

# Oily Water Separators (OWS) & Oil Record Books (ORB)



## “Fraudulent entries in ORBs is rising exponentially and fines have recently skyrocketed”

■ The Oily Water Separator (OWS) was first mandated for installation on ships by the International Maritime Organization (IMO) in 1974. At the same time, a requirement was established for maintenance of an Oil Record Book (ORB) to keep track of use of the OWS and disposal of the ship’s oily waste. The OWS was originally designed to reduce the oil in discharge water to 100 parts per million. Ships could discharge waste water that contained up to that level of oil so long as the ship was underway, at least a certain distance offshore, and not in a particularly sensitive area. The equipment operated reasonably well and the program was largely self-enforced. Life was good.

In 1992, though, the discharge standard was strengthened to 15 parts per million. Problems surfaced immediately. The OWS equipment was not operating properly. Filters regularly clogged and discharges ceased frequently. Meanwhile, waste water levels in the bilges were rising. It turned out that many OWS manufacturers had merely fine-tuned their old 100 ppm devices to achieve the new 15 ppm requirement. This was achievable on a test platform in the factory, but frequently failed on a ship at sea. Life was no longer good, at least for chief engineers, who had to manage this problem while keeping the ship operating.

Things changed drastically on February 1<sup>st</sup> 1993, when a routine U.S. Coast Guard air patrol observed a long sheen of oil streaming astern of a cruise ship on the high seas off Florida. Review of the ship’s ORB when the ship arrived in port revealed that no entry had been made relative to this discharge. When the flag state declined to take action, the U.S. government charged with cruise ship operator with making a false statement to a federal official. The operator litigated this and a related case, arguing, among other things, that there was no violation of federal law since both the discharge and the ORB entry were made while the ship was on the high seas. The court held, though, that the false statement occurred when the ORB was presented for Coast Guard examination while the ship was in a U.S. port. After losing the procedural motions, the cruise ship operator settled this criminal charge by payment of USD 9 million and, in the related case, by payment of USD 18 million. No other shipowner or operator has litigated an ORB charge since those highly expensive events. Life was no longer good for chief engineers, masters, or shipowners.

Many in the maritime industry are beginning to view the ORB as a signed confession. The number of prosecutions in the United States for fraudulent entries in ORBs is rising exponentially and fines have

recently skyrocketed. In the years 1998 through 2001, research has revealed one prosecution in each year for oil record book violations. In 2002, there were seven prosecutions – and four of those were against individual chief engineers. In 2003, nine prosecutions, four of which were again against individual chief engineers. In 2004, there were seven prosecutions, and only two were directed at individual chief engineers. Through September, nine companies and nine individuals have been prosecuted during 2005. Criminal fines to date have totaled USD 82,716,000. Shipping companies are also being required to implement court-supervised compliance programs.

Under federal law, a false statement consists of

- 1) making a statement orally or in writing;
- 2) when the statement is false or misleading;
- 3) the false or misleading information is material;
- 4) the statement or concealment was made knowingly; and
- 5) the statement was made to a federal official engaged in performance of his or her duty.

Here, the statement was made in the ORB, which the ship is required to maintain and is required to present to the Coast Guard upon request when the ship is in U.S. waters. If the federal government can prove that the chief engineer or another senior person in the ship knew that one or more entries in the ORB (which the person in charge of the operation is required to initial) is false and that the false entry was made knowingly, then the company can be held criminally responsible. The individuals making the false entry (generally the chief engineer and the master) can also be held criminally responsible.

Because the ORB bears the initials of the person making each entry and the signature of the master, the document serves the purpose of a signed confession, for which there is almost no defense.

To minimize the likelihood that the chief engineer or another engineering officer on the ship improperly disposes of the waste oil, the company should take positive steps to ensure that the OWS is operating properly and is well maintained. This will often require replacement of the OWS, particularly if the unit is more than about seven years old. The chief engineer should be clearly informed (preferably in writing) that his or her primary goal in this regard is to properly handle and dispose of waste oil and that the general admonition to minimize expenses does

↳ continues on page 9

# INVESTIGATIONS

## cast an even darker shadow

Record Book entries regarding discharge of oily water.

As can be seen from the descriptions of the foregoing cases, (1) both owners in their corporate forms and individuals are being charged and convicted, and (2) none of the cases are going to trial, but are being resolved by means of guilty pleas, that is, admissions in court and on the public record that the defendants have engaged in the criminal conduct with which they have been charged, and are prepared to endure the consequences. In the face of the possibility of even more severe sanctions than those following a guilty plea, defendants have not been willing to take these matters to trial.

### The Consequences

Criminal convictions, including plea agreements, can bring with them not only substantial fines, but possible prison terms, the banning of personnel from entering the United States or serving on vessels calling at United States ports, and stringent environmental compliance programs which the United States government will supervise. Investigators will also detain the vessels for indefinite periods and crew members may be held as material witnesses long after the ship is allowed to sail. The financial implications of such detentions of ships and personnel are obvious and substantial.

### Contingency Planning

In the crucial first hours after a serious casualty or security incident, investigators from the Coast Guard, the Environmental Protection Agency, Border and Customs Protection, the FBI, the federal secret service, and comparable state agencies may board the vessel and begin an investigation. Mariners must understand both their rights and their obligations, and must understand what actions will bring additional charges of obstruction of justice.

Education through contingency planning and training must prepare company personnel – both shipboard and management – for the appropriate and proper response in the event they become involved in criminal matters.

Proper contingency planning and training of personnel should include:

- Explanation of the investigative roles of the various agencies, including the Coast Guard. The Coast Guard may simultaneously be onboard conducting vessel inspections, regulatory compliance, port state control, and criminal issues;
- Identification and explanation of the rights and obligations which both personnel and the company have when confronted with a criminal investigation;
- Outline of Coast Guard policy and procedure regarding criminal investigation;
- Identification of significant maritime environmental crimes, their elements and possible sanctions;
- Implications for criminal and civil liability inherent in the mandatory reporting of an incident to the Coast Guard, the flag state, and owners;
- Establishing procedures for avoidance of falsification of evidence and obstruction of justice charges;
- Inclusion of competent criminal defense counsel as part of the ship owner's response team;
- For risk managers and senior executives, an explanation of the negative impact criminal proceedings and convictions may have on civil liabilities and insurance programs;
- Establishing and publishing guidelines covering the circumstances under which the company will provide a defense for its personnel who are facing criminal charges and development of personnel policies covering the company's obligations to its employees caught up in criminal matters;
- Consideration of circumstances where self disclosure may be appropriate and the benefits which may be gained by such early action;
- The role that whistle blowers, who are often disgruntled employees or former employees, may play and the appropriate responses to disclosures from such sources.

The looming shadow of the criminal investigator is a constant presence in the

modern maritime world. Only planning and training can assure a proper and competent defense when the criminal investigators arrive onboard, or even in the company's offices, and minimize the serious risks of early and irreversible errors in the response. ■

↳ continued from page 7



not apply to this goal. Also, personnel should be clearly advised of the requirement that log and record entries are to be made contemporaneously with the event and are to be accurate.

A preferred method of accomplishing both tasks is for the company to institute a maritime compliance program. Federal law provides that, if a company has a qualifying compliance program in place and a violation occurs regardless, the company will be entitled to a major reduction in sentence. One major cruise ship company benefited from this provision when it was proven that some of its personnel had engaged in improper discharge of waste oil and falsification of the ORB. Both the Department of Justice and the Environmental Protection Agency (EPA) have written policies providing that, in appropriate cases, they will forego criminal prosecution for companies with compliance programs. The EPA has exercised such forbearance in the past, although not yet in a maritime context.

The bottom line is that, for a shipowner or operator to avoid handing the federal government a signed confession in the form of an oil record book with false entries, the owner or operator must impress upon its engineering officers that they are to properly maintain and operate the OWS and to make accurate and contemporaneous entries in the ORB. The engineering officers, particularly the chief engineer, must be given every incentive to do the right thing and no incentive to do the wrong thing. ■