

On the horizon: US criminal sanctions vs. offshore operations



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Offshore operations in the United States are governed by an overlapping web of international treaties and federal and state environmental laws and regulations.

Some rules apply when a Mobile Offshore Drilling Unit (MODU) is underway; others when the MODU is attached to the seabed. Discharges permitted by international treaties may not be allowed under U.S. laws, and vice-versa. Absent a carefully crafted and strictly implemented compliance program, a company operating or drilling offshore is at risk for costly civil and criminal sanctions – even for inadvertent record keeping violations.

What is Your Exposure?

When in transit, a MODU is subject to the same environmental requirements as vessels including the International Convention for the Prevention of Pollution from Ships (MARPOL), and in some cases the U.S.'s Act to Prevent Pollution from Ships (APPS). APPS adopts, but also criminalizes, violations of MARPOL.

Given the requirements imposed on MODUs as ships, the offshore oil industry should look closely at how the shipping industry fared under the U.S. government's Vessel Pollution Initiative which began in 1998 as a means to force MARPOL compliance. Since then, more than \$330 million in criminal fines and more than 26 years of prison confinement have been levied¹. Whistleblower laws resulted in employees turning against their employers to receive rewards of up to half of fines imposed against their employers. Criminal sentences against the corporate defendants typically involved the imposition of comprehensive and costly environmental compliance plans requiring years of outside independent audits and court-appointed monitors as a

condition of probation. In some instances, certificates of compliance were revoked and ships were banned from US ports because of MARPOL violations.

Could the offshore industry be next?

Offshore operators in the Gulf of Mexico are experiencing substantial growth and industry activity there is projected to increase by 60% over the next five years². To keep pace, the U.S. Coast Guard (USCG) will be forced to increase its inspections.

- November 2012: USCG and the U.S. Bureau of Safety and Environmental Enforcement (BSEE) executed a Memorandum of Understanding regarding cooperative enforcement on the Outer Continental Shelf (OCS)³. Historically, BSEE (through its predecessor agencies) exercised jurisdiction when the facility was attached to the seabed; while USCG regulations governed the same facility when in transit.
- February 2013: U.S. sued rig operator after inspectors discovered a metal tube "hidden in the rafters" allegedly being used to allow dispersants to bypass compliance inspections and mask unlawful oil discharges.
- USCG announced it is considering establishing a single Marine Inspection unit to oversee marine inspections for all MODUs and Floating OSC facilities engaged in exploration or production in the Gulf of Mexico⁴.

- Regulatory provisions governing MODU and OCS facility operations in the United States are numerous, confounding and often carry criminal sanctions.
- The U.S. government's Vessel Pollution Initiative resulted in more than \$330 million in criminal fines and more than 26 years of prison confinement as a result of MARPOL violations.
- "Trust but verify" – Overreliance on unenforced written policies can lead prosecutors from a rig straight into the boardroom. Only those companies that are committed to enforcing their policies through purposely designed audit programs can minimize that risk.

How can your company minimize these risks?

Reliance on traditional Safety Management Systems (SMS) or Safety and Environmental Management Systems (SEMS) audits is not enough. Flag Administration and Class inspections may be too cursory, have different objectives and are not privileged from disclosure to U.S. authorities. These programs proved to be ineffective for the shipping industry.

A self-critical compliance audit program is essential. If violations are discovered through an internal compliance program, a Voluntary Disclosure to the USCG or Environmental Protection Agency should be considered after consulting with legal counsel. The benefit of a successfully executed Voluntary Disclosure is that the respective agency will not make a criminal referral to the Department of Justice (DOJ). If DOJ is already involved, the existence of a robust compliance program must be considered by prosecutors when deciding whether to file criminal charges against a company. A vigorous compliance program can also be used to argue against debarment. As further deterrence, a debarred company is unable to participate in any federal contracts until the government determines that the company is "presently

responsible." Debarment can be fatal to a company that operates or drills on parcels leased from the government.

Every MODU operator has written policies supporting environmental stewardship. Yet, overreliance on unenforced written policies can lead prosecutors from a rig straight into the boardroom. Experience demonstrates that only those companies that enforce their policies through purposely designed audit programs receive credit when the government decides who will be prosecuted or debarred. From the government's view, written policies are only as good as the internal commitment to ensure compliance and documentation of that compliance.

The mantra is "trust but verify." Trust that company procedures are being followed; but, verify through audits. Trust that your audits are meaningful and comprehensive; but verify by auditing your auditors. If you don't, the government will.

- 1 ACCOMPLISHMENTS REPORT, Fiscal Year 2012, UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION date January 17, 2013.
- 2 78 Federal Register 48180 dated August 7, 2013
- 3 www.uscg.mil/hq/cg5/cg522/docs/mou/BSEE_USCG_MOU_NOV_2012.pdf.
- 4 78 Federal Register 48180 dated August 7, 2013

