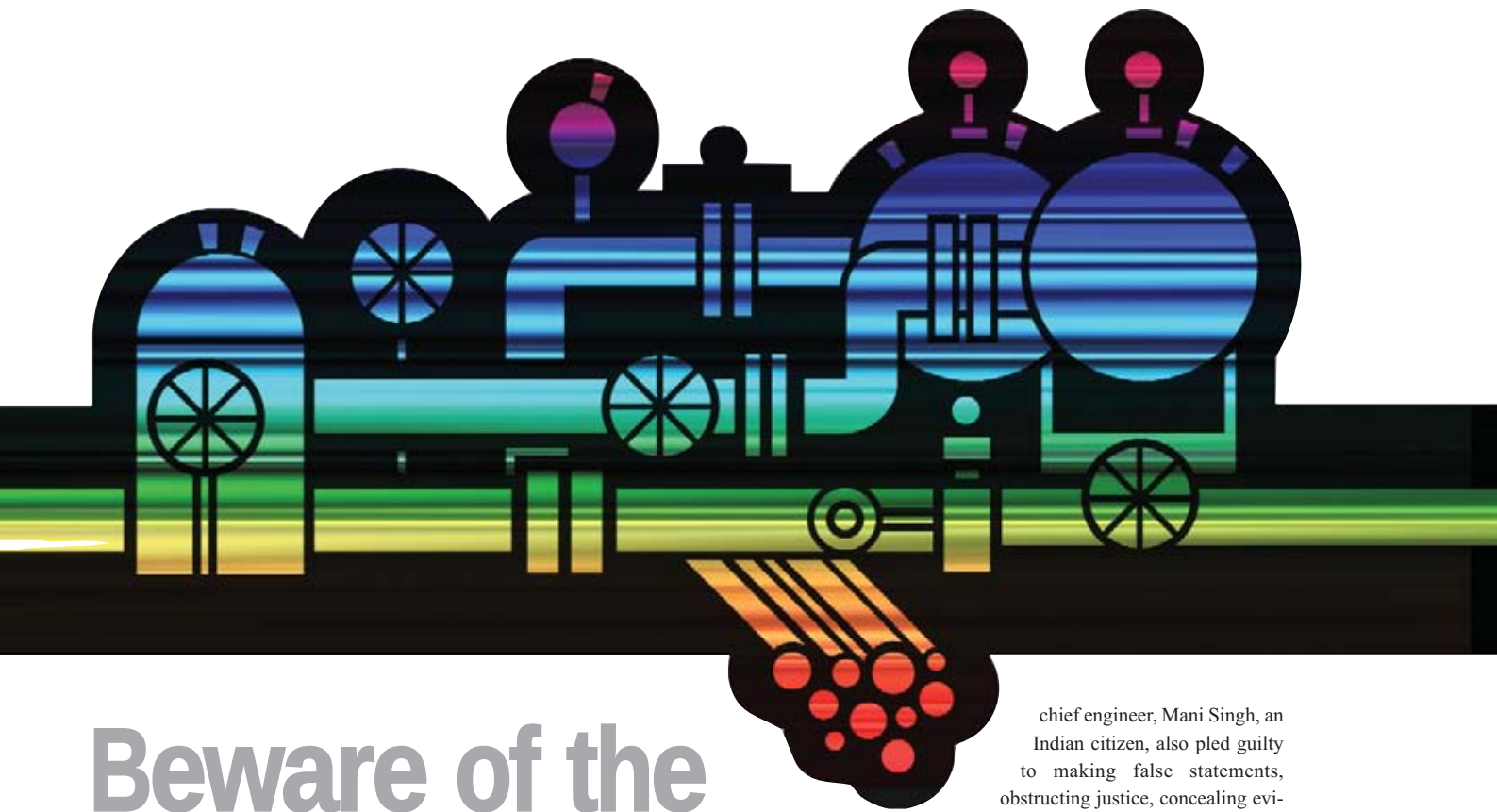




Beware of the 'Magic Pipe'

For a number of years, federal prosecutors in the US have been active in pursuing ocean dumping cases, especially 'magic pipe' cases, in which equipment is installed to by-pass ship-board oily water separators, and ship logs on waste discharges are falsified.

That trend continued in 2006. Themes running through the cases include higher and higher penalties, reaching \$37 million in one multi-vessel, multi-district case at year-end; fines and prison sentences for responsible officials; imposition of non-financial penalties, such as requirements for detailed environmental compliance programs and exclusion from US waters during probationary periods; and government reliance on crew member whistle blowers, who may be compensated by awards of up to one half of the penalties imposed.

MSC Management (Hong Kong) Limited

In February, 2006, MSC Management pled guilty to charges of conspiracy, obstruction of justice, destruction of evidence, false statements and violating the Act to Prevent Pollution from Ships, and agreed to pay a \$10.5m fine. According to Department of Justice representatives, this is the largest fine involving a single vessel charged with deliberate pollution and the largest fine paid by a defendant in an environmental case in the history of the State of Massachusetts, where the prosecution was brought. A specially fitted 'magic pipe' had been installed on the MSC Elena to bypass required pollution prevention equipment and discharge oil sludge and waste directly overboard.

Following the discovery of the 'magic pipe' during a US Coast Guard inspection in Boston Harbor in May, 2005, senior management in Hong Kong directed crew members to lie to the Coast Guard, and senior ship engineers ordered that documents be destroyed or concealed. The ship's

chief engineer, Mani Singh, an Indian citizen, also pled guilty to making false statements, obstructing justice, concealing evidence and concealing the discharges in a falsified oil record book that was presented to Coast Guard inspectors. He was sentenced to two months in jail and fines totaling \$3,500. The ship's second engineer, Aman Mahana, also pled guilty. As a condition to MSC Management's probation, it was required to enter into a detailed, 42-page environmental compliance program covering all of its ships, paid for by MSC Management (with funding guaranteed by MSC's parent).¹

Wallenius Ship Management Pte, Ltd.

The investigation that led to this prosecution was initiated by a fax from crew members on the M/V Atlantic Breeze to an international seafarers' union, alleging that they were being ordered to engage in deliberate acts of pollution, including the discharge of oil-contaminated waste and garbage. The Coast Guard subsequently found a 'magic pipe' bypass system on board the ship, as well as a falsified oil record book and a falsified garbage record book (concealing the discharge of plastic refuse). In March, 2006, Wallenius Ship Management pled guilty to seven felony counts and agreed to pay \$6.5m in fines. The chief engineer of the M/V Atlantic Breeze, Nyi Nyi, of Myanmar, also pled guilty to submitting a false oil record book, and faces a maximum penalty of five years in prison.²

MK Shipmanagement Co. Ltd

In another case involving the routine discharge of oil sludge and oil-contaminated bilge water, bypassing pollution control equipment and the falsification of records, MK Shipmanagement, owner of M/V Magellan Phoenix, pled guilty and agreed to pay \$350,000 in April, 2006, and the ship's chief engineer, Noel Abrogar, a Filipino national, was sentenced in January, 2006, to a year in jail and three years of supervised release.

The Department of Justice noted that this was only the second time in a US federal court that an individual was sentenced to such a lengthy term for attempting to conceal the discharge of oil-contaminated water and sludge from a ship at sea. The US Attorney's Office sought a sig-

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nificant sentence because of the defendant's persistent obstruction of the investigation, including repeatedly lying to Coast Guard personnel at the initial boarding of the vessel, and later to criminal investigators and federal prosecutors. The sentence that Mr Abrogar will actually serve is not clear, however, a US appeals court vacated the original sentence because it had been based in part on the fact that Mr Abrogar had assisted in the illegal discharge of contaminated water on the high seas, an act that the court ruled could not be considered an offense for sentencing purposes under US law.³

Pacific-Gulf Marine, Inc

Pacific-Gulf Marine agreed in June, 2006, to plead guilty to deliberate acts of pollution involving four different ships, and to pay a \$1m fine and \$500,000 for community service. It acknowledged that ship records misrepresented that hundreds of thousands of gallons of oil-contaminated bilge water were properly discharged through required pollution prevention equipment, when in fact the ships involved used a 'magic pipe' to circumvent the equipment. Stephen Karas and Mark Humphries, former chief engineers of one of the ships involved, the M/V Tanabata, have been indicted for various environmental crimes, including witness tampering and obstruction of justice; Mr Humphries allegedly threw the 'magic pipe' for his ship overboard after the Coast Guard inspected the vessel. The government's criminal investigation of this matter began in 2003. Pacific-Gulf Marine came forward after learning of the investigation and disclosed to the government the results of an internal investigation, including over 50 interviews with present or former employees containing incriminating information. It received credit for having done so (compare its fine to that imposed in another multi-vessel case from 2005, Evergreen International), but the prosecution was not averted because a governmental investigation had already begun.

All Oceans Transportation Inc., et al

In this case, the owners and operators of the container vessel *Mad Taipei* agreed in July, 2006, to pay \$3.25m to resolve allegations that 15 containers lost overboard in February, 2004, on a trip from San Francisco to Los Angeles caused long-term damage to the Monterey Bay National Marine Sanctuary off the California coast. The ship operators failed to report the loss, but a container was later discovered within the sanctuary and traced to the ship. A US Coast Guard investigation revealed that the containers had been inappropriately loaded.

Ioannis Georgios Vafeas

Mr Vafeas, the chief engineer of the M/T *Georgios Nikolos*, pleaded guilty in August, 2006 to a felony count of failing to maintain accurate records concerning the handling and disposal of oil-contaminated water and sludge. He admitted directing crew members to install and later conceal a 'magic pipe' and to dump oil overboard. He faces a possible six-year jail sentence.

Sun Ace Shipping Company

Following a guilty plea, Sun Ace was sentenced in November, 2006 to pay a \$400,000 penalty and a \$100,000 community service payment, and to three years of probation, during which time its vessels will be banned from US ports and waters. Sun Ace was charged with knowingly failing to maintain an accurate oil record book and falsifying records. The US Department of Justice also requested the court grant an award of \$200,000 (half of Sun Ace's penalty), as authorized by the Act to Prevent Pollution from Ships, to three crew members who acted as whistleblowers in reporting the use of a 'magic pipe' and oil dumping to the authorities. The chief engineer and the second engineer of the vessel involved, the M/V *Sun New*, are also being prosecuted for conspiracy, obstruction of justice, and violation of the Act to Prevent Pollution from Ships.

Overseas Shipholding Group Inc

Following a multi-district investigation involving ports in Boston, Portland, Maine, Los Angeles, San Francisco, Wilmington, North Carolina and Beaumont, Texas, Overseas Shipholding Group Inc. pled guilty to 37 felony counts related to deliberate vessel pollution from nine ships and false pollution log entries on three additional ships, and agreed to pay \$37m, the largest criminal penalty to date involving deliberate vessel pollution. According to an agreed statement of facts,

"Numerous OSG crew members, including chief engineers, engaged in conspiracies to commit illegal pollution and falsify ship records while certain lower level crew members knowingly participated because they were explicitly or implicitly threatened by superiors with loss of employment if they refused." OSG also acknowledged that shore-side management failed to provide sufficient supervision and control.

These cases illustrate the continuing determination of US authorities to change behavior in the shipping industry as it relates to ocean dumping in general and the onboard operation of oily water separators in particular. The government has a number of powerful tools to employ in these efforts, including authority to impose truly significant fines and prison terms, the ability to encourage lower-level crew members to provide evidence through the carrot of sizable bounty awards (as well as the stick of prosecution), and the capacity to use non-monetary penalties (with impressive monetary consequences) like exclusion from U.S. waters or required compliance and monitoring plans during post-conviction probationary periods.

In the MK Shipmanagement case the government suffered a setback in its ability to seek sentence enhancements based on conduct outside US waters, but the effects of this decision (even if upheld and applied outside of the circuit where it was decided) can probably be limited by changes in how the government charges and prosecutes defendants. The government's powers overall remain formidable. The real question is when or whether the shipping industry will seek to lower the risk of major civil and criminal penalties by raising standards of conduct in the handling of ship-generated wastes through improvements in training and equipment. ■

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BIOGRAPHY

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Cliff Case is a partner at the New York City law firm of Carter Ledyard & Milburn LLP, where he co-directs the Environmental Practice Group and serves on the firm's Executive Committee. The Environmental Practice Group represents private and public clients in a variety of hazardous waste, permitting and development matters. Cliff's practice includes litigation and regulation as well as the environmental aspects of corporate and real estate transactions, involving both domestic and foreign clients.



Cliff served on the U.S. Environmental Protection Agency's Negotiated Rulemaking Committee on All Appropriate Inquiry, whose proposed standard for environmental site assessments formed the basis for the final rule that EPA recently issued, effective November 1, 2006. Cliff lectures and writes often on environmental topics.

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