

Marc Greenberg

KEESAL, YOUNG & LOGAN



Hong Kong



San Francisco



Seattle



Long Beach

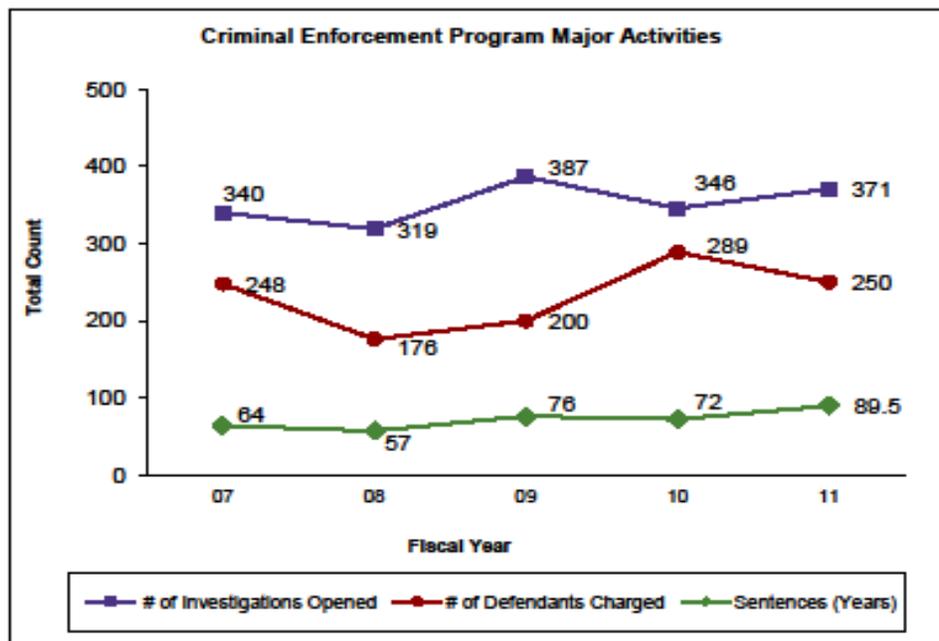


Alaska

**US Pollution Liabilities:  
Accidents, Mistakes & Intentional  
Discharges-Is there Really a  
Difference?**

# Cases – 2011 Statistics:

## FY2011 Enforcement & Compliance Annual Results Criminal Enforcement



- In FY 2011, 371 environmental crime investigations were opened. The second highest number of new cases since FY 2007.
- The increase reflects the 2008-2010 strategy to increase the number of special agents back up to the minimum of 200, as mandated by the 1990 Pollution Prosecution Act.
- Criminal charges were brought against 249 defendants in FY 2011, the second highest number since FY 2007. Of the 249 defendants, 197 were individuals and 52 were companies. Charging individuals, where warranted, enhances deterrence because only individuals face potential incarceration.
- In FY 2011, individual defendants were sentenced to a total of 89.5 years of incarceration.\*

Note: The 248 defendants charged in FY 2007 is different than the number which appeared on FY 2007 report (226). FY 2007 number failed to include the defendants in several additional cases that were also charged during FY 2007.

\* The total level of incarceration in FY 2011 was reduced by 43 years as a consequence of prior Supreme Court decisions which made the U.S. federal sentencing guidelines discretionary rather than mandatory.

FY2011 Data Source: Criminal Case Reporting System; Source for previous years: annual Criminal Case Reporting System data.

# Enforcement Trends

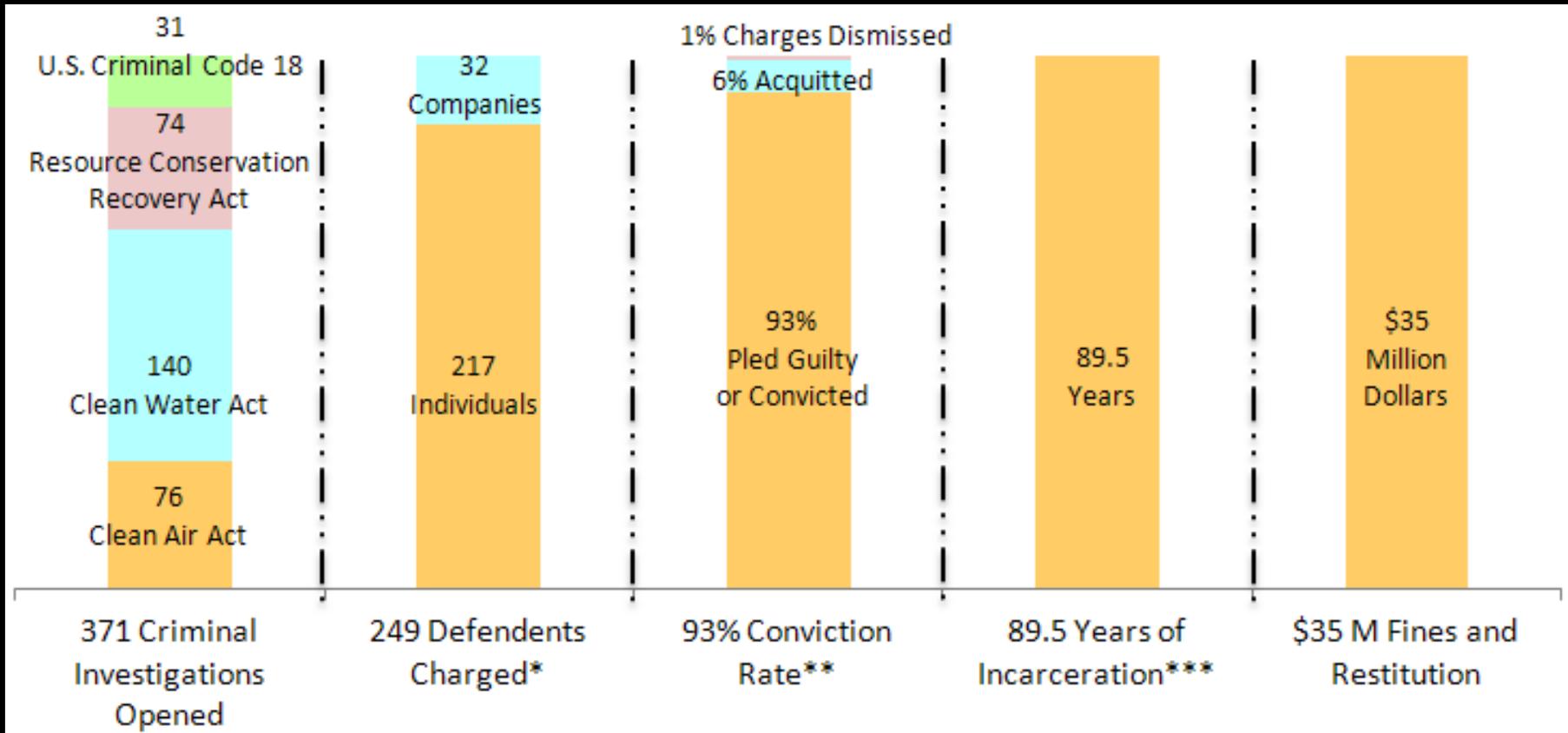
**FY 2007 - FY 2011**

## **Criminal Enforcement Program Activities**

*(Fines and Restitution Inflation/Deflation Adjusted to FY 11 Dollars)*

<b>Criminal Enforcement Program Major Activities</b>				
<b>Fiscal Year</b>	<b># of Cases Initiated</b>	<b># of Defendants Charged</b>	<b>Sentences (Years)</b>	<b>Fines and Restitution (in \$M Inflation/Deflation Adjusted to FY 11 Dollars)</b>
07	340	248	64	\$68
08	319	176	57	\$66
09	387	200	76	\$100
10	346	289	72	\$42
11	371	249	89.5	\$35

# Enforcement Trends



# U.S. Federal Laws

- Oil Pollution Act 1990 (OPA 90)
- Act to Prevent Pollution From Ships (APPS)
- Federal Water Pollution Control Act (FWPCA)
- Clean Water Act (CWA)
- Outer Continental Shelf Lands Act Amendments
- Coastal Zone Management Act
- Magnuson-Stevens Fisheries Act
- Deep Water Port Act 1974
- Trans-Alaska Pipeline Authorization Act
- Refuse Act
- Migratory Bird Act
- Marine Sanctuary Act
- Federal Ballast Water Management Act
- Hazardous Materials Transportation Act

# U.S. Federal Laws

- False Statements or Entries Act
- Felony Obstruction of Justice
- Felony Witness Tampering
- Felony Destruction of Records
- Conspiracy
- Alternative Fines Act
- Forfeiture

# United States of America v. Maury, Davidson, Prisque, Faubert, Atlantic States Cast Iron Pipe Co., (9/17/12)

- former plant manager John Prisque, 70 months (almost six years) in prison;
- former human resources manager Scott Faubert ( in charge of safety), 41 months (almost 3.5 years) in prison;
- former maintenance supervisor Jeffrey Maury, 30 months (2.5 years) in prison;
- former supervisor Craig Davidson, six months in prison; and
- the company, four years probation and an \$8 million fine.

# United States of America v. Maury, Davidson, Prisque, Faubert, Atlantic States Cast Iron Pipe Co., (9/17/12)

- Clean Air Act
- Clean Water Act
- OSHA Violations
- Obstruction of Justice
  
- Bad Facts made bad law.

# DOJ Priorities



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

- Clean Air Act
  - *“There’s a widely held view among prosecutors that there has been too little prosecution of Clean Air Act cases historically.”* David Uhlmann, ECS Chief from 2000-2007
  - EPA will be more aggressive on toxic air pollution in 2012, according to Cynthia Giles, OECA Assistant Administrator



# DOJ Priorities



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

- Vessel Pollution
  - Increased enforcement, especially “magic pipe” cases.
  - Whistleblowers may get up to half of criminal fine under Act to Prevent Pollution from Ships.



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

ENVIRONMENTAL  
JUSTICE  
AT  
DOJ



# Korean Shipping Company, Chief Engineer Convicted in Hawaii

- *01/11/2012*

Keoje Marine was sentenced to pay a \$1.15 million criminal penalty, \$250,000 of which will go to the National Fish and Wildlife Foundation as a community service payment for projects aimed at protecting and restoring marine resources in the District of Hawaii.

# Two Shipping Companies Plead Guilty in Maryland

- *01/25/2012*
- Two corporations pleaded guilty today in separate hearings in Baltimore for their role in managing and owning a ship engaged in deliberate discharges of waste oil and plastic garbage.

Ship owner, operator fined \$1.85M in pollution case. Whistle-blower, a Filipino crewman, to receive a reward

- 01/25/2012
- When Coast Guard inspectors boarded a new freighter docking in Baltimore last February, a junior-level engineer from the Philippines approached and slipped them a note.
- "I have sometheng to till you but secret," he wrote, using all capital letters.
- Resulted in the owners and operators of the M/V *Aquarosa* being fined \$1.85 million and pay \$550,000 to a foundation to help restore the Chesapeake Bay.

## Singapore Ship Operator and Engineers Plead Guilty to Crimes Related to Pollution From Cargo Ship Traveling to Alabama; Company Sentenced to Pay \$1.2 Million Criminal Penalty

2012, Target Ship Management (Singapore) pleaded guilty and was sentenced in Mobile, Alabama for deliberately falsifying records to conceal pollution discharges from the ship directly into the sea

The company was sentenced to pay a \$1 million criminal fine along with a \$200,000 community service payment to the National Fish & Wildlife Foundation.

*Italian Shipping Company and Chief Engineer  
Charged With Environmental Crimes and  
Obstruction of Justice*

- *03/05/2012*
- Italian-based shipping company Giuseppe Bottiglieri Shipping Company S.P.A., owner and operator of the MV *Bottiglieri Challenger*, and Vito La Forgia, the vessel's chief engineer, charged in a four-count indictment with the illegal dumping of waste oil and oil-contaminated waste water and two counts of obstruction of justice.

*Chief Engineer of U.S. Ship Pleads Guilty to  
Concealing Deliberate Pollution in “Magic  
Pipe” Case*

Babukchiev, the former chief engineer of the M/V *Windsor Castle* pleaded guilty to criminal charges related to the deliberate discharge of oil-contaminated bilge waste through a “magic pipe” that bypassed required pollution prevention equipment.

Navi Ship Management pleaded guilty to an APPS count and to making false statements to the Coast Guard and was fined \$1.5 million.

February 2008

## *One Outlier Vessel Pollution Case*

- The Government did not charge the employer.
- The Government did not charge officers in charge.
- The Government did not require the employer to implement a compliance program.

# *Former U.S. Coast Guard Officer Sentenced for Lying About Vessel Pollution*

David G. Williams, a former Coast Guard Chief Warrant Officer on the Coast Guard Cutter *Rush*, was sentenced in U.S. District Court in Hawaii for making a false statement to federal criminal agents investigating allegations of potential discharges of oil-contaminated waste from the cutter into the Honolulu Harbor.

Williams was sentenced to pay a \$5,000 fine, serve 200 hours of community service and serve two years of probation.

# *US Investigative Tools*

- Analysis of OWS operability.
- Analysis of OWS maintenance history.
- Analysis of waste disposal records.
- Analysis of Oil Record Books.
- Analysis of incinerator capacity.
- Analysis of incinerator log.
- Interview of crew members.
- Review of audit reports.
- Review of enforcement history.
- Review of Alarm Log.
- Whistleblowers.

# Whistleblower Sues The United States Attorney For His Bounty

13 Attorneys for Plaintiff  
PATRICK ANDERSON

14

15

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

16

17

PATRICK ANDERSON

18

Plaintiff,

19

vs.

20

21

UNITED STATES OF AMERICA,

22

Defendant.

23

24

CASE NO. **CV 12-03490**

**PLAINTIFF PATRICK ANDERSON'S  
ORIGINAL COMPLAINT**

**DEMAND FOR JURY TRIAL**

- Leaking overboard discharge valves.



- Oil on the discharge side



# What Wrong In This Picture?



# What's Wrong In This Picture?



# What's Wrong In This Picture?

			MAX. CAPACITY → 59,8 m <sup>3</sup>
			RETAINED QUANTITY → 30,0 m <sup>3</sup> 
06-MAY-2012	C	12	2,5 m <sup>3</sup> FROM AIR SEPARATOR SURGE TANK No. 86
			CAP. 3,0 m <sup>3</sup> ; RETAINED - 0,5 m <sup>3</sup>
		12.2	TO SLUDGE HOLDING TANK No. 83; CAP. 84,7 m <sup>3</sup>
			RETAINED QUANTITY → 21,5 m <sup>3</sup> 
08-MAY-2012	D	13	21,0 m <sup>3</sup> FROM BILGE WATER TK. No. 81, CAP. 59,8 m <sup>3</sup>
			RETAINED QUANTITY → 9,0 m <sup>3</sup>
		14	17.10 - 19.51
		15.1	DISCHARGED OVERBOARD WITH OWS THROUGH 15 PPH

# 18 Months of DATA





I didn't do it, my computer is lying.

# Garbage Cases



# Garbage Log



		RECORD OF GARBAGE DISCHARGES 59/120					Approved by : R.G. [Signature]			
<p><b>Garbage Categories</b></p> <p>1. Plastic</p> <p>2. Floating dunnage, lining, or packing materials</p> <p>3. Ground paper products, rags, glass, metal, bottles, crockery, etc.</p> <p>4. Paper products, rags, glass, metal, bottles, crockery, etc.</p> <p>5. Food waste</p> <p>6. Incinerator ash * REFER TO PAGE 7, SECTION 9 FOR FURTHER DETAILS</p>										
Date/Time	Position of the Ship	Estimated Amount Discharged into Sea (M <sup>3</sup> )					Estimated Amount Discharged to Reception Facilities or to other ship (M <sup>3</sup> )		Estimated Amount Incinerated (M <sup>3</sup> )	Certification Signature
		CAT.2	CAT.3	CAT.4	CAT.5	CAT.6	CAT.1	Other		
13.03.01 22.00	P. PIRAEUS 39° 22' 2" N	-	-	-	-	-	-	-	-	[Signature]
14.03.01	014° 00' 2" E	-	-	-	0.2	-	-	-	> 40	[Signature]
15.03.01	P. LIVORNO PORT OF	-	-	-	-	-	-	-	-	[Signature]
16.03.01	SPAIN	-	-	-	-	-	-	-	-	[Signature]
17.03.01 18.00	P. VALENCIA 35° 31' 3" N	-	-	-	-	-	0.3	0.1	-	[Signature]
18.03.01	007° 36' 7" W	-	-	-	0.3	-	-	-	> 50	[Signature]

# Land Based Initiatives

- DOJ/EPA and OSHA commenced an “Initiative” in 2005 tying work place safety and environmental risk.

“If you don’t care about protecting your workers, it probably stands to reason that you don’t care about protecting the environment either.”



David M. Uhlmann  
Chief Environmental Crimes Section (2005)  
USDOJ



FIRE ALARM  
CONTROL PANEL  
BYPASSED

NORMAL

BYPASS



DO NOT FORGET TO PUT TO PUT BACK TO NORMAL  
AFTER STARTING 1750

0/5

OPEN

OPEN

OPEN

OPEN





# Beware: EPA Is Using Drones



HORNEY  
© 2012  
LOS ANGELES TIMES

"SEE? THEY ARE REAL!  
ONE OF THEM EPA SPY DRONES WAS  
HOVERIN' RIGHT OVER THE BARN AND I  
BLASTED IT TO KINGDOM COME!"

DRONE? THAT  
WAS GRANDPA'S  
FANCY ANTIQUE  
WEATHERVANE.



# Does migratory bird deaths resulting from lawful commercial activity that is unrelated to hunting or poaching a crime under the Migratory Bird Treaty Act?

- United States v. Brigham Oil & Gas
- Seven companies charged with violating the Migratory Bird Treaty Act.
- Dead birds were found near their operations.
- Three defendants entered plea agreements.
- What is required to meet the definition of “taking” under the MBTA?
  - “Intentionally reducing wildlife to possession”
  - “Attempt to possess wildlife through capture”
  - Not incidental or accidental taking through lawful acts
  - “Take” means to pursue, hunt, shoot, wound, kill, trap, capture, or collect

# Government argued that any bird death is a taking

- The Government requests that the Court apply a broad interpretation of the words “take” and “kill” in the MBTA to encompass not only physical activity directed against a bird, but also habitat modification and other impacts that arise from lawful commercial activity. The Eighth Circuit has held that such a broad interpretation “would stretch this 1918 statute far beyond the bounds of reason.”

# Motion To Dismiss Granted

- The terms “take” and “kill” are action verbs that generally denote intentional behavior.
- Many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths.
  - Window strikes account for 97-976 million bird deaths each year.
  - Cars may kill 60 million birds.
  - Cats kill hundreds of millions of birds each year.



*Wanted by the FBI*

 [Get FBI Updates](#)



**Have You Seen This Criminal?**

# Over-Criminalization

## A Bird-Brained Use of the Migratory Bird Treaty Act

Joe Luppino-Esposito | February 6, 2012 at 12:03 pm | (16) | [Like](#) 64 | [Tweet](#)



## Overcriminalization Victimizes Animal-Loving 11-Year-Old and Her Mother

Joe Luppino-Esposito and Rajja Churchill | August 5, 2011 at 4:25 pm | (29) | [Like](#) 1k | [Tweet](#)



No. 98-1600

In the Supreme Court of the United States

ROBERT W. "BOBBY" UNSER, PETITIONER

v.

UNITED STATES OF AMERICA

# Failure to Report?

- Possible civil penalties
- Possible criminal sanctions
- Negligent Failure to Report
- Willful and Knowing Failure to Report



# Hazardous Condition

- Any condition that may adversely affect the safety of any vessel, bridge, structure, or shore area or the environmental quality of any port, harbor, or navigable waterway of the United States.
- It may, but need not, involve collision, allision, fire, explosion, grounding, leaking, damage, injury or illness of a person aboard, or manning-shortage.

# Key Cases – *Canal Barge*

- *United States v. Canal Barge Co.*
- Failure to “immediately notify” Coast Guard of a “hazardous condition” in violation of the Ports and Waterways Safety Act, 33 U.S.C. 1221 *et. seq.*

# Voluntary Disclosure Policy

1. Must have been discovered during compliance management system.
2. Voluntarily discovered – not because of court ordered audit.
3. Disclosure in writing within 21 days of discovery of violation.
4. Must discover the violation independent of government.  
Can't be a race to beat the whistleblower.
5. Must correct condition.
6. Prevent reoccurrence.

Get out of jail free once every five years.



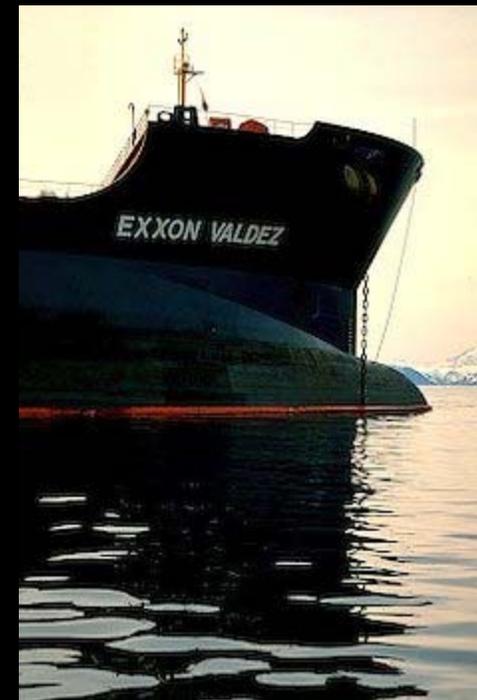
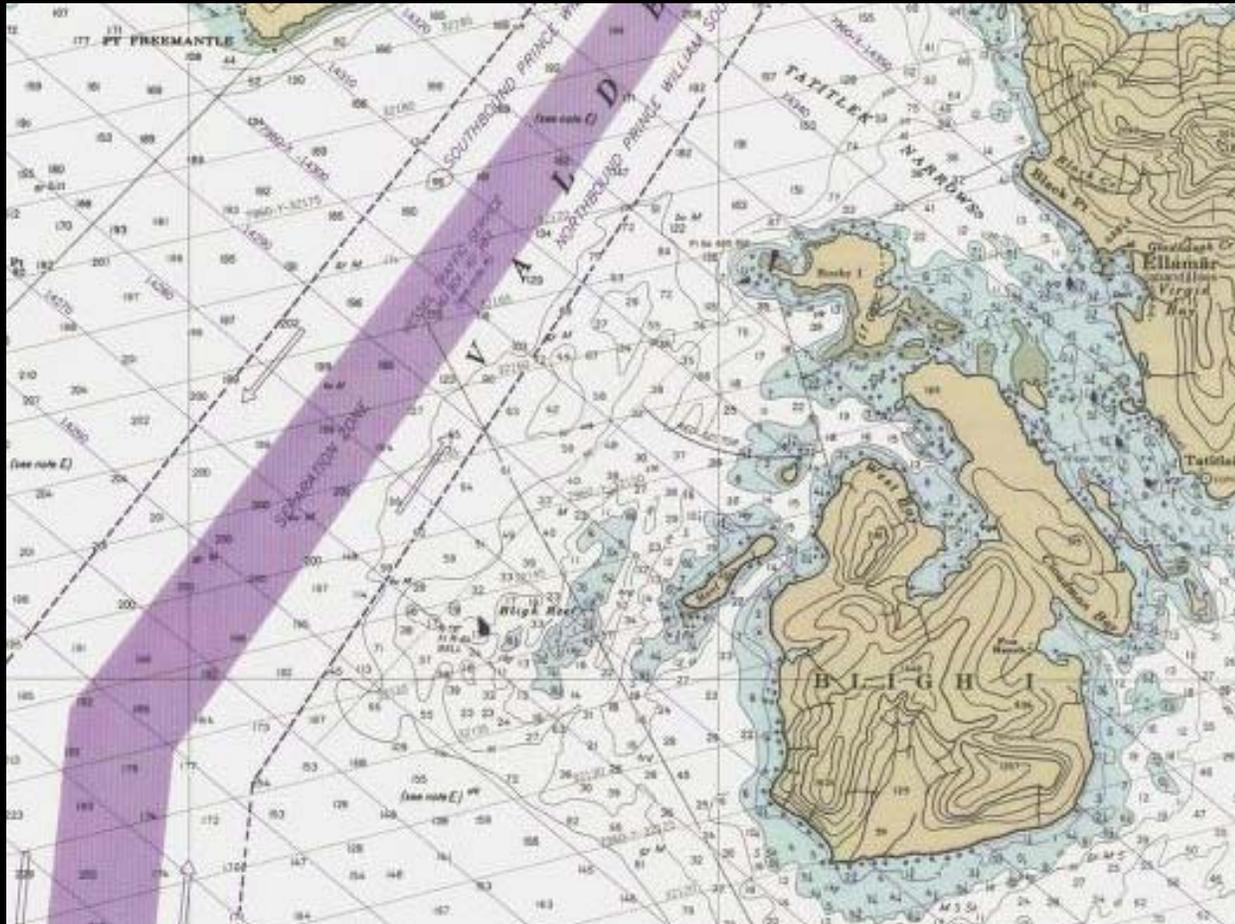


## What If It Was An Accident ?

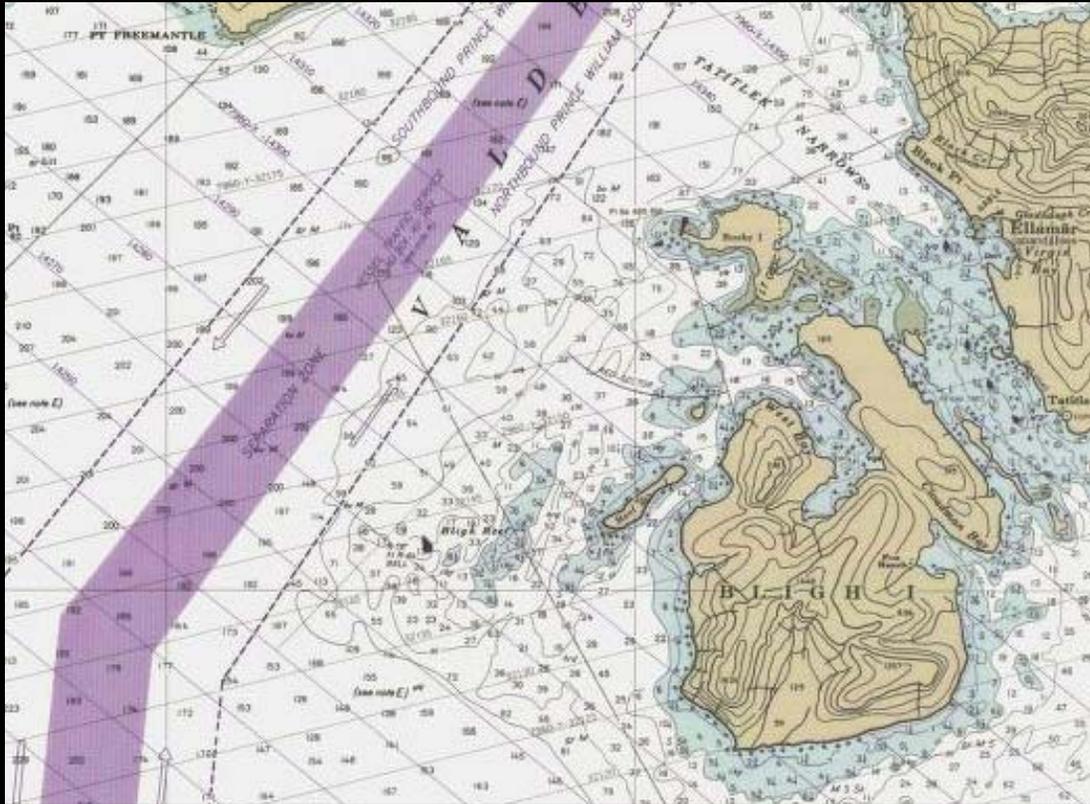


But You Are No Better Than Your  
Worst Employee.





# The Pathfinder Finds Bligh Reef



My Tank Runneth Over

# Bunker Spill = Criminal Prosecution



# Ship's Fuel Tank Gauges

What is wrong in this picture?



# How Could One Of The Tank Be Overfilled?



# When Did It Become A Criminal Investigation?

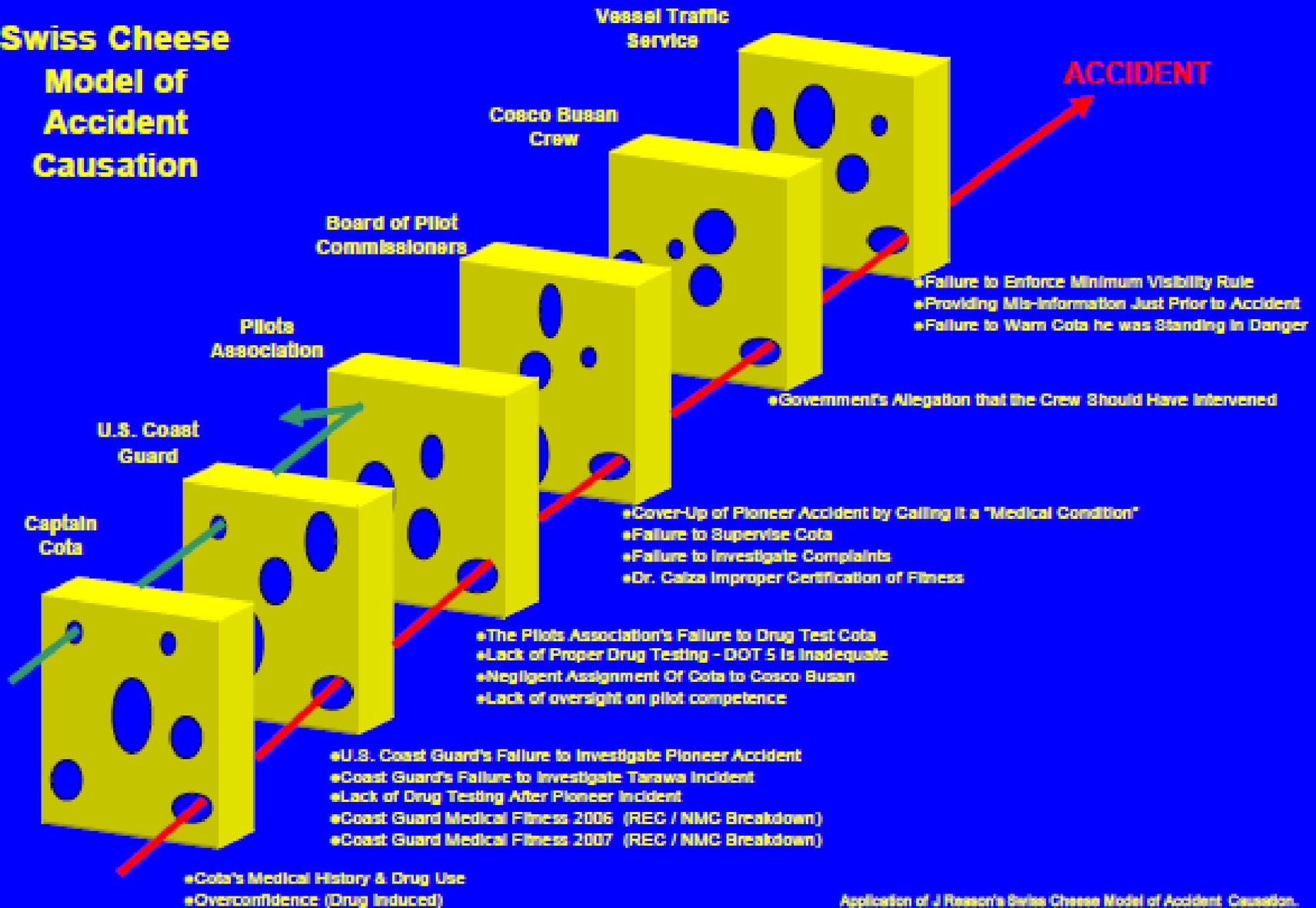
- a. As soon as you as you receive a call about an issue.**
- b. As soon as the Coast Guard walks on the ship.**
- c. As soon as someone admits wrongdoing.**
- d. As soon as two people admit wrongdoing.**
- e. As soon as someone suggests that they hide documents.**
- f. As soon as you conclude that someone has violated the law.**

# It Only Takes Negligence To Be Guilty of a Crime

- Simple Negligence = Criminal Negligence
- 1% the cause = 100% Criminally Negligent

United States v. Hanosek

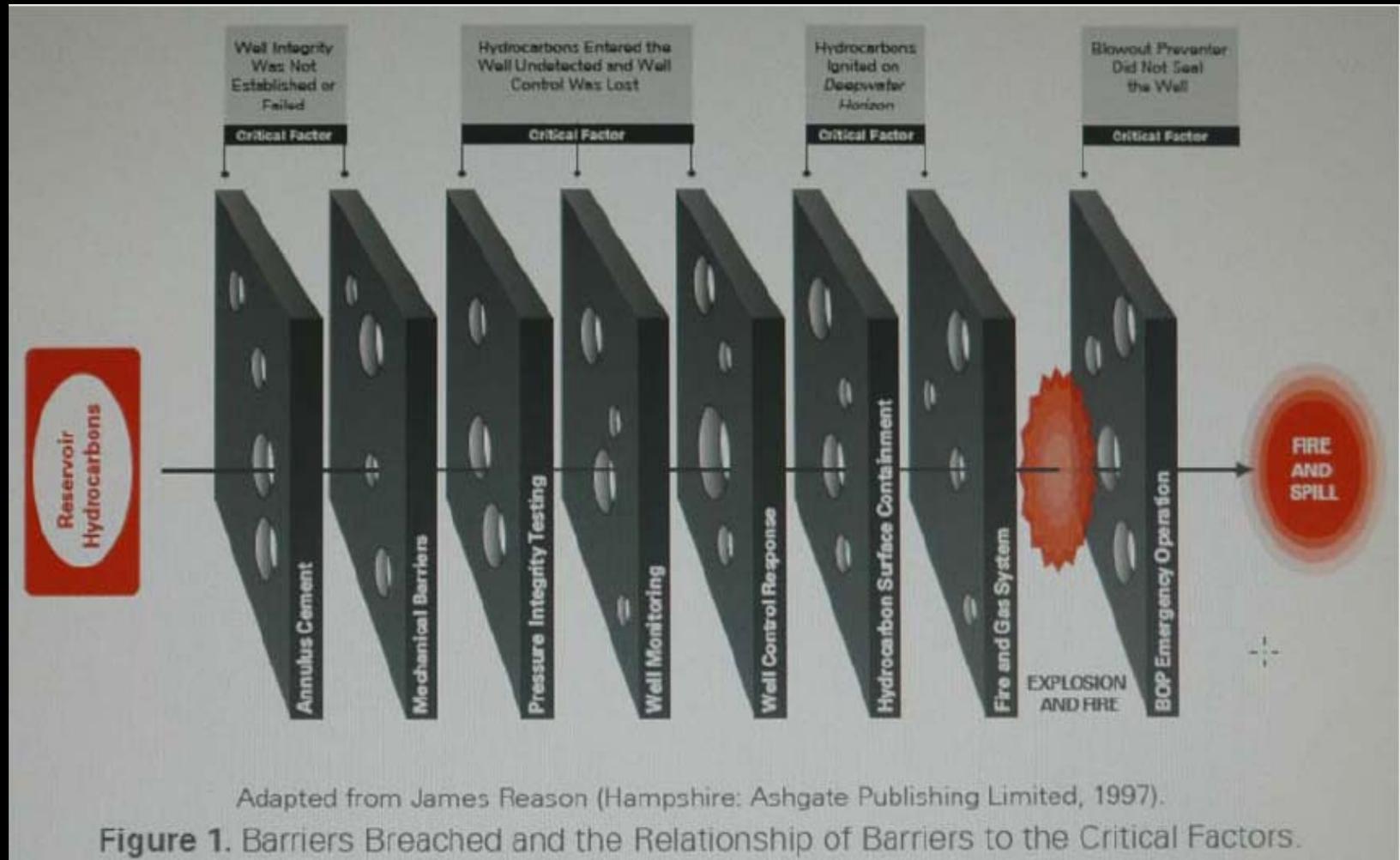
# Swiss Cheese Model of Accident Causation



Which Ones Are Criminal Negligence?

Who should be charged with criminal strict liability?

# BP's Explanation of Deepwater Horizon Event



“Any Press Is Good Press.”

Vanna White



THE COMMON LAW IS THE WILL OF *Mankind* ISSUING FROM THE *Life* OF THE *People*

SEARCH THE SITE  [SEARCH](#)

THE UNITED STATES  
**DEPARTMENT OF JUSTICE**

[HOME](#) [ABOUT](#) [AGENCIES](#) [BUSINESS](#) [RESOURCES](#) [NEWS](#) [CAREERS](#) [CONTACT](#)

[Home](#) > [Briefing Room](#) > [Justice News](#) [Printer Friendly](#)

**JUSTICE NEWS**

**Department of Justice**  
Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, August 15, 2012

**Italian Ship Owner and Chief Engineer Sentenced in Alabama for Crimes Related to Illegal Discharges from Cargo Ship**

*Company Sentenced to Pay \$1.3 Million Criminal Penalty*

WASHINGTON – A shipping company headquartered in Italy and the chief engineer of one of its ships were sentenced today in federal court in Mobile, Ala., for deliberately falsifying records to conceal discharges of oily wastewater from the ship directly into the sea. Giuseppe Bottiglieri Shipping Company S.P.A, was sentenced by U.S. District Court Judge Ginny Granade in the Southern District of Alabama to pay a \$1 million criminal fine, serve four years of probation, and make a \$300,000 community service payment to the National Fish and Wildlife Foundation. The company must also fund and implement a comprehensive environmental compliance plan during the term of probation. Chief Engineer Vito La Forgia was sentenced by Judge Granade to one month in jail.

**DEPARTMENT OF JUSTICE ACCOMPLISHMENTS**

**OPEN GOVERNMENT**  
AT THE  
**DEPARTMENT OF JUSTICE**

**THE CRIMINAL JUSTICE SYSTEM**  
*as a*  
**COUNTERTERRORISM TOOL**

**JUSTICE.GOV en ESPAÑOL**

# EPLS

## Excluded Parties List System



EPLS - Excluded Parties List System



Suspension and Debarment Program

Brief History of EPA's Debarment Program

Contacts

EPA Debarment and Suspension Contested Case Determinations

Information Regarding the Suspension and Debarment Process, Clean Water Act and Clean Air Act Ineligibilities, How to Contest a Notice, and How to Seek Reinstatement

Regulations

Excluded Parties List System

Interagency Suspension and Debarment Committee

Return to the Grants and Debarment Home Page

U.S. ENVIRONMENTAL PROTECTION AGENCY

### Grants and Debarment

Share

[Recent Additions](#) | [Contact Us](#) Search:  All EPA  This Area

You are here: [EPA Home](#) » [Grants and Debarment](#) » Suspension and Debarment Program

## Suspension and Debarment Program

EPA's management authority includes an effective administrative tool to address waste, fraud, abuse, poor performance, environmental noncompliance or other misconduct...the authority to suspend and or debar individuals and entities.

Suspension and Debarment actions prevent companies and individuals from participating in government contracts, subcontracts, loans, grants and other assistance programs. The effect of suspension and debarment by a Federal agency is government wide. (See [2 CFR Part 180](#) and [2 CFR Part 1532](#)). Suspension and debarment actions protect the government from doing business with individuals/companies/recipients who pose a business risk to the government. [\[EXIT Disclaimer\]](#)

Richard A. Pelletier, EPA Debarring Official

### SUSPENSION

May be based on indictments, information or adequate evidence involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, non-performance, or false statements.

Are temporary actions which may last up to one year and are effective immediately.

### DEBARMENT

May be based on convictions, civil judgments or fact based cases involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, non-performance or false statements as well as other causes.

Results in the imposition of a set period of time decided on a case by case basis.

### STATUTORY DEBARMENT

Occurs by operation of law following criminal conviction under Clean Water Act (Section 508) and Clean Air Act (Section 306).

Last until the Debarring Official certifies that "condition giving rise to conviction has been corrected."

List of Violating Facilities Incorporated into GSA - "[Excluded Parties List System](#)" [\[EXIT Disclaimer\]](#)

SUSPENSIONS & DEBARMENTS can be extended to include subsidiaries, parent companies & other individuals. All individuals and entities excluded from receiving government grants and contracts are listed on the GSA "[Excluded Parties List System](#)" (For more information, please call [202-564-5374](tel:202-564-5374)) [\[EXIT Disclaimer\]](#)

# Be Prepared

- Compliance Program
- Audit Compliance Program
- Audit the Auditor
- Don't disregard data (Oil Content Meter)

Not all of the pencils in the box are equally sharp.



# Be Prepared

- Rights Advisement
- Appointment of Counsel
- Preservation of Evidence
- Prevention of Obstruction of Justice
- Protection of Constitutional Rights
- Internal Investigation

## Worst Case Scenario

- What if all my preparation fails me and the company is threatened with a criminal indictment if we don't plead guilty to a felony and pay a huge fine?
- What's the worst case scenario?

# 18 USC 3571(d) is Worst Case

- If any person derived pecuniary gain from the offense or if the offense resulted in pecuniary loss to a person other than the defendant, the defendant may be fined not more than twice the gross gain or twice the gross loss, unless imposition of a fine under this section would unduly prolong the sentence process.

(Slip Opinion)

OCTOBER TERM, 2011

1

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# **SUPREME COURT OF THE UNITED STATES**

## Syllabus

**SOUTHERN UNION CO. *v.* UNITED STATES**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

No. 11–94. Argued March 19, 2012—Decided June 21, 2012

# Must Prove Beyond A Reasonable Doubt

- If any person **derived pecuniary gain from the offense** or if the offense resulted in **pecuniary loss to a person other than the defendant**, the defendant may be fined not more than **twice the gross gain or twice the gross loss**, unless imposition of a fine under this section would unduly prolong the sentence process.

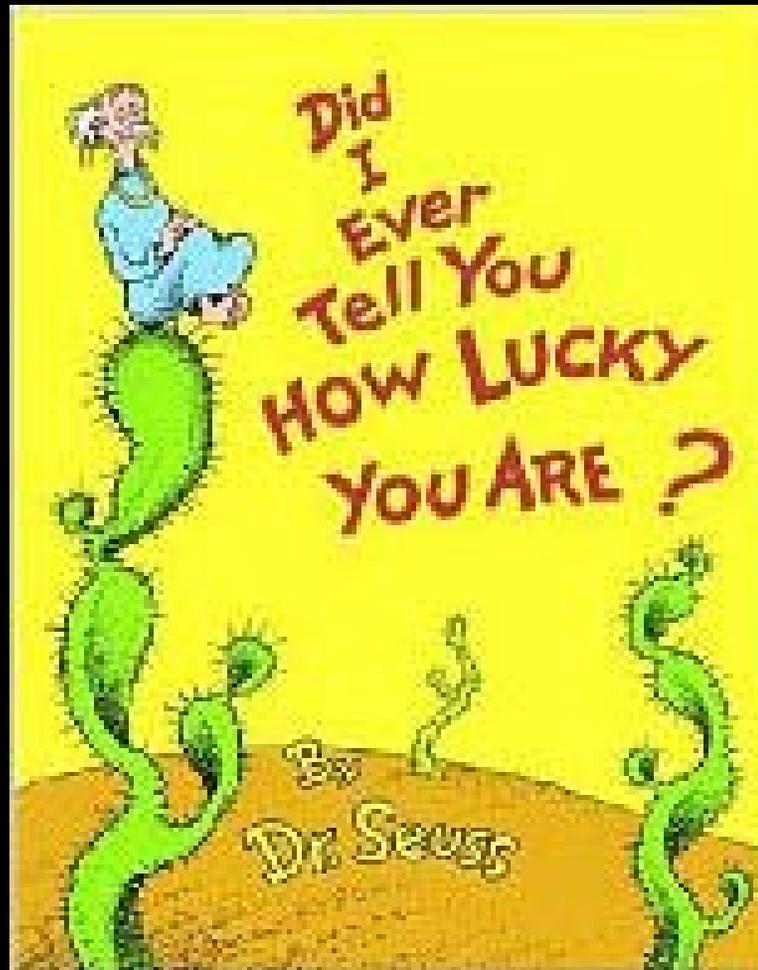
# Criminal Penalties



is 2

- Forfeiture (Criminal or Civil)

# Lessons From Dr. Seuss





Did I Ever Tell You How Lucky You Are? is a book that describes people in situations that are surely worse than your own. Imagine, for instance, if your job was to watch the bee watcher-watcher who watched the bee-watcher who watched the bee.

# Environmental Crime Table Top Exercise

- Oil Spill as a result of an accident
- No one dies but it's a serious accident
- Several birds were killed in the process



# Various Violations of Law

- Refuse Act
- Clean Water Act - criminal negligence
- Migratory Bird Act - strict liability
- Marine Sanctuary Act – strict liability
- Failure to report
- Obstruction of Justice for failing to report

# NTSB Findings

- It was an accident
- No intent to damage environment
- No benefit from the violation
- Company paid for clean-up
- Government was partially responsible
- Company's negligence was 2% of the cause

# Which Environmental Laws Did Captain Sully Violate



- Clean Water Act – oil in the Hudson River
- Migratory Bird Act – aircraft killed several birds
- Refuse Act – discharge of refuse in the River
- Marine Sanctuary Act – if oil traveled into MS
- Failure to Report – report was late
- Obstruction because of late reporting

# CAPTAIN "SULLY" SULLENBERGER, CHARLES DICKENS,

## *and the Migratory Bird Treaty Act*

---

BY MARC R. GREENBERG

---

**O**n January 15, 2009, Captain "Sully" Sullenberger heroically piloted U.S. Airways flight 1549 in a manner that quite unintentionally resulted in

Although Captain Sullenberger may be guilty under the plain reading of the MBTA, the government has stated that it has no interest in prosecuting Captain Sul



Accidents,  
Mistakes &  
Intentional  
Discharges-  
They Are All  
Criminal.

