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Company and Employee Rights During a U.S. Coast Guard MARPOL Investigation

The U.S. Department of Justice aggressively prosecutes shipowners and operators of foreign-flag vessels calling at U.S. ports for MARPOL violations. These prosecutions are often the result of an initial inspection and investigation by the U.S. Coast Guard. Our authors both served as US Coast Guard attorneys before moving to the private sector. They share their insights into the rights and responsibilities of shipowners and crew when interacting with U.S. Coast Guard inspectors and investigators.

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Introduction

Over the past year, the U.S. Department of Justice (DOJ) has continued to aggressively prosecute shipowners and operators of foreign-flag vessels calling at U.S. ports for violations of the Act to Prevent Pollution from Ships (“APPS”) which is the U.S. implementation of the MARPOL convention. To illustrate, in July 2020, the U.S. Department of Justice issued a [USD 1.5 million fine](#) to a Japanese Shipping Company for concealing illegal discharges of oily water. In March 2020, a Singaporean Shipping Company was [fined USD 1.65 million](#) for concealing illegal discharges of oily water. In December 2019, a fishing vessel owner and operator pled guilty and was [fined USD 1 million](#) for discharging oily waste into the coastal waters of the United States, and an oil tanker owner, operator, and Chief Engineer were [convicted for obstruction of justice and concealing deliberate pollution](#). And, in July 2020, a Japanese-based international shipping company was sentenced to pay a fine of [USD 1.5 million](#), placed on probation for a period of four years, and ordered to implement a comprehensive Environmental Compliance Plan after pleading guilty to violating APPS by failing to accurately maintain an oil record book that covered up discharges of oily water.

These prosecutions indicate a continued effort by the U.S. Government to vigorously enforce violations of pollution laws by ships. Moreover, they make clear the costly penalties to which owners may be subjected if criminally prosecuted and held vicariously liable for APPS violations, including instances when vessels enter U.S. waters with false entries in the Oil Record Book (ORB) that are designed to hide discharges of waste oil in violation of MARPOL that occurred outside U.S. waters. Our authors provide the background to the U.S. Coast Guard authority to inspect ships and discuss what may be a transition from a routine port state inspection to a criminal investigation. While providing guidance on legal rights, their comments should not be taken as legal advice.

Sean - The U.S. Coast Guard has broad authority to subject foreign vessels to Port State Control (PSC) Inspections while in United States jurisdictional waters. APPS investigations are different from routine PSC inspections; they are targeted investigations by the Coast Guard to determine whether environmental crimes have been committed by or onboard the vessel. While the U.S. Attorney’s offices in the various United States judicial districts lead the prosecution of APPS criminal cases – usually in coordination with the Environmental Crimes Section of the U.S. Department of Justice – the prosecutions are based on evidence gathered by the U.S. Coast Guard during an APPS investigation. How does the Master, crew, and ship operator know whether the Coast Guard is aboard to conduct a routine administrative port state control inspection, or conversely, has come aboard to investigate a potential APPS violation that can result in a massive fine and possible imprisonment of crew members?

Andrew - APPS cases for foreign-flagged vessels typically begin as a port state control examination. If an irregularity is detected, an expanded exam (APPS 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.

Most Coast Guard non-criminal 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, although there is no “bright line” rule for determining if or when the U.S. Coast Guard has referred a port state control inspection to DOJ for further investigation.

Nor is the Coast Guard 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. So, while there are clues that a criminal investigation may be underway when a CGIS inspector arrives, the port state inspection and any information already gathered or evidence seized can be and often is used if the case is later prosecuted.

Sean - Many of us have seen police dramas on American television where the officers advise suspects of their so-called “Miranda rights,” for example the right to remain silent, that anything said can be used against them in a criminal prosecution, and that the suspect has a right to an attorney. Generally speaking, “Miranda” advisements apply in a custodial interrogation. Are Coast Guard investigators required to give such rights advisories when interviewing the crew of a vessel?

Andrew – U.S. Coast Guard inspectors, including CGIS agents, are not required to provide any rights advisement to the crewmembers. That does not mean rights do not exist, although whether and when they exist may be difficult to discern. Among the rights that do exist is the right to not be “forced” or compelled to divulge information about a particular incident beyond the minimum information that must be provided as part of a mandatory reporting requirement related to that incident.

Mandatory reports must be made to the Coast Guard in the event certain incidents like marine casualties or oil spills occur (a full list of mandatory reports is contained in the Appendix). In situations where mandatory reports are required, adequate information must be divulged to satisfy the minimum notification requirement, and thereby avoid the penalties for failing to provide required notification.

These penalties can be 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 USD/day, with each day of a continuing violation constituting a separate offense.

Sean - Getting back to APPS investigations, assuming that any mandatory notification has been made, what are the rights of the company and crew?

Andrew - As discussed above, other than the minimum information necessary to satisfy any mandatory reporting requirements, plus essential communications necessary to carry out casualty 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 – but it is an option/right.

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.

Sean - We both have background as U.S. Coast Guard lawyers, and I think we both would say that cooperation with an investigation may result in a better outcome for the company, but it is essential that any statement made during an investigation is truthful because many cases arising from APPS violations involve false statements or obstruction of justice charges.

Andrew - That's right Sean - Any written or oral information the company or its representatives provide 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. As you say, many APPS cases involve charges of false statements or obstruction of justice, and many are based on “presenting” false records, which is itself a felony.

Sean - Let's talk about legal representation in the context of an APPS investigation. You have explained that the Coast Guard does not have the obligation to advise the Master or crewmembers that they have a right to have a lawyer present, but what if they ask for one?

Andrew - 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 provides that whenever possible, a mutually agreed upon time and place offering reasonable opportunity to consult with an attorney should be arranged.

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 operating company to represent crewmembers since the interests of the various parties may conflict.

Sean - That's a good point – an attorney may not represent two or more clients that have a conflict of interest and APPS cases often raise conflicts. Criminal charges can be brought against a shipowner based on vicarious liability for actions of the crew, and that is often the case in APPS cases. Further, some of these cases are prosecuted based on evidence provided by crew members as “whistle blowers,” meaning they are providing evidence of wrongdoing alleged to have been committed by other crew members. This means that there may be conflicts of interest not only between the shipowner and crew but also between various crewmembers.

Maritime law and criminal law are distinct specialties, and I would suggest that maritime lawyers maintain contact details for criminal lawyers versed in these types of cases should the need arise. Andrew - once various lawyers are onboard and acting on behalf of one or more of the subjects, can you explain their role in the investigation phase?

Andrew – Attorneys are obviously permitted to advise their client(s), including advice that they are not required to answer questions. Attorneys also have the right to be physically present if the client(s) elect to answer Coast Guard questions. An attorney may not interfere with response or investigative efforts by obstructing or physically impeding the response or investigation, or by tampering with witnesses.

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. 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.

Many crew members are not fluent in English so I should also mention that the Master and/or crewmembers have the right to request that arrangements be made to have a translator present during 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.

Sean – In concluding, I wanted to clarify the role of the P&I Club in APPS cases. Clubs have narrow cover for pollution fines that is limited to “accidental discharges”. This means that there is no cover as a matter of right for APPS violations arising from intentional bypassing of an oily water separator. This is the case even when the crewmember acted in contravention of company policy and without knowledge of the company management. That said, we do assist our members by providing them information about lawyers who have a special competence in these types of cases. I think you and I both agree, that in the event there is a potential criminal investigation, the company will need competent legal advice to guide them.

Andrew, thank you very much for sharing your experience with us. For more information about mandatory reporting obligations, we recommend that our readers review the appendix you kindly prepared.

Appendix

A. Marine casualties which must be reported to the Coast Guard include:

- (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 condition

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 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.

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. “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;

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