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Whistleblower Protections to Combat Pollution on the High Seas

*Submitted to the European
Commission, Public Consultation on
Whistleblowing*

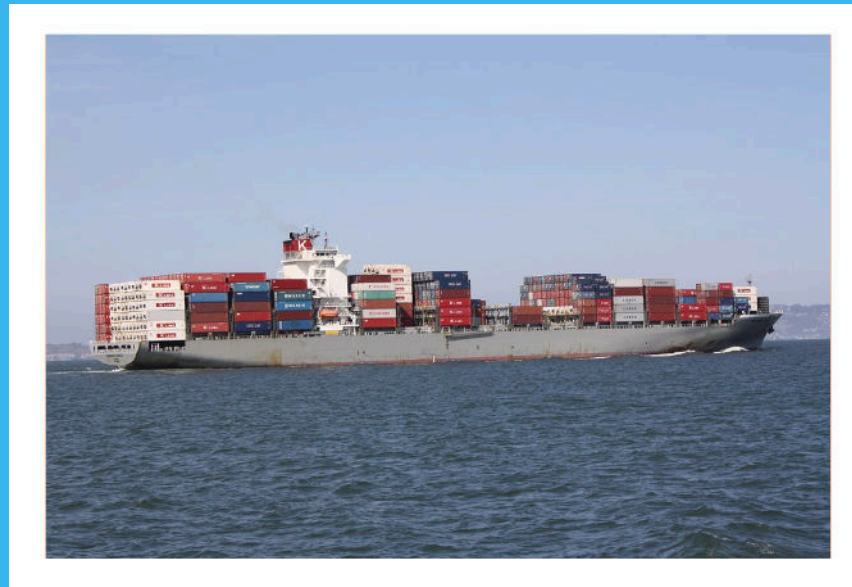
Stephen M. Kohn

Attorney at Law

Kohn, Kohn and Colapinto, LLP

On behalf of the National Whistleblower Center

- Oil pollution is a serious threat to the marine environment.
- Oil is the fastest source of deterioration to the ocean, being far more harmful than trash and waste.
- ***Implementing whistleblower laws will trigger a massive increase in the detection of ocean pollution crimes.***



Protecting the Oceans from Pollution: MARPOL (73/78)

- The International Convention for the Prevention of Pollution from Ships (1973), as modified by the MARPOL Protocol (1978), is the most important international convention concerning marine pollution.
- Every major European country has signed MARPOL and is obligated to enforce its provisions.
- Enforcement of MARPOL is the key to protecting oceans from oil pollution, noxious liquids, sewage, garbage, and air pollution from ships.



European Parties to MARPOL Protocol

- Albania (2007)
- Austria (1988)
- Belarus (1984)
- Belgium (1988)
- Bulgaria (1985)
- Croatia (succession 1991)
- Cyprus (1989)
- Czechia (succession 1993)
- Denmark (accession 1983)
- Estonia (1992)
- Finland (accession 1983)
- France (1983)
- Germany (ratification 1983)
- Greece (accession 1983)
- Hungary (accession 1985)
- Iceland (1985)
- Ireland (1995)
- Italy (accession 1983)
- Latvia (accession 1992)
- Lithuania (accession 1992)
- Luxembourg (accession 1991)
- Malta (2004)
- Moldova (accession 2006)
- Monaco accession 1992)
- Montenegro (2006)
- Netherlands (1983)
- Norway (1983)
- Poland (ratification 1986)
- Romania (1993)
- Serbia (2006)
- Slovakia (1993)
- Slovenia (1991)
- Spain (1984)
- Sweden (1983)
- Switzerland (1988)
- United Kingdom (signatory 1983)

- Source: *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, IMO, 104-108, <http://bit.ly/2pYJcyh> (April 21, 2017).

Worldwide Enforcement Crisis

- The Oceans are being destroyed by large-scale pollution in violation of MARPOL.
- Roughly 10-15% of the over 88,000 ships registered to operate as part of the global commercial fleet regularly and intentionally dump oil into the seas.
- The inability to detect when ships pollute makes efforts to protect the oceans very difficult.



The Solution

- The [Act to Prevent Pollution from Ships](#) (APPS), U.S. domestic law implementing MARPOL, has made the U.S. the #1 enforcer of MARPOL—*despite* the fact that the overwhelming majority of flag ships are non-U.S., and the crimes do not occur in U.S. waters.

Why has it been so successful?

- **APPS incentivizes insiders:** Crew members receive whistleblower rewards for reporting MARPOL violations and turning in evidence necessary to convict the polluters.

Evidence provided by a whistleblower showing a “magic pipe” or bypass pipe used illegally to bypass the Oily Water Separator and to dump oily sludge directly overboard.

– Source: Government’s Motion for Whistleblower Award, Attachment B, Exhibit 16, [United States v. Efploia Shipping Co. 1:11-cr-00652 \(2011\)](#).



Whistleblower Law

- The APPS whistleblower law is simple: A whistleblower who provides original information to the U.S. Government that results in a successful prosecution of a APPS/MARPOL violation is entitled to **up to 50% of the recovery** (sanctions, criminal fines) obtained from the polluter.
- Non-U.S. citizen seamen are eligible for rewards under this law, and have successfully received rewards since the law's implementation.

"The United States is the leading country in enforcing MARPOL, a widely accepted maritime environmental treaty to which the United States is a party, but to which there is widespread non-compliance."

- Source: U.S. Department of Justice, Environment and Natural Resources Division, [Environmental Crimes Section](#), Press Release (April 13, 2015).



How it Works

- APPS requires all ships entering U.S. ports to have an accurate log of their ocean discharges (e.g., an oil record book). The failure to keep an accurate log triggers liability.
- If ships illegally dump oil into the ocean, they often do not accurately record that discharge in their log.
- Seaman working on these ships are ***the best*** (and in most cases, the only) source of information concerning illegal discharge on the high seas.
- The APPS whistleblower law provides an incentive to report these crimes, and the reward helps offset the risk of reporting for whistleblowers who reside in countries with no realistic protections for informants.

Prosecution and Rewards

- The United States Department of Justice (“DOJ”) prosecutes APPS/MARPOL violations.
- At the conclusion of a successful prosecution, DOJ files an official court pleading, requesting the whistleblower receive an award, and why whistleblowers are the key to successful MARPOL prosecutions. DOJ has filed **numerous** such pleadings in APPS cases.
- In almost every APPS case, the U.S. Courts have recognized the importance of paying whistleblower rewards, and ordered the whistleblower be paid at the maximum amount permitted by law (50%).

“The oceans must be protected from shipping companies that look to cut corners by dumping waste improperly.”

“Today’s action demonstrates that neither the government nor the public will tolerate the flagrant disregard of U.S. laws. Those who violate the law and pollute our waters will be vigorously prosecuted.”

- Source: [Shipping Company and Senior Crewmembers Convicted of Covering up Oil Pollution, Department of Justice Press Release \(Dec. 2, 2010\).](#)

Implementation in Europe

- The incredibly successful APPS whistleblower model can be duplicated by every nation in Europe.
- Every European nation that enacts an APPS-style law implementing MARPOL can become a leader in preventing ocean pollution and holding criminals accountable.
- A whistleblower reward law would help European countries increase detection of these clandestine crimes, and ships that enter any European port could be held accountable for pollution on the high seas.

“A substantial monetary award, as provided by APPS, both rewards the crew member for taking those risks and provides an incentive for other crew members to come forward and report illegal conduct on vessels in the future.”

- Source: [*U.S. v. Marine Managers*, 2:14-cr-00118, 2 \(2014\), Government's motion in support of statutory moiety payments.](#)

Use Whistleblowers to Effectively Police Pollution on the High Seas

- The U.S. is the number one enforcer of MARPOL solely because it has implemented a whistleblower reward provision through APPS.
- As confirmed in hundreds of DOJ court filings, and all of the court decisions and records, incentivizing whistleblowers is a powerful solution to improving detection.
- APPS whistleblower case public court records are available online and can be reviewed here:
<http://bit.ly/2pfndmv>.

Awarding whistleblowers “would further the purpose of APPS by encouraging those with information ... to come forward and disclose that information to authorities.”

-Source: *U.S. v. Ciner, Gemi Acente Isletni Sanayi Ve Ticaret S.A. 1:15-CR-00610, 2* (2016), Government’s Motion for Award.

One Size Does Not Fit All

- Whistleblower laws must be designed to with the specific industries and types of violations in mind. The key is to create incentives and protections that increase the number of high-quality reports submitted, while ensuring whistleblowers are protected.
- Implementing an APPS-style whistleblower law perfectly fits the needs of whistleblowers at sea and law enforcement agencies attempting to hold polluters accountable.

“Very few other countries have any track record of prosecuting deliberate MARPOL violations, let alone a legal process that would protect witnesses from obstruction of justice such as occurred in the vast majority of vessel pollution prosecutions.”

- Source: U.S. Department of Justice, Environment and Natural Resources Division, Government’s Response in [*United States v. Efploia*](#), MJG-11-0652, 4 (D.Md) (Mar. 4, 2016).

How the U.S. Addresses the Issues

- APPS codified at [33 U.S.C. § 1901-1915](#).
- [§ 1908\(a\)](#) criminal penalties for failing to maintain an accurate Oil Record Book.
- **Payment for Information:** “In the discretion of the Court, an amount equal to not more than 1/2 of such fine may be paid to the person giving information leading to conviction.” [33 U.S.C. § 1908\(a\)](#).
- APPS also includes civil penalties and whistleblower rewards at [§ 1908\(b\)](#).



APPS Prosecutions Depend on Whistleblowers

Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are extremely difficult to uncover.

- Source: [U.S. Department of Justice, USA v. Noble Drilling, LLC \(D. Alaska\), 3:14-cr-00114, June 11, 2011.](#)

“The availability of the APPS award aptly reflects the realities of life at sea . . . A monetary award both rewards the crew member for taking that risk and may provide an incentive for other crew members on other vessels to alert inspectors and investigators regarding similar crimes.”

-Source: [U.S. Department of Justice, Government’s Motion for Whistleblower Award, USA v. Odjell, 3:14-cr-00114, 5\(D. Conn. 2014\).](#)



APPS Whistleblower Rewards

- 80% of APPS whistleblowers obtain the maximum award (50% of the fines collected).
- The largest reward paid for an individual whistleblower is \$2,100,000 (USA v. Omi Corporation).
- The largest amount of compensation set aside in one case for payment to 12 whistleblowers from the Philippines is \$5,250,000 (USA v. Overseas Shipholding Group).
- The average reward paid per whistleblower for the 75 publicly available cases reviewed is \$455,668.00.

Revenue Generated from Whistleblower Cases Serves the Public Interest

- Whistleblower cases generate millions of dollars in revenue from the fines and penalties collected from polluters.
- A majority of the revenue generated from whistleblower cases is paid to the general treasury.
- 24% of the total funds generated from whistleblower cases is used for beneficial purposes to help mitigate the impact of ocean pollution.

Monetary Analysis

- The National Whistleblower Center evaluated revenue collected from the most recent [75 publicly available APPS whistleblower cases](#). resulted in From these cases, the U.S. collected \$219,593,000.00 in fines and sanctions.
- Whistleblower rewards were paid from these sanctions, resulting in non-U.S. citizens obtaining over \$30 million in compensation.
- The polluters in these cases pay fines for MARPOL violations under APPS, but also are convicted of other offenses based on information the whistleblower provides, such as obstruction of justice.

“An award to these witnesses would be consistent with the manifest purpose of APPS to encourage those with information about unlawful conduct to come forward and disclose information to authorities – information otherwise difficult, if not virtually impossible, to obtain.”

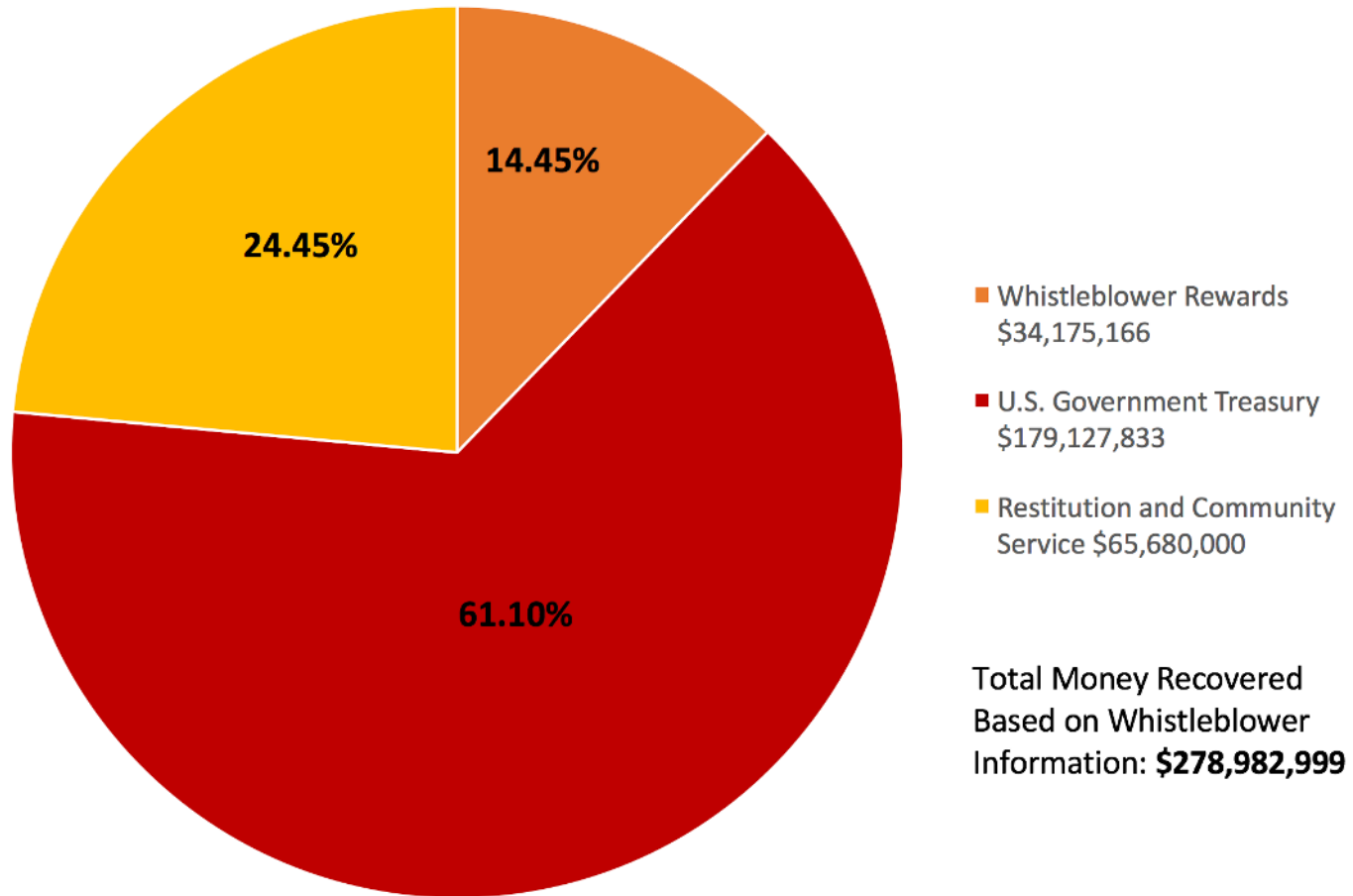
-Source: [U.S. v. Sun Ace Shipping, 2:06-cr- 00705, 3 \(2006\)](#), U.S. Attorney Christopher Christy’s Motion and Memorandum in Support of Award.

Monetary Analysis (Cont.)

- Over \$65 million of the monies collected was allocated for non-governmental conservation and anti-pollution efforts thru U.S. restitution laws.
- Analysis of the collected fines and penalties demonstrates the effectiveness of whistleblowers in detecting crimes and serving the public interest.
- No case indicated whistleblower abuse of the system or fraudulent submission of information.
- Record indicates that whistleblower rewards have had an incredibly positive impact on law enforcement.



Chart of Revenue Distribution from APPS Cases Involving Whistleblowers



- Results obtained from PACER, Court Filings, LexisNexis, DOJ ENRD, Responses to FOIA filed by NWC, and Princess Cruise Lines, LTD. Prosecution (Dec. 2016).

Revenue Resulting from Whistleblower Disclosures Serve the Public Interest

Sample of Groups that Obtained Restitution/Community Service Payments:

- The National Fish & Wildlife Foundation
- The National Marine Sanctuary Foundation
- The National Parks Foundation
- The National Marine Fisheries Service of the Oceanic & Atmospheric Administration
- Smithsonian Environmental Research Center
- Florida National Keys Marine Sanctuary
- Alaska Sealife Center
- Pinellas County, Florida Environmental Fund (PCEF)
- International Arctic Research Center
- Puget Sound Marine Conservation Fund
- Stenson Bank National Marine Sanctuary
- North American Wetlands Conser. Fund
- Columbia River Conservation Fund
- Channel Islands National Park

Examples of Projects Targeted for Use from these Payments:

- Benefit, preserve, and restore the environment and ecosystems in U.S. waters
- Activities of conservation and management of fish, wildlife, and plant resources of the U.S. coastline
- Restoration of marine & aquatic injured resources and protection coral reefs, sea grass beds, and species dependent on that habitat
- Scientific research of marine resources & habitats
- Education regarding protection of the marine environment from pollution
- Louisiana habitat conservation

Review the Court Cases

- The National Whistleblower Center's analysis and findings are based on empirical data and publicly available court records.
- The publicly available court records have been collected and published here:
<http://bit.ly/2pfndmv>.
- We strongly urge the persons responsible for reviewing potential whistleblower solutions in Europe review these cases.



The Act to Prevent Pollution from Ships (APPS) - A Prototype for Ocean Pollution Whistleblower Laws in Europe

- The United States has limited resources, enforcement capability, and capacity to effectively eliminate ocean pollution alone.
- Europe should implement an enforcement and whistleblower program modelled after APPS.
- If Europe were to implement an APPS-styled whistleblower program the ability to successfully combat pollution on the high seas would be radically enhanced.



Framework for a European/EU Ocean Pollution Whistleblower Program

1. Create an enforcement model based on APPS, including large penalties and a pollution log-book mandate that permits European nations to police non-European ships that enter its ports and hold them accountable for pollution on the high seas for falsifying their oil record books.
2. Enact a whistleblower reward provision. Incorporate “best practices” such as those used by the U.S. Securities and Exchange Commission (SEC). Best practices include: 1) Establish a Whistleblower Office; 2) Protect the whistleblower’s identity; 3) Publish the criteria for obtaining a reward; 4) Receive whistleblower allegations and ensure they are given to the appropriate office for investigation; 5) Accept whistleblower reward applications, adjudicate the claims and pay rewards. Visit www.sec.gov/whistleblower for more information on the SEC’s highly successful whistleblower program.

Framework (Cont.)

3. Whistleblower rewards must have a mandatory minimum payment for qualified whistleblowers (not less than 15%) and can have a maximum percentage award (50%). There should be no maximum monetary cap.
4. If a reward is denied, the whistleblower must be able to appeal the denial in court.
5. The program must be well publicized so whistleblowers know how to submit their information and apply for rewards.



About the Presenter



[Stephen M. Kohn](#) is the Executive Director of the [National Whistleblower Center](#), and is a partner at the Washington, D.C. law firm of Kohn, [Kohn and Colapinto, LLP](#). He has represented whistleblowers for over 30 years, successfully setting numerous precedents that have helped define modern whistleblower law. [The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's right and Protecting Yourself](#) (Lyons Press, 2017), is Mr. Kohn's eighth book on whistleblowing. Mr. Kohn represented Swiss banker [Bradley Birkenfeld](#) in his case against UBS, and obtained the largest whistleblower reward ever obtained for an individual (\$104 million).

Contacts and Information

- Access the APPS/Ocean Pollution Whistleblower cases: <http://bit.ly/2pfndmv>.
- National Whistleblower Center Website: www.whistleblowers.org.
- Obtain Legal Help: ars@whistleblowers.org.
- Read the Whistleblower's Blog: www.whistleblowersblog.org.
- Contact the Presenter, [Stephen M. Kohn](#): sk@whistleblowers.org
- Join the Action Network: action.whistleblowers.org.

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Set up a Training

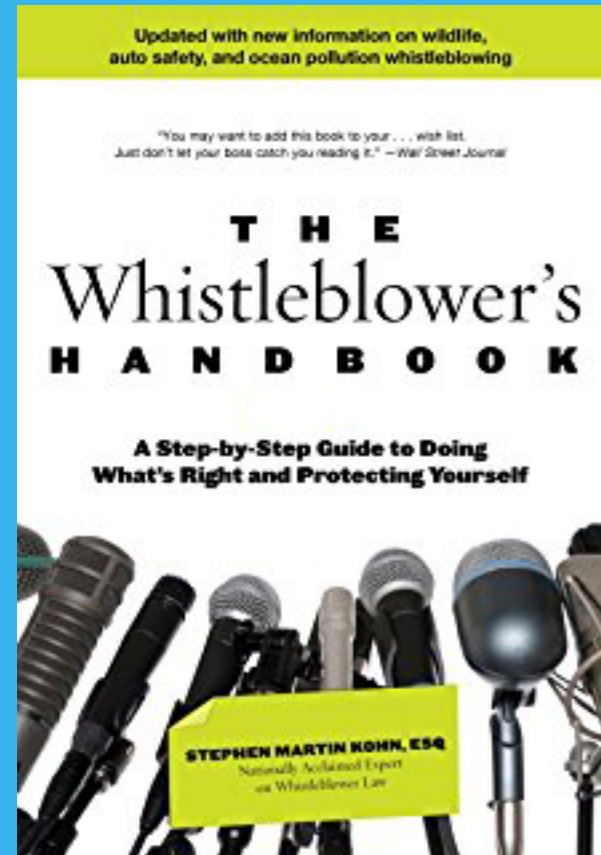


If you are interested in arranging a training please contact:

sk@whistleblowers.org

“The single best volume of all laws, rights and obligations related to to whistleblowing that I have come across” – FCPA Compliance & Ethics Blog

The Whistleblower’s Handbook is a “vastly shrewd and practical” tool that “offers an astute long-view of American whistle-blowing.” – Boston Globe



The 2017 edition of *The New Whistleblower’s Handbook* contains specific chapters on ocean pollution whistleblowing and an international anti-corruption toolkit. The *New Handbook* explains all of the major whistleblower laws with transnational application (including the Foreign Corrupt Practices Act). Order Copies online at www.whistleblowershandbook.com