stopping at multiple ports.[9] It carried a crew of twenty-three, of whom ten were assigned to the deck department, seven to the engine department, three had duties in both departments (an electrician and two "fitters" (mechanics)), the captain (Alfredo Sabado) and two cooks. The following people served in the engine department, in order of seniority:

Chief Engineer	Carlito Hufalar
2nd Engineer	Vincent Genovana
3rd Engineer	Roque Umahag
4th Engineer	Alme Tabug
Oiler	Romy Magbual
Wiper	Cezar Clarito
Engine Cadet	Mario de Guzman

The engineers are ship's officers and the oiler and wiper are "ratings." Officers serve aboard ship for six-month tours of duty; ratings serve for nine months. Four of the seven engine room crew came aboard the Höegh Minerva on June 16, in Vancouver, British Columbia. They were the second and fourth engineers, the oiler and engine cadet. The other three came aboard earlier. It was standard practice to have crew members' tours of duty overlap.

Each engineer had specific pieces of equipment and processes for which he was responsible, while the ratings were assigned to assist any or all of the engineers. The electrician and fitters were assigned to specific tasks or repairs as needed. Höegh Fleet Services' SEMS plan included job descriptions and responsibilities for all of the crew (Exhibit 17). Some responsibilities were reassigned or shared aboard ship, as reflected in

[9] In Asia the Höegh Minerva called at China, Taiwan, Korea, Japan and the Philippines. In North America it called in Central and Northern California, Vancouver, Washington and several ports in British Columbia.

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deposition testimony taken.[10] Based on those materials, the duties of the engine room crew may be summarized as follows.

Chief Engineer (Hufalar):	the chief engineer is the engine department administrator. He is responsible for "the performance of all activities in the Engine Department." He answers to the Master of the ship and to Höegh Fleet Services.
2nd engineer (Genovana):	the second engineer is responsible for the "daily work in engine room according to Chief Engineer's instruction and [company] maintenance plan." He is charged with maintaining the main engine and related systems. Aboard the Höegh Miranda, he also was responsible for the oil water separator and incinerator.
3rd engineer (Umahag):	"Carry out work as ordered by the 2nd Engineer . . . ;" maintenance of the auxiliary engine, maintenance of life boat, rescue boat, maintenance of emergency fire pump, air compressor, maintenance of main engine safety valve, fuel pump and chemical locker. (Umahag DT 6-7 and 17-18.)
4th engineer (Tabug):	"Carry out work as ordered by the 2nd Engineer . . . ;" maintenance of pumps, purifiers, evaporator [fresh water supply] and incinerator. (Tabug DT 7-9, 21-24.)
Oiler (Magbual):	"To follow orders from the second engineer," to make routine checks of pressures in running machinery and tank levels. (Magbual DT 8-9, 51.)
Wiper (Clarito):	"As a wiper, our job is to assist the engineer and do minor routines in the engine room." (Clarito DT 10, 12.)

[10] Depositions were taken of the captain and eight crewmen: the eight included the two fitters (Farnacio and Perez), the electrician (Ygpuara) and all of the engine room crew except the chief engineer and the second engineer. References to the deposition transcripts are shown as "[Name] DT [page number]. A compendium of the transcript excerpts referenced may be found as Appendix 1.

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Cadet (de Guzman):	"The cadet is there for his on-board training." His job assignments were made by the second engineer. (De Guzman DT 8, and10-11.)
Fitter (Farnacio and Perez):	"The 2nd engineer is his closest superior." His principal duty was repair of the ship's cargo cranes. (Farnacio DT 6-7.) "A fitter is the one who fix [sic] the damage on the ship and some machinery . . ." (Perez DT 8.)
Electrician (Ygpuara):	"The Electrician is responsible under the Chief Engineer for the maintenance and the safety of the electrical plants on board." "I repair anything electrical that needs to be repaired." (Ygpuara DT 6.) His orders are given to him by the second engineer. (*Id.*, at 7.)

In addition to the specified responsibilities, the 2nd, 3rd and 4th engineers took turns "on duty." Aboard the Höegh Minerva, as many other ships, at night the engine room was closed and unmanned. On this ship the engine room was closed from 8:00 P.M. to 8:00 A.M. During the night one engineer was on duty to respond to problems in the engine room. The engineer on duty would be assisted by the oiler, wiper or cadet. (Clarito, DT 12; Tabug DT 8-9; Umahag DT 17-18.)

C. Maintenance Aboard the Höegh Minerva

The Höegh Minerva, as all Höegh Fleet Services vessels, operated under a computerized preventive maintenance plan called AMOS for Windows. The computer program directed performance of maintenance at specified times and intervals of various pieces of equipment. Performance of maintenance was reported to Höegh Fleet Services. In addition, there was a weekly maintenance committee meeting aboard ship, chaired by the captain.

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Under the Höegh Fleet Services SEMS plan, that committee included the captain, chief officer, chief engineer, second engineer and electrician. A "work planning meeting" was held monthly with weekly follow up meetings in between them. A written record of the meeting was required. Captain Sabado described in his deposition how he chaired those meetings.

> . . . A work planning is composed, the members are me, captain, chief officer, chief engineer, second engineer, the electrician, and the safety officer. Okay. We plan what we have to do for this month. We always do that during start of the month, let's say Saturday, or any day.
>
> Then we have to record that one in the plan. After that one, the plan for every week, we have a follow-up meeting also. Every week we have to update that plan, how it was already done, what items already done, and what's still outstanding jobs.
>
> Q. What kind of jobs are we talking about, Captain?
>
> A. Okay. Let's just say the engineer is planning to overhaul one generator, then we have to overhaul one pump, then they have to make a plan for that to do it this month.

(Sabado DT 20, Exhibit 18.) Exhibit 18 includes the relevant page from the SEMS plan and the minutes of the committee for June - August 2003. As the Court will see, the committee addressed and scheduled maintenance items from painting rust spots on deck to repairs to the main engine and tracked work on them as it went along.

In addition, the Höegh Minerva had a Protection and Environment Committee, as required by the SEMS plan. (Exhibit 19.) This committee also was chaired by the captain, but unlike the maintenance committee, it was structured so there were more ratings on the committee than officers. In the committee minutes in Exhibit 19, the Court can see that a myriad of matters was raised and considered by the committee, including health and safety of the crew and environmental matters. Tthe minutes do not reflect any problem being

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reported concerning bilge water management. We note, as is clear in the March 2003 minutes, that fitter Farnacio and wiper Clarito served on the committee.

D. Crew Training on Environmental Matters

Most of the crew attended maritime college and studied MARPOL rules there.[11] Before boarding a ship managed by Höegh Fleet Services, each received additional training on the company's rules, including its environmental rules.[12] In addition Höegh conducts separate conferences in Manila for senior officers (captain, chief officer, chief and second engineers), junior officers and ratings. (Sabado DT 16-17.) Conferences are held three times a year for each group and attendance at one is mandatory. *(Id.,* at 18.) While aboard ship, each crewman is required to participate in computer-based training that includes the company's ISO 14001 environmental program. (*Id*., at 23-25 and 48.[13])

A record of each crewman's training is made in his "Seafarer's Info-sheet." As an illustration of the training program, please see Exhibit 20, the Info-sheet for second engineer Genovana. On page 2 and 3 there is a list of all required courses, the dates completed and the dates on which retraining was scheduled.

Aboard ship both the captain[14] and the chief engineer[15] held monthly meetings at which company rules were discussed, including environmental rules. Both the captain and

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[11] Clarito DT 56-58; de Guzman DT 8-9, 51 and 76.

[12] Clarito DT 58-59; de Guzman DT 51 and 76; and Perez DT 46.

[13] De Guzman DT 51, 76-77; Perez DT 46; Tabug DT 13-14 and 31.

[14] Clarito DT 60; Farnacio DT 46-48; Magbual DT 52-53; and Perez DT 47.

[15] Clarito DT 22 and 61; de Guzman DT 67; Farnacio DT 48-49; Magbual DT 57-58; Perez DT 47-48; Tabug DT 15 and Umahag DT 10-12.

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the chief engineer warned the crew against violating the pollution rules.

> Q. And the chief engineer held a monthly meeting?
>
> A. Yes.
>
> Q. And he told the crew to be sure to obey the pollution laws?
>
> A. Yes
>
> Q. . . . Did the chief in those meetings make it clear that he expected his crew to obey the laws?
>
> A. Yes.

(De Guzman DT 67. *See also*, Farnacio DT 65-66; Magbual DT 18, 52, 57-58.) Crewmen acknowledged in their depositions that they knew the company rules and the legal requirements of oily waste disposal.

> Q. What did you understand to be the company policy about environmental rules?
>
> A. It prohibits the illegal discharge of oil or oil water on oceans or seas.

(Clarito DT 59.)

> Q. So the captain held periodic meetings with the crew, didn't he?
>
> A. He had, sir.
>
> Q. And he talked about company policies, didn't he?
>
> A. (By the witness) He also did.
>
> * * *
>
> Q. You knew from the captain that no one should be pumping over the side.
>
> A. Yes, sir.

(*Id.,* 60.)

> Q. And among the conduct that was prohibited was the improper discharge of bilge water; isn't that true?
>
> A. . . . It's mentioned in the meetings. We have heard that. We already know that.

(Farnacio DT 46.)

> Q. And you also had heard from your employer . . . that illegal overboard discharges was [sic] prohibited?
>
> A. Yes, sir, we know that. Even if they don't tell us, we know because there are a lot of notes that say it's illegal to pump out.
>
> Q. . . . But it's clear they did tell you?

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A. Yes, they told us.

* * *

Q. When the second engineer had this pipe, you knew what he was doing was wrong; didn't you?

A. It was wrong, sir.

(Magbual DT 53, 52.)

Q. . . . before you started [on the voyage] you clearly knew that the company's policy was to prohibit bilge-water discharges that were illegal?

A. Yes, sir.

Q. And you heard that again during the trip from both the captain and the chief engineer?

A. Yes, sir.

(Perez DT 48.[16])

The Höegh Minerva was fully and properly equipped, as required by international law, to manage its oily wastes. It was regularly inspected and approved for its physical equipment and its shipboard environmental plan. Its crew knew the rules and was reminded of them regularly by the captain and chief engineer. How and why did the second engineer violate the law and company rules?

VII. THE VIOLATIONS ABOARD THE HÖEGH MINERVA

Höegh Fleet Services acknowledges that second engineer Vincent Genovana violated MARPOL rules and company rules, and that he ordered subordinates to assist his illegal conduct. He also ordered them to conceal their conduct from the chief engineer, the captain and any inspectors who might visit the ship. Even after a crewman informed the Coast Guard and the Coast Guard found physical evidence of his crime, Genovana continued to lie to the captain and ordered subordinates to lie to the Coast Guard. In this

[16] *See also* de Guzman DT 50-52, Tabug DT 13-14 and Umahag DT 8-9.

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section we address the crew's conduct (Section VII.A) and Genovana's motives (Section VII.B.).

A. Genovana's Conduct

1. Defeating the Ship's Bilge Water Treatment System

Genovana joined the Höegh Minerva on June 16, 2003, in Vancouver British Columbia. At the time the ship was engaged in carrying timber from North America to Asia and other goods on its return to North America. After the ship left North America on June 25, Genovana began defeating the ship's oil water separator system. Initially he diluted the waste stream with fresh water, so the stream successfully passed examination in the oil content meter.[17] He stopped doing that because he feared the chief engineer would become suspicious about the amount of fresh water the ship was using. About a month

[17] Technical information may assist the Court on this point. Bilge water aboard the Höegh Minerva was drawn from a holding tank and pumped to the oil water separator. Oil that was removed flowed to another waste tank (from which it was burned in the ship's incinerator). Water from the separator flowed past an oil content meter that determined whether the water contained less than 15 ppm of oil. If the meter determined that the oil content was too high, it closed a solenoid switch, which in turn closed a valve and sent the water back into the bilge system. From there the process would start again. If the meter determined that the oil content was below 15 ppm, it allowed the water to flow to an overboard connection and to the sea.

IMO approved oil content meters may measure either the entire waste stream from an oil water separator or may test samples of the waste stream. Aboard the Höegh Minerva, the meter "read" the whole stream. Because the waste stream was diluted to a level of less than 15 ppm, the meter permitted it to be discharged overboard. Because the waste stream contained less than 15 ppm of oil, the MARPOL rules were not violated; however, company policy was violated. Genovana believed that diluting the waste stream was a violation of law.

In section V.B. above, we mentioned that the company was installing new "failsafe" controls in the waste handling system. A new device will prevent an engineer from trying to fool the meter by running fresh water through it. The device will close the discharge valve whenever the fresh water valve is opened.

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after Genovana came aboard the Höegh Minerva[18] he ordered fitter Perez to manufacture a pipe to route around the oil content meter water coming out of the separator. Using that pipe bypassed the part of the waste disposal process in which the meter determined whether processed water could be discharged lawfully, *i.e.,* whether the oil content of the separator's discharge was less than 15 ppm. Once he had the pipe made, Genovana made no effort to manage the ship's waste lawfully, either by storing it until the ship reached port or by processing it according to the rules.

Genovana did not violate the law by himself. He ordered engine room subordinates to help him. His principal assistant was the engine cadet, de Guzman. The oiler and wiper also were pressed into service. (Magbual DT 14; Magbual Grand Jury Testimony 9; de Guzman DT 23 - 27.)

No discharge occurred in the territorial waters of the United States or of any other nation. Beyond that, the time and location of illegal discharges remain unclear. There was agreement among the crew members that the pipe was used on the trip from Asia to the United States at the end of August. There was inconsistent testimony about how many times it was used, how long it was connected, etc.[19]

---

[18] Crew members' testimony differed on when the bypass pipe was made. Perez, who made the pipe, thought he did it "a month or so" after Genovana came aboard (Perez DT 48-49). Clarito, who saw the pipe made agreed it was made about a month after Genovana came aboard. (Clarito DT 68-69.) De Guzman placed it in the same time period. (Guzman DT 23, 63.) Magbual first saw the pipe in mid-July. (Magbual DT 51.) Genovana, however claimed he had the pipe "within the first week aboard the ship." (Government Memorandum of Interview on September 15, 2003, at 2.)

[19] Clarito and de Guzman agreed that the bypass pipe was used on the trip from Asia to the United States. Clarito DT 100; de Guzman DT 26. De Guzman also said it was used on the way to Asia, *Id.,*at 25. De Guzman was asked in his deposition how many times he connected the pipe. His answer was, "Two to five times." *Id.* Oil record

(continued...)

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2. Concealment from The Chief Engineer and Port State Authorities

a. Genovana Frightened Subordinates to Conceal his Activities

Before arriving in port, Genovana ordered telltale signs of his illegal activity cleaned up or painted over. (De Guzman DT 29-30.) He ordered his subordinates to keep the chief engineer in the dark about the illegal activity that occurred. He also made false entries in official and company records to conceal his illegal activity.

A ship's chief engineer is more of an administrator than a hands-on worker. Some chiefs spend more time on the several decks of the engine room than others. Chief engineer Hufalar did not spend as much time as he should have in the engine room, seeing what his men were doing. That gave the second engineer the ability to do as he chose and to scare his subordinates into silent cooperation. The men that Genovana ordered to assist him testified about why they did not tell the chief engineer what Genovana was doing. Wiper Clarito said:

---

[19](...continued)
book entries made by Genovana show eight bilge water discharges between his joining the ship and his arrest:

July 1	Between Canada and Japan
July 2	Between Canada and Japan
July 8	Between Canada and Japan
July 23	Between Japan and The Philippines
August 3	Between The Philippines and Taiwan
August 8	Between Japan and Shanghai
August 20	Between Japan and the United States
August 30	Between Japan and the United States

We do not know, and have no way to find out, whether those entries were entirely fanciful or whether there was a discharge on those dates, or whether there were discharges on other dates. We do know that in their deposition testimony, no crew member testified to any discharge except while crossing from and to North America.

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> Q. But you weren't afraid of the second engineer, were you?
> A. Sometimes I was afraid of the second engineer.
> Q. Afraid he would do what to you?
> A. Do some bad reports to the chief engineer or to the company.
>
> * * *
>
> A. . . . If we don't follow the orders from the second engineer – maybe we get lost or [sic our] job – or we have some bad records – he will make us some bad records or bad comments to the chief engineer or to the company. So we don't have any choice, so we better follow his orders.

(Clarito DT 56, 62.) Fitter Perez testified to similar fears.

> Q. Were you concerned that if you told the chief, that the second engineer would do something to you?
> A. Yes, sir.
> Q. What did you think he could do to you?
>
> * * *
>
> A. Things that will make me look bad. Things that will make me look bad on the company's side.

(Perez DT 55 - 56.) Cadet de Guzman, who was the subordinate most often pressed into service by Genovana, feared a bad evaluation from Genovana and was physically abused by him.

> A. I was a little involved, but I would not have done that if I wasn't given instructions. And if I didn't follow the instructions then I would lose my job. The company won't know how good you are once they've written bad stuff in your training book.

(De Guzman DT 56.) "But the chief wouldn't be able to help me if I was given bad reviews in my training record book." (De Guzman DT 54.) In his deposition de Guzman reported, and another crewman confirmed, that he was abused physically by the second engineer.

> Q. Did the second engineer ever strike you?
> A. Yes. . . .
> Q. How often did he strike you?
>
> * * *
>
> A. Many, many times.

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(Id., at 47-48.) Later he described the frequency as "all of the time." *(Id.*, at 83.) Wiper Clarito confirmed the abuse. "Sometimes he just slam the chest of the cadet or sometimes the head." (Clarito DT 55.) Neither the cadet nor any other crewman told the chief engineer or captain of Genovana's physical abuse of de Guzman. But someone did tell the chief that, "The second is picking on" de Guzman. After that, instead of being hit "all of the time," he was struck "Only once in a while . . ." (De Guzman DT 66-67 and 83.)

Fitter Farnacio, the man who informed the Coast Guard of Genovana's conduct, expressed another level of fear. He was afraid that if Genovana learned he was the informer, Genovana's family would seek revenge,

> Q. . . . Let's talk about the fears that you have expressed. Is it the second engineer that you were afraid will hurt you?
> A. Right now with what's been happening.
> Q. Is it the second engineer that you are afraid will harm you?
> A. As for me, if his family finds out about this, I'm afraid of his family, not of him, because it's his family that will take their revenge.

(Farnacio DT 63.) The Court may better appreciate the fear the crew had of Genovana by looking at an incident through Cadet de Guzman's testimony.

During the ship's return to the United States, the chief engineer became suspicious because de Guzman was in the engine room after hours. He questioned de Guzman about being in the engine room. Cadet de Guzman lied to and misled the chief engineer rather than "give up" Genovana.

> Q. You were told by the second engineer, were you not, to be sure the chief engineer wasn't told what you were doing?
> A. Yes.
> Q. You knew that if the chief found out, he would stop you, didn't you?
> A. Yes.
>
> * * *
>
> Q. On the occasion that the chief found out that you were in the engine room when you weren't supposed to be -- do you remember that -- you had the perfect opportunity to talk with him, right?

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A. Yes.
Q. It was just you and the chief engineer, right?
A. Yes.
Q. The second engineer was asleep. You had the opportunity to tell the chief the truth.
A. Yes.
Q. But instead of telling him the truth, you misled him.
A. Yes.
Q. You said, "I was pumping bilges," right?
A. Yes.
Q. You could have said, I was pumping the bilges in the improper way?
A. Yes.
Q. You could have said, Chief, I'm very sorry, but bad things have been happening and I need to tell you about them.
A. The same.
Q. You could have said, Chief, I've been ordered to do things and I need you to know about them.
A. Yes.
Q. But you didn't want the chief to know about it.
A. I was given instructions, so -- I was given instructions not to tell the chief engineer.

(De Guzman DT 52-54.)

b. Genovana Falsified Records and Camouflaged Physical Evidence

Genovana made false entries in the ship's oil record book to conceal his illegal conduct. He also falsified a "soundings" log to conceal his activity. Measuring the fluid content of a tank is called "sounding" the tank. It may be accomplished by reading a gauge on a tank or by dropping a weighted measuring tape ("sounding tape") to a tank's bottom. Soundings of certain tanks may be recorded in a "sounding log." Over the course of the several years that MARPOL cases have been prosecuted in the United States, the U.S. Coast Guard realized that by comparing a ship's oil record book and sounding log, inconsistencies and discrepancies might be noted that could indicate illegal discharges occurred. *See* Exhibit 6. For example, a sudden recorded drop in the level of the bilge water tank reflected in the sounding log would be suspicious if there was no corresponding

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entry in the oil record book to show where, when and how the bilge water "disappeared." Genovana apparently realized that risk. According to Cadet de Guzman, Genovana made and kept a "second set of books" for sounding data. "We were on our way to Long Beach, and the second engineer made new results of sounding to match the oil record book." (De Guzman DT 44.) De Guzman knew about it because Genovana required him to assist in making the fake record. *(Id.*, at 45.)

Genovana hid the bypass pipe in his "dressing room" when it was not in use and cleaned or painted over signs of its use. Painted areas were smudged with grease so they did not look new. (Clarito DT 20-21; de Guzman DT 29-30; Magbual DT 15.) The pipe was hidden from port state inspectors and from the chief engineer.

> Q. And the second engineer, however, made it clear to you that the chief wasn't to know what was going on in the engine room?
> A. Yes.
> Q. And that the pipe was not to be connected if the chief came below decks?
> A. But when he goes below deck, the pipe is not there.
> Q. And you saw the chief on at least one occasion near the separator and the pipe wasn't there?
> A. Yes. Yes.

(De Guzman DT 68.) In an interview with the government, de Guzman made the same observation. "De Guzman stated that the pipe was never connected [when] the chief engineer was below deck." (Memorandum of Interview on September 12, 2003.)[20]

c. Genovana Obstructed the Criminal Investigation

When the Höegh Minerva arrived in the United States in September 2003, it made three U.S. port calls, at Long Beach/Los Angeles, Richmond, California and Vancouver,

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[20] Genovana claimed that the chief was below decks when the pipe was connected.

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Washington. In Vancouver the U.S. Coast Guard boarded the vessel and searched it, based on a tip that fitter Farnacio gave the Coast Guard in Richmond.[21] Before the Coast Guard interrogated the crew, a representative of the company told the crewmen that they could choose to speak with the Coast Guard or not, but that if they spoke they had to tell the truth. He also said that the company would provide an independent lawyer to advise them of their rights. Despite the fact that Genovana heard that advice, he directed his subordinates to lie to the Coast Guard. Genovana personally lied to the Coast Guard and to the captain.

> Q. Did the second engineer have a private conversation with you about how to answer the Coast Guard's questions regarding handling of bilge water?
>
> A. When a lawyer was sent for advice, that evening he spoke to me privately . . .
>
> * * *
>
> A. He said that, "When asked, all you say is that you don't know anything about that, about the oil/water separator. The one who is in charge is the second engineer, and all you're asked to do is that, the soundings.

(De Guzman DT 49.) According to fitter Perez (who had made the bypass pipe), Genovana told the engine crew collectively and Perez individually "not to tell this pipe." (Perez DT 21.) He urged Perez to blame the pipe on Genovana's predecessor.

> Q. Did he tell you if the Coast Guard asked how long the pipe had been on board, what you should say?
> A. He told me to tell it was from a previous year.

(Id., at 22.) Genovana told oiler Magbual to lie about what had happened in the engine room. (Magbual DT 64.)

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[21] Farnacio passed that note to the Coast Guard, he said, because he felt the second engineer was treating him badly and he wanted "to get even." Farnacio (, 27 and 63.) Elsewhere he said he was motivated by concern about ocean pollution. *(Id*., 28-29.)

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In his plea agreement, Genovana acknowledged lying to the Coast Guard. Similarly, when confronted by Captain Sabado, after the Coast Guard found the bypass pipe, Genovana denied ever having seen the pipe before. (Sabado DT 36-38.)

B. Why Did Genovana Violate Company Rules and the Law?

Before this Court, Genovana asserted that the ship's oil water separator had been installed incorrectly and as a result, it was inoperable from the day he joined the ship in June 2003 until the time of his arrest. (Plea Agreement, at 5.) Therefore, he asserted, he had no alternative but to dispose of bilge water unlawfully. Höegh Fleet Services believes his claims are untrue. We offer a variety of evidence to demonstrate that.

1. *Genovana is Contradicted by Other Crewmen* on the Condition of the Oil Water Separator

Genovana joined the ship on June 16, 2003, in Vancouver, British Columbia. Oiler Magbual and Cadet de Guzman joined the ship at the same time. The ship's electrician and wiper had been aboard the ship for some months.

The electrician testified that he had worked on the oil water separator before Genovana came aboard. Then the device was tested. "So from the time I fixed it, it was all right. I just don't remember what date is [sic] was, but it was all right from the time I fixed it until I left the vessel." (Ygpuara DT 27.) Mr. Ygpuara left the vessel when he was arrested as a material witness, following the Coast Guard's discovery of the bypass pipe.

Oiler Magbual was one of the people who assisted Genovana in bypassing the oil content meter and illegally discharging bilge water. Yet he acknowledged that before the bypass pipe was used by Genovana, the oil water separator was working. (Magbual DT 51.) Asked a similar question before the grand jury, he again said that the separator was working.

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Q. Do you know whether the oil/water separator aboard the Hoegh Minerva was working?
A. It was working. I know. It was working.
Q. So the water - - the bilge water could have been properly process through the oil/water separator on the Minerva?
A . Yes. It was possible. It could have been done.

(Magbual Grand Jury Transcript 13.)

Finally, we invite the Court's attention to wiper Clarito's testimony that when Genovana came aboard, they opened and inspected the oil water separator. At that time it was in operating condition, according to Clarito, and similar in appearance to the last time he cleaned it out for Genovana's predecessor. (Clarito DT 77.) And according to de Guzman, just before the ship reached the U.S. in September, Genovana tested the system and it worked. (De Guzman DT 26, 61.)

2. Genovana's Claim that Incorrect Installation Prevented Use of the Separator is Wrong

The oil water separator aboard the Höegh Minerva in September 2003 had been installed in 1992. Its installation and operation were subject to classification society and port state authorities inspection for more than ten years. It passed inspection on all occasions. *See, e.g.,* Exhibits 7, 8 and 9. The last classification society IOPP survey was about two months before Genovana joined the ship. The last port state inspection occurred in Japan a month after Genovana joined the vessel and at a time when he claimed the equipment was inoperable. Neither inspection found fault with the equipment or its condition.

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Second, according to the separator manufacturer's U.S. representative, the separator was operable as installed.[22] The installation aboard the Höegh Minerva differed from the manufacturer's manual in using an existing pump to bring bilge water to the separator. That pump had a higher pumping capacity than the pump specified by the manufacturer. So long as an operator monitored and controlled the pressure under which bilge water was pumped to the separator, there was no problem. On the other hand, if an operator misused the system and tried to force bilge water through the separator faster than the machine's capacity, he would plug up the system with waste oil and damage internal components. (Declaration of David W. Hiller, Exhibit 21.) When the oil water separator was opened and inspected in Vancouver, after Genovana's arrest, it was found to be plugged and damaged. It had been misused and the operator had not cleaned or repaired it.[23] As discussed below, that is consistent with crew testimony that Genovana was looking for "faster and easier" ways of disposing of bilge water rather than doing what was required of him.

3. If the Oil Water Separator was Broken and in Need of Repair, Why Didn't Genovana Report it and Request Assistance?

The captain chaired a weekly meeting to address and schedule maintenance aboard ship. Second engineer Genovana was a member of the committee and attended its

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[22] The separator was made by Heli-Sep. Its U.S. representative is Coffin World Water and its president In September 2003 was Richard Grounds. Mr. Grounds has since left the organization.

[23] Cadet de Guzman confirmed that the oil water separator was not cleaned between the time he and Genovana came aboard and Genovana's arrest in Vancouver, Washington. De Guzman DT33. On the other hand, wiper Clarito testified that the separator had been cleaned during the tenure of Genovana's predecessor. Clarito DT 78.

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meetings. Per the company SMS, all needed work was scheduled and followed up. The committee's minutes for the time that Genovana was aboard are contained in Exhibit 18. They do no show any request for repair work or maintenance on the oil water separator. Captain Sabado said that Genovana made no mention of needing to repair it. (Sabado DT 21.) Chief Engineer Hufalar said Genovana told him the separator was functioning properly. (Hufalar DT 22-23.) If it was inoperable and could not be readily repaired by the second engineer, why did he not raise it at the committee meeting and request repair assistance? His failure contrasts starkly with a request he made for repair of another piece of equipment.

According to the ship's electrician, Ygpuara, when the former second engineer left the vessel in Vancouver, B.C., he requested inspection and testing of the incinerator. (Ygpuara DT 9, 24.) Ygpuara ran a test after the ship sailed from Canada and he did so with Genovana present. *(Id.,* at 10, 24.) He found a problem and repaired it[24] *(Id.,* at 13, 24) in about an hour. *(Id*., at 25.) Ygpuara wanted to make a better repair, and so initiated a request to the company for assistance. *(Id.)* The company responded and that ended the problem. More important for present purposes is the process that was involved and its chronology.

The request for assistance was sent to the company by chief engineer Hufalar on July 2. By July 7 the company's "Electro Supt." had queried the manufacturer, obtained the information needed to fix the problem and faxed it to the ship. Copies of the communications are contained in Exhibit 22. Ygpuara followed the directions received.

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[24] Cadet de Guzman, on the other hand recalled that the incinerator was "down" for the first two weeks he was aboard the ship. (De Guzman DT 34.)

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(Ygpurara DT 25.)

This incident demonstrates that when a problem was brought to the attention of the chief engineer, he passed it to the company for assistance. The company provided assistance promptly and the problem was resolved. If Genovana was able to obtain assistance in this manner for the incinerator problem and get it resolved, why would he not have asked for assistance for the oil water separator, if it was inoperable as he claimed? And recall, please, that the incinerator repair was accomplished, according to crew members' testimony before the bypass pipe was made and used.

4. Genovana Found it "Faster and Easier" to Act Illegally than Responsibly

The question of why Genovana abused the trust placed in him is of great concern and significance to Höegh Fleet Services. We do not believe, for the reasons stated above, Genovana's claim that he acted illegally because the system did not work and could not be made to work. If Genovana was faced with that situation, we would expect to see him respond differently. First, we would expect to see a request for assistance in repairing a broken system that the ship was required to have in working condition. Second, until it was repaired, we would expect to see requests to dispose of accumulated waste ashore when the ship reached port.[25] Captain Sabado testified that as a matter of company policy, on

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[25] The ship's records show that on August 6-7, 2003, *i.e.*, at a time when Genovana was the second engineer, the ship discharged to shore a quantity of accumulated sludge. Exhibit 23, attached. If Genovana had a legitimate problem or reason for not processing bilge water on the voyage, he could have and would have requested to pump ashore accumulated bilge water as well. He surely had enough opportunities to do so for between mid-July and mid-August, the Höegh Minerva called at:

Kawasaki, Japan
Tokyo, Japan

(continued...)

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request from the engineering department he is required to arrange for shoreside disposal of oily waste. “I never say no because that's the environment company policy.” (Sabado DT 15.) Third, if bilge water was accumulating faster than Genovana could process it and his bilge tank was full, we would expect to see another tank or space on the ship used to hold the excess until the ship reached port. Excess bilge water could be stored in an empty fuel tank or even in the ship’s pipe tunnel. Fourth, a licensed engineer forced by circumstances beyond his control to discharge bilge water would not also “cook the books.” MARPOL allows discharges of bilge water containing greater than 15 ppm of oil if a discharge results “from damage to a ship or its equipment.” (Regulation 11.) But the particulars of the discharge must be recorded in the oil record book. An honest engineer with broken equipment may have to discharge to the sea. He would not have any reason to conceal the fact. He would not urge others to lie and conceal the fact from their superiors and

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[25](...continued)

Tagonoura, Japan
Nagoya, Japan
Osaka, Japan
Manila, Philippines
Kaohsiung, Taiwan
Ishigaki, Japan
Shanghai, China
Ulsan, S. Korea
Yatsushiro, Japan
Tokyo, Japan

At every one of these port calls, there was an opportunity to pump bilge water ashore or have a repair technician come aboard to fix the separator, if it was broken. The ship did not leave Asia for the United States until August 16.

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inspectors. He would not conceal his conduct with false entries to the ship's official records.

We believe the true reason for Genovana's conduct may be found in de Guzman's deposition testimony. Several times he was asked why the bypass pipe was used, in light of his testimony that the oil water separator and oil content meter were working.

> Q. Do you know why the pipe was being made?
> A. My understanding is this was made so that the work on the oil/water separator can be made faster.
> Q. How do you know that?
> A. I remember them talking about it.
> Q. Who was talking about it?
> A. The second engineer and the fitter.

(De Guzman DT 17.)

> Q. . . . What was your understanding as to why the pipe was made?
>
> * * *
>
> A. So that our work will go faster.

(Id. at 19, 20.)

> Q. What do you mean by "faster"?
> A. It's easier, it's quicker, compared to when you use the content meter.

(Id., at 77-78.)

> *Q. Did it save the crew some time to use the bypass pipe?*
> *A. No, not really. But the second engineer has more time to rest.*

(Id., at 78 (emphasis added).) Similar testimony was given by oiler Magbual.

> Q. So, was it faster and easier to bypass the system with this pipe? Let me rephrase that. Faster and easier to bypass the meter with this pipe?
> A. That's my understanding, and maybe the second also wants the discharge process faster so that the tank can be emptied faster.

(Magbual DT 58.)

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C. The Chief Engineer's Response to Suspicious Circumstances

Although recognizing that hindsight makes circumstances more suspicious and easier to fit into a pattern, we have to ask whether chief engineer Hufalar missed opportunities to discover what Genovana was doing. According to the chief, he afforded Genovana more latitude than he ordinarily would give a second engineer because Genovana held a chief's license. (Hufalar DT 20.[26]) Exhibit 20 confirms that Genovana was licensed as a chief engineer. Was the added measure of trust warranted?

After Genovana came aboard, he proposed to Chief Hufalar that he reset the oil content meter to allow discharge of bilge water containing up to 100 ppm of oil. "Old" MARPOL rules had allowed 100 ppm discharges on the high seas but that was no longer the law. Chief Hufalar told Genovana that he could not change the meter. (Hufalar DT 21-22.) The chief did nothing more.

When fitter Perez made the bypass pipe he was uncomfortable, despite Genovana's promise to him "that only clean water would go through it." (Government Memorandum of Interview of Genovana on September 15, 2003, at 2.) Perez went to the chief engineer but told him only part of the story. According to Perez, he told the chief that Genovana had ordered him to make the pipe but he did not tell the chief that the pipe already had been made and installed. (Perez DT 51, 65.) The chief responded by immediately calling the engine room crew together for a meeting. As described by Perez, the meeting lasted about thirty minutes. During the meeting, the chief engineer gave clear warning that pollution

[26] All of the engine room crewmen except Hufalar gave up their Fifth Amendment rights in exchange for immunity. Immunity was not extended to the chief engineer. He did not testify as a consequence, but his lawyer made "proffers" that were made of record at his deposition.

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violations were not to occur on his ship. (*Id.*, at 53.) He showed the crew a trade magazine, the cover of which showed an engineer handcuffed for pollution violations. [27]

> Q. What did he say?
> A. The discharging of oil could be -- it could be happen to all of us, like the guy who has been handcuffed.
> Q. So he warned that violation of the rules, people could go to jail?
> A. Yes, sir.
> Q. And he warned that violation of the rules could cost the company a great deal of money?
> A. Yes, sir.

(*Id.*, at 54.) The chief reported the incident to Captain Sabado. The captain believed that the chief's action ended the problem.

> Q. . . . As captain, did you think you needed to do something else about this request after it was turned down?
> A. Okay. Second engineer is a responsible person on board, and he has also been, he knows about this company policy, about this regulations that we have to make bypass, then that's all against the regulations, and the chief engineer denied that he could not do that in the ship or in this company, then I think that's the end.

(Sabado DT 34.) No other circumstances suggested a problem until just before the ship arrived back in the United States. That was when the chief learned the cadet was in the engine room after hours. He apparently accepted the cadet's false explanation of why he was there and what he was doing but the next morning he called another meeting of the engine room crew and admonished them to stay out of the engine room after hours. (De Guzman DT 47; Clarito DT 23.) With the benefit of hindsight, one reasonably can say that the chief engineer should have been more suspicious and more inquiring. Certainly from a management perspective it appears the chief engineer should have spent more time than

---

[27] The magazine is called *Fairplay.* It is a "magazine [that] has been subscribed by our company, and they are sending that by mail to each of the ships." (Sabado DT 35.) Captain Sabado gave the magazine to the chief engineer. (*Id.*, at 36) A copy of the cover is attached as Exhibit 24.

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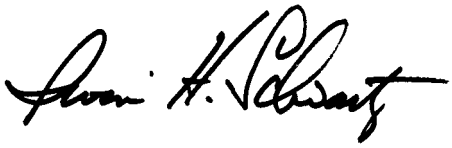
he did in the engine room rather than his office.

VIII. CONCLUSION

Höegh Fleet Services regrets what happened aboard the Minerva, as reflected in the letter from its president, attached as Appendix 2. Well before the Minerva incident, the company had embarked on a program to upgrade the equipment aboard its ships. Its hope was and is that replacement equipment, and additional equipment with new technology, will make it easier for shipboard waste to be managed. It has also increased the frequency with which superintendents visit the ships and increased their training so they can better detect problems. Crew members of all ranks have received additional training coupled with a warning that there is no employment prospect at the company for anyone who violates the company's environmental rules. Will that be enough to prevent another incident? All of the rules, inspections, admonitions and expenditures cannot provide failsafe protection against an employee who finds "faster and easier" ways to avoid duties that are time consuming and tedious. If subordinate crew members are bullied into silently allowing or participating in illegal conduct, it will be discovered only during after-the-fact inspections, if at all. Those are challenges that face Höegh Fleet Services and the industry.

Dated: June 21, 2004.

Respectfully submitted:



IRWIN H. SCHWARTZ
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Exhibit

2

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. TA TONG MARINE CO. LTD., and WANG KI, Defendants.	NO. CR03-5171 JET **INDICTMENT**

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times relevant to this Indictment:

1. Defendant TA TONG MARINE CO., LTD., was a Taiwanese corporation with headquarters in Tapei, Taiwan, which operated a marine vessel known as the M/V GRAND GLORY.

2. Defendant WANG KI served as Chief Engineer on board the M/V GRAND GLORY.

3. Engine room operations in large marine vessels such as the M/V GRAND GLORY produce oily waste water and sludge. Oily waste water typically accumulates in the bottom ("bilges") of the vessel. This oily waste is collected and run through various processes designed to separate oil and other wastes from the water. The

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processes include settling tanks and a water pollution prevention device known as an "oil water separator." Sludge is generated through several oil refining processes and is stored in sludge tanks. The sludge may either be burned or offloaded to shore for proper disposal.

4. All internal transfers of oil within a vessel and all overboard discharges of oil into the water must be recorded in the vessel's "Oil Record Book." In the event of an emergency, or accidental or other exceptional discharge of oil or an oily mixture, a statement must be made in the Oil Record Book explaining the reasons and circumstances for the discharge.

5. The United States is part of an international regime embodied in numerous agreements ratified by the United States that depend on principles of reciprocity. Flag states certify a ship's compliance with international standards and port states such as the United States conduct inspections to assure compliance in their ports and waters. In conducting Port State Control Inspections the United States Coast Guard examines, among other things, compliance with the International Convention for the Safety of Life at Sea ("SOLAS"), the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 ("MARPOL 73/78"), and the International Management Code for the Safe Operation of Ships and for Pollution Prevention ("ISM Code"). Failure to comply with international standards can form the basis of a United States Coast Guard order refusing to allow a ship to enter a United States port or prohibiting a ship from leaving port without first taking corrective action. In conducting these agency proceedings, the United States Coast Guard relies on the statements of a ship's crew and documents, including its Oil Record Books. The United States Coast Guard is authorized to board and inspect all vessels in United States ports to determine compliance with federal regulations and the MARPOL Protocol. Such inspections typically include examination of Oil Record Books.

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COUNT 1

(False Statement/TA TONG MARINE & WANG KI)

On or about February 3, 2003, at Vancouver, within the Western District of Washington, defendant TA TONG MARINE CO. LTD., by and through its agents and employees, and defendant WANG KI did knowingly and willfully make and use a false writing and document containing a materially false and fraudulent statement and entry in a matter within the jurisdiction of the United States Coast Guard, an agency within the Executive Branch of the United States, in that on that date, during an inspection of the vessel M/V GRAND GLORY at the Port of Vancouver by personnel of the United States Coast Guard, defendants presented to United States Coast Guard personnel the ship's Oil Record Book, which contained materially false and fraudulent entries, omissions and misrepresentations – to wit, representations that oily waste from the ship had been incinerated and transferred to certain waste oil tanks for incineration; whereas in truth and in fact, as defendants well knew at the time the entries were made in the Oil Record Book and presented to the United States Coast Guard, oily wastes were not incinerated, but were improperly discharged into the ocean and the equipment necessary for the lawful discharge of the oily wastes was not used.

All in violation of Title 18, United States Code, Sections 1001 and 2.

COUNT 2

(Obstruction of Agency Proceedings/TA TONG MARINE & WANG KI)

On or between about August 2, 2002 and February 4, 2003, at Vancouver, within the Western District of Washington, and elsewhere, defendant TA TONG MARINE CO., LTD., by and through its agents and employees, and defendant WANG KI did corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding was being conducted before United States Coast Guard officials, namely, an inspection of the M/V GRAND GLORY's compliance with federal and international oil pollution laws, standards and treaties, in that the defendants concealed, and directed engine room

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crew members serving onboard the M/V GRAND GLORY to conceal, the existence and use of equipment used to unlawfully discharge oily wastes overboard into the ocean, and made false statements and representations to United States Coast Guard officials, including presenting false records, regarding the existence and use of such equipment to manage the vessel's oily wastes.

All in violation of Title 18, United States Code, Sections 1505 and 2.

COUNT 3

(Violation of Oil Pollution Prevention Regulations/TA TONG MARINE)

On or between about August 2, 2002 and February 3, 2003, in Vancouver, within the Western District of Washington, and elsewhere, defendant TA TONG MARINE CO., LTD., by and through its agents and employees, knowingly failed to maintain an Oil Record Book for the M/V GRAND GLORY in which all disposals of oil residue and all overboard discharges and disposal of bilge water were fully recorded in the Oil Record Book.

All in violation of Title 33, United States Code, Section 1908(a), and Title 33, Code of Federal Regulations, Sections 151.25(a), (d) and (h).

A TRUE BILL

DATED: 2-27-03

Leslie Lewin
PRESIDING JUROR

Jeffrey C. Sullivan for
JOHN McKAY
United States Attorney

Mark Chutkow
MARK CHUTKOW
Assistant United States Attorney

FLOYD G. SHORT
Assistant United States Attorney

JAMES D. OESTERLE
Special Assistant U.S. Attorney

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