

April 24, 2017

European Commission
DG Justice and Consumers
Unit C2 'Fundamental Rights Policy'
59, rue Montoyer
B-1049 Brussel/Belgium
JUST-C2-CHARTE@ec.europa.eu

Dear European Commission:

This letter constitutes the National Whistleblower Center's (NWC)ⁱ formal submission in response to your request for public consultation on whistleblower protection.ⁱⁱ In this letter and the attached PowerPoint Presentation, the NWC has provided information on whistleblower protections that help implement the [MARPOL Protocol](#),ⁱⁱⁱ an international treaty concerning the prevention of ocean pollution.^{iv} We will be filing an additional recommendation regarding general whistleblower protection laws, but the challenges facing ocean pollution cases call for a special law to address those issues.

For the reasons set forth below, we strongly recommend the E.U. (any every nation in Europe) adopt specific protections for seamen who report ocean pollution, like those protections that have been extremely successful in this context in the United States. Protection of international seamen can be challenging as most seamen are not citizens of E.U. countries, and the majority of the ships they work on are non-E.U. flag ships. The United States has a whistleblower law covering this type of informant under its MARPOL implementing legislation: The Act to Prevent Pollution from Ships, 33 U.S.C § 1908 ("APPS"). This highly effective law rewards international whistleblowers for the risks they take when reporting information, facilitates detection and prosecution of these clandestine crimes, and can be easily replicated in the E.U.

Whistleblower Rewards Protect APPS Whistleblowers

Under the [Act to Prevent Pollution from Ships, 33 U.S.C § 1908](#) ("APPS"), if a whistleblower provides evidence that leads to a successful prosecution, they are awarded up to 50% of the monies (sanctions, fines, and penalties, etc.) obtained from the criminal actors. 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. 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.

APPS recognizes that unless seamen with "firsthand knowledge of the illegal conduct com[e] forward, APPS violations are otherwise extremely difficult to uncover."^v However, as seamen are the only witnesses to ocean pollution, they are also extremely vulnerable to

retaliation, threats, and “be[ing] blacklisted and barred from working in the marine shipping industry in the future.”^{vi} Since many whistleblowers come from non-U.S. countries^{vii} where there are few retaliation laws protecting them, a substantial monetary award—as provided by APPS—both protects the seaman who took the risk to report, and provides an incentive for other seamen to come forward to report future illegal conduct on vessels. In numerous court cases, the United States Department of Justice (DOJ) has explained how the U.S. APPS whistleblower program works, and why it is so critical to the detection and enforcement of these crimes. Given the importance of the DOJ court filings, we have assembled the relevant cases reported on the public docket here: <http://bit.ly/2pfndmv>.

The APPS whistleblower provision has been a very effective tool. As the U.S. Department of Justice has recognized, “thousands of seafarers participate in or are aware of illegal conduct on their vessels” every year, but only “a tiny minority choose to take active measure to stop the wrongdoing and bear witness.” Government’s Unopposed Motion for Whistleblower Rewards, *U.S. v. Columbia Shipmanagement (Deutschland)*, Criminal Case No. 13-205 (D. N.J.) (Aug. 8, 2013). The reward provision has provided not only financial benefit (and protection) to the whistleblowers, but has also provided great financial benefit to the U.S. Government by contributing to the “government’s success in identifying” these crimes and in “obtaining sufficient evidence to support investigations and prosecutions.” *Id.* This has permitted the United States government to collect hundreds of millions of dollars in fines, and to successfully prosecute (and sometimes imprison) wrongdoers. In fact, in the 75 cases the NWC was about to locate online, whistleblowers were the source of the information leading to successful prosecutions where the Government collected over \$278 million dollars.^{viii} Court records, which fully document the high-quality information that APPS whistleblowers submit and the usefulness of this reward program, provide empirical evidence that the whistleblower reward model works remarkably well and is the backbone of law enforcement’s successful prosecution of ocean pollution cases.

How the APPS Law Works

APPS makes it a violation to falsely record, or not record, the discharge of oil pollution in a ship’s Oil Record Book.^{ix} This recordkeeping requirement permits U.S. law enforcement to essentially penalize ships for polluting on the high seas, although the actual violation is the failure to keep an accurate discharge log. When a ship docks at a U.S. port, the U.S. government checks the ship’s logs and can hold them accountable for any APPS violations based on the inaccurate recording(s). The law sets high penalties, sufficient to dissuade repeat offenses; a violator must pay a maximum fine of \$500,000, or twice the gross pecuniary gain or loss resulting from the unlawful conduct. 18 U.S.C. § 3571(c),(d). There are both criminal and civil penalties associated with these violations. *See id.* at § 1908(a) and (b).

Furthermore, the requirement that each ship maintain an accurate log of its discharges makes it relatively easy for whistleblowers to document these violations. For example, if a ship’s crew does not record an oil discharge accurately in the record book, crew members who witness the dumping can take photos with their cellphones, or otherwise document the violation, and provide their evidence to law enforcement who can then compare it to the ship’s Oil Record Book.

Without help from crew members, it would be impossible to obtain the evidence necessary for a guilty verdict and/or compel a shipping company to plead guilty to such offenses.^x Ocean pollution is almost impossible to detect because “the discharge of oily waste typically takes place in the middle of the ocean in international waters, [and] the only persons likely to know about the conduct ... are crew members.”^{xi} By implementing APPS and incentivizing insiders to report these violations with monetary rewards, the United States has become the number one enforcer of the MARPOL Protocol.^{xii}

Dual Benefits: Whistleblower Protections and Eliminating Ocean Pollution

The United States’ APPS whistleblower program is a perfect model for Europe to aggressively combat ocean pollution and implement MARPOL at European ports. Whistleblowers from around the world (including citizens from have effectively used it, demonstrating that the U.S. program can easily be adopted worldwide. We urge your office to strongly recommend that every European nation, and the E.U. itself adopt a whistleblower law modeled on APPS. We also recommend that, in establishing this whistleblower reward program, the E.U. review the U.S. Securities and Exchange Commission Office of the Whistleblower. This Office incorporates best practices for administering a whistleblower office, including rules permitting confidential whistleblower disclosures and criteria for granting awards. *See* www.sec.gov/whistleblower.

Ocean pollution is a worldwide problem that needs to be aggressively tackled, and based on the highly successful U.S. program, whistleblowers are needed to effectively police pollution from ships occurring on the high seas. These whistleblowers take great risks when reporting violations, and offering financial rewards is one way to offset that risk and protect them. We have enclosed a PowerPoint that further explains how the Act to Prevent Pollution from Ships works, and how an effective, successful ocean pollution whistleblower program can protect whistleblowers and incentivize reporting in the E.U.

Thank you in advance for your kind attention to these matters. We look forward to workig with you to ensure that whistleblowers are adequately protected.

Respectfully submitted,

/s/

Stephen M. Kohn
Executive Director

Enclosure: PowerPoint Presentation

ⁱ The National Whistleblower Center is a non-profit tax-exempt NGO registered in the United States with over 30 years of experience in whistleblower law. Although our “home” country is the United States, we have participated in numerous programs in Europe and have consulted with governmental ministries, anti-corruption commissions, European NGOs and various Members of Parliament regarding the

establishment of whistleblower laws in Europe, including highly successful programs in Hungary, Serbia, Bosnia and the Czech Republic. Our attorney-directors currently represent confidential whistleblowers from a wide range of European countries, including the United Kingdom, Bosnia, Germany, France, the Baltics, and Russia. In 2016, our *Global Wildlife Whistleblower Program* was selected as a Grand Prize Winner in the 2016 Wildlife Crime Tech Challenge, an initiative of USAID in partnership with the National Geographic Society, the Smithsonian Institution, and TRAFFIC. This program focuses on bringing the benefits of whistleblower protections to those reporting wildlife trafficking outside the United States. See www.globalwhistleblower.org and www.whistleblowers.org/wildlife.

ⁱⁱ Public Consultation on Whistleblower Protection, Justice and Consumers, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254.

ⁱⁱⁱ Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL), entered into force Oct. 2, 1983.

^{iv} Over 30 European countries have signed or ratified MARPOL, which obligates Parties to take steps to implement ocean pollution prevention laws. See “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://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.pdf> (Apr. 21, 2017).

^v See Government’s Motion for Statutory Monetary Payments, *United States v. Atlas Ship Management*, 10-cr-00363 (M.D.Fla. 2010).

^{vi} *Id.*

^{vii} Most the whistleblowers that could be identified in the public court records are citizens of the Philippines. Cases also identified whistleblowers as citizens from Portugal, Greece, Korea and India. The ships themselves were registered in Turkey, Jordan, Korea, Denmark, Liberia, Japan, Greece, Panama, Hong Kong, Norway, Singapore, Cyprus, New Zealand and Sweden. All the prosecutions occurred in the United States.

^{viii} See attached slide #19, “Chart of Revenue Distribution from APPS Case Involving Whistleblowers.”

^{ix} 33 U.S.C § 1908(a).

^x Whistleblowers are any crew member or witness who provides information that leads to the successful prosecution of APPS violations. In most of these cases, the whistleblowers are non-U.S. citizen seamen working on non-U.S. flag ships. They inform the U.S. government about pollution, such as oil dumping, on the high seas and often provide recordings or photographic evidence that are critical to prosecutions. As mentioned above, the United States obtains jurisdiction over these ships when they enter U.S. waters, even if the pollution occurred abroad, and is able to prosecute the criminal actors based on their inaccurate logs in their oil record books.

^{xi} See *Atlas Ship*, *supra* note v.

^{xii} “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.” U.S. Department of Justice, Environment and Natural Resources Division Motion, [United States v. Efploia](https://www.usdoj.gov/enrd/motion/United%20States%20v.%20Efploia), MJG-11-0652, 4 (D. Md. 2016).