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COMPANY AND EMPLOYEE RIGHTS DURING A U.S. COAST GUARD INVESTIGATION

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I. WHEN MUST YOU DIVULGE INFORMATION TO THE COAST GUARD OR OTHER FEDERAL OR STATE AGENCIES?

When in waters subject to the jurisdiction of the U.S., there are a number of situations when mandatory reports must be made to the Coast Guard or other federal or state agencies, which may trigger a further investigation. In making such notifications, which are discussed in more detail in the Appendix, adequate information must be divulged to satisfy the minimum notification requirement, and thereby avoid the sanctions for failing to provide required notification.¹

A. REPORTING A MARINE CASUALTY

Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge must notify the nearest Coast Guard Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in certain defined marine casualties (see Appendix).²

¹ In most cases, information provided to satisfy a mandatory notice requirement cannot be used against the person providing the notice. For example, with respect to oil spill notification, U.S. law states that “[n]otification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.” 33 USC § 1321(b)(5). While important, this protection is limited: (1) it only protects the person providing notice from criminal sanction; civil sanctions are fair game; (2) it only protects the notifier; it does not, for example, protect the company for whom the person works; and (3) it only prohibits the use of information provided in the notification; the notifier or company can still face the entire range of enforcement options, up to and including criminal prosecution, as warranted by other evidence gathered by the Coast Guard during the course of an investigation into the incident.

² 46 CFR § 4.05-1(a)



This immediate notice must be followed up within 5 days by a written report submitted on Form CG-2692.³

B. REPORTING A HAZARDOUS CONDITION

Whenever there is a hazardous condition (see Appendix) either on board a vessel or caused by a vessel or its operation, the owner, agent, master, operator, or person in charge must immediately notify the nearest Coast Guard Sector Office or Group Office.⁴ If the hazardous condition involves a reportable marine casualty, a Form CG-2692 must be timely submitted as well.

C. REPORTING AN OIL SPILL

Any person in charge of a vessel or an onshore or offshore facility must, as soon as he or she has knowledge of any discharge of oil from such vessel or facility in violation of section 311(b)(3) of the Clean Water Act (see Appendix), immediately notify the National Response Center (NRC).⁵

If the spill is the result of a reportable marine casualty, notification of the spill to the NRC satisfies the immediate marine casualty notification discussed in A. above.

D. REPORTING A HAZARDOUS SUBSTANCE RELEASE

Any person in charge of a vessel or an offshore or an onshore facility must, as soon as he or she has knowledge of any release (other than a federally permitted release or application of a pesticide) of a hazardous substance (see Appendix) from such vessel or facility in a quantity equal to or exceeding the reportable quantity in any 24-hour period, immediately notify the National Response Center.⁶

E. REPORTING A DISCHARGE OR PROBABLE DISCHARGE RESULTING FROM AN INCIDENT

The master, person in charge, owner, charterer, manager, or operator of a vessel involved in any incident that involves a covered discharge (see Appendix) must report the particulars of the incident without delay to the fullest extent possible to the Coast Guard or NRC.⁷ This reporting requirement obviously duplicates much of what is required to be reported under C. and D. above. To the extent it imposes requirements beyond those in C. and D., including but not limited to a requirement to report a probable discharge resulting from an incident (see Appendix), it does exist as a separate obligation.

II. SANCTIONS FOR FAILURE TO REPORT

Penalties for failing to report mandatory items as just discussed are severe. For example, failure to report an oil spill or release of hazardous substances can lead to criminal prosecution and, upon conviction, a significant fine, imprisonment for up to 5 years, or both. Reporting failures can also lead to substantial civil penalties issued by the Coast Guard; for example, the offense of failure to report a marine casualty can lead to a civil penalty of up to \$39,936/day, with each day of a continuing violation constituting a separate offense.

³ 46 CFR § 4.05-10. Electronic versions of the 2692 form and its various addenda can be accessed at <https://homeport.uscg.mil/Lists/Content/DispForm.aspx?ID=1065&Source=/Lists/Content/DispForm.aspx?ID=1065>.

⁴ 33 CFR § 160.216

⁵ 40 CFR § 110.6; 33 CFR § 153.203

⁶ 40 CFR § 302.6

⁷ 33 CFR § 151.15



III. COAST GUARD INVESTIGATIONS, AND YOUR RIGHTS DURING ONE

Having discussed mandatory reporting and the consequences of failing to make a mandatory report, we now arrive at the main topic of discussion – what are the rights and obligations of the company and its employees during a Coast Guard investigation that may be triggered by one of these reports? Several principal points need to be made and understood:

1. THERE IS A FINE LINE BETWEEN ASSISTING IN A RESPONSE AND COOPERATING DURING AN INVESTIGATION

Coast Guard responsibilities following an incident include responding to the incident itself and its consequences, as well as conducting an investigation into the cause(s) of the incident for a variety of purposes.⁸ The Coast Guard recognizes the indistinct line between a response and an investigation in its internal guidance:

*An investigation should never supersede or impinge upon search and rescue or pollution response activities, but must be carried on concurrently. Many investigation activities, particularly those for pollution investigations, are integrated and required parts of pollution response.*⁹

Companies and crewmembers have an obligation to take response activities such as going to the assistance of mariners in distress, stopping an active spill, and taking steps to contain and begin cleaning up the spill. This obligation can be carried out independently, or in conjunction with the Coast Guard. However, beyond conveying necessary information to carry out or assist in carrying out immediate response activities, companies and crew members must be careful not to gratuitously discuss the circumstances leading up to the incident, for the reasons discussed below.

Note that the Coast Guard personnel on scene to respond to a spill and oversee the cleanup operation are generally not the people who will ultimately conduct the investigation. Simply asking them about their roles while on scene may help clarify the situation.

⁸ For example, under U.S. law, a marine casualty investigation is supposed to examine:

(1) the cause of the casualty, including the cause of any death;

(2) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any individual licensed, certificated, or documented under part E of this subtitle has contributed to the cause of the casualty, or to a death involved in the casualty, so that appropriate remedial action . . . may be taken;

(3) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any person, including an officer, employee, or member of the Coast Guard, contributed to the cause of the casualty, or to a death involved in the casualty;

(4) whether there is evidence that an act subjecting the offender to a civil penalty under the laws of the United States has been committed, so that appropriate action may be undertaken to collect the penalty;

(5) whether there is evidence that a criminal act under the laws of the United States has been committed, so that the matter may be referred to appropriate authorities for prosecution; and

(6) whether there is need for new laws or regulations, or amendment or repeal of existing laws or regulations, to prevent the recurrence of the casualty.

⁹ Coast Guard Marine Safety Manual, Volume V, Part A, Chapter 3 (hereinafter MSM), section D.1.



2. NO REQUIREMENT TO ANSWER QUESTIONS

Other than mandatory reporting as discussed above, plus essential communications necessary to carry out response activities, the Coast Guard cannot “force” the company or its employees to divulge any information through any means short of a subpoena. This means that any person being questioned by the Coast Guard during an investigation can decline to answer questions. This may not be the best idea – see 8. below and the discussion in the Conclusion section. But it is an option/right.

Coast Guard internal guidance for their Investigating Officers (IOs) on dealing with a crewmember who declines to answer questions during an investigation is as follows:

If [a crewmember declines to answer questions] on-scene, this does not mean the Coast Guard must stop asking reluctant crewmembers for assistance or stop asking questions. IOs may continue asking questions of reluctant crewmembers just as they would a cooperative crewmember. However, IOs should not single out, harass or badger reluctant crewmembers. Further, any attempt to encourage a reluctant crewmember to participate in a response or investigation should not be in the form of a threat of subsequent prosecution or other action.¹⁰

2.A. COAST GUARD-ISSUED SUBPOENAS

Coast Guard-issued subpoenas are not self-enforcing. What this means is that even though subpoenas are written in imperative terms (“You are hereby commanded to produce [x],” for example), if a company or employee declines to comply with the subpoena, the Coast Guard has no inherent compulsion mechanism to enforce compliance. Instead, the Coast Guard must approach the local U.S. Attorney and convince him/her to take the subpoena before a federal judge and attempt to get the judge to order compliance (such an order, if issued, must be complied with!). This process, even if ultimately successful, may take days or even weeks.

3. COAST GUARD CAN GENERALLY SEIZE RELEVANT PHYSICAL EVIDENCE

In furtherance of their investigation, the Coast Guard may remove vessel records (documents and/or electronic) and other physical evidence from the vessel.¹¹ Crewmembers should not physically attempt to impede the Coast Guard while it is carrying out such seizures. The company, through its attorneys, can challenge the lawfulness of any seizures after the fact, either directly with the Coast Guard or through judicial processes.

The master can ask the Coast Guard to explain its actions, and should carefully record the response. The master should also insist on a receipt for all items seized. All items necessary for safe or lawful operations must be replaced before the vessel operates, either with an original returned by the Coast Guard, or a suitable replacement.

4. EVIDENCE CAN BE USED FOR ANY PURPOSE

¹⁰ MSM, section D11.

¹¹ Such a seizure may be accomplished without a warrant if done for civil/remedial purposes. If done in support of a criminal investigation, a warrant is required.



Any written or oral information the company or its representatives provides to the Coast Guard, as well as any hard evidence (logbooks, piping, pumps, etc.) provided to or seized by the Coast Guard, can be used by U. S. authorities for any purpose, up to and including as evidence in a civil or criminal proceeding.

5. THE NATURE, TYPE, AND PURPOSE OF AN INVESTIGATION MAY NOT BE CLEAR OR CLARIFIED

An investigation can be purely for administrative/marine safety purposes (determining and documenting the cause of an accident); it can be purely for criminal purposes (for example, if a crewmember murders another); it can from its inception be for both marine safety and criminal purposes (investigating an oil spill that was not reported); or it can begin as a marine safety evolution and then morph into a criminal one (this is the typical *modus operandi* in suspected MARPOL violations, such as oily water separator bypass cases).¹² The Coast Guard is not required to advise the company or its employees of the type of investigation it is conducting, and the reason it is asking the questions it is asking. Internal Coast Guard guidance advises investigators to respond as follows if questioned about the purpose of an investigation:

IOs should cite the specific authority that they are acting under (sometimes several) when asked as to the purposes of an investigation. If asked about the possibility of criminal liability by a witness or involved person before or during an interview, the IO should respond with words to the effect that “the Coast Guard is free to choose civil, criminal, or administrative enforcement when an apparent violation is detected, and any decision to take one type of action does not preclude another type of action.”¹³

This intentionally noncommittal statement has multiple purposes, first and foremost of which is to keep all investigative options open. A related purpose is to avoid misleading and unauthorized statements such as “this is not a criminal inquiry,” or “this is just an investigation for cause,” which may cause legal difficulties for the Coast Guard if a criminal investigation is in fact undertaken. Under no circumstances is an IO permitted to “cut a deal” with crewmembers or their attorneys to gain assistance. Similarly, Coast Guard personnel must not make any representation as to a possible grant of immunity.¹⁴

One final point – most Coast Guard investigations are conducted by uniformed Coast Guard personnel. Criminal investigations, however, are conducted by special agents of the Coast Guard Investigative Service (CGIS). If a CGIS special agent shows up aboard your vessel or otherwise in conjunction with an ongoing investigation, that is a sign that a criminal action is at least being contemplated.

6. ATTORNEY RIGHTS

¹² Such cases for foreign-flagged vessels typically begin as a port state control examination. If an irregularity is detected, an expanded exam (investigation) is conducted. This expanded exam, conducted for marine safety purposes, can include gathering witness statements and seizing any evidence related to the irregularity. Once the port state control officers have finished their investigation, the case is handed over to Coast Guard criminal investigators to commence their criminal investigation. Any and all evidence collected during the port state control investigation can be and is made available to the criminal investigators.

¹³ MSM, section D.4.

¹⁴ MSM, section D.2.



The company and any employee questioned during an investigation have the right to consult with an attorney and to have an attorney present during that questioning. The Coast Guard should delay the investigation for a reasonable period to permit an attorney to be retained and to travel to the site of the investigation.

Coast Guard guidance in the event the subject of an investigation asks for the assistance and/or presence of an attorney is as follows:

The IO should advise the witness that they are free to consult their own attorney on matters prior to giving testimony. Wherever possible, a mutually agreed upon time and place offering reasonable opportunity to consult with an attorney should be arranged. Such delay for consultation should be reasonable given the ready availability of attorneys.¹⁵

6.A. WHO IS THE ATTORNEY REPRESENTING?

Any reasonably experienced Coast Guard investigator will ask the attorney for the identity of the crewmembers, employees or corporations he or she is representing. It may be a conflict of interest for an attorney retained by the marine insurer to represent the operating company, managers, or crewmembers, and *vice versa*, since the interests of the various parties may conflict. An experienced IO will clarify the question of representation as soon as he or she comes in contact with an attorney.

6.B. WHAT MAY OR MAY NOT AN ATTORNEY DO ON SCENE?

The attorney may not interfere with response or investigative efforts by obstructing or physically impeding the response or investigation, or by tampering with witnesses.

Attorneys are obviously permitted to advise their client(s), including advice not to answer questions. Attorneys also have the right to be physically present if the client(s) elect to answer Coast Guard questions.

Attorneys may demand and be permitted to be present during the interview of non-clients. Coast Guard policy is that in general, exclusion of any person, including an attorney, is inappropriate; in other words, the attorney should be permitted to sit in on any Coast Guard interview, even of a non-client.¹⁶ That policy goes along with the policy that the Coast Guard may not remove an attorney from the scene unless he or she is physically impeding the response.¹⁷

7. RIGHT TO AN TRANSLATOR/INTERPRETER

The Master and/or crew have the right to request that arrangements be made to have a translator present during IO interviews in the event there is a language barrier. The Coast Guard should grant this request if it does not involve excessive delay. Crew members should consult with company officials and/or attorney representatives if there are issues relating to interpreters or language barriers.

8. WHY COOPERATION MAY, AFTER ALL, BE THE BEST POLICY

¹⁵ MSM, section D10.

¹⁶ MSM, section D17

¹⁷ MSM, section D18



Coast Guardsmen are human, and may be more favorably disposed toward a company that is cooperative during an investigation. Conversely, they may be less well disposed toward a company that does not cooperate. That favorable or unfavorable disposition may manifest itself in the vigor with which the Coast Guard pursues any enforcement action once their investigation is complete.

IV. CONCLUSION AND RECOMMENDATIONS

Shipping companies and their employees face a dilemma when an incident occurs that may result in some sort of sanction to the company and/or to involved personnel. On the one hand, companies and employees have an incentive to cooperate with the Coast Guard, both to convey an image of good corporate citizenship, and also to avoid Coast Guard displeasure that may affect the sanctions decision in the current matter and possibly Coast Guard behavior toward company vessels in the future. On the other hand, as stated above, any information divulged to the Coast Guard can be used against the company and its employees for the entire range of available sanctions, including civil penalties, suspension and revocation actions against marine credentials (for U.S. mariners), and even criminal prosecution. Coast Guard internal guidance recognizes this dilemma:

Response personnel arriving at the scene of a Marine Casualty involving an actual or potential environmental incident should consider that crewmembers face an unusual situation. On one hand, if crewmembers provide full cooperation and information to Coast Guard personnel, any statements they make could be used in potential criminal, civil or administrative proceedings. On the other hand, failure to cooperate in the response could expose their employer to potential civil penalties, or loss of defenses or limits of liability in civil cases.¹⁸

Notwithstanding the Coast Guard's recognition of this dilemma, its sympathy is limited:

IOs must recognize that the situation faced by the crew does not in any way affect the Coast Guard's responsibility to respond (including gaining cooperation of the crew to assist) and/or to fully investigate the incident and take appropriate action. The investigation should only be delayed in order to best meet immediate response concerns. The investigation should not be suspended or delayed because of the crew's situation.¹⁹

Taken together, the facts and considerations discussed in this article warrant the following recommendations:

1. The information in this article should be shared, at a minimum, with all corporate compliance officers and all vessel masters.
2. All companies and vessel operating in U.S. waters should have a robust network of advisors and agents in place to provide guidance and recommendations in the event of an incident that leads to a Coast Guard investigation.
3. Part of that network must be the ready ability to retain or employ the services of an experienced maritime law firm to, among other things, ensure proper notification is provided; guide the decision on whether to cooperate

¹⁸ MSM, section D.7.

¹⁹ MSM, section D.8.



with a Coast Guard investigation, and if so, to what extent and in which manner; and to oversee and participate in any cooperative endeavors to ensure that the company or its employees do not needlessly expose themselves to civil or criminal sanctions.

4. Form 2692 and its addenda, which must be filed within five days of a marine casualty, should be prepared in consultation with corporate compliance officials and attorney advisors. As this article should have made clear (see particularly footnote 1), though submission of a 2692 is mandatory if a reportable marine casualty occurs, what the 2692 says, and how it says it, particularly with respect to the nature and cause of the casualty, may have significant repercussions to the company and all involved personnel. This warrants taking all necessary time (though not more than 5 days) and effort, after professional consultation, to ensure that minimum reporting requirements are satisfied, without the provision of gratuitous or unnecessarily harmful information.

IMC has robust associations with many of the principal maritime law firms in the U.S., and can assist in linking clients with suitable legal representatives in the event of an incident. In addition, IMC's regulatory compliance division is comprised of senior former Coast Guard Sector commanders or attorneys, all of whom have vast experience, including qualifying and serving as Coast Guard investigating officers. IMC can directly assist companies and marine insurers to navigate through any phase of a Coast Guard investigation, up to and including assistance in mitigating any civil penalty sanction that might eventually be handed down.²⁰

Primary contacts for USCG and other regulatory related issues or assistance:

Andrew Norris anorris@IndependentMaritime.com

Tim Close tclosek@independentmaritime.com

Liam O'Connell loconnell@independentmaritime.com

Barry Compagnoni bcompagnoni@independentmaritime.com

David Smith dsmith@independentmaritime.com

IMC 24 Hour Emergency Line 203-256-1000 head@independentmaritime.com

²⁰ For instance, in 2020, IMC negotiated a \$5,000 civil penalty down to a letter of warning in a case involving failure to notify the Coast Guard of a hazardous condition.



APPENDIX

A. MARINE CASUALTIES WHICH MUST BE REPORTED TO THE COAST GUARD INCLUDE:²¹

- (1) An unintended grounding, or an unintended strike of (allision with) a bridge;
- (2) An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of subparagraphs (3) through (8) below;
- (3) A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;
- (4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;
- (5) A loss of life;
- (6) An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties; or
- (7) An occurrence causing property-damage in excess of \$75,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.
- (8) An occurrence involving significant harm to the environment.

B. HAZARDOUS CONDITION²²

Hazardous condition means 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.

C. OIL SPILL

Section 311(b)(3) of the Clean Water Act (33 U.S. Code § 1321(b)(3)) prohibits the discharge of “harmful quantities” of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 et seq.], or (iii) which may affect natural resources belonging to, appertaining to, or under the exclusive management

²¹ 46 CFR 4.05-1. Such casualties are referred to as reportable marine casualties.

²² 33 CFR 160.202



authority of the United States. Harmful quantities of oil are those that: (1) cause a sheen or discoloration on the surface of a body of water; (2) violate applicable water quality standards; or (c) cause a sludge or emulsion to be deposited beneath the surface of the water or on adjoining shorelines.²³

The following information must be conveyed to NRC regarding a reportable oil spill: (1) name and address of the reporting party and the name and address of the responsible party; (2) the type and quantity of material which was spilled or released; (3) the location of the spill or release; (4) the time of the spill or release and/or when it was discovered; and (5) the cause of the discharge.

D. HAZARDOUS SUBSTANCES

“Release” means (with some exceptions) any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant.²⁴ “Hazardous substances” are designated in 40 CFR § 302.4, and are too numerous to list here. “Reportable quantities” of hazardous substances are described in 40 CFR § 302.5.

As with an oil spill report, the NRC Duty Officer will ask the caller a set of standardized questions to obtain the maximum amount of available information concerning the incident.

E. DISCHARGE RELATED TO AN INCIDENT

The immediate report must be made whenever an incident involves -

- (1) A discharge of oil, hazardous substances, marine pollutants, or noxious liquid substances (NLS) resulting from damage to the vessel or its equipment, or for the purpose of securing the safety of a vessel or saving a life at sea;
- (2) A discharge of oil in excess of the quantities exceeding 15 PPM (or less, if in a Special Area), or NLS in bulk, in 46 CFR §153.1126 or §153.1128, during the operation of the vessel;
- (3) A discharge of marine pollutants in packaged form; or
- (4) A probable discharge resulting from damage to the vessel or its equipment.

The factors that go into the “probability” determination of (4) are set out in 33 CFR § 151.15(c)(4).

Each report must contain -

- (1) The identity of the ship;
- (2) The type of harmful substance involved;
- (3) The time and date of the incident;
- (4) The geographic position of the vessel when the incident occurred;

²³ 40 CFR § 110.3

²⁴ 40 CFR § 302.3



- (5) The wind and the sea condition prevailing at the time of the incident;
- (6) Relevant details respecting the condition of the vessel;
- (7) A statement or estimate of the quantity of the harmful substance discharged or likely to be discharged into the sea; and
- (8) Assistance and salvage measures.²⁵

The initial report must be supplemented as necessary with information concerning further developments.²⁶

²⁵ 33 CFR § 151.15(e).

²⁶ 33 CFR § 151.15(f).